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“HE WHO WISHES TO PRESERVE HIS LIFE AT OTHERS’ EXPENSE SHOULD ALSO BE READY TO GIVE IT UP FOR THEIR SAKE.”¹ HOW NATURAL LAW AND THE DECLARATION OF INDEPENDENCE JUSTIFY CAPITAL PUNISHMENT.

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I. INTRODUCTION

“What gives a state the right to imprison a person?”² The simplest answer is that the person broke the law.³ Justifying punishment, however, is not, and should not, be so simple. It is generally accepted that our government is allowed to punish persons who commit crimes.⁴ Professor John Bronsteen⁵ demands that a “developed theory”⁶ is needed to justify punishment by society. The purpose of this article is to

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¹ JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT*, AT 36 [1762] (G.D.H. Cole trans., Barnes and Noble 2005).

² John Bronsteen, *Retribution's Role*, 84 *IND. L.J.* 1129, 1129 (2009).

³ *Id.*

⁴ *See id.*; *see also* Kyron Huigens, *The Jurisprudence of Punishment*, 48 *WM. & MARY L. REV.* 1793 (2007).

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⁶ Bronsteen, *supra* note 2, at 1154-55 (suggesting theories such as neo-Kantian, Rawlsian social contract theory, and fair play).

provide a justifying theory for capital punishment in the United States.

Generally speaking, the death penalty debate focuses on whether it is right or wrong, and whether the United States should continue to punish by death. Some people advocate for the death penalty because of concepts like retribution and punishment. Others believe the death penalty serves no legitimate purpose and risks executing innocent people; for instance, one scholar states that

[T]he death penalty is discriminatory in administration in a country rife with background racial discrimination, that it cannot be fairly and effectively administered when used as sparingly as it is usually used, that having a death penalty creates too great a gulf between the United States and other democratic nations, or that there is insufficient evidence that the death penalty has greater deterrent value than life in prison without parole.⁷

The focus on capital punishment involves whether we should continue to have the death penalty. It is not surprising that debates regarding capital punishment are generally focused on whether the United States should continue to allow it as a practice; but the far better debate would focus on whether, and to what extent, there is a moral justification for the practice that goes beyond the notions of “retribution” and “punishment.”⁸ For instance, some death penalty advocates “may believe that the death penalty is what some murderers, i.e., the worst of the worst, deserve by dint of their wrongdoing.”⁹ However, the “he deserves it” approach is more difficult to justify; additionally, one must subscribe to a

⁷ Claire Finkelstein, *A Contractarian Argument Against the Death Penalty*, 81 N.Y.U. L. REV. 1283, 1284 (2006); see generally, Death Penalty Focus website, <http://www.deathpenalty.org/index.php>.

⁸ See Finkelstein, *supra* note 7, at 1288 (analyzing the terms “deterrence” and “retribution” as applied to the death penalty).

⁹ Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 422 (2005).

moral basis in order to support the fact that the person “deserves” death.

This article seeks to clarify America’s relationship with capital punishment through one of the country’s most important documents. This article will distinguish America’s philosophy on capital punishment from the rationales of other countries that also have the death penalty. Unlike in the movie “National Treasure,”¹⁰ the actual Declaration of Independence does not contain a treasure map, but it does contain evidence of a concept that reveals why America implements capital punishment.

I. THE DECLARATION OF INDEPENDENCE, THE “RIGHT TO LIFE,” AND ESTABLISHING AMERICAN MORALS.

A. A RIGHT TO LIFE IS PROVIDED TO ALL AMERICANS.

The Declaration of Independence enshrines three basic rights: life, liberty, and the pursuit of happiness.¹¹ “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness.”¹²

“The right to life is the only fundamental right, from which all other rights are derived.”¹³ The Constitution, specifically the Bill of Rights, provides all other American rights. Why would the Founding Fathers not list the “right to life” in the Bill of Rights, but list the “right to life” in the Declaration?¹⁴

The authority of the Declaration of Independence is not usually described as fundamental law; therefore, using the

¹⁰ NATIONAL TREASURE, Director Jon Turteltaub, Walt Disney Pictures, Jerry Bruckheimer Films, Junction Entertainment, Saturn Films (2004).

¹¹ *Life, Liberty, and the Pursuit of Happiness*, Principles of a Free Society website, Ayn Rand Center for Individual Rights, <http://principlesofafreesociety.com/life-liberty-pursuit-of-happiness/> last accessed Mar. 14, 2013.

¹² THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

¹³ *Life, Liberty, and the Pursuit*, *supra* note 11.

¹⁴ Compare U.S. CONST. amend. I- XXVII, with THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

Declaration as a primary reference in legal argument rarely occurs. Some might argue that the Declaration is only an emancipation document that does not carry legal authority in the common use of the term “law;” however, there are those that disagree. Professor John Eidsmoe, who is an attorney, an author, and a professor of constitutional law and legal history at Faulkner University’s Thomas Goode Jones School of Law in Montgomery, Alabama, describes it as “fundamental law:”

[t]he role of the Declaration of Independence in American law is often misconstrued. Some believe the Declaration is simply a statement of ideas that has no legal force whatsoever today. Nothing could be further from the truth. The Declaration has been repeatedly cited by the U.S. Supreme Court as part of the fundamental law of the United States of America.¹⁵

If fundamental law is characterized as a base law from which all other law extends, then the Declaration is perhaps “fundamental law.” However, it is more accurate to characterize the Declaration of Independence similar to the Utah Supreme Court’s opinion regarding its Declaration of Rights. Utah’s Supreme Court articulated that its Declaration of Rights¹⁶ “was never meant to establish a comprehensive or positive law but merely to reaffirm various natural rights that exist independent of any constitution.”¹⁷ Nonetheless, determining the role of the Declaration as it applies to capital punishment is rather unique. At first glance, it appears that capital punishment is in direct contradiction with a “right to life.” To understand this dichotomy, one must analyze a

¹⁵ John Eidsmoe, *Christianity and the Constitution: The Faith of Our Founding Fathers*, pp. 360-361 (1995); Earl Taylor, Jr., *The Declaration of Independence Part of American Law*, Newsletter to National Center for Constitutional Studies, June 1998, <http://www.nccs.net/newsletter/jun98nl.html>.

¹⁶ UTAH CONST. ART. 1 § 1

¹⁷ *Am. Bush v. City of S. Salt Lake*, 140 P.3d 1235, 1283 (Utah 2006) (citing *Utah v. Gardner*, 947 P.2d 630, 636 (Utah 1997)).

concept that goes beyond fundamental law and into natural rights.¹⁸

B. THE DECLARATION OF INDEPENDENCE IS A DOCUMENT FROM WHICH AMERICAN MORALITY ORIGINATED.

Since a “right to life” is provided in the Declaration and such right is a prerequisite to all other rights granted in the Bill of Rights,¹⁹ it is important for Americans to analyze the need and justifications for the death penalty with all American principles, especially the Declaration. “The Declaration matters, and it is important that we bring to it the same level of critical analysis that we apply to the Constitution and to other legal texts.”²⁰

The Declaration is a document that reflects the moral values of its authors, who were the founders of American government. Principles stated in the Declaration are now the roots of American moral code. “[T]he Declaration was an act of all the American people, creating an entity, the United States of America, which presented itself as one nation to the world.”²¹ The “right to life, liberty, and the pursuit of happiness”²² is a designation of morality. It is a moral standard set forth by America at its inception to dictate what is important. It is important to know that morality can be, and often is, just a standard set forth by society. Morals can, but need not be, universal concepts that are unchangeable. For instance, “defenders of the death penalty continue to refer to moral desert,” which is a condition in which one is deserving

¹⁸ One law review author does not agree with analyzing the Declaration of Independence solely through a natural law perspective. He states, “The importance of the Declaration of Independence to American law has been obscured by dubious associations with natural rights jurisprudence.” Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701 (2001).

¹⁹ See U.S. CONST. amend. I-XXVII.

²⁰ Larson, *supra* note 19, at 702.

²¹ *Id.* at 723.

²² THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

of something, whether good or bad, "as...real, and not infinitely subject to public manipulation"²³

The argument among Americans on whether the death penalty is right or wrong should be discussed based on perceived morals stated in the Declaration. However, how is moral generally defined? Merriam-Webster Dictionary defines "moral" as "of or relating to principles of right or wrong in behavior."²⁴ Morals, therefore, according to this definition, are merely a standard of action set by a group of people. Generally, morality is not just a single universal code; rather, there are several potential definitions of morality, for instance

[w]hen a person simply claims that morality prohibits or requires a given action, then the term "morality" is genuinely ambiguous. It is not clear whether it refers to (1) a guide to behavior that is put forward by a society, either one's own or some other society; (2) a guide that is put forward by a group, either one to which the person belongs or another; or (3) a guide that a person, perhaps himself, regards as overriding and wants adopted by everyone in his group, or (4) is a universal guide that all rational persons would put forward for governing the behavior of all moral agents.²⁵

As Professor Gert noted, there are essentially two main types of morality: normative morality and descriptive morality.²⁶ Descriptive morality is a type of morality put forth by a society, a group, a church, or an individual for her own behavior.²⁷ The set of people who subscribe to that moral code

²³ R. George Wright, *The Death Penalty and the Way We Think Now*, 33 LOY. L.A. L. REV. 533, 537 (2000).

²⁴ Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/moral>, last accessed Jan. 20th 2012 at 3:02p.m.

²⁵ Bernard Gert, *The Definition of Morality*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Fall 2012 Ed., Edward N. Zalta ed., <http://plato.stanford.edu/archives/fall2012/entries/morality-definition/>.

²⁶ *Id.*

²⁷ *Id.*

live by it, and adhere to those morals.²⁸ Normative morality, on the other hand, is a universal concept.²⁹ This type of morality is a code of conduct that would be put forward by any rational person under the same circumstances.³⁰ An example of normative morality in terms of the death penalty is a statement that the death penalty is immoral because “the rest of the civilized world knows better.”³¹ “Indeed, it is possible that ‘morality’ in the normative sense has never been put forward by any particular society, by any group at all, or even by any individual who holds that moral rules should never be violated for non-moral reasons.”³² Gert states, “the only feature that the descriptive and normative senses of ‘morality’ have in common is that they refer to guides to behavior that involve, at least in part, avoiding and preventing harm to others.”³³

There are two additional moral approaches that are ancillary to Gert’s normative and descriptive classifications. First, Deontology is one approach to morality; this is the best approach, according to Professor Peter Brandon Bayer.³⁴ Professor Bayer contends that the Founding Fathers were deontologists.³⁵ The Deontology theory asserts that government is legitimate only if it governs according to eternal moral precepts.³⁶ Deontology requires a sacrifice to abide by morality no matter the circumstances.³⁷ Interestingly, Professor Bayer offers that such a sacrifice is evident in the Declaration:³⁸

For the preservation of those moral principles,
the Founders pledged their “Lives,”

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ David McCord, *Imagining A Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 16 (1998).

³² Gert, *supra* note 25, at § 2, sent. 2.

³³ Gert, *The Definition of Morality*, *supra* note 25.

³⁴ Peter Brandon Bayer, *Sacrifice and Sacred Honor: Why the Constitution is a Suicide Pact*, 20 WM. & MARY BILL RTS. J. 287 (2011).

³⁵ *Id.* at 288.

³⁶ *Id.* at 287.

³⁷ *Id.* at 292.

³⁸ *Id.*

“Fortunes,” and “sacred Honor,”³⁹ meaning that it is the duty of all Americans-their “sacred Honor”-to sacrifice, if necessary, their lives and property to defend legitimate government.⁴⁰

A second moral theory is Consequentialism, which is a moral philosophy that relies on the consequences of one’s actions for determining morality.⁴¹ Therefore, if the consequence for an act is a “good” result, then such an act is moral. However, while Consequentialism applies to capital punishment, its application does not offer in-depth insight.

The referents of both labels [deontology and consequentialism] . . . are usually caricatures, used to oversimplify philosophical positions for the sake of convenience and less innocently to provide people with a plausible pretext for rejecting ideas they do not understand.⁴²

Theories like Consequentialism and Deontology are overly simplistic when justifying the death penalty and do not provide a complete understanding of an all-encompassing approach.⁴³ As such, for the purposes of this article, a more encompassing and less restrictive philosophical approach is necessary to answer the capital punishment dilemma between the death penalty and the right to life. Natural rights embedded in the Declaration of Independence serve this purpose.

II. AMERICAN CRIMINAL LAW IS DICTATED BY MORAL BELIEFS.

Morality in its various forms is so intertwined with law that it is nearly impossible to evaluate each concept

³⁹ *Id.* at 292 (citing DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776)).

⁴⁰ *Id.*

⁴¹ *Id.* at 293.

⁴² *Id.* at 293 (citing Allen W. Wood, KANTIAN ETHICS at 259).

⁴³ *Id.*

independently.⁴⁴ One well known theorist, Immanuel Kant, believed that laws lacking moral support are not law, rather only commands.⁴⁵ Law is one method by which society demands certain action that corresponds with morality. “When we credibly attempt to punish an offender who knows, or reasonably should have known, that it was illegal to have stolen, raped, or murdered, we are trying to tell him that his actions matter to this community constituted by shared laws.”⁴⁶

Basically, American criminal law creates and enforces written law in order to avoid or prevent harm. Punishment for non-conformity in an attempt to prevent harm is generally summed into four categories: incapacitation, deterrence, rehabilitation, and retribution.⁴⁷ However, these four categories only penetrate so far when justifying punishment for the death penalty; morality is the underlying theory that provides authority for the notion that certain acts should result in deterrence, incapacitation, rehabilitation, and retribution.⁴⁸ Since morality is the basis of the aforementioned punishments, the moral debate⁴⁹ is often the subject of

⁴⁴ *Id.* at 369 (explaining that “Like morality, concepts of law ‘cannot be understood in isolation from one another,’ although they can be described discretely.”).

⁴⁵ *Id.* (citing Allen W. Wood, KANTIAN ETHICS 108-09 (2008) (quoting Immanuel Kant, LECTURES ON ETHICS, in Cambridge Edition of the Writings of Immanuel Kant 27:273 (1992)).

⁴⁶ Markel, *supra* note 9, at 427-28.

⁴⁷ Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1154 (2003).

⁴⁸ *See*, Markel, *supra* note 9, at 426. “In the past, retribution theorists asserted that “the fact that a person has committed a moral offence provides a sufficient reason for his being made to suffer.” *Id.* This understanding of retribution as a purely interpersonal moral doctrine has waned over time.” *Id.*

⁴⁹ The moral debate extends in a multitude of directions. For example, two popular, but contrary, views for defining driving forces behind moral actions are utilitarianism and deontology. “Utilitarianism, holds that morality is defined by the consequences of one's actions or that increasing overall welfare generally equates to doing the right thing;” Bronsteen, *supra* note 2, at 1130.

“[However,] deontology, [which] defines morality independent of

criminal law disputes, especially the death penalty, because it is the ultimate punishment in criminal law. If the death penalty changes, it will be due to a change in law, which, in turn, indicates a change in societal morals.

Morality, when translated, becomes the law, which is then written and enforced by a sovereign power. However, the law operates by separation of powers through the executive, legislative, and judicial branches. Morality's ability to change law can often be a lengthy process. This long process is exemplified by the capital punishment debate through past attempts to abolish the death penalty. The law can be slow to evolve to meet social morals, especially in eradicating moral concepts that are based on founding concepts of the United States, like the "right to life."

When law is or becomes contrary to moral beliefs, social and political stability are undermined.⁵⁰ It is important to keep laws updated in accordance with society's progressing moral code lest instability ensue,⁵¹ otherwise the instability results in unjust punishment of citizenry. However, there is controversy as to what branch of government should adjust the law to conform to moral preference. For instance, one notion contends that the legislative branch should ensure that laws reflect morality:

[t]raditional jurists contend that the positive law is itself systemically moral and that judges can and should decide all cases--including those that present controversial moral issues of liberty and equality--within the constraints of the standards, rules, and precedents in the positive law.⁵²

consequences and suggests that moral acts are done for their own sake rather than in order to achieve any particular end." *Id.*

⁵⁰ Alice Ristoph, *Third Wave of Legal Moralism*, 42 ARIZ. ST. L.J. 1151 (2010).

⁵¹ *Id.*

⁵² Evelyn Keyes, *Two Conceptions of Judicial Integrity: Traditional and Perfectionist Approaches to Issues of Morality and Social Justice*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 233, 233 (2008).

However, there is an alternative argument that the judicial branch should ensure that laws reflect morality, which avers

that judges should, therefore, read the Constitution 'morally,' i.e., they should construe the principles of liberty and equality in the Constitution in accordance with the community's best construction of the moral requirements of decency and fairness and should implement the true democratic conditions of liberty and equality.⁵³

Adjusting criminal law based on changes in society's moral fabric generally occurs in one of two ways. First, the legislature can make or amend the positive law. This type of law-making process is said to be in accordance with public opinion because political representatives are elected to act for their constituents. Second, the judiciary may alter criminal law in some instances, especially those issues that involve interpretation of the law. For example, the Supreme Court has abolished some execution methods as violating the Eighth Amendment's⁵⁴ "cruel and unusual punishments" language.⁵⁵ The Court has held: "To constitute cruel and unusual punishment, an execution method must present a 'substantial' or 'objectively intolerable' risk of serious harm."⁵⁶ Of course, the previous statement is subject to broad interpretation. It could be assumed that the Supreme Court may one day abolish the death penalty based on changing morals. Perhaps the Court will use the "right to life" language in the Declaration to justify such an opinion; however, considering natural law theories from which this phrase originates, such a decision from the Supreme Court is unlikely.

⁵³ *Id.* at 234.

⁵⁴ U.S. CONST. amend. VIII.

⁵⁵ See *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (declaring "disemboweling, beheading, quartering, dissecting, and burning alive" are not allowed as execution techniques).

⁵⁶ *Baze v. Rees*, 553 U.S. 35, 35-6 (2008).

III. MURDER VIOLATES A PERSON'S "RIGHT TO LIFE," BUT EXECUTION BY THE STATE DOES NOT VIOLATE THE MORAL "RIGHT TO LIFE" CONCEPT.

At common law, murder was defined as "the unlawful killing of another human being with 'malice aforethought.'"⁵⁷ The intent to kill and the intent to commit a felony were sub-categories of the single concept of "malice aforethought."⁵⁸ At its most basic description, murder is one person taking the life of another through some volitional act. This act violates the victim's "right to life." One West Virginia Supreme Court Justice, in dissent, has described murder as "an ordinary natural law crime."⁵⁹

When a convicted murderer is put to death, there is no violation of the right to life.⁶⁰ This dichotomy seems contradictory at first glance but, in fact, it is not contradictory to the right to life language in the Declaration. A person's "right to life" under the Declaration is different from rights granted in the Constitution. The Declaration, as previously established, is not the same type of legal authority as the Constitution. The Constitution limits government action or conduct against citizens; it does not apply to non-state actor wrongs against other private citizens. Moreover, the Declaration was not intended to necessarily limit government; rather, it attempts to create a moral structure within which both society and its government will thrive.

The Declaration is much broader than the Constitution and applies to capital punishment differently. It can be inferred that the Declaration imposes a duty not to kill on both

⁵⁷ *Schad v. Arizona*, 501 U.S. 624, 640 (1991); see 3 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 21-22 (1883).

⁵⁸ *Id.*

⁵⁹ *West Virginia v. Hobbs*, 282 S.E.2d 258, 276 (W. Va. 1981) (Neely, J., dissenting).

⁶⁰ Not everyone agrees that a violation of the right to life occurs when a convicted murderer is sentenced to death: "Executions undermine the very respect for life they purport to foster." David McCord, *Imagining A Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 13 (1998). While Americans subscribe to natural rights by virtue of the Declaration of Independence, a person's belief system allows him or her to oppose such theories internally, while society acts on an adjacent moral level.

government and citizenry. The Constitution imposes a duty only on the government not to kill unjustly -- unjustly meaning through either deprivation of due process or cruel and unusual methods of punishment.⁶¹ For example, a private citizen can murder another private citizen and not violate that particular victim's constitutional rights; however, such a victim's right under the Declaration's "right to life" language is violated. Such a moral violation⁶² occurs under the Declaration because of the natural rights theory known as the social contract. From a natural law perspective, there is no violation when the state seeks retaliation because according to natural law that person's right to life is voluntarily forfeited based on the act of killing.⁶³

Notwithstanding natural law, there are other theories that can justify punishment but that do not necessarily flow from the Declaration. First, Utilitarianism offers one such approach:

[f]or utilitarians the good that can be done is preventing the criminal, by incapacitation, from committing future criminal acts, plus deterring other potential criminals, and minus the harm punishment does to the criminal; but what a criminal supposedly "deserves" is merely revenge and does no good.⁶⁴

A second approach is retribution theory, which focuses singularly on justice based on a theory of revenge. To put it in Latin, *lex talionis*⁶⁵ or "an eye for an eye"⁶⁶ is the principle of

⁶¹ See generally, U.S. CONST. amends. V & VIII.

⁶² One commentator asserts that dignity is "the premier value underlying the last two centuries of moral and political thought, an essential 'basis of human rights.'" Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 172 (2011).

⁶³ See ROUSSEAU, *supra* note 1.

⁶⁴ Andrew Oldenquist, *Retribution and the Death Penalty*, 29 U. DAYTON L. REV. 335 (2004).

⁶⁵ "The principle or law of retaliation that a punishment inflicted should correspond in degree and kind to the offense of the wrongdoer, as an eye for an eye, a tooth for a tooth; retributive justice." Dictionary.com, <http://dictionary.reference.com/browse/lex+talionis>.

retribution. Professor Oldenquist suggests that most people are not well-informed when subscribing to the retribution approach. "Most people's reasons for capital punishment are retributivist; they talk about deterrence because it seems a respectable kind of reason that relies on crime statistics and they don't know what to say when told retribution is revenge."⁶⁷

IV. AMERICAN SOCIETY CAN PUNISH INDIVIDUALS BY DEATH, BECAUSE OF NATURAL LAW AND SOCIAL CONTRACT THEORY.

Justifying capital punishment is difficult and rightly so. One can use terms of art such as "retribution," "deontology," "consequentialism," and "deterrence." However, these terms are limited in application. They do not, for example, provide a solution as to why America is in the minority of the world, since most countries have abolished punishment by death.⁶⁸ Countries such as China, Iran, Saudi Arabia, Iraq, the United States of America, Yemen, North Korea, Somalia, Taiwan, and several others still retain the death penalty.⁶⁹ However, there is a distinguishing factor between the United States and the other countries listed above. Unlike the other countries, the United States still has the death penalty because of natural law, the philosophical concept that embodies various theories that are mostly encompassed in a general theory known as the "social contract."⁷⁰

⁶⁶ The phrase "eye for an eye" is generally used when referencing Biblical scripture. See *Exodus* 22:24 (New Living Trans. 2d ed.).

⁶⁷ Oldenquist, *supra* note 65, at 337.

⁶⁸ Amnesty International, <http://www.amnesty.org/en/death-penalty>, last accessed Jan. 20th 2015 at 6:30 p.m.

⁶⁹ *Id.*

⁷⁰ ROUSSEAU, *supra* note 1, at 13.

A. PHILOSOPHERS WHO INFLUENCED THE FOUNDING FATHERS' "RIGHT TO LIFE" LANGUAGE IN THE DECLARATION, NATURAL RIGHTS, AND POLITICAL PHILOSOPHY THAT OFFERED THE BASIS FOR AMERICA'S FOUNDING.

"[T]he Founders inspired and justified both the Revolution and ensuing fundamental principles of American law, especially due process, on the best applicable precepts of enduring morality they knew."⁷¹ Moral influence on the Founding Fathers in large part likely came from theorists such as Rousseau, Hobbes, Locke, and Mill, whose works offer original and intelligent explanations into the American social and political structure as well as America's moral fabric. These theorists believed in a concept known as natural law. "Natural law theory is a label that has been applied to theories of ethics, theories of politics, theories of civil law, and theories of religious morality."⁷² One can look to the plain language of the Declaration to derive evidence to support natural law's influence in the document.

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.⁷³

This aforementioned language and the natural rights concept were successful in establishing a separation between America and Britain. However, its meaning and impact established more than just independence; it established a mindset, morals, and a society. In order to fully understand the justification that

⁷¹ Bayer, *supra* note 35, at 328.

⁷² Mark Murphy, *The Natural Law Tradition in Ethics*, (Sept. 23, 2002), <http://plato.stanford.edu/entries/natural-law-ethics/> (last substantive revision Sept. 27, 2011) (last accessed Mar. 23, 2012).

⁷³ THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776).

natural law provides for the death penalty, one must become further acquainted with the philosophical ideas from these natural law theorists whose voices resonated in the minds of the Founding Fathers.

B. ROUSSEAU'S "THE SOCIAL CONTRACT," LOCKE'S "TWO TREATISES ON GOVERNMENT," MILL'S "ON LIBERTY," AND HOBBS' "LEVIATHAN," OFFER CLARITY AND UNDERSTANDING ON NATURAL RIGHTS JUSTIFICATIONS FOR CAPITAL PUNISHMENT.

The social contract is exactly like it sounds - a contract. On one side of the contract is the individual; on the other side of the contract is a collective unit comprised of all individuals.⁷⁴ In his work, "The Social Contract,"⁷⁵ Jean Jacques Rousseau offered two basic concepts upon which he builds his well-known theory. First, each man seeks to preserve himself; man in his natural state has free will and acts to protect himself because no one else will protect him.⁷⁶ Rousseau's second concept, the common good, offers a way for each man to alter his method of self-preservation by submitting through an exercise of free will to a civil body, but in return he receives rights, and with those rights comes protection.⁷⁷ In essence, self-preservation becomes preservation of the civil state, and the civil state in return offers to help preserve each individual through rights and interests. "Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole."⁷⁸

The social contract takes man from a natural state of anarchy and free will and provides a structured system where free will impulses are tempered with human thought.⁷⁹ The

⁷⁴ ROUSSEAU, *supra* note 1, at 13-14.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 14

⁷⁹ Oldenquist, *supra* note 63 (suggesting that humans are innately social, as opposed to being social through adoption of societal conventions).

social contract is mutually beneficial to all because the natural state of man exploited the weaknesses of all men.⁸⁰ Under the social contract, weakness is counteracted by collective action and thought. Rousseau articulates that “only[] when the voice of duty takes the place of physical impulses and right of appetite, does man, who so far had considered only himself, find that he is forced to act on different principles, and to conduct his reason before listening to his inclinations.”⁸¹ The obligation of each participant under the contract is to conform to the “civil state,” as compared to the natural state where man only conformed to his own free will. “As nature gives each man absolute power of his members, the social compact gives the body politic absolute power over all its members also[.]”⁸²

After man leaves his natural free state and enters the civil state, there are boundaries of action; however, each man still has liberties. But liberty to act is no longer unfettered as it was in the state of nature. Rousseau argues that punishment is required to preserve the civil state when man goes outside the boundaries set by the civil state (i.e., when man violates the collective morals).⁸³ Rousseau addresses the concept of the death penalty directly in his work.

The death penalty is justified because the wrongdoer has provided “consent” to be punished or perhaps die for his breach of the contract. “He who wishes to preserve his life at other’s expense should also, when it is necessary, be ready to give it up for their sake.”⁸⁴ As a result, if a person acts within

⁸⁰ See ROUSSEAU, *supra* note 1.

⁸¹ *Id.* at 19.

⁸² ROUSSEAU, *supra* note 1, at 31.

⁸³ Other well-known theorist St. Thomas Aquinas agrees with Rousseau declaring that “[t]herefore if a man is dangerous and infectious to the [other members], on account of some sin, it is praiseworthy and advantageous that he be killed in order to safeguard the common good, since a little leaven corrupted the whole lump.” Wright, *supra* note 24, at 554 (citing THOMAS AQUINAS, SUMMA THEOLOGICA II (Fathers of the English Dominican Province trans., 1929), reprinted in FRANCISCO DE VITORIA, REFLECTION ON HOMICIDE & COMMENTARY ON SUMMA THEOLOGICA II-II q. 64, 240 (John P. Doyle trans., 1997)).

⁸⁴ ROUSSEAU, *supra* note 1, at 36.

his former state of nature⁸⁵ (self-preserving) to the detriment of another (for instance, through murder), then the civil state must punish him, because the person harmed, and the person harming had given up their right to act impulsively. The civil state can act⁸⁶ because “by the social compact we have given the body politic existence and life; we have now by legislation to give it movement and will.”⁸⁷ In short, the act of punishment is justified because the wrongdoer and victim both consented to the civil state’s social contract for protection and for punishment.⁸⁸

i. JOHN LOCKE

John Locke also shared Rousseau’s principles of justification for punishment in a civil society. In *Two Treatises of Government*, Locke explained: Punishment is permitted to correct transgressions not for oneself but for mutual security.⁸⁹ More relevantly, “[e]ach [t]ransgression may be *punished* to that *degree*, and with so much [*s*]everity as will suffice to make it an ill bargain to the [o]ffender, give him cause to repent, and terrifie others from doing the like.”⁹⁰ The former statement is what is, in modern terms, called deterrence. Of course, deterrence⁹¹ is commonly used as justification for the death penalty.

⁸⁵ There is another perspective that believes detrimental human action in the civil state is not a reversion to the previous state of nature, but rather only a skewed action under the civil state. For example, “To say that the defendant, at the time of the offense, was operating at a sub-human, animalistic level and yet engaged in premeditation and deliberation or malice aforethought is to indulge in patent self-contradiction.” Wright, *supra* note 24, at 555.

⁸⁶ Markel, *supra* note 9, at 432 (noting a more modern term for civil state action and punishment is known as “democratic self defense”).

⁸⁷ ROUSSEAU, *supra* note 1, at 39.

⁸⁸ *See id.*

⁸⁹ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 312 (Peter Laslett ed., Cambridge Univ. 1960).

⁹⁰ *Id.* at 315.

⁹¹ There are skeptics on whether the death penalty has deterrent value. *See e.g.*, Walter Berns et al., *The Death Penalty: A Philosophical and Theological Perspective*, 30 J. MARSHALL L. REV. 463, 468 (1997) (stating “If we make the admittedly unlikely assumption that the

Locke also addressed retribution, insinuating that in the state of nature, a type of vigilantism is necessary. However, the right to punish a transgressor in a structured civil state is turned over to the government. Locke explains the civil state's collective protection scheme: "[e]xecution of the [l]aw of [n]ature is in that state, put into every [m]an's hands, whereby everyone has a right to punish the transgressors of that [l]aw to such a [d]egree, as may hinder its [v]iolation."⁹² The individual right of retribution that existed in the state of nature no longer exists and is replaced with a right to punish in the civil state. The right to punish becomes more complex in the civil state, as compared to the state of nature. In the state of nature, a wrongdoing was only an act against the person. In comparison, a wrongdoing in the civil state is a crime both against the person and the body politic, but the wrong can only be righted by the body politic, which seeks punishment on behalf of the victim and all others in society.⁹³

ii. JOHN STUART MILL

In his work, *On Liberty*,⁹⁴ John Stuart Mill also explored the body politic. For instance, does man give up all rights to the civil body to seek retribution? Mill articulated an answer this way:

[e]veryone who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct toward the rest. The conduct consists, first, in not injuring the interest of another; or rather certain interests, which either by express legal provision or by tacit

number of murderers is equal to the number of murders, this means that 99.9 percent of the murderers are not, or have not been, executed, which is not much of a 'message.'").

⁹² LOCKE, *supra* note 90, at 312.

⁹³ *Id.*

⁹⁴ JOHN STUART MILL, *ON LIBERTY* [1859] (Charles W. Elliot ed., 2004).

understanding, ought to be considered as rights.⁹⁵

It appears that Mill agrees with Locke's perspective that action by individuals who injure others is not allowed; further, it appears that Mill agrees with Locke's perspective that the benefit for exercising restraint of personal vigilante retribution is "protection by society."⁹⁶

Mill avers that society will attempt to control human action by either, or both, a written moral code (law) or a tacit understanding.⁹⁷ The most interesting aspect of Mill's "tacit understanding" language is that no collective body can judge tacit understanding, but rather it is determined within each individual with the expectation of consensus among all. Unlike law, which is interpreted and enforced by the civil state, tacit understanding is in each individual's mind. Therefore, two sets of moral code exist: one that is prescribed by society, and another which is a moral code of the individual. These sets of moral codes are similar to Bernard Gertz's descriptive and normative morality, discussed above.

If one, globally-adopted moral code ("macro morality") could govern all human action, then no crime would exist, because all human action would follow the predetermined morality, i.e., no one would breach the social contract. Man cannot give up all of his state of nature impulses; such impulses will often result in breaking the law, or in other words, violating the civil body's code of conduct. Therefore, in regard to Mill's issue, how much free will does man submit to the sovereign? The answer is not enough to prevent breaches of civil code (morals). Man's state of nature still exists, and reverting to the previous state of nature often violates the social contract and must result in punishment. In other words, breaching the social contract is immoral.

iii. THOMAS HOBBS

"The Founding Fathers were heavily influenced by English philosopher Thomas Hobbes in establishing America's

⁹⁵ *Id.* at 75.

⁹⁶ *Id.*

⁹⁷ *Id.*

first principles, most notably the recognition of unalienable rights, the social compact, and limited government.”⁹⁸ Hobbes was a natural law theorist.⁹⁹

The paradigmatic natural law view holds that (1) the natural law is given by God; (2) it is naturally authoritative over all human beings; and (3) it is naturally knowable by all human beings. Further, it holds that (4) the good is prior to the right, that (5) right action is action that responds nondefectively to the good, that (6) there are a variety of ways in which action can be defective with respect to the good, and that (7) some of these ways can be captured and formulated as general rules.¹⁰⁰

In his work, *Leviathan*, Hobbes creates a metaphor for the civil state in the form of an artificial man with arms, legs, and a head.¹⁰¹ Each part of the artificial man, which Hobbes called the “leviathan,” performs the functions of the state.¹⁰² Every part of the “leviathan” is made up of each person in that state, and each person has desires and reason. The good of man corresponds with the good of the state.

[T]he Hobbesian view what is good is what is desired, Hobbes thinks that humans are similarly constructed so that for each human (when he or she is properly biologically functioning) his or her central aim is the avoidance of violent death.¹⁰³ Thus Hobbes is

⁹⁸ Michael Warren, *America's Survival Guide*, http://www.americassurvivalguide.com/thomas_hobbes.php

⁹⁹ Murphy, *supra* note 73, at § 2.1.

¹⁰⁰ Murphy, *supra* note 73 at § 1.4.

¹⁰¹ THOMAS HOBBS, *LEVIATHAN PARTS I & II*, (A.P. Martinich ed. 2005).

¹⁰² *Id.* at 9.

¹⁰³ Similar to Hobbes' “violent death” terminology, Nancy Bothne, Midwest Director for Amnesty International, says that each person has the “right to be free of fear.” Berns et al., *supra* note 90, at 471 (“To be free from fear is a concept that is a pretty incredible concept.

able to build his entire natural law theory around a single good, the good of self-preservation, which is so important to human life that exceptionlessly binding precepts can be formulated with reference to its achievement.¹⁰⁴

Similar to Rousseau, Hobbes takes the position that self-preservation is the most important element of human action. It is simple logic to connect between murder (the act of taking another's life) and the violation of natural law.

Robert Kraynak, a professor at Colgate University, believes that Hobbes' theory of natural law "gave citizens a standard for determining if the written laws and customs of their nation or any other nation were just or unjust, right or wrong, human or inhumane."¹⁰⁵ Kraynak submits that Hobbes' theory of natural law has translated into what is now called "liberties or rights."¹⁰⁶ Therefore, the notion of self-preservation at the natural law level has now been converted into a right or liberty to individual "life."¹⁰⁷ The Declaration of Independence contains this right. "We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."¹⁰⁸

A violation of a person's "right to life" is a breach of the social contract and violates natural law. The United States adopted natural law in the Declaration as a set of morals. Consequently, capital punishment is morally justified through natural law according to the previously discussed theorists.¹⁰⁹

It deals not only with a relationship of the state to individuals, but with individuals to individuals.").

¹⁰⁴ Murphy, *supra* note 73, at 2.1.

¹⁰⁵ Robert P. Kraynak, *Thomas Hobbes: From Classical Natural Law to Modern Natural Rights*; Natural Law, Natural Rights, and American Constitution website, <http://www.nlnrac.org/earlymodern/hobbes>.

¹⁰⁶ *Id.*

¹⁰⁷ *See id.*

¹⁰⁸ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁰⁹ *Contra* Kleven Thomas, *Is Capital Punishment Immoral Even If It Deters Murder?* 46 SANTA CLARA L. REV. 599 (2006) (concluding "... capital punishment is immoral even if it does deter murder.")

The Founders did not make up the right to life. Rather, the concept was borrowed from theorists such as Thomas Hobbes. In short, the Founders did not create natural rights, but adopted them. Quite the contrary, natural rights have created and shaped the United States into its current form: one that allows the death penalty.

V. THE CONTRACTARIAN VIEW VERSUS SOCIAL CONTRACT THEORY- MORAL JUSTIFICATION OF CAPITAL PUNISHMENT.

There is minimal authority for justification theories regarding punishment outside the well-known death penalty justifications.

The absence of any well-developed contractarian theory of punishment seems all the more puzzling in light of two salient facts: First, there is a robust contractarian tradition that emerged in seventeenth century political philosophy, first with the writings of Thomas Hobbes, later in the Enlightenment version of this same tradition in the writings of Locke and Rousseau"¹¹⁰

Perhaps the absence of the contractarian viewpoint in American capital punishment discourse is most unusual because of its origin and relation to beginning principles of the United States.

A. MORAL JUSTIFICATION

Punishment under a contractarian theory is generally easier to understand than other concepts that operate with death penalty arguments, such as retribution theory¹¹¹ or religious theories. The act of punishment needs moral

¹¹⁰ Claire Finkelstein, *Punishment as a Contract*, 8 OHIO ST. J. CRIM. L. 319, 322 (2011).

¹¹¹ See Markel, *supra* note 9, at 423.

support.¹¹² Contractarian theory provides support for punishment in a different manner than other theories.¹¹³ The basic nature of a contract is that the obligation is either fulfilled or unfulfilled, and if it is unfulfilled, action may be taken to rectify the breach.¹¹⁴ However, a source of morality must be added to a basic contract viewpoint for there to be moral support for punishment. Of course, in the case of American capital punishment, this article establishes that the Declaration of Independence offers a moral element to the social contract view of punishment.

The contractarian view espoused by Claire Finkelstein in the article *Punishment as Contract* is different from an argument for social contract justification.¹¹⁵ Finkelstein says that “it is unlikely that rational contractors would accept the death penalty.”¹¹⁶ Essentially, a contractarian view presumes voluntary entry into a contract.¹¹⁷ This article is unique from Finkelstein’s assertion of punishment based on contract, because pure contractarian view lacks moral justification compared with social contract theory developed in the Declaration of Independence. Finkelstein is correct in her assertion that “rational agents simply do not regard losing their lives for the sake of protecting their property as a trade-off worth making.”¹¹⁸ This would not make sense either for Rousseau or Hobbes because it would preclude the basic notions of “self preservation”¹¹⁹ and “avoidance of violent death.”¹²⁰ The social contract is assumed by the fact one is alive. Therefore, an American citizen does not enter the social contract voluntarily; rather it is inherently part of being born an American citizen. While Finkelstein’s contractarian view is similar to social contract theory, there are important differences that differentiate social contract theory under the

¹¹² Finkelstein, *supra* note 108, at 324 (stating “[t]he practice of punishment therefore stands in need of justification if the background moral objections to it are to be overridden.”).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 324-25.

¹¹⁶ *Id.* at 335.

¹¹⁷ *See id.* at 324.

¹¹⁸ *Id.* at 335.

¹¹⁹ ROUSSEAU, *supra* note 1, at 3, 5, 13.

¹²⁰ HOBBS, *supra* note 97, at part 1, ch. 13.

Declaration from pure contract theory flaws, such as lacking a moral foundation or origin and lacking consent to enter the contract because consent is assumed in social contract theory.¹²¹

B. CASE EXAMPLES OF THE “RIGHT TO LIFE,” SOCIAL CONTRACT THEORY, AND JUSTIFIED PUNISHMENT.

The effect of natural rights, specifically social contract theory, on the “right to life” is that they transform the “right to life” from a plain language interpretation to a term of art. Basically, the “right to life” is conditional-- not unconditional. For example, the defendant in *Kansas v. Kleypas*,¹²² who appealed to the Kansas Supreme Court, argued that his “right to life”¹²³ under the Kansas Constitution would be violated by the death penalty. In his argument, the defendant distinguished his “right to life” from a right to due process guaranteed by the Fourteenth Amendment.¹²⁴ The defendant further argued that “our [Kansas] state constitution simply does not contemplate the taking of a life by the State under any circumstances.”¹²⁵ He contends that the Kansas Constitution confers upon him an absolute “right to life.”¹²⁶ However, the Court rejected his argument, stating that “[the] argument, though somewhat novel, has been soundly rejected by other state courts.”¹²⁷ Most interestingly, the court noted that the defendant’s absolute “right to life” argument “stretches” the language of the Kansas Constitution outside of its intended meaning, and such an argument is not within the

¹²¹ See ROUSSEAU, *supra* note 1, at 13.

¹²² *Kansas v. Kleypas*, 40 P.3d 139, 252-53 (Kan. 2001) (overruled as to some conclusions of law but not the “right to life” conclusion stated in this text) (overruling recognized by *Kansas v. Marsh*, 548 U.S. 163 (2006)).

¹²³ *Kleypas*, 40 P.3d at 252-53 (citing KAN. CONST. BILL OF RIGHTS § 1 (“All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.”)).

¹²⁴ See U.S. CONST. amend. XIV.

¹²⁵ *Kleypas*, 40 P.3d at 253.

¹²⁶ *Id.*

¹²⁷ *Id.*; see, e.g., *Ruiz v. Arkansas*, 772 S.W.2d 297 (Ark. 1989); *Missouri v. Newlon*, 627 S.W.2d 606, 612-13 (Mo. 1982); *Slaughter v. Oklahoma*, 950 P.2d 839, 861-62 (Okla. Crim. App. 1997).

spirit or letter of the language.¹²⁸ This conclusion leads one to infer that other Supreme Courts would conclude similarly when presented with the same question.

One dissenting judge in *Rhode Island v. Blood* mischaracterized natural law and its application to murder. In this Rhode Island case, the defendant killed a family member.¹²⁹ The dissenting judge declared that killing a family member is a “gross violation of the natural law.”¹³⁰ This characterization in the context of this article is inaccurate for two reasons. First, a gross violation of natural law does not exist; there is either a violation of natural law or no violation at all. Secondly, under natural law and the “right to life,” there is no difference between murdering a family member and murdering any other person in society – everyone has a right to live, even the murderer himself, until, of course, he or she commits the murder and breaches the social contract.

The main purpose of the social contract is protection. Everyone benefits from protection of the civil state. There are two obvious instances that highlight the moral justification of capital punishment through the context of natural rights. First, capital punishment for murderers of law enforcement officials is morally justified because police are necessary for self-preservation under the civil state. The act of murdering a police officer under Hobbes’ view is like severing the hand of the Leviathan or the “artificial man.”¹³¹ Essentially, the police provide the protection that a person would have provided on his or her own under the state of nature. However, it is a better exchange for everyone to defend each other through a civil body rather than trying to preserve ourselves alone.

Another obvious example that justifies punishment by death via the social contract would be killing a person who is weaker, such as a child. A child enters the world and bargains for safety, protection, or in the event that protection fails, retribution, in exchange for his or her relinquishment of free will under the state of nature discussed by Hobbes and Rousseau.

¹²⁸ *Kleypas*, 40 P.3d at 253.

¹²⁹ *Rhode Island v. Blood*, 37 A.2d 452, 454 (R.I. 1944) (Condon, J., dissenting).

¹³⁰ *Id.* at 465.

¹³¹ See HOBBS, *supra* note 99, at 9.

An example of a capital execution is the tragic case involving Ernest John Dobbert Jr. and his daughter, Kelly Ann.¹³² Dobbert brutally abused Kelly Ann until she died.¹³³ Both Dobbert and Kelly Ann had a right to life, but when Dobbert decided to deny Kelly Ann her right to life, he also forfeited his own right to life under the social contract. Therefore, when examining the “right to life” language with natural rights concepts, Dobbert relinquished his right, thus prompting the civil state to act¹³⁴ to both avenge the death of Kelly Ann and preserve the civil state from further harm. The Florida governor at the time of Dobbert’s execution commented and described the connection between the state and its citizens regarding such executions:

Ernest Dobbert has been executed because of his brutal actions toward his own children. I hope that this indication of the seriousness of child abuse will be an example of the value which the people of Florida place upon the lives of infants and young people in our state, and a measure of the lengths the people of Florida are prepared to go to prevent and punish such crimes.¹³⁵

Consider Locke’s position on such crimes: “each transgression may be punished to that degree and with so much severity as will suffice to make it an ill bargain to the offender, give him cause to repent and terrify others from doing the like.”¹³⁶ It appears that Governor Graham is essentially describing the same idea espoused by Locke.

¹³² *Dobbert v. Florida*, 432 U.S. 282, 284 (1977).

¹³³ *Id.* at 285.

¹³⁴ The natural life, says Blackstone, “cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.” *New Jersey v. Kociolek*, 129 A.2d 417, 420 (N.J. 1957) (citing 1 *Blk.Com.* 133).

¹³⁵ Executedtoday.com,

<http://www.executedtoday.com/2009/09/07/1984-ernest-dobbert-child-abuser/>, last accessed Mar. 31 2013, quoting former Governor of Florida, Bob Graham.

¹³⁶ LOCKE, *supra* note 88, at 315.

VI. THE CHRISTIAN INFLUENCE: CHRISTIAN FAITH AS AN ALTERNATIVE MORAL THEORY IN THE CAPITAL PUNISHMENT REALM.

This section offers one alternative moral influence to the capital punishment debate. An in-depth analysis of the Christian faith would encompass several works and require extensive research and analysis. However, mentioning such an alternative theory bolsters the natural rights argument as a legitimate justification for capital punishment and it also provides a more comprehensive understanding; further, and more importantly, it provides a basis for another common source of American morality to compare against natural rights.

Throughout its history, the United States has recognized a higher source of power - God; for example, the Pledge of Allegiance contains the phrase "One nation under God;"¹³⁷ "in God We Trust," was first printed on U.S. coins in 1864; the U.S. Supreme Court has, since the early 1820's, opened session with "God save the United States and this Honorable Court;" and ever since George Washington, during his inaugural oath, first added "so help me God," so too has every President since then.¹³⁸ Christianity has likely influenced the United States more than any other religious faith.¹³⁹ President Dwight D. Eisenhower espoused a high regard for the Declaration but considered it second to the Bible: "Fellow Americans, we venerate more widely than any other document, except only the Bible, the American Declaration of Independence."¹⁴⁰

When debating American capital punishment, Christianity and its principles are almost always applicable.

¹³⁷ 4 U.S.C. § 4 (2013).

¹³⁸ America Acknowledges God, Foundation For Moral Law, available at, <http://morallaw.org/resources/america-acknowledges-god/>

¹³⁹ See, e.g., *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

¹⁴⁰ Bayer, *supra* note 35, at 336 (2011) (citing Dwight David Eisenhower, *Report by the President to the American People on His European Trip* (Sept. 10, 1959), in WILLIAM J. FEDERER, *TREASURY OF PRESIDENTIAL QUOTATIONS* 322 (2004).

Christian followers have a connection to capital punishment because Jesus was executed. The story about Jesus' short trial and execution offers insight into societal desire to punish by death and the political motivation which services that need. The Book of Matthew, chapter 27, verses 11-26 describe Jesus' sentencing:

[n]ow it was the governor's custom each year during the Passover celebration to release one prisoner to the crowd - anyone they wanted. This year there was a notorious prisoner, a man named Barabbas. As the crowds gathered before Pilates' house that morning, he asked them, "which one do you want me to release to you - Barabbas, or Jesus who is called the Messiah? The crowd shouted back, "Barabbas!" Pilate responded, "Then what should I do with Jesus who is called the messiah? They shouted back, "Crucify him!"¹⁴¹

It can be said that Jesus' sentencing and execution is the antithesis of America's ambition for a capital punishment process. An innocent man (Jesus) dies. A killer (Barabbas) was released into society. No appeal or due process occurred. Lastly, execution by crucifixion is cruel and unusual.¹⁴²

It would be difficult to argue that Christianity is not a moral code. In large part, Christianity as a basis for morals is more prevalent in the United States - at least, consciously - than natural rights; it is certainly referenced more often. However, Christianity is unclear about its position on whether it is for or against the death penalty. Should we forgive or punish according to Scripture? America's uncomfortable association with the death penalty in modern times is likely attributable, at least in part, to Christianity and its principles.

Christianity fuels two differing sides of the death penalty argument. Consider the following passages and their apparent contradiction to one another. The first passage is from Exodus, Chapter 22 verse 24: "an eye for an eye, tooth for

¹⁴¹ *Matthew 27:11-26* (New Living Trans. 2d ed.).

¹⁴² *See In Re Kemmler*, 136 U.S. 436, 446 (1890).

a tooth, a hand for a hand, a foot for a foot.”¹⁴³ Now compare the previous pro-death penalty passage with one that endorses forgiveness¹⁴⁴ instead of retribution: “Get rid of all bitterness, rage, anger, harsh words, and slander, as well as all types of evil behavior.”¹⁴⁵ “Instead, be kind to each other, tenderhearted, forgiving one another, just as God through Christ has forgiven you.”¹⁴⁶ The natural rights position is clear on capital punishment; it is not only allowed, but required. Christianity is ambiguous on the topic of capital punishment, as evidenced by the ambiguity of various Bible verses.

While Christianity is the basis of numerous moral discussions about capital punishment, it is mutually exclusive in text. The language of the Bible is subject to interpretation. It is difficult for opponents to discern whether or not one actually believes the scripture and is enforcing it, or whether that person believes in or against the death penalty and is using scripture to support his or her position. As such, natural rights are not as ambiguous, nor as controversial, as Christianity. Furthermore, natural rights are adopted by virtue of being American. Christianity, on the other hand, is not adopted by virtue of citizenship; rather, it is voluntarily adopted. In other words, a person can, of course, be an American but not a Christian; however, one cannot be an American and not be subject to natural law, because of the Declaration of Independence’s incorporation of natural rights and its involuntary social contract.

An issue arises when participants in the death penalty process are Christians who subscribe to the forgiveness text as the most important tenet of the Bible.

¹⁴³ *Exodus* 22:24 (New Living Trans. 2d ed.); see also *Numbers* 35:31; *Leviticus* 24:16-17.

¹⁴⁴ For an interesting account of execution and the Christian Faith, see e.g., Jill Jones, *The Christian Executioner: Reconciling "An Eye for an Eye" with "Turn the Other Cheek"*, 27 PEPP. L. REV. 127, 127 (1999) (What made the Texas execution (Karla Faye Tucker) so dramatic was the fact that the “pickax killer” was a born-again Christian); see also Michael Graczyk, *Tucker Face to Face with Jesus*, ARIZ. REP., Feb. 4, 1998, at A1.

¹⁴⁵ *Ephesians* 4: 31-32 (New Living Trans. 2d ed.).

¹⁴⁶ *Id.*

In Florida, one criminal judge dramatically highlighted the struggle that some practitioners face regarding whether they can participate in capital sentencing by writing a series of letters to the public in the local newspaper. In one such letter he declared, “[b]ecause God has given me a new life in Jesus Christ, I choose not to condone our use of capital punishment.”¹⁴⁷

Punishment under a natural rights theory may not correspond with religious moral principles, especially for those charged with the task of carrying out the execution. As such, it is possible that man’s moral codes can contradict one another. The dilemma then becomes which path to follow; in other words, which morals to adopt.

VII. CONCLUSION

Summing up the death penalty in few words is almost impossible; however, the following passage is an admirable attempt. “We pity him [subject of execution], but we also appreciate the anger of his countrymen and the dramatic necessity of his death. The dramatic necessity would appear to rest on its moral necessity.”¹⁴⁸ This passage draws on the social contract theory to find the death penalty is a necessary evil. Social contract theory, when supported by the moral nature of the Declaration, offers Americans a developed and unique argument to justify decisions and actions surrounding the death penalty.

As established previously, every American has a right to life when they enter the social contract pursuant to the Declaration’s language. However, breach of this social contract through murder violates another’s right to life, as inferred from Rousseau, Locke, Mill, and Hobbes, and subjects the

¹⁴⁷ Jones, *supra* note 143, at 134 (citing Talbot D’Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TUL. L. REV. 611, 639 n.154 (1987)).

¹⁴⁸ Berns et.al, *supra* note 92, at 469.

murderer to morally justified punishment.¹⁴⁹ Punishment is necessary and consented to by the wrongdoer to accomplish the key goal of self-preservation of all individuals in the state. Therefore, the death penalty serves a purpose of “self-preservation”¹⁵⁰ under the social contract by offering the bargained-for protection guaranteed by the civil state in exchange that Man leaves his state of nature.

Considering the Founding Fathers’ sources of philosophical influences, the “right to life” is not absolute; it is subject to forfeiture by the act of murder under the social contract. The death penalty serves a necessary function under natural law theory that adheres to deep-rooted morals of American society encompassed in the Declaration of Independence. Therefore, given the origins of America’s founding, it is not surprising that America still has the death penalty.

¹⁴⁹ See Wright, *supra* note 24, at 535 (concluding the death penalty is, under our social circumstances, not morally justifiable, even in principle).

¹⁵⁰ See ROUSSEAU, *supra* note 1, at 13-6.