

Death Is Unconstitutional: How Capital Punishment Became Illegal in America—A Future History

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INTRODUCTION

We have no choice. Try as we might, we must breathe so long as we live. The motive force which causes humans to breathe is sometimes called the soul.¹ The constitution, as Thomas Hobbes says,² is the “soul” of the immortal being,³ comprised of mortals,⁴ the body politic, the state. A constitution, by definition, constitutes the state. Humans are rational social animals and thus the most perfect animals⁵ who, whether by custom

* For Annika Veldre, a wonderful psychologist, from whom I learned that deviant behavior occurs because people are simply trying to obtain their basic and natural human needs—in dysfunctional ways. Those might be the only ways they know due to their experiences or are the only ways they are capable of due to the features of their nervous system. People with mental problems often do not realize they had any other choice and therefore might feel justified in their actions. Psychotherapy helps people understand their needs and their unhealthy behaviours in order to transform them as much as possible.

She also gave me this great quote: “Many that live deserve death. And some die that deserve life. Can you give it to them? Then be not too eager to deal out death in the name of justice, fearing for your own safety. Even the wise cannot see all ends.” J.R.R. TOLKIEN, *THE LORD OF THE RINGS*, at bk. 4, ch. 1. And also to our lady of the harbor: Best loved by they who know her least.

1. This can be seen in the Sanskrit *Ātman* (soul, breath); *c.f.* German *Atem* (breath, though *Seele*, soul). In Estonian it is also clear: *hinge* means both “breath” and “soul.” A puzzle for linguists: how did the Uralic and Indic languages have two different words yet the same concept? (N.b.: There is no liquid “g” as in “passage” in Estonian, though the *ng* diphthong does exist, thus HING-guh—soul).

2. THOMAS HOBBS, *LEVIATHAN* 23 (Oskar Piest ed., 1958) (“For by art is created that great LEVIATHAN called a COMMONWEALTH, or STATE—in Latin CIVITAS—which is but an artificial man, though of greater stature and strength than the natural, for whose protection and defense it was intended; and in which, the *sovereignty* is an artificial *soul*, as giving life and motion to the whole body . . .”).

3. *Id.* at 142–43 (“This done, the multitude so united in one person is called a COMMONWEALTH, in Latin, CIVITAS. This is the generation of that great LEVIATHAN (or rather, to speak more reverently, of that *mortal god*) to which we owe, under the *immortal God*, our peace and defense.”).

4. KARL MARX, *THE POVERTY OF PHILOSOPHY* 119 (H. Quelch trans., 1920) (“There is a continual movement of growth in the productive forces, of destruction in social relations, of formation in ideas; there is nothing immutable but the abstraction of the movement—*mors immortalis*.”).

5. ARISTOTLE, *POLITICS* 7 (Benjamin Jowett trans., Kessinger Pub. n.d.) (“Now, that man is more of a political animal than bees or any other gregarious animals is evident. Nature, as we often say, makes nothing in vain, and man is the only animal whom she has endowed with the gift of speech. . . . [I]t is a characteristic of man that he alone has any sense of good and evil, of just and unjust, and the like, and *the association of living beings who have this sense makes a family and a state*.”) (emphasis added).

(Aristotle),⁶ or by convention (Hobbes),⁷ live and work together in states to achieve not only the common needs of life,⁸ but also the anticipated goal of a good life.⁹ The state (society) is as inevitable as breathing.

A constitution is an organic fact of every state: it is a part of the being of the state. People, like the state, also have a constitution—a character. Just as people change over time, so do states. But just as there are natural limits on what people can or cannot become, so there are natural limits on what the state can and cannot fairly do. No man, nor any group of men, *ex ante* may justly take the life of another person, though perhaps their killing may be excused (or forgiven) *ex post*.

The death of Death would surely be seen by Aristotle, Hobbes, and Marx as worthy of contemplation.¹⁰ The death of the state and its replacement by society was the essence of Marx's work.¹¹

A condemnation to life means the prisoner is condemned to breathe, to contemplate their error and to try the impossible: repairing the injury they caused. Some people under that circumstance would prefer to die. Some fates are worse than death. We are a social animal, and killing is the most asocial act.

There are two aspects to any entity: the being and the becoming. The death penalty is becoming unconstitutional out there, in the real world. It may take another ten years, or only three, or even twenty. In my inner world, and in all of Europe, Canada, Australia, and South Africa, state killing of prisoners has already been rejected for some time. At some point, the rising principle—the becoming—will replace the falling principle—the being—and the death penalty will be seen by all courts to be a violation of the law of the land in the United States. How will that happen?

6. "Every state is a community of some kind, and every community is established with a view to some good." *Id.* at 5. "[W]hen several *families* are united, and the association aims at something more than the supply of daily needs, the first society to be formed is the village. And the most natural form of the village appears to be that of a colony from the family . . ." *Id.* at 6 (emphasis added). "When several villages are united in a single complete community, large enough to be nearly or quite self-sufficing, the state comes into existence, originating in the bare needs of life, and continuing in existence for the sake of a good life." *Id.* at 6–7.

7. See generally HOBBS, *supra* note 2, at 139–42. I do not believe that there ever was a state of nature. I take Aristotle's view that the state (society) is natural and inevitable, and not conventional because individuals are not self sufficient. The social contract and the state of nature are impossible. The right to rebel against tyrannical oppression and exploitation is an inalienable natural right, not an alienable convention.

8. ARISTOTLE, *supra* note 5, at 6–7.

9. *Id.*

10. "Death, thou shalt die!" John Donne, *Death Be Not Proud (Holy Sonnet X)*, reprinted in BARTLETT'S POEMS FOR OCCASIONS 219 (Geoffrey O'Brien ed., 2004).

11. "Marx's and Engels's views on the state and its withering away were completely identical . . ." VLADIMIR LENIN, THE STATE AND REVOLUTION, at ch. 5, § 1 (1918), reprinted in 25 LENIN COLLECTED WORKS 381, <http://www.marxists.org/archive/lenin/works/1917/staterev/ch05.htm>.

Conceptually, it is clear. The death penalty is unconstitutional because it is irrational. The punishment is disproportionately and unfairly meted out, and it is irrevocable. The wrong people sometimes get killed¹² and a disproportionate number of the killed are descendants of slaves.¹³ Moreover, capital punishment does not deter criminal behavior¹⁴ and is costly and inefficient.¹⁵ Capital punishment within the prison plantation system is simply one more injustice inflicted on black people by white people. Racism kills.

Capital punishment is also per se unconstitutional as a violation of natural rights and of international law. To expose this argument we must first show that natural law and international law are part of the U.S. Constitution.

I. THE UNWRITTEN CONSTITUTION

The United States are heirs to a constitutional tradition that can be traced back to Magna Carta and to the Roman *ius commune* and Saxon customary law. The customary constitution (i.e. the unwritten common law) which the United States inherited from England traces its roots to the Roman *ius commune*, to Cicero and Aristotle, and is the basis of the written constitution. The unwritten U.S. Constitution protects the rights of all persons, particularly the weak, and defends justice. Its principles are discovered by natural reason and it is the embodiment of natural justice. We can find rights in the U.S. Constitution directly from the British Constitution and indirectly from the constitutions of other nations. We discover those rights using natural reasoning.

12. See, e.g., Steve Mills & Maurice Possley, *Did One Man Die for Another Man's Crime?: 'I Didn't Do It but I Know Who Did,'* CHI. TRIB., Jun. 25, 2006, at C20; see also Equal Justice USA, Larry Griffin, <http://www.ejusa.org/grip/reasonabledoubt/Larry%20Griffin.html>.

13. See *infra* Statistical Annex Table 1.

14. Capital punishment cannot deter crimes of passion or crimes committed by the stupid. See generally Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. OF CRIM. L. 255 (2006); Robert Weisberg, *Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny* (Stanford Law Sch. Annual Review of Law & Soc. Sci., Working Paper No. 114, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=752044.

15. Jeffrey A. Fagan, *Capital Punishment: Deterrent Effects & Capital Costs*, COLUM. L. SCH. REP., http://www.law.columbia.edu/law_school/communications/reports/summer06/capitalpunish (“[E]ach execution can cost between \$2.5 million to \$5 million.”).

A. *The English Foundation of the U.S. Constitution*

The U.S. Constitution is a direct successor to the structure and substance of the British Constitution. Accordingly, to understand the U.S. Constitution, sometimes misleadingly called a “written constitution,” we must understand the British Constitution, sometimes misleadingly called an “unwritten constitution.”

1. *Sources and Structure of the British Constitution*

The British—and thus the Colonial—Constitution contained both written and unwritten sources.¹⁶ Among the unwritten sources were natural law and customary law.¹⁷ Customary law was of two sorts: local customs of non-constitutional character, and the common law which is, absent legislation, constitutive. Coke divided the law into three parts:¹⁸ written *lex* (statutes), unwritten local custom,¹⁹ and common law.²⁰ Customary law arises out of common usages (i.e., practices), coupled with the sense that such customary actions are obligatory.²¹ Usage (i.e., habitual common practice) is an interpretive guide to our understanding of law.²²

The common law evolved, in part, out of the Roman *ius commune*²³ and the customs of the Angles and Saxons. The source and extent of the authority of the written constitutional provisions—Magna Carta, the English Bill of Rights, and the Habeas Corpus Act—are found in the unwritten constitutive natural law sources of common law.

16. Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1130 (1987) (footnotes & citations omitted) (“Neither a single written document nor a category of either natural or enacted law, the ancient constitution was an amorphous admixture of various sources of law. It was essentially custom mediated by reason. . . . This natural law tradition was also echoed in the thought of various continental influences on the Americans.”).

17. *Id.*

18. 2 EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 344a (Philadelphia, Robert H. Small 1853) (“*Law temporall.* Which consists of three parts, viz. First, on the common law, expressed in our bookes of law, and judicial records. Secondly, on statutes contained in acts and records of parliament. And thirdly, on customes grounded upon reason, and used time out of minde.”).

19. 1 *id.* at 110b (“[I]n special cases, a custome may be alleged within a hamlet, a towne, a burgh, a city, a manor, an honor, an hundred, and a county; but a custome cannot be alleged generally within the kingdom of *England*; for that is the common law.”).

20. *Id.* (“*Consuetudo* is one of the main triangles of the laws of England; those laws being divided into common law, statute law, and custome.”).

21. *Id.* (“Of every custome there be two essentiall parts, time and usage; time out of minde, (as shall be said hereafter) and continuall and peaceable usage without lawful interruption.”).

22. *Id.* at 81b (“[U]sage is a good interpreter of laws, so non usage where there is no example is a great intendment that the law will not bear it . . .”).

23. See R.H. Helmholz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297, 297 (1999) (comparing Magna Carta with the then contemporary *ius commune* and suggests *ius commune* influenced the formulation of Magna Carta).

a. *Natural Law: Cicero's "Right Reasoning in Accord with the Law of Nature" (recta ratio naturae congruens)*

According to Coke, law is the summation of reason,²⁴ and the realization and perfection of rational action.²⁵ Cicero agrees:²⁶ the life of the law has been reason.²⁷ However, the reasoning of the common law is a special kind: it is a practical reasoning (*phronesis*) acquired through years of diligent study.²⁸ Reason is the motive force of the rule of law, and one must understand the rationale behind the rule of law to appreciate and apply that rule correctly.²⁹ This is what is meant by natural law reasoning.

b. *Magna Carta*

Magna Carta is the written cornerstone of the British Constitution. That "Great Charter" is, however, an embodiment of natural and customary constitutional law, and superior to ordinary laws: "[G]eneral law shall not take away any part of Magna Charta."³⁰ Yet, Magna Carta evolves with time,³¹ protecting an ever-growing sphere of liberties that now encompass the internationally recognized right to life.

The unwritten British Constitution was already quite specific about the content of rights by the time of the U.S. Revolution. The most basic rights

24. 1 COKE, *supra* note 18, at 62a ("*Lex est summa ratio.*").

25. *Id.* at 97b ("And the law, that is the perfection of reason, cannot suffer anything that is inconvenient.").

26. MARCUS TULLIUS CICERO, DE REPUBLICA (51 B.C.), reprinted in 3 C.J. DE VOGEL, GREEK PHILOSOPHY: A COLLECTION OF TEXTS WITH NOTES AND EXPLANATIONS 177 (3d ed. 1973) ("*Est quidem vera lex, recta ratio, naturae congruens, diffusa in omnes, constans, sempiterna, quae vocet ad officium jubendo, vetando a fraude deterreat, quae tamen neque probos frustra jubet aut vetat, nec improbos jubendo aut vetando movet.*" (True law is right reason in accord with nature.)).

27. 1 COKE, *supra* note 18, at 97b ("[F]or reason is the life of the law, nay the common law itself is nothing else but reason . . . gotten by long study, observation, and experience, and not of every man's natural reason; for, *Nemo nascitur artifex.* This legal reason *est summa ratio.*").

28. 2 *id.* at 183b ("[T]hough a man can tell the law, yet if he know not the reason thereof, he shall soone forget his superficial knowledge. But when he findeth the right reason of the law, and so bringeth it to his natural reason, that he comprehendeth it as his own, this will not only serve him for the understanding of that particular case, but of many others: for *cognitio legis est copulata et complicata*; and this knowledge will long remaine with him.").

29. *Id.* at 395a ("*Ratio est anima legis*; for then are we said to know the law, when we apprehend the reason of the law; that is, when we bring the reason of the law so to our owne reason, that wee perfectly understand it as our owne; and then, and never before, we have such an excellent and inseparable propertie and ownership therein, as wee can neither lose it, nor any man take it from use, and will direct us (the learning of the law is so chained together) in many other cases. But if by your studie and industrie you make not the reason of the law your owne, it is not possible for you long to retaine it in your memorie.>").

30. Bernard H. Siegan, *Protecting Economic Liberties*, 6 CHAP. L. REV. 43, 67 (2003) (quoting *Dominus Rex v. Tooley*, (1613) 80 Eng. Rep. 1055, 1059 (K.B.)).

31. *Green v. United States*, 356 U.S. 165, 189 (1958) (Frankfurter, J., concurring) ("What Magna Carta has become is very different indeed from the immediate objects of the barons at Runnymede.>").

protected by the British Constitution were life, liberty, and property,³² as well as the rights to due process of law³³ and trial by a jury of one's peers. Trial by jury is a common law³⁴ constitutional right also found in Magna Carta.³⁵ These three basic rights are protected through the guaranty of the due process of law, which is also rooted in Magna Carta.³⁶ The Great Charter guaranties both substantive³⁷ and procedural³⁸ due process of law. However, "the *Magna Charta*, doth not give the privileges therein mentioned, nor doth our *Charters*, but must be considered as only declaratory of our rights, and in affirmance of them."³⁹ Magna Carta is the embodiment of transcendent principles of natural law.

Other protections guaranteed by Magna Carta at the time of the American Revolution include the right to life, liberty,⁴⁰ and property; the prohibition of ex post facto laws; substantive and procedural due process of law; and equal protection under the law of the land, both as to individuals and collectivities.⁴¹ As specific instances of these general concepts, Magna Carta guaranteed, inter alia, that: (1) no one shall be judge of their own cause;⁴² (2) regulations must be a rational means to a permissible end;⁴³ (3) executive powers are to be narrowly construed to serve only their intended goal which must be in the public interest;⁴⁴ (4) laws contrary to natural right or natural reason, or impossible of performance are void;⁴⁵ (5) property rights are not absolute;⁴⁶ (6) taxation must be proportional to benefit

32. Siegan, *supra* note 30, at 58.

33. *Id.*

34. *In re Oliver*, 333 U.S. 257, 266 (1948) ("This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage.")

35. *BMW of N. Am. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring) ("This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion.")

36. *Hurtado v. California*, 110 U.S. 516, 521-26 (1884) (interpreting due process in light of the language and interpretations given to parts of the Magna Carta).

37. Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 972.

38. *Id.* at 971-72. In discussing chapter 39 of Magna Carta, he [Blackstone] sometimes identifies "law of the land" with judicial procedures. *Id.*

39. Sherry, *supra* note 16, at 1132 (quoting SILAS DOWNER, A DISCOURSE AT THE DEDICATION OF THE TREE OF LIBERTY (1768)).

40. Liberty includes the free movement of persons. "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth (and Fourteenth Amendments). In Anglo-Saxon law that right was emerging at least as early as the Magna Carta." *Bell v. Maryland*, 378 U.S. 226, 293 n.10 (1964) (Goldberg, J., concurring).

41. Siegan, *supra* note 30, at 58-59.

42. *Bonham's Case*, (1610) 77 Eng. Rep. 646, 652 (K.B.).

43. *Id.*

44. *The Case of the King's Prerogative in Saltpetre*, (1606) 77 Eng. Rep. 1294, 1295 (K.B.).

45. *Bonham's Case*, 77 Eng. Rep. at 652.

46. *See Mouse's Case*, (1609) 77 Eng. Rep. 1341 (K.B.).

received;⁴⁷ (7) that economic competition would be free and fair: monopoly is repugnant to the common law.⁴⁸

These rights are the unbreakable ribs of the ship of state. The rebellious colonists fought not to destroy them but to preserve them.

Blackstone regarded the rights of “personal security, of personal liberty, and of private property”⁴⁹ as absolute. Like Coke, Blackstone recognized the unwritten constitution, and contrasted national common law with local customs. Local customs, unlike the common law, were not constitutional.⁵⁰

c. Parliamentary Supremacy, or Judicial Review?

“Magna Charta is such a fellow that he will have no sovereign.”
– Sir Edward Coke

British constitutionalism “rested on three distinct premises: first, that some form of higher law—the British Constitution—existed and operated to make void acts of Parliament inconsistent with that fundamental law; second, that this fundamental law, or constitution, consisted of a mixture of custom, natural law, religious law, enacted law, and reason; and third, that judges might use that fundamental law to pronounce void inconsistent legislative or royal enactments.”⁵¹ Against this view is the idea of an absolute parliamentary sovereignty. The usual reading is that parliamentary supremacy precludes judicial review. That reading is erroneous. Judicial review is possible in that the law must be moral and reasonable; that is, law to be valid must comport with the principles of natural justice. The usual reading is also erroneous in that it sees parliamentary supremacy as supremacy vis-à-vis the *law*. In fact, parliamentary supremacy refers to the relation of Parliament to the *King*. Parliament, under the British Constitution, while supreme as to the King, was, and is, subject to natural law.⁵² Acts of Parliament that are “against common right and reason, or repugnant, or impossible to be performed” are void.⁵³ This is of course seen in the U.S. Supreme Court “rational review” jurisprudence: legislation that is

47. The Case of the Isle of Ely, (1610) 77 Eng. Rep. 1139, 1142 (K.B.).

48. The Case of Monopolies, (1603) 77 Eng. Rep. 1260, 1265–66 (K.B.).

49. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 140 (Univ. of Chi. Press 1979) (1765).

50. *Id.* at 74–75.

51. Sherry, *supra* note 16, at 1128–29.

52. City of London v. Wood, (1701) 12 Mod. Rep. 669, 678 (K.B.) (“[A]n act of parliament can do no wrong[.]”). That is, an immoral law is not a law. *Id.*

53. Bonham’s Case, (1610) 77 Eng. Rep. 646, 652 (K.B.).

irrational is void.⁵⁴ The better view of parliamentary supremacy was elucidated by Coke. According to Coke, only the House of Lords can overturn the common law;⁵⁵ that is, the common law had (and has) a special constitutional status that set it apart from local customs. Judicial review, with the House of Lords as ultimate arbiter, is part of the British Constitution.⁵⁶

Blackstone noted that the House of Lords played exactly the same role which the U.S. Supreme Court today plays as ultimate arbiter of the Constitution.⁵⁷ And indeed judicial review exists in Britain in the proceedings of the Judicial Committee of the Privy Council (JCPC).

Britain ultimately rejected the idea of judicial review of the constitutionality of legislation against the common law particularly as positivism became seen, wrongly, as somehow inconsistent with natural law. However, parliamentary supremacy did not become a settled issue in English constitutional law until one hundred years after the U.S. Revolution.⁵⁸ At the time of independence, Coke's view on judicial review was the majority view, particularly in the colonies. Rather than breaking from Coke, as is commonly believed, I argue that Blackstone refined Coke's views on the relations of the British executive (the Crown), legislature (Parliament), and judiciary (the House of Lords, particularly, later, the JCPC).⁵⁹ In all events the unwritten British Constitution in 1776 is the starting point of the U.S. Constitution and judicial review of statutes was clearly part of colonial legal practice.

54. 1 COKE, *supra* note 18, at 140a (“[O]ne of the maxims of the common law, viz. that all customs and presumptions that be against reason are void.”).

55. *Id.* at 115b (“The common law has no contrroller in any part of it, but the high court of parliament; and if it be not abrogated or altered by parliament, it remains still, as *Littleton* here saith. The common law appeareth in the statute of *Magna Charta* and other statutes (which for the most part are affirmations of the common law) in the originall writs, in judiciable records, and in our bookes of termes and yeares.”).

56. *Bonham's Case*, 77 Eng. Rep. at 652.

57. See *Vanhorne v. Dorrance*, 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012 (C.C.D. Pa. 1795) (No. 16,857).

58. Glenn M. Willard, *Courts of General Jurisdiction: Judicial Power Extending to Cases Arising Under the “Laws of Nature and of Nature’s God,”* 7 REGENT U. L. REV. 1, 22 (1996) (“The *Bonham's Case* principle was affirmed, though carefully circumscribed, only fifty-three years before Blackstone wrote his *Commentaries*. . . . [T]he principle was not categorically denied until 1871 . . .”).

59. *Id.* at 23 (“[I]n Blackstone’s eighth edition of his *Commentaries*, published in 1778, there is a note in the margin of a copy, alleged to be in Blackstone’s own hand, that makes the latter part of the second sentence of the quotation above read: ‘I know of no power in the ordinary forms of the Constitution that is vested with authority to control it.’ The ninth and all later editions have this modification. Josiah Quincy suggested that Blackstone had changed his opinion with respect to judicial review, as a consequence of American precedents.”).

B. *America: The U.S. Constitution Is a Successor to the British Constitution*

The U.S. Constitution is a successor to the British Constitution.⁶⁰ The American Revolution was fought to secure the rights of the Colonists, as English subjects to the rights of Englishmen: life, liberty, and ownership of property (“the pursuit of happiness”).⁶¹ Sources of U.S. constitutional law are either written or unwritten, and are either binding or persuasive. Written binding sources include the Constitution, the Bill of Rights, the English Bill of Rights, Magna Carta, and the Habeas Corpus Act. Unwritten binding sources include natural law reasoning and international law. Written persuasive evidence includes the Declaration of Independence and the writings of Coke, Blackstone, Locke, and *The Federalist Papers*. Unwritten persuasive evidence includes legal maxims.

The original intent of the framers of the Constitution was to include within the Constitution numerous unwritten⁶² sources of constitutional law which were part of the British Constitution.⁶³ Consequently, the U.S. Constitution is a successor to the British Constitution,⁶⁴ and the English civil

60. Transcript of Oral Argument, *Jurney v. MacCracken*, 294 U.S. 125 (1935) (No. 339) (“We did not create a new Constitution as a result of the Revolution. All the pre-Declaration of Independence conventions and resolutions show, whether from small groups or from such sources as the Boston Convention and the Continental Congress, the demand of the Colonies was not for a new Government or for a new Constitution. The complaint was that King George and his Parliament were violating our Constitution which had come down to us through the centuries as our heritage from our ancestors. We fought not to free ourselves from a Constitution, but to preserve it. Ours was not a true revolution. It was a territorial secession and a resort to arms to preserve our existing Constitution. When we wrote our Constitution we naturally brought forward in the main our former unwritten Constitution. On this point an analytical comparison of the unwritten and the written Constitutions, the facts of our history and the weight of probabilities agree.”).

61. Benjamin Franklin argued from the “‘common rights of Englishmen,’ as declared by Magna Charta, and the petition of right.” 4 BENJAMIN FRANKLIN, *The Examination of Doctor Benjamin Franklin, in the British House of Commons, Relative to the Repeal of the American Stamp Act* (1766), in THE WRITINGS OF BENJAMIN FRANKLIN 412, 445 (Albert Henry Smyth ed., 1906).

62. Thomas C. Grey, *Symposium on Interpreting the Ninth Amendment: The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 217 (1988) (“[T]he American Revolution was made by a generation of lawyers and pamphleteers who believed in and were used to arguing on the basis of a legally supreme and yet unwritten English or British constitution.”).

63. Jed Rubenfeld, *The New Unwritten Constitution*, 51 DUKE L.J. 289, 289–90 (2001) (“From the very beginning, American judges have been prepared to enforce constitutional rights that cannot fairly be said to derive from any enumerated textual guarantee. The Framers themselves, we are told, understood constitutional rights in unwritten, natural-law terms, drawing on the English *lex non scripta* and “ancient constitution” traditions passed down to them by Blackstone and others.”).

64. *See, e.g., Dollar Sav. Bank v. United States*, 86 U.S. (19 Wall.) 227, 239 (1873) (“The rule thus settled respecting the British Crown is equally applicable to this government It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriae*, or universal trustee, enters as much into our political state as it does into the principles of the British constitution.”)

rights as of 1776 applied—Crown be damned—to Americans.⁶⁵ The sources and structure of the U.S. Constitution are essentially the same as those of the British Constitution. The American Colonists retained their customary rights under the British Constitution. An honest originalist interpretation recognizes the natural law component of American constitutionalism; the intention of the framers was that the Constitution must be interpreted within the contexts of pre-constitutional writings and natural law reasoning.

1. *Binding Sources of U.S. Constitutional Law*

a. *Written Binding Sources: Magna Carta, English Bill of Rights*

The U.S. Supreme Court regularly cites British constitutional documents such as Magna Carta, the English Bill of Rights, and the Habeas Corpus Act.⁶⁶ These are written binding sources of U.S. constitutional law.

i. *Magna Carta*

Magna Carta⁶⁷ is an integral part of the U.S. Constitution.⁶⁸ The provisions of Magna Carta are reproduced in U.S. written constitutional documents in translation word-for-word.⁶⁹ Magna Carta has constitutional value in the United States.⁷⁰ It is a binding source of unwritten constitutional law. Congress may recognize more liberties than in the Great Charter but not less. The U.S. Supreme Court recognizes that the signification of Magna Carta changes over time, admitting an ever greater number of

65. *Glasser v. United States*, 315 U.S. 60, 84 (1942) (“Since it was first recognized in Magna Carta, trial by jury has been a prized shield against oppression, but, while proclaiming trial by jury as ‘the glory of the English law,’ Blackstone was careful to note that it was but a ‘privilege.’ Our Constitution transforms that privilege into a right in criminal proceedings in a federal court.” (citation omitted)).

66. *E.g.*, *Chambers v. Florida*, 309 U.S. 227, 237 n.10 (1940) (comparing Bill of Rights with the Habeas Corpus Act).

67. *Riggs*, *supra* note 37, at 969 (“Given the common perception of Magna Carta as a protection against arbitrary government, it is not surprising that the colonists also resorted to the Great Charter in their controversies with king and Parliament, particularly over the right to tax.”).

68. *Twining v. New Jersey*, 211 U.S. 78, 107 (1908) (naming Bill of Rights and Magna Carta). “[T]he great instruments in which we are accustomed to look for the declaration of the fundamental rights” *Id.*

69. Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORDHAM L. REV.* 1477, 1511 (2005) (“At the time of the American Revolution, the substantive provisions of the Magna Carta and the English Bill of Rights became central to the process of the drafting of the state constitutions and, later, the United States Constitution. The United States Constitution and the Bill of Rights incorporated many of the substantive provisions of both documents, sometimes word-for-word.”)

70. *Twining*, 211 U.S. at 105 (“Magna Carta, ‘a sacred text, the nearest approach to an irrevocable, ‘fundamental statute’ that England has ever had.”).

essential liberties.⁷¹ Moreover, the liberties protected by Magna Carta are to be accorded even greater protection in the United States than in England.⁷² Magna Carta is cited by U.S. courts, because it is the root of the U.S. Constitution.⁷³ For example, the right to property is rooted in Magna Carta.⁷⁴ Likewise, the principle that no person should be deprived of life, liberty, or property, except by due process of law, originated in Magna Carta.⁷⁵ The principle “*Ubi jus ibi remedium*”—wherever there is a right, there is a remedy—originated in Magna Carta and the common law.⁷⁶ Due process of law is equivalent to the law of the land as used in Magna Carta and due process of law as used in the Fifth and Fourteenth Amendments are coextensive.⁷⁷ Coke interpreted due process as a general protection against governmental oppression.⁷⁸

ii. *The English Bill of Rights*

Like Magna Carta, the English Bill of Rights⁷⁹ is an organic part of the U.S. Constitution. “There is no doubt that the [English] Declaration of Rights [of 1689] is the antecedent of our constitutional text.”⁸⁰ The Eighth Amendment was derived from Magna Carta⁸¹ and the English Bill of

71. *Hurtado v. California*, 110 U.S. 516, 529 (1996) (“[O]wing to the progressive development of legal ideas and institutions in England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally.”).

72. *Id.* at 531–32. “The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative.” *Id.* at 531.

Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

Id. at 532.

73. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *see supra* text accompanying note 35.

74. *E.g.*, *Miller v. McKenna*, 147 P.2d 531, 536 (Cal. 1944).

75. *Davidson v. City of New Orleans*, 96 U.S. 97, 101 (1878); *Munn v. Illinois*, 94 U.S. 113, 123 (1876).

76. *See, e.g.*, *Smith v. Mercy Hosp. & Med. Ctr.*, 560 N.E.2d 1164, 1169 (Ill. App. Ct. 1990).

77. *Davidson*, 96 U.S. at 101 (“The equivalent of the phrase ‘due process of law,’ according to Lord Coke, is found in the words ‘law of the land,’ in the Great Charter”); *Wichita Council v. Sec. Benefit Ass’n*, 28 P.2d 976, 980 (Kan. 1934); *Ex parte Sizemore*, 8 S.W.2d 134, 136 (Tex. Crim. App. 1928); *see also* *Den v. Hoboken Land & Improvement Co. (Murray’s Lessee)*, 59 U.S. (18 How.) 272, 276 (1856); *Motor Equip. Co. v. Winters*, 69 P.2d 23, 28 (Kan. 1937); *Jordan v. Gaines*, 8 A.2d 585, 587 (Me. 1939); *State v. Ballance*, 51 S.E.2d 731, 769 (N.C. 1949); *State v. McClintick*, 23 Ohio Misc. 194, 198 (1970).

78. *Murray’s Lessee*, 59 U.S. (18 How.) at 276.

79. *See generally* *An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown*, 1688, 1 W. & M., c. 2 (Eng.).

80. *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991).

81. *Solem v. Helm*, 463 U.S. 277, 284–85 (1983).

Rights.⁸² Likewise, “[t]he bail clause was lifted with slight changes from the English Bill of Rights Act.”⁸³ Moreover, “the Eighth Amendment’s ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.”⁸⁴

Like the British Constitution, the U.S. Constitution evolves with time to reflect “evolving standards of decency.”⁸⁵ This is especially relevant to capital punishment since the historical trend is very clearly abolition of capital punishment as ineffective, expensive, and unjust.

iii. *Foreign Sources*

The U.S. Supreme Court sees civil law concepts of law and justice and Magna Carta as consistent because the common law developed in part out of the Roman *ius commune*.⁸⁶ There is not one law in Athens and another in Rome.⁸⁷ Looking at foreign law to appreciate the U.S. Constitution is

82. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989). (“[I]t is clear that the Eighth Amendment was ‘based directly on Art I, § 9, of the Virginia Declaration of Rights,’ which ‘adopted verbatim the language of the English Bill of Rights.’ Section 10 of the English Bill of Rights of 1689, like our Eighth Amendment, states that ‘excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.’” (citations omitted)).

83. *Carlson v. Landon*, 342 U.S. 524, 545 (1952).

84. *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

85. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

86. *Hurtado v. California*, 110 U.S. 516, 530–31 (1996) (“The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*suum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.”).

87. MARCUS TULLIUS CICERO, TREATISE ON THE COMMONWEALTH, in 1 THE POLITICAL WORKS OF MARCUS TULLIUS CICERO (Francis Barham trans., London, Edmund Spettigue 1841–42), available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=546&layout=html (“There is a true law, a right reason, conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil. Whether it enjoins or forbids, the good respect its injunctions, and the wicked treat them with indifference. This law cannot be contradicted by any other law, and is not liable either to derogation or abrogation. Neither the senate nor the people can give us any dispensation for not obeying this universal law of justice. It needs no other expositor and interpreter than our own conscience. It is not one thing at Rome and another at Athens; one thing to-day and another to-morrow; but in all times and nations this universal law must for ever reign, eternal and imperishable.”).

perfectly consistent with the natural law foundations of the British Constitution.

b. *Unwritten Binding Sources*

i. *Natural and Common Law*

Natural law remained and remains an unwritten source of constitutional law in the new republic: “statutes against law and reason are void.”⁸⁸ The unwritten sources of the U.S. Constitution are at least as important as the written ones, for “[t]he sacred rights of mankind are not to be rummaged for, among old parchments or musty records. They are written, as with a sunbeam, in the whole *volume* of human nature, by the hand of divinity itself; and can never be erased or obscured by mortal power.”⁸⁹ These rights are deathless. The framers intended courts to look to natural law and customary constitutional law when interpreting the Constitution.⁹⁰

If these rights were thought to be inherent, what, then, was a legislature doing when it “enacted” enumerated and elaborate lists of fundamental rights and principles? It was merely *declaring* rights already in existence: “*Magna Charta*, doth not *give* the privileges therein mentioned, nor doth our *Charters*, but must be considered as only declaratory of our rights, and in affirmance of them.”⁹¹

These unwritten sources of constitutional law were used *ab initio* in the review of the constitutionality of legislation.⁹² Judicial review was a practice even of colonial courts.⁹³ The English Constitution of 1776 established a minimum standard of U.S. rights. The written constitution would

88. Sherry, *supra* note 16, at 1138 (quoting Alexander Hamilton).

89. ALEXANDER HAMILTON, *The Farmer Refuted*, in 1 THE PAPERS OF ALEXANDER HAMILTON 81, 122 (Harold C. Syrett & Jacob E. Cooke eds., 1961).

90. Suzanna Sherry, *Commentary on the Symposium Interpreting the Ninth Amendment: The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT. L. REV. 1001, 1003 (1988).

91. Sherry, *supra* note 16, at 1132 (citation omitted).

92. *Id.* at 1143–44 (“*Commonwealth v. Caton*, a 1782 Virginia case . . . is the first reported case in the United States in which a court reviewed a statute for constitutionality. *Caton* and others had been sentenced to death for treason under a 1776 statute that, in addition to defining the treason, removed the pardon power from the executive to the legislature. The lower house of the legislature (the House of Delegates) passed a resolution pardoning the prisoners, but the Senate refused to concur. When the attorney general moved the court for authority to execute the prisoners, *Caton* and his fellows responded that the 1776 statute must either be interpreted to grant pardon power to the House of Delegates alone or be held unconstitutional. The Virginia Court of Appeals, to which the case was sent by the trial court because of its novelty and difficulty, found the statute constitutional and held the single-house attempt at pardon ineffective.”)

93. *E.g.*, *Robin v. Hardaway*, Jeff. 109, 114 (Va. 1772) (citing *Coke*).

explicitly denominate the then implicit and customary rights, would not abridge them, and could and did expand them, notably in the case of freedom of the press.⁹⁴ “[T]he Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.”⁹⁵ *Ubi dubium, ibi libertas* would be the motto of the Republic:⁹⁶ when in doubt, freedom.⁹⁷

ii. *International Law*

Customary international law, as Blackstone recognized,⁹⁸ is an organic part of the common law.⁹⁹ Magna Carta is not a mere statute of local application to England but was valid overseas in the colonies as well.¹⁰⁰ U.S. courts consider international opinion in their increasing rejection of capital punishment¹⁰¹ because customary international law is an integral part of the common law¹⁰² and because treaties are part of the supreme law of the land.¹⁰³ International consensus opposes capital punishment¹⁰⁴ and increasingly limits its application. The global trend is against death.

94. Bernard H. Siegan, *Protecting Economic Liberties*, 6 CHAP. L. REV. 43, 73–74 (2003). “[A]s Alexander Hamilton put it in *The Federalist Papers* No. 84, the United States Constitution was a bill of rights. It did not grant the national government any power to deprive the people of their common law rights.” *Id.* at 73.

95. THE FEDERALIST NO. 84 (Alexander Hamilton).

96. U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

97. JOHN BOUVIER, A LAW DICTIONARY 154 (Philadelphia, J.B. Lippincott & Co. 1874) (“*Quotiens dubia interpretatio libertatis est, secundum libertatem respondendum erit.* Whenever there is a doubt between liberty and slavery, the decision must be in favor of liberty.”).

98. 4 BLACKSTONE, *supra* note 49, at 66, 73 (“International law is ‘deducible by natural reason,’ and each state shall ‘aid and enforce the law of nations, as part of the common law; by inflicting an adequate punishment upon offenses against that universal law.’”).

99. William C. Bradford, *The Changing Laws of War: Do We Need a New Legal Regime After September 11?*, 79 NOTRE DAME L. REV. 1365, 1429 n. 248 (2004) (“[T]he English common law regarded international law as a species of natural law—and therefore a part of the domestic law—that bound all individuals and states consistent with the principle that natural law resided at the apex of the hierarchy of sources of law both domestic and international.”).

100. *Martin v. Lessee of Waddell*, 41 U.S. 367, 403 (1842) (argument of appellant, who won at the U.S. Supreme Court).

101. *People v. Bull*, 705 N.E.2d 824, 846–47 (Ill. 1998) (Harrison, J., concurring in part and dissenting in part) (noting death penalty unconstitutional and considering foreign judicial opinion).

102. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (stating that “international law is a part of our law”); see also *Hilao v. Estate of Marcos (In re Estate of Ferdinand E. Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1474 (9th Cir. 1994) (stating that previous courts did not hold that “international law is not part of federal common law if there are no contradictory federal statutes”); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (“[T]he law of nations... has always been part of the federal common law.”).

103. U.S. CONST. art. VI (“This Constitution . . . and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”).

2. Persuasive Sources

a. Written Persuasive Sources

i. The Declaration of Independence

The Declaration of Independence is a constitutional document serving as an interpretative guide to the teleology of the American Republic: “[I]t is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence.”¹⁰⁵ However, the Declaration of Independence, apart from an embodiment of the natural constitutional right of rebellion, is only a persuasive source—evidence—of the Constitution: the statements of the Declaration do not have the force of organic law.¹⁰⁶ However, courts do sometimes refer to the Declaration to help determine constitutional issues.¹⁰⁷

ii. Works of Learned Scholars

Persuasive evidence of the content of the U.S. Constitution can also be found in Coke’s *Institutes*, Blackstone’s *Commentaries*,¹⁰⁸ and scholarly writings such as the works of John Locke, Adam Smith, and *The Federalist Papers*.¹⁰⁹ All these various sources are cited in U.S. courts as sources and evidence of the U.S. Constitution.¹¹⁰ For example, the privileges and immunities¹¹¹ clause is derived from due process and equal protection of the

104. *State v. Koskovitch*, 776 A.2d 144, 226–27 (N.J. 2001) (Long, J., concurring in part and dissenting in part) (“The international community has moved more quickly toward an understanding of the flaws and dangers inherent in any capital punishment scheme.”).

105. *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 159–60 (1897).

106. *Filan v. Martin*, 684 P.2d 769, 773 (Wash. Ct. App. 1984).

107. *See, e.g., id.*; *Am. Fed’n of Labor v. Buck’s Stove & Range Co.*, 33 App. D.C. 83 (1909); *People ex rel. Tyroler v. Warden of City Prison*, 51 N.E. 1006 (N.Y. 1898).

108. *Schick v. United States*, 195 U.S. 65, 69 (1904) (“Blackstone’s *Commentaries* are accepted as the most satisfactory exposition of the common law of England. . . . [U]ndoubtedly the framers of the Constitution were familiar with it.”).

109. Finkelman, *supra* note 69, at 1500–01.

110. *E.g., Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601 (1895); *McPherson v. Blacker*, 146 U.S. 1 (1892); *Rhode Island v. Massachusetts*, 37 U.S. 657 (1838); *Cohens v. Virginia*, 19 U.S. 264 (1821); *McCulloch v. Maryland*, 17 U.S. 316 (1819). In ascertaining the meaning of the phrase “republican form of government” the debates of the constitutional conventions and *The Federalist Papers* are of great importance, if not conclusive.

111. Randolph J. Haines, *Getting to Abrogation*, 75 AM. BANKR. L.J. 447, 451 (2001).

Blackstone had defined the basic rights of Englishmen—those set forth in the Magna Carta, the Habeas Corpus Act, the Petition of Right, and the English Bill of Rights—as a collection of “privileges” and “immunities,” and explained why he chose each of those terms: “The rights themselves, thus defined by these several statutes, consist in a number of private immunities; . . . that *residuum* of natural liberty, which is not required by the laws of society to

laws, which are rules of law rooted in Magna Carta.¹¹² Given the current trend to overlook the fact that the Constitution was intended by the framers to be open-ended and interpreted in the context of time, the constitutional importance of Blackstone's *Commentaries* cannot be overemphasized.¹¹³

b. *Unwritten Persuasive Sources: Maxims of Law and Equity*

Maxims or aphorisms of law are witty sayings designed as memory aids and to convey legal meaning quickly and cogently. Their use has been in decline,¹¹⁴ but they are making a comeback.¹¹⁵ Llewellyn argued the maxims were contradictory.¹¹⁶ Sunstein is trying to revive them and is not alone.¹¹⁷ Maxims are best seen as persuasive evidence of the law.¹¹⁸ They are, like axioms of geometry,¹¹⁹ fundamental principles from which other legal propositions can be correctly formed.¹²⁰ At least in death penalty litigation, it should be noted that "*de morte hominis nulla est cunctatio longa.*"¹²¹ Maxims of law should be seen as persuasive evidence of the law only, but may be useful as guides to the substance of the law.

be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals."

Id. (quoting 1 BLACKSTONE, *supra* note 49, at 125–29).

112. See *Malinski v. New York*, 324 U.S. 401, 413–14 (Frankfurter, J., concurring).

113. ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 11 (1984) ("All of our formative documents—the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall—were drafted by attorneys steeped in [Blackstone's Commentaries]."); David J. Bederan, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1382 (1996); see also Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 771–72 (1995); Mark Spatz, Comment, *Shame's Revival: An Unconstitutional Regression*, 4 U. PA. J. CONST. L. 827, 835 (2002) ("Blackstone's treatise, *Commentaries on the Laws of England*, served as the source of law for American courts.").

114. J. Stanley McQuade, *Ancient Legal Maxims and Modern Human Rights*, 18 CAMPBELL L. REV. 75, 75 (1996) ("Until the middle of the nineteenth century books were still being published which appeared to regard the ancient maxims as central pillars of the law. The teaching of the law was organized round them. They were cited reverentially in court. Since that time the maxims have steadily declined in importance.").

115. See Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1179–81 (1990).

116. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 521–35 (4th prtg. 1969) (1960).

117. See, e.g., Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990).

118. *Freeman v. Caldwell*, 10 Watts 9, 10 (Pa. 1840).

119. BOUVIER, *supra* note 97, at 116 ("Maxims in law are somewhat like axioms in geometry.").

120. *Liebig Mfg. Co. v. Wales*, 34 A. 902, 907 (Del. Ch. 1896) ("These principles are legal maxims or axioms essential to the existence of regulated society."); *Rice v. State*, 7 Ind. 264, 265 (1855) ("There are some propositions that may be regarded, we think, at this day, as being settled; as having passed into the rank of maxims or axioms in American jurisprudence.").

121. BOUVIER, *supra* note 97, at 123 ("When the death of a human being may be concerned, no delay is long. When the question is concerning the life or death of a man, no delay is too long to admit of inquiring into facts.").

II. A NATURAL LAW ARGUMENT AGAINST THE DEATH PENALTY

The prisoner is as one at war with the state. Yet in war we ordinarily do not execute captured enemy prisoners. Here we discuss the various natural law arguments against the death penalty.

A. *International Law*

Customary international law is an integral part of the common law.¹²² Though international law does not yet prohibit capital punishment per se, there is a clear abolitionist trend internationally. The United States is “the only western democratic state to employ the death penalty for ordinary crimes during times of peace.”¹²³ While U.S. state courts increasingly kill prisoners,¹²⁴ the U.S. Supreme Court is increasingly finding exceptions to the application of the death penalty, e.g., in cases of the mentally retarded¹²⁵ and minors,¹²⁶ but also in cases involving mandatory sentencing¹²⁷ and the crime of rape.¹²⁸ Happily, the trend is against death.

However, the United States has repeatedly imposed capital punishment in defiance of treaties the United States authored and signed. For example, in 1998 Virginia executed Angel Breard, a Paraguayan convicted of rape and murder in state court.¹²⁹ Paraguay had obtained an order for a stay of execution from the International Court of Justice (ICJ).¹³⁰ Under international law, federal governments are responsible for the acts of their federated states. The Virginia government ignored the ICJ’s order.¹³¹ Similar

122. See Bradford, *supra* note 99.

123. Kristi Tumminello Prinzo, *The United States—“Capital” of the World: An Analysis of Why the United States Practices Capital Punishment While the International Trend Is Towards Its Abolition*, 24 BROOK. J. INT’L L. 855, 856 (1999) (citing Ursula Bentele, *Race and Capital Punishment in the United States and South Africa*, 19 BROOK. J. INT’L L. 235, 237 (1993)).

124. AMNESTY INTERNATIONAL, FACTS AND FIGURES ON THE DEATH PENALTY 5–6 (Jan. 1, 2007), available at http://www.amnesty.org/en/alfresco_asset/c3d650aa-a2a8-11dc-8d74-6f45f39984e5/act500022007en.pdf.

125. *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

126. *E.g.*, *Roper v. Simmons*, 543 U.S. 551, 574–75 (2005).

127. *E.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 301–04 (1976).

128. *See, e.g.*, *Coker v. Georgia*, 433 U.S. 584, 598–600 (1977) (finding the death penalty an unconstitutionally disproportionate sentence for the crime of rape of an adult woman).

129. *Breard v. Greene*, 523 U.S. 371, 372–74 (1998) (per curiam).

130. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 258 (Apr. 9).

131. In *Beard*, the Supreme Court indicated that the U.S. secretary of state asked Virginia to stay the execution, pending the result of the ICJ case. The Court found that it was unable to intervene because of the Eleventh Amendment. That view was rather uncreative. The Eleventh Amendment divests jurisdiction from the federal courts over cases in law and equity. It does not refer to cases before the admiralty courts. The admiralty courts were those which specialized in international law at the time. Since the Eleventh Amendment does not divest the federal government of jurisdiction over admiralty cases, a foreign plaintiff could bring a claim under international law (as opposed to national law!) before the federal courts. Moreover, as far as international law is concerned, the internal constitution of

facts existed in the *LaGrand Case*.¹³² There, a German citizen was to be executed, also by Virginia. The defendants in *LaGrand* had not been informed of their right under the Vienna Convention to obtain the advice of their consulate. The ICJ unanimously issued an order to stay the execution.¹³³ Once again, Virginia executed the foreign national¹³⁴ in violation of U.S. treaty obligations. The United States also regularly ignores Mexico's assertions of its citizens' rights, having executed more than one Mexican national unapprised of his right to consular advice by Mexico. Currently the U.S. Supreme Court is slotted to decide another case where a state did not apprise a foreign defendant of their rights under a U.S. treaty,¹³⁵ *Medellín v. Texas*.¹³⁶

The issue arises because the Eleventh Amendment divests jurisdiction in law and equity by foreign citizens and subjects from federal courts but at the same time also divests the states of their unlimited international legal personality. This appears to result in a conflict between international obligations and the domestic constitutional order. That conflict contradicts the very logic of a federal constitution and that fact should tell us something is amiss with thinking that the Eleventh Amendment applies here.

First, the Eleventh Amendment does not bar claims at admiralty—and the admiralty courts were the courts for hearing international law claims at the time of independence. So, in fact, the U.S. government is not divested of its sole and exclusive final authority over cases in international law.

Second, even if these cases were considered as being under law or equity (as opposed to admiralty, i.e. international law) the Eleventh Amendment applies to lawsuits “by Citizens of another State, or by Citizens or Subjects of any Foreign State.” The Eleventh Amendment does not apply to lawsuits by foreign states! The Eleventh Amendment does not divest the judicial power of the United States in cases of law or equity brought by foreign states. The Eleventh Amendment's terms are expressly limited to divesting jurisdiction over suits brought by citizens and subjects of foreign states. Thus, the Eleventh Amendment does not apply to the consular cases, for it is the foreign citizens' states which are asserting their right to

any state is irrelevant to the international obligations of that state. Additionally, U.S. states ceded their treaty making powers to the federal government. Members of federations have, at most, limited international legal personality. For a contemporary view of these purely internal questions of U.S. constitutional structure, see Thomas Healy, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726.

132. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

133. *Id.* at 515–16.

134. *Id.*

135. See Linda Greenhouse, *Supreme Court to Hear Appeal of Mexican Death Row Inmate*, N.Y. TIMES, May 1, 2007, at A16.

136. *Medellín v. Texas*, No. 06-984 (U.S. argued Oct. 10, 2007).

apprise their citizens of their consular rights. The directly injured party in these cases is not the individual. It is their state. The individual may have a derived claim therefrom, but unless their state intervenes on their behalf they do not have a remedy under international law because international law governs, in principle, only states in their relations inter se and not the relations of states to individuals. Individuals, only exceptionally, have directly enforceable rights under international law.

To reiterate: international law gives its protections principally to foreign states and only exceptionally to individuals. In principle, individuals must rely on their state for enforcement of their rights under international law. The Eleventh Amendment does not apply to foreign states. Rather it applies only to citizens and subjects of foreign states. Thus, the Eleventh Amendment does not apply to the consular cases. When Texas does not apprise foreign criminals of their consular rights, the injured party is not the foreign citizen, rather it is their state, and the right to a remedy under international law is not the individual's, rather it is their state's.

In its 2003 decision in the *Avena Case*,¹³⁷ the ICJ ruled that the United States breached its obligations under the Vienna Convention to provide for consular notice and assistance and to inform the defendants of their right thereto.¹³⁸ Finally, the United States withdrew from the Optional Protocol to the Vienna Convention on Consular Relations in 2005 over the issue of consular rights of capital defendants.¹³⁹ U.S. allies are rightfully outraged at the lack of respect of their citizens' rights. How would the United States react were a U.S. citizen to be imprisoned in, say, Mexico, not informed of his consular rights, and executed?

Because the United States ignores international treaties it has signed and tortures¹⁴⁰ and executes prisoners, foreign states often refuse U.S. ex-

137. *Avena & Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

138. *Id.* at 53–54.

139. Charles Lane, *U.S. Quits Pact Used in Capital Cases: Foes of Death Penalty Cite Access to Envoys*, WASH. POST, Mar. 10, 2005, at A1 (“The United States proposed the protocol in 1963 and ratified it—along with the rest of the Vienna Convention—in 1969.”).

140. Ian Austen, *Canadian Manual Has U.S. on Torture List*, N.Y. TIMES, Jan. 18, 2008, at A10; *Canada Puts U.S. on “Torture List,”* BBC NEWS, Jan. 18, 2008, <http://news.bbc.co.uk/1/hi/world/americas/7195276.stm>; *U.S. Acknowledges Torture at Guantanamo; in Iraq, Afghanistan—U.N.*, AFX NEWS, June 24, 2005; American Civil Liberties Union, *Autopsy Reports Reveal Homicides of Detainees in U.S. Custody*, <http://action.aclu.org/torturefoia/released/102405/> (listing autopsy reports of persons tortured to death that were obtained from the Department of Defense under Freedom of Information Act requests.) (last visited Feb. 3, 2008). The U.S. military has admitted that it has tortured prisoners. *See, e.g.*, *Torture of Iraqi POWs*, http://www.whatreallyhappened.com/torture_pow.html (last visited Jan. 24, 2008). *Salon* has also documented graphic evidence of U.S. torture of prisoners of war. *See* Joan Walsh, *The Abu Ghraib Files*, SALON, Oct. 2003, http://www.salon.com/news/abu_ghraib/2006/03/14/introduction/. The CIA has admitted to near drowning of intentional prisoners (so called waterboarding). *CIA Admits Waterboarding Inmates*, BBC NEWS, Feb. 5, 2008, available at <http://news.bbc.co.uk/1/hi/world/americas/7229169.stm>.

tradition requests. The European Convention on Human Rights can limit extradition of suspects who face the death penalty.¹⁴¹ For example, in the case of *Soering v. United Kingdom*,¹⁴² the European Court of Human Rights concluded that extradition of the defendant to the United States would violate the European Convention on Human Rights, because Soering would be in danger of being tortured.¹⁴³ Foreign states refuse to extradite defendants to the United States as a retorsion for the U.S. choice to ignore international law.

B. *Natural Law: The Death Penalty Is Irrational and Thus Per Se Unconstitutional*

The death penalty violates principles of natural justice as it is an irrational means to the end of deterring crime. Capital punishment does not deter because most criminals are irrational. Capital punishment itself is irrational because it falls disproportionately on the poor and socially disadvantaged, especially on the class of persons descended from slaves. Capital punishment is also disproportional and irrational because it sometimes falls on the innocent and is irrevocable. As such it is a violation of principles of natural justice and natural reasoning. Because the death penalty is irrational, it is also unconstitutional. It is not a sane means to any permissible state end.

1. *The Death Penalty May Be Cruel and Unusual Punishment*

Before he was advocating torture,¹⁴⁴ Alan Dershowitz opposed capital punishment, arguing that it was cruel and unusual in violation of the Eighth Amendment.¹⁴⁵ An additional argument was that the death penalty was

141. See Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 68 ALB. L. REV. 909, 910 (2005).

142. *Soering v. United Kingdom*, 1989 E.C.H.R. (ser. A) No. 161, at 14, available at <http://www.worldlii.org/eu/cases/ECHR/1989/14.html>.

143. *Id.*

144. Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275, 277 (2003). "I am generally against torture as a normative matter, and I would like to see its use minimized." *Id.* (emphasis added). "Minimized" is no synonym for "abolished." Though Dershowitz may not know it, torture is illegal under international law and is a violation of *jus cogens*. See generally HUMAN RIGHTS WATCH, SUMMARY OF INTERNATIONAL AND U.S. LAW PROHIBITING TORTURE AND OTHER ILL-TREATMENT OF PERSONS IN CUSTODY (2004), <http://www.hrw.org/english/docs/2004/05/24/usint8614.htm>. See also *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (discussing civil causes of action in the United States based on international law). So Dershowitz's proposal for torture warrants is not just a fascist affront to human rights, it is also quite illegal.

145. See Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1775 (1970).

administered arbitrarily and capriciously.¹⁴⁶ Of course, the administration of the death penalty can be cruel and unusual.¹⁴⁷ However, history has shown this was the wrong way to argue since it implied there could be a just administration of an inherently unjust punishment. Thus, soon after *Furman*, the Court in *Gregg v. Georgia*¹⁴⁸ allowed capital punishment—provided adequate “safeguards” were in place.¹⁴⁹ The problem with killing prisoners is not that killing is cruel or unusual. Capital punishment is unconstitutional because killing prisoners is *inherently* unfair and notoriously and inevitably inefficient. No “safeguards” could change that. In fact, “safeguards” guarantee the administration will be expensive and inefficient.

2. *The Death Penalty Is Disproportional*

The death penalty has been held to be unconstitutionally disproportionate when imposed as a punishment for rape.¹⁵⁰ I argue that the penalty is disproportionate in all cases because it falls on the poor and especially on the descendants of liberated slaves. It is disproportionate as to the individual prisoner who may well be innocent and lynched—punished where there was no crime in fact, or punished more severely than a white person would have been punished. It is also disproportionate because any analysis quickly concludes that descendants of slaves are the people most likely to go to prison and be executed. Capital punishment violates principles of individual justice (corrective transactional justice) and of social justice.

The death penalty has also been found disproportionate in the case of felony murder.¹⁵¹ The argument that the death penalty is unconstitutional because it is inherently disproportionate becomes compelling when we see that the penalty sometimes falls on the wrong individual and falls disproportionately on black persons as a class and is, in every instance where applied, irrevocable.

146. This argument was adopted suddenly, in 1972, in *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

147. See *In re Kemmler*, 136 U.S. 436, 447 (1890) (“Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution.”).

148. 428 U.S. 153 (1976).

149. See Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 664–65 (2006).

150. See *Coker v. Georgia*, 433 U.S. 584, 598–600 (1977) (declaring the death penalty an unconstitutionally disproportionate sentence for the crime of rape of an adult woman).

151. See, e.g., *Enmund v. Florida*, 458 U.S. 782 (1982) (finding death penalty unconstitutional where defendant merely participated in the felony to which the murder charge was imputed).

Any of these arguments alone might be sufficient. Taken in concert they compel the conclusion that capital punishment is simply per se irrational and thus unconstitutional.

3. *The Death Penalty Has No Deterrent Effect*

The death penalty is not an effective deterrent to crime,¹⁵² because most crimes are passionate acts or are committed by stupid people.¹⁵³ Most criminals are simply not rational economic actors.¹⁵⁴ This, and the fact that it simply costs more to kill prisoners than to keep them in prison for life,¹⁵⁵ explains why the death penalty is inefficient and uneconomical. A prisoner who labors contributes to society. A dead prisoner does not. Since the death penalty does not and cannot deter,¹⁵⁶ the cost-benefit analysis is very obvious. Appellate lawyers are very expensive.¹⁵⁷ Dead prisoners are entirely unproductive. Prisoners are compelled to do forced labor and more than earn their keep.¹⁵⁸ Expropriating prison labor is profitable,¹⁵⁹ and partly explains why the United States is the world's leading

152. See Rudolph J. Gerber, *Death Is Not Worth It*, 28 ARIZ. ST. L.J. 335, 350 (1996) (“[N]o proof exists that general deterrence results from capital punishment as opposed to life imprisonment.”); Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 10 (1996) (“[T]he death penalty does, and can do, little to reduce rates of criminal violence.”). But see Adam Liptak, *Does Death Penalty Save Lives? A New Debate*, N.Y. TIMES, Nov. 18, 2007, § 1, at 1 (citing recent studies that have found a minor deterrent effect associated with the death penalty).

153. See generally *Furman v. Georgia*, 408 U.S. 238, 301–05 (1972) (Brennan, J., concurring).

154. See generally ACLU, *THE CASE AGAINST THE DEATH PENALTY* (1997), <http://www.aclu.org/capital/general/10441pub19971231.html>.

155. *Id.* For example, the federal prison labor program, UNICOR, paid wages ranging from \$0.23 per hour to \$1.15 per hour in 2001. PETER WAGNER, *THE PRISON INDEX: TAKING THE PULSE OF THE CRIME CONTROL INDUSTRY* § 3 (2003), available at <http://www.prisonpolicy.org/prisonindex/prisonlabor.html>.

156. See generally ACLU, *supra* note 154.

157. For example, in Washington State, the trial of a murder case pursuing the death penalty is approximately \$470,000 more expensive than trying the same case as a non-capital case. Direct appeals cost approximately \$100,000 more in death penalty cases than in non-death penalty murder cases. WASH. STATE BAR ASS'N, *FINAL REPORT OF THE DEATH PENALTY SUBCOMMITTEE OF THE COMMITTEE ON PUBLIC DEFENSE* 18–20 (2006), available at <http://www.wsba.org/lawyers/groups/finalreportbog.pdf>.

158. See generally Jeffrey R. Kling & Alan B. Krueger, *Costs, Benefits and Distributional Consequences of Inmate Labor* (Princeton Univ. Indus. Rel. Section, Working Paper No. 449, 2001), available at <http://www.irs.princeton.edu/pubs/pdfs/449.pdf>.

159. South Carolina Department of Corrections presents a representative example of three operating programs:

Inmates working in this [traditional] program may receive a wage of up to \$.35 per hour. . . . [I]nmate wages can be negotiated with private sector companies since it does not fall under Federal Minimum Wage requirements.

Inmates [in the Service Program] earn from \$.35 to \$1.80 per hour. . . .

[Inmates in the Prison Industry Enterprise Program] . . . acknowledge that taxes, victim compensation and room and board will be deducted from their gross pay. Pay ranges from \$5.15 to \$10.00 per hour.

prison state with the most prisoners per capita and in absolute terms on earth.¹⁶⁰

4. *The Death Penalty Often Punishes the Innocent*

Not only is killing prisoners ineffective, but the state often kills the wrong person. “Since 1973, 115 innocent people have been sentenced to death in the U.S.”¹⁶¹ DNA testing has demonstrated that “innocent people are convicted of capital crimes with some frequency.”¹⁶² This punishment is irrevocable: the state cannot resurrect the dead. This too explains why the death penalty is inherently irrational and thus violates natural law and the right to life.

5. *The Death Penalty Is Racially Discriminatory*

Not only does the state kill the wrong people, it kills black people and people who kill white people much more often than other groups.¹⁶³ This discriminatory application was rightly seen as unconstitutional at one time.¹⁶⁴ However, because the argument was that the death penalty was either cruel, undignified, or badly administered, rather than per se irra-

Currently 2,233 inmates are working in Prison Industries. *The Prison Industries Program is completely self-supporting, providing valuable training for the inmates while generating funding for the Agency.*

S.C. Dep’t of Corr., Traditional, Prison Industries (2007), <http://www.doc.sc.gov/programs/pi.jsp> (emphasis added). Of course, prison labor is not subject to OSHA, nor are the laborers able to quit, strike, or even complain. And it just so happens that the majority of prison laborers are black and hispanic. One can fairly call it a modern form of the slave plantation, but it is more economically productive than the death penalty and the lesser of two bads.

160. See ROY WALMSLEY, KING’S COLLEGE, WORLD PRISON POPULATION LIST (6th ed. 2005), available at <http://www.kcl.ac.uk/depsta/rel/icps/world-prison-population-list-2005.pdf>; see also Gail Russell Chaddock, *U.S. Notches World’s Highest Incarceration Rate*, CHRISTIAN SCI. MON., Aug. 18, 2003, at 2 (“More than 5.6 million Americans are in prison or have served time there, according to a new report by the Justice Department released Sunday. That’s 1 in 37 adults living in the United States, the highest incarceration level in the world. . . . If current trends continue, it means that a black male in the United States would have about a 1 in 3 chance of going to prison during his lifetime. For a Hispanic male, it’s 1 in 6; for a white male, 1 in 17.”). The land of the free and home of the brave has been turned into the land of the fear and the home of the slaves. Patriots, those who love liberty, ought to organize against that.

161. *Law Enforcement Officials Call on New York State Legislature to Keep New York’s Unjust Death Penalty Law off the Books*, NEW YORKERS AGAINST DEATH PENALTY, Aug. 1, 2004, <http://www.nyadp.org/main/police811.html?news=50>.

162. *United States v. Quinones*, 196 F. Supp. 2d 416, 420 (S.D.N.Y. 2002).

163. See *infra* Statistical Annex Table I.

164. See *Furman v. Georgia*, 408 U.S. 238, 256 (1972) (Douglas, J., concurring) (arguing that a law that yields discriminatory results “has no more sanctity” under the Eighth Amendment than a law effecting those same results through express terms).

tional, death crept back into the judges' interpretations.¹⁶⁵ The death penalty is unconstitutional not because it is cruel and unusual, but because it is inherently unfair and cannot be administered justly under any circumstances.

The objective of a discriminatory intent is to achieve a discriminatory effect. So it is logical to presume that a discriminatory effect is the result of a discriminatory intent—effects do not occur randomly but are the result of willful action. Nevertheless, the U.S. Supreme Court rejects the proposition that a racially discriminatory purpose ought to be inferred from a racially discriminatory effect. For the Court, the presumption of constitutionality outweighs the presumption of practical reason. Thus, the defendant alleging a violation of her right to equal protection of the law bears the burden of proving “the existence of *purposeful* discrimination.”¹⁶⁶ The Court rejects inferring racially discriminatory purpose from racially discriminatory effect because it believes that other crimes would then also be attacked as racially discriminatory and because gender would also provide a claim (many more men go to prison than women).¹⁶⁷ However, the fact that we can easily observe racially discriminatory outcomes in all manner of criminal law just shows that racism can be book-smart, hiding under a black robe instead of a white sheet. A Court truly interested in ending racial discrimination would hold that a racially discriminatory effect in criminal law raises a rebuttable presumption of discriminatory intent. The burden of proof should fall on the state to show that no discriminatory intent existed despite the effect, because criminal statutes are to be strictly construed and because of the presumption of liberty (*in dubitas, libertas*).

Widespread discrimination in penal law is a fact¹⁶⁸ and that fact is further evidence that the death penalty cannot be constitutionally administered. Capital punishment is not only an irrational means to a desirable end; it is also a reflection of continued oppression of black people by white people in the United States. It must stop.

165. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 177–78 (1976) (plurality opinion) (“For nearly two centuries, this Court, repeatedly and often expressly, has recognized that capital punishment is not invalid *Per se*.”).

166. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (emphasis added) (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)).

167. See *id.* at 315–18.

168. See Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 AM. U. J. GENDER SOC. POL'Y & L. 427, 428 (2000) (“[W]hen the victims of homicide were White, it was statistically likely that the defendant would be convicted and sentenced to death.”) (citing David C. Baldus et al., *Law and Statistics in Conflict: Reflections on McCleskey v. Kemp*, in CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 147, 148 tbl.13.2 (1994)).

C. “Safeguards” and “Exceptions”

Because courts fail to recognize the inherent irrationality of the death penalty and its class character, yet can see its unfair and disproportional effects anytime they look at the system, they have tried to implement “safeguards” and “exceptions” to remedy an inherently unfair system. That is an example of the global trend toward recognizing that the death penalty violates principles of natural justice as an irrational means to the end of deterring crime and as a punishment which disproportionately falls on the innocent and socially disadvantaged. However, the “safeguards” do not work and cannot work and by definition make the system expensive and inefficient. Thus, capital punishment is unconstitutional because it violates basic principles of natural justice. It will eventually be recognized as such in the United States—as it already has throughout the rest of the developed world, including the rest of the developed common law world.

1. “Safeguards” and Mandatory Sentencing

In *Franz v. Lockhart*, a federal district judge found the Arkansas death penalty statute unconstitutional because there was no mandatory appellate review of the death sentence.¹⁶⁹ This finding mirrored the Supreme Court’s finding, in 1976, that mandatory death penalty statutes are unconstitutional.¹⁷⁰ Accordingly, in 1977, the death penalty for rape was held to be unconstitutional because the punishment is disproportional to the crime.¹⁷¹ The disproportionality and irrationality of the death penalty has been increasingly recognized by the Supreme Court.

2. Exceptions: The Retarded and Juveniles

Because capital punishment is inherently unfair, a number of exceptions to capital punishment are entering into U.S. domestic law. The execution of the mentally retarded has been found unconstitutional,¹⁷² in part because the Supreme Court recognized the development of a national consensus around the idea that the execution of mentally retarded persons is inherently unfair and thus unconstitutional.¹⁷³ Likewise, in *Roper v. Simmons*, the Court found the execution of offenders under the age of eighteen

169. 700 F. Supp. 1005, 1025 (E.D. Ark. 1988) (rejecting plaintiffs’ standing but nonetheless recognizing the constitutional requirement of mandatory review for death sentences).

170. *Woodson v. North Carolina*, 428 U.S. 280, 301–04 (1976).

171. *Coker v. Georgia*, 433 U.S. 584 (1977) (finding death penalty unconstitutionally disproportionate sentence for crime of rape of an adult woman).

172. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

173. *See id.*

unconstitutional.¹⁷⁴ This determination, a reaffirmation of earlier U.S. caselaw,¹⁷⁵ was the result of the development of a national consensus that killing those who were children at the time of their crimes is inherently unfair, as well as international concerns.¹⁷⁶ The Convention on the Rights of the Child, for example, prohibits executions of those persons aged under eighteen at the time of the crime,¹⁷⁷ and a 1994 act of Congress forbade juvenile executions.¹⁷⁸ In sum, “[t]he death penalty cases . . . stand as strong support for the notion that the Court is willing to overrule itself on life and death issues other than abortion.”¹⁷⁹ The question is: will the exceptions eat up the rule? The answer is yes, and the quicker the better.

3. Exception via Trial by Jury: Jury Nullification

Trial by jury is considered the most important constitutional right of all¹⁸⁰ under both the English¹⁸¹ and American¹⁸² constitutions. Trial by jury, according to Blackstone, is “the glory of the English law,” and it has been characterized, like the U.S. Constitution, as rooted in Magna Carta.¹⁸³ The reason jury trials are so crucial to liberty in the common law is that the

174. 543 U.S. 551, 574–75 (2005).

175. *Thompson v. Oklahoma*, 487 U.S. 815, 822–23 (1988) (holding death penalty per se unconstitutional where criminal is under sixteen years of age when crime committed).

176. *Roper*, 543 U.S. at 564, 577–78.

177. Convention on the Rights of the Child art. 37, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 (“Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”).

178. *Roper*, 543 U.S. at 567.

179. Calabresi, *supra* note 149, at 668.

180. See generally *Neder v. United States*, 527 U.S. 1, 30–31 (1999) (Scalia, J., concurring in part and dissenting in part).

William Blackstone, the Framers’ accepted authority on English law and the English Constitution, described the right to trial by jury in criminal prosecutions as “the grand bulwark of [the Englishman’s] liberties . . . secured to him by the great charter.” One of the indictments of the Declaration of Independence against King George III was that he had “subject[ed] us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws” in approving legislation “[f]or depriving us, in many Cases, of the Benefits of Trial by Jury.” . . . The right to trial by jury in criminal cases was the only guarantee common to the 12 state constitutions that predated the Constitutional Convention, and it has appeared in the constitution of every State to enter the Union thereafter.

Id. (citations omitted).

181. Trial by jury was the first and most essential feature of the English constitution:

From these passages in Judge Blackstone’s Commentaries, from the variety of authorities to which he refers, and from many others of the greatest reputation, it most clearly appears, that the trial by jury was ever esteemed a first, a fundamental, and a most essential principle, in the English constitution. From England this sacred right was transferred to this country, and hath continued, through all the changes in our government, the firm basis of our liberty, the fairest inheritance transmitted by our ancestors!

JAMES M. VARNUM, *THE CASE, TREVETT AGAINST WEEDEN* 13–14 (Providence, John Carter 1787).

182. The right of trial by jury descended from England to the United States. *Id.* at 17–18.

183. *Glasser v. United States*, 315 U.S. 60, 84–85 (1942).

common law grants juries the right to nullify the law when they believe the law itself is unjust—when the statute violates natural law, a jury may ignore the statute.¹⁸⁴ The jury must consist of twelve persons¹⁸⁵ for the obvious reason that the truth is only attained by a comparison of different views.

The jury must be “truly representative of the community.”¹⁸⁶ A jury of one’s peers means those similarly situated. Thus, poor people should have jurors of similar economic means and black defendants should have black juries¹⁸⁷ because justice should not only be done, but should be manifestly seen to be done. If you are white, how would you feel if you were judged by an all-black jury accusing you of killing a black man? It would be impossible to claim the system to be racist, even with all its ugly history, if black defendants were judged by black juries.

III. CONCLUSION: THE DEATH PENALTY IS IRRATIONAL, VIOLATES PRINCIPLES OF NATURAL LAW, AND IS THUS UNCONSTITUTIONAL

The trend in both international and national law is clear: the death penalty is increasingly recognized as irrational and thus illegal. More than one Supreme Court Justice has held that capital punishment is per se unconstitutional.¹⁸⁸ Constitutional standards evolve with social progress.¹⁸⁹ The death penalty has become unconstitutional, as it violates principles of natu-

184. See generally Steve J. Shone, *Lysander Spooner, Jury Nullification, and Magna Carta*, 22 QUINNIAC L. REV. 651 (2004). See also *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 3–4 (1794) (recognizing the jury’s right “to determine the law as well as the fact in controversy”).

185. See generally 1 COKE, *supra* note 18, at 155a (“[U]sage and ancient course maketh law. And it seemeth to me, that the law in this case delighteth herself in the number of 12; for there must not only be 12 jurors for the tryall of matters of fact, but 12 judges of ancient time for tryall of matters of law in the Exchequer Chamber.”).

186. *Smith v. Texas*, 311 U.S. 128, 130 (1940) (“It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.”).

187. William Sharpe McKechnie, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN, WITH AN HISTORICAL INTRODUCTION* 377–78 (1914) (citations omitted).

The need for “a judgment of peers” was recognized at an early date in England. . . . [T]he “peers” of a Crown tenant were his fellow Crown tenants, who would normally deliver judgment in the *Curia Regis*; while the “peers” of the tenant of a mesne lord were the other suitors of the Court Baron of the manor.

Id. Also, Jews might be judged by those of their own religion, and a foreign merchant by a jury composed partly of those of his country. *Id.* at 378; see also F.M. Powicke, *Per Iudicium Parium Vel Per Legem Terrae*, in *MAGNA CARTA COMMEMORATION ESSAYS* 96, 101–02 (Henry Elliott Malden ed., 1917).

188. See *Furman v. Georgia*, 408 U.S. 238, 240, 305, 358–59 (1972) (Justices Brennan and Marshall finding the death penalty unconstitutional per se).

189. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (“The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

ral rights and natural reasoning. The death penalty is unconstitutional, not because (or not merely because) it is an example of cruel and unusual punishment, or an affront to human dignity,¹⁹⁰ or even because it is unfairly administered. The death penalty is unconstitutional because it is irrational. It is irrational because it is inherently unfair, falling disproportionately on the former slave class and all too often on the wrong person, with irrevocable injustice as a consequence. The death penalty is not unconstitutional because it is unfairly administered. It is unconstitutional because it cannot be fairly administered. It is inherently unfair and irrational and per se unconstitutional. An irrational law is not merely a bad law. It is no law at all.¹⁹¹ That is the true spirit of Anglo-American constitutionalism.

190. William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 330 (1986) (arguing that the death penalty is per se unconstitutional as an affront to human dignity).

191. Cf. THOMAS AQUINAS, SUMMA THEOLOGICA 1048 (Fathers of the English Dominican Province trans., 2d rev. ed. 1920) (“[A] law that is not just, seems to be no law at all.” (citing AUGUSTINE, DE LIBERO ARBITRIO, I, 5)).

STATISTICAL ANNEX

Figure 1: Racial Disparity in Prisons

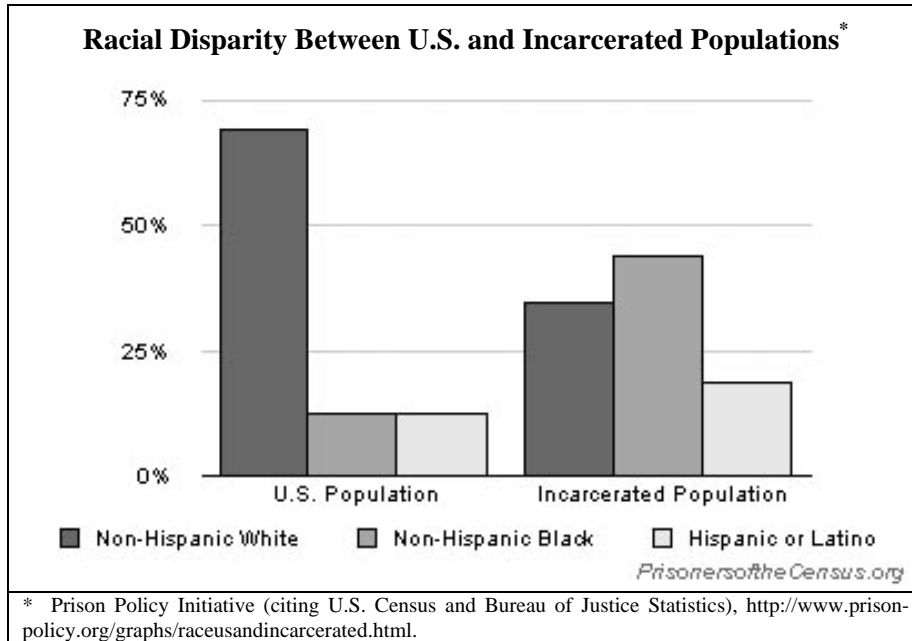


Table 1: Race of Executed Prisoners

Race of Defendants Executed in the United States Since 1976*		
BLACK	374	34%
HISPANIC	76	7%
WHITE	625	57%
OTHER	24	2%

* Race of Death Row Inmates Executed Since 1976, Death Penalty Information Center, available at <http://www.deathpenaltyinfo.org/article.php?did=184&scid=>.

Table 2: No Deterrent Effect

Ratio of Executions to the National Murder Rate: 1976–1995*		
Year	Number of Executions	National Murder Rate
1976	0	8.8
1977	1	8.8
1978	0	9
1979	2	9.7
1980	0	10.2
1981	1	9.8
1982	2	9.1
1983	5	8.3
1984	21	7.9
1985	18	7.9
1986	18	8.6
1987	25	8.3
1988	11	8.3
1989	16	8.7
1990	23	9.4
1991	14	9.8
1992	31	9.3
1993	38	9.5
1994	31	9
1995	56	8

* American Civil Liberties Union, *The Case Against the Death Penalty* (Dec. 31, 1997), available at http://www.aclu.org/capital/general/10441pub_19971231.html.