Name: _____

Critical Thinking and the Law Assignment for November 28 & December 5, 2011

A. Answer questions 1 – 3 *before* reading the argument

B. Read, but do not answer questions 4 – 10 (Keep them in mind as you read the argument)

C. Read the argument

D. Answer questions 4 – 10 on a separate sheet of paper *after* reading the argument

E. Go Home

F. By next Monday (December 5, 2011), create a counter-argument approximately 3 – 5 typed pages. Use any resources you wish. Do your best to follow a similar structure.

1. Do you agree with the idea of capital punishment?

CIRCLE ONE: YES NO

2. List briefly 3 reasons for your answer to question 1

a._____

_____

b._____

_____

c._____

_____

3. How strongly do you feel about this issue?

CIRCLE ONE: 1 2 3 4 5

4. **What claims does the writer make?**

5. **What kinds and quality of evidence does the writer provide to support the claims?**

6. **What assumptions underlie the argument, connecting evidence to claims?**

7. **What is the writer's tone? How does the writer use language?**

8. **Is the writer reasonable?**

9. **Is the argument logical? Has the writer committed any fallacies?**

10. **Are you convinced? Why or why not?**

INTRODUCTION

If one accepts the proposition that no one is beyond the redemptive, transformative power of God, then one must necessarily accept this as the single, greatest, transcendent, and irrefutable argument against the death penalty. Although there are many "legal arguments" against the death penalty, there is none so compelling as this transcendent principle that no one is beyond the redemptive, transformative power of God. This paper, with the above principle in mind, will review the classic legal arguments against the death penalty.

Essentially, the legal arguments against the death penalty are of two intersecting schools: sophisticated constitutional law arguments--that the penalty is arbitrary and capricious, racist, and classist; and pragmatic arguments---that the penalty is grossly inefficient and unworkable for a variety of very practical, empirical reasons: The death penalty does not deter crime, rather, it perniciously enhances and exacerbates the culture of violence and death through state murder. The death penalty is extraordinarily expensive, at the great loss and social expense of other much more effective and humane means of law enforcement and crime control.

The most immediate and direct argument for the death penalty is, quite simply, that there is no recidivism. The dead, obviously, do not kill again, at least not in the immediate, physical, corporal sense--although the collective psychic wounds inflicted upon the social fabric through state murder are incalculable, corrosive, and profound. The simplistic "no recidivism" argument is ugly, crude, and primitive, and it denies many larger truths.

The death penalty effectuates none of the classic principles of justice, such as proportionality, distribution, and most obviously, rehabilitation. The death penalty is premised upon blood vengeance or revenge, a frustrating and ultimately futile and imploding quest.

The Eighth Amendment of the Constitution of the United States expressly prohibits cruel and unusual punishment. The Supreme Court of the United States has never held that the death penalty is unconstitutional *per se*. In the twentieth century, United States Supreme Court Justices William Brennan and Thurgood Marshall repeatedly, in dissents from Supreme Court majority opinions, would have found the death penalty unconstitutional on its face. In an interview in 1991, retired United States Supreme Court Justice Lewis Powell stated that, if he could, he would change his vote to now find the death penalty unconstitutional. In 1987, Justice Powell was the deciding vote in the five-to-four majority decision of the Supreme Court, *McClesky v. Kemp*, sustaining capital punishment despite, and in the direct face of, unequivocal evidence that black murderers of white victims were more than four times as likely to be executed than any other racial combination of perpetrator and victim. Justice Powell, in the interview in 1991, said, "I would vote the other way in any capital case . . . . I've come to think that capital punishment should be abolished." Justice Powell went on to say that he no longer believes that the death penalty could be constitutionally administered, and that the spectacle of endless delay breeds deep cynicism about the law and contempt for courts and the judicial process. Most recently, in his last term on the United States Supreme Court, Justice Harry Blackman said that he would have nothing further to do with "the machinery of death." Echoing the

remarks of Justice Powell, Justice Blackman also concluded that the death penalty in many cases was precariously close to state murder. However, with none of these Justices now on the Court, through death or retirement, it is very unlikely that in the foreseeable future the United States Supreme Court will be philosophically inclined to find capital punishment unconstitutional. At best, in some especially egregious cases, the Supreme Court may reluctantly find the death penalty unconstitutional in particular applied circumstances, contingent upon grossly outrageous facts.

In 1972, the United States Supreme Court ruled in Furman v. Georgia that the death penalty was arbitrary and capricious as it was applied. By 1976, the constitutional defects in the particular applications of the death penalty were remedied by individual states and, with New York State the most recent to reenact death penalty legislation, effective September 1, 1995, thirty-eight states now provide for the death penalty. With this introductory framework in mind, the paper will proceed to an analysis of the particular legal arguments against the death penalty.

I. THE DEATH PENALTY IS ARBITRARY AND CAPRICIOUS

The most powerful legal argument against the death penalty is that there is very real risk that the innocent, in fact, will be executed. This has been popularized through the award winning film, *The Thin Blue Line.* According to a Stanford Law Review study of approximately 7,000 people executed in the United States since 1900, at least twenty-three were innocent, eight of those in New York State. The Judeo-Christian jurisprudence is founded on the principle that it is better to let the guilty go free than to punish the innocent. The application of capital punishment in contemporary society cruelly and contemptuously mocks this Judeo-Christian heritage and completely perverts the jurisprudence founded upon it. In the powerful scriptural story of Sodom and Gomorrah, God was willing to spare the wicked cities if there were ten innocent people within them. Eerily enough, there are today approximately 3,000 people on death row in the United States. If even the most conservative would admit the possibility that ten of those 3,000 are in fact innocent of the crimes for which they have been convicted and sentenced to death, one quickly realizes that this is less than four-tenths of one percent of the death row population. The implementation of the death penalty, in the direct face of these proportions, is a cruel repudiation of the scriptural teaching that favors the innocent.

In *Herrera v. Collins*, in 1993, Justice Blackmun dissented from a capital punishment case where there was compelling new evidence to demonstrate the factual innocence of the person subject to execution. Justice Blackmun lamented that, "The execution of a person who can show that he is innocent comes perilously close to simple murder."

Jesse DeWayne Jacobs was executed on January 4, 1995, despite the fact that Texas prosecutors knew that he did not shoot Etta Urdiales in 1986. In speaking to the jurors that would sentence Jacobs to death, Montgomery County District Attorney Peter Speers said, "The simple fact is that Jesse Jacobs and Jesse Jacobs alone killed Etta Ann Urdiales." However, another prosecutor said that Jacobs' sister, Bobbie Jean Hogan, actually killed Urdiales. At Hogan's trial, the prosecutor also said that Jacobs "[didn't] know that Bobbie had a gun." Texas convicted Hogan of involuntary manslaughter in the Urdiales killing, and Hogan received a ten year sentence. Nevertheless in Jacobs v. Scott, No. 94-7010, the U.S. Supreme Court, by a 6-3 vote, allowed Texas to execute Jacobs. Jacobs was killed by lethal injection on January 4, 1995.

After he was arrested, Jacobs, a lifelong drifter who worked as a mechanic, confessed to shooting Urdiales and leaving her corpse in some nearby woods. Jacobs had been paroled after serving 10 years for a previous murder conviction in Oklahoma. At his sister's trial, Jacobs testified that he had originally confessed to the killing because he did not want to spend the rest of his life in prison. Jacobs also claimed that he was waiting outside the victim's home when Hogan shot Urdiales. Jacobs' only admitted involvement was in helping transport the victim's body for disposal. Even in light of this new evidence, Texas Attorney General Dan Morales refused to acquiesce to a new sentencing hearing, relying on Supreme Court precedents that limit death row inmates to raising constitutional questions on appeal. Since "the prosecution's subsequently stated belief that Hogan was the trigger person is not new evidence, newly discovered or otherwise," Morales asserted that Jacobs' death sentence should stand. Two different persons were convicted for shooting the same person. Upon review, the United States Court of Appeals for the Fifth Circuit refused to overturn Jacobs' death sentence, holding that "it is not for us to say" that the jury had made a mistake. The Supreme Court denied review, with Justices Stevens, Ginsburg, and Breyer dissenting. Stevens wrote, "It would be fundamentally unfair to execute a person on the basis of a factual determination that the state has formally disavowed. I find this course of events deeply troubling." Stevens was particularly moved by the fact that the State itself vouched for the recantation of Jacob's confession.

In arguing that Jacobs' death sentence should stand, Morales also argued that the determination of who actually shot Urdiales was unnecessary to support the execution of Jacobs. However, this argument is directly contradicted by Edmund v. Florida, 458 U.S. 104 (1982).

The United States Supreme Court's refusal to consider Jacobs' case received international attention. In an editorial in the Vatican's semiofficial newspaper *L'Osservatore Romano*, Gino Cincetti, a moral theologian whose views closely track those of Pope John Paul II, called Jacob's execution "not only incredible but monstrous and absurd." The editorial also compared the Court to Pontius Pilate, the Biblical Roman leader who also washed his hands of the blood of the innocent.

Texas has full knowledge of the fact that Jacobs was not guilty of the crime that he was sentenced to death for committing. Texas sentenced the person who actually killed Urdiales to ten years in prison, while executing Jacobs. Before he was killed, Jacobs said that, while he may deserve to die for his past crimes, he was not guilty of the crime for which he was being executed. This is but the most recent example of the death penalty inflicted upon the innocent.

Beyond the obvious possibility of execution of the innocent in fact, the death penalty as applied is arbitrary and capricious in a host of particular contexts. Implementation of the death penalty is often based, at least indirectly, upon the economic circumstances of the criminal defendant. In the United States, quality of justice is often contingent upon the financial resources of the defendant. Only the wealthy are able to purchase and pay for the most highly competent attorneys from the private criminal bar. Meanwhile, a third of those on death row have no resources and therefore no attorneys whatsoever through which to pursue appeals of their sentences. The death penalty is also arbitrary and capricious because it is geographically contingent. It is contingent state to state in that, if one commits a capital crime in one of the twelve states where the death penalty is not available, that person can be subject to, at most, life imprisonment without parole, while an otherwise similarly situated perpetrator in a neighboring state may be subject to the death penalty upon conviction. These conditions of geographic contingency are heightened intra- as well as inter-state. For example, in the state of Texas, with approximately 400 persons on death row in 1995, convicted murderers are much more likely to receive the death penalty for crimes committed in Houston than in Dallas, simply because the prosecutor in Houston is a particularly vigorous champion of the death penalty while the prosecutor in Dallas realizes that it is much more problematic. The regionalization of the death penalty is most painfully apparent in the state of Texas, where 92 people have been executed since 1976. Only 42 of Texas' 254 counties presently have convicts on death row, with many of these counties with just one or two inmates. Paris county, however, which includes the city of Houston, has 113 of the death row inmates on death row in the state of Texas. In Dallas, the district attorney will not request the death penalty unless he is "ninety-nine percent sure" the jury would condemn the defendant. However, Harris County's district attorney is a leading death penalty proponent, and his office will pursue the death penalty for any murder subject to Texas' death penalty statute. That two prosecutorial offices can implement the same laws so differently displays why the death penalty is imposed in such a sharply arbitrary and capricious manner. Most recently, in the wake of the enactment into law of the death penalty in New York, the District Attorney of Bronx County, where hundreds of potentially capital crimes are committed each year, has stated that he will not pursue the death penalty in any of the potential cases, while other district attorneys throughout the state have been vigorous and enthusiastic endorsers of the legislation.

An analysis of the number of murderers throughout the United States reveals that the death penalty is employed in a highly arbitrary and capricious manner. "There are approximately 22,000 homicides a year, 18,000 arrests, and maybe 300 death sentences, leading to maybe 50 or 60 convictions," said Victor Streib, a law professor at Cleveland State University. "How do you figure out why lightning strikes one defendant and not another? It's been studied for twenty years, and all I can say is, it's not a rational process." These remarks from an interview in *The New York Times* in early 1995 perfectly highlight the exquisitely unconstitutional, mercurial, and arbitrary and capricious nature of the process. The training of the attorneys who handle death penalty cases also varies greatly between jurisdictions. In New Jersey, death penalty defense attorneys are required to receive special training, while Texas requires no additional training for court appointed attorneys and provides no counsel after the first appeal. New York State will have no better luck in sanitizing out the pernicious arbitrary and capricious qualities of the death penalty. Eric Friedman, a Hofstra University law professor with significant experience defending death row inmates, has stated, "If New York gets the death penalty, I guarantee that of the 20 people who commit the most spectacular crimes, maybe five will get the death penalty, four will be reversed, and the one poor schnook who gets executed will hardly be the worst of the lot." Of the 2,300 murders committed in New York State, experts have estimated that 15 to 20 percent of those crimes will be subject to the State's newly reenacted death penalty legislation. If one looks correspondingly to New Jersey which enacted the death penalty in 1982, there have been 40 sentences of death, with 36 set

aside by the courts. Thirteen years after the enactment of the death penalty legislation in New Jersey, no one has yet been executed. In 1995, a person was executed in Texas after having been on death row for over 18 years.

The prominently arbitrary and capricious qualities of the death penalty are essentially tantamount to torture. In her powerful book, *Dead Man Walking,* Sister Helen Prejean chronicles the psychic torture inflicted by the State of Louisiana upon persons repeatedly subject to the death penalty, only to have the imposition of the execution repeatedly delayed and rescheduled during the protracted appeals process. In *Dead Man Walking,* Sister Prejean demonstrates that psychic death and psychic torture occur repeatedly prior to the actual execution. With most states moving toward lethal injection, including New York State the most recent state to reenact the death penalty, the arguments of torture in the application of the death penalty through either the gas chamber or the electric chair have somewhat diminished. However, even in states using lethal injection, there is evidence that the process can nevertheless be torturous. There have been protracted execution procedures of almost an hour, executioners who have been unable to find good veins to accept the lethal fluids, or the needles and syringes become dislodged, spewing the liquid contents throughout the death chamber, while the person subject to the execution lies moaning strapped to a gurney eerily in the shape of the cross. And, of course, in states retaining the process of electrocution, it is directly analogous to being burned alive at the stake. In 1985, in his dissent to the United States Supreme Court's denial of *certiorari* in Glass v. Louisiana, Justice William Brennan argued that electrocution was the equivalent to "disemboweling while alive, drawing and quartering, public dissection, burning alive at the stake, crucifixion, and breaking at the wheel." Regarding the process of execution by electrocution, Justice Brennan said:

When the switch is thrown, the prisoner cringes, leaps and fights the straps with amazing strength. The hands turn red, then white, and the cords of the neck stand out like steel bands. The prisoner's limbs, fingers, toes and face are severely contorted. The force of the electrical current is so powerful that the prisoner's eyeballs pop out and rest on his cheeks. The prisoner often defecates, urinates, and vomits blood and drool. The body turns bright red as his temperature rises, and the prisoner's flesh swells and his skin stretches to the point of breaking. Sometimes the prisoner catches on fire, particularly if he perspires excessively. Witnesses hear a loud and sustained sound like bacon frying, and the sickly sweet smell of burning flesh permeates the chamber. The smell of frying human flesh in the immediate neighborhood of the chair is sometimes bad enough to nauseate even the press representatives who are present. In the meantime, the prisoner almost literally boils: the temperature in the brain itself approaches the boiling point of water, and when the post-electrocution autopsy is performed the liver is so hot the doctors have said it cannot be touched by the human hand. The body is frequently badly burned and disfigured.

In *Gregg v. Georgia,* in 1976, the Supreme Court of the United States overturned the *Furman* decision of 1972. Today, 13 states still use electrocution. Among the almost 300 executions since 1976, including 38 executions in 1993, the largest annual figure since capital punishment resumed in 1977 with the execution of Gary Gilmore before a Utah all-volunteer firing squad, sociologists have documented that there have been at least 15 botched executions, including eight electrocutions, ranging from instances where the prisoner's head or leg caught fire and eyeballs literally exploded, to taking well over one hour to kill the victim.

Since the restoration of capital punishment in 1976, 387,000 persons have been murdered in the United States. Approximately 3,000 convicted murderers today are on death row with almost 300 executed in the past 19 years. At this rate of execution, it would take 200 years to execute the 3,000 people on death row today.

In summary, therefore, the death penalty as applied is perniciously arbitrary and capricious to an extraordinarily high degree. It is contingent upon geography, upon the defendant's financial resources, upon race and class, and upon all the vagaries of fallible justice systems and human nature. When the penalty is implemented, it could be literally a death-by-torture protracted process with extraordinary physical pain inflicted upon the person subject to the execution. Even if the death is relatively painless, such as in most instances of lethal injection, the process of death row itself inflicts psychic death many times over, prior to the actual execution. Perhaps worst of all, the innocent may be murdered by the state.

II. **THE DEATH PENALTY IS RACIST, CLASSIST, AND FINANCIALLY CONTINGENT**

In *McCleskey v. Kemp,* in 1987, despite a study that found that the black murderer of a white victim was 4.3 times as likely to be executed as any other perpetrator-victim racial combination, the United States Supreme Court upheld the imposition of

the death penalty by a polarizing five-to-four vote. Because no procedure is perfect, the Court simplistically asserted that the public must simply be willing to accept some mistakes.

In *Ford v. Wainwright*, in 1986, the United States Supreme Court determined that death row inmates could be "made sane through medicational therapy" prior to execution, although the Constitution continues to prohibit the execution of the literally insane. Although the Constitution also prohibits the execution of persons under the age of sixteen, the United States Supreme Court ruled in Stanford v. Kentucky, in 1989, that a state's statute subjecting sixteen year olds to the death penalty was constitutional, noting that a majority of the states that administered the death penalty authorized the execution of sixteen year olds. Most states also provide for, and the Supreme Court has endorsed the principle of, execution of the mentally retarded.

Of the approximately 3,000 persons on death row in the United States today, more than one-half are white, with the balance of the death row population primarily African-American, with approximately 10% Hispanic or Native American. In a

1990 study of race and capital punishment, the United States General Accounting Office said, "In 82% of the studies, the race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty." For example, since 1977, 85% of those executed in Utah killed a white person, compared to only 11% executed for killing black persons.

Racial bias also creeps into prosecutorial decisions on whether to pursue the death penalty. Prosecutors usually pursue capital punishment in serial or unusually grisly killings. "Middle ground" situations, such as the killing of a shopkeeper in a robbery, where prosecutors exhibit more judgment in determining sentencing, are more likely to be tainted by bias. In a highly regarded study conducted by David Baldus, Professor of Law at the University of Iowa, the numbers reveal that with "middle ground" murders, the chance of the death penalty being imposed in cases with white victims was double that of cases involving black victims. In the past 19 years since 1976, 88 black men have been executed for killing whites, while only two white men have been executed for killing blacks. In *Spinkellink v. Wainwright*, the decision from the United States Court of Appeals for the Fifth Circuit in 1978, the Florida Attorney General had expressly contended that capital punishment normally was not merited in cases involving black crime victims. The State maintained that "murders involving black victims have, in the past, generally been qualitatively different from murders involving white victims; as a general rule murders involving black victims have not presented facts and circumstances appropriate for imposition of the death penalty. Murders involving black victims have in the past fallen into the categories of the family quarrels, lovers quarrels, liquor quarrels, and barroom
quarrels."

In addition to thousands of persons legally executed by the state, there have been over 4,000 incidents of lynchings in the United States. It is no coincidence that states with high incidence of capital punishment have been some of the states historically with high incidence of unlawful lynching. For example, Georgia, North Carolina, South Carolina, Texas, Virginia, and Florida are among the states with the highest concentrations of capital punishment inflicted by the state today; these were also among the most notorious, leading states during the regime of unlawful racist lynching for many decades in this country.

III. EMPIRICAL AND PRAGMATIC LEGAL ARGUMENTS AGAINST THE DEATH PENALTY

Apart from the obvious point that the executed have no rate of recidivism, the death penalty does not deter. In fact, many studies demonstrate that state murder enhances and exacerbates the culture of death and violence. In a study of capital punishment in England in the 17th century, the book *The Hanging Tree* demonstrates that approximately 4% of the adult population of England was executed in an 80-year period, while, concomitantly, levels of crime in England continued unchecked and unabated. Louisiana today has one of the most vigorous records of implementations of capital punishment, yet New Orleans is the leading city in the United States for crimes of murder.

Eighteen of the twenty states with the highest murder rates today have the death penalty. Seventeen of the cities with the highest murder rates are in death penalty jurisdictions. Texas has executed more people in the past decade than any other state, yet still has three cities with murder rates nationally among the top twenty-five. New York has not executed anyone since 1963, but has no city among the twenty-five cities with the highest murder rates in the United States. Federal Bureau

of Investigation reports for 1992 show that murder rates in states that have abolished the death penalty average 4.9 murders per 100,000 people, while states using the death penalty average 9.1 murders per 100,000 people. Michigan does not have the death penalty, while Indiana does, yet they have indistinguishable homicide rates. Canada abolished capital punishment in 1975, yet the murder rate in Canada declined consistently over the next decade. Studies have demonstrated that while New York implemented the death penalty between 1907 and 1963, on average there were two more homicides in the month following an execution and one more homicide in the second month, evidence that the death penalty may, at least in an indirect way, result in more killing, not less. In 1993, Texas led in deaths of law enforcement officers for the sixth straight year, although Texas leads in executions in the United States, with more than any other state since the death penalty was reimposed in 1976. California, with the largest death row population, is a close second in law enforcement deaths over the past six years and became the leading state in the country with law enforcement officer deaths in 1994. Florida, which ranks second in executions to Texas, had the third most law enforcement officer deaths in the same period. Since 1977, only one correction officer at a New York correctional facility has been killed, even though more than 200,000 inmates have been imprisoned during that time, including thousands of convicted murderers serving life sentences. Thus, the statistics are overwhelming that the death penalty is simply not a deterrent to crimes of violence.

One of the most powerful, pragmatic arguments against the death penalty is its enormous and inordinate cost when compared to the expense of incarceration for life without possibility of parole, the latter being approximately one-sixth as expensive as the over $3 million cost to execute someone through the exhaustion of all legal appeals. In 1989, the New York State Department of Corrections determined that New York State could hire an additional 250 police officers and build prison space for an additional 6,000 more inmates for the amount that it would cost the state to reimpose the death penalty in a similar five-year period. "It is always more expensive to have and use the death penalty than it is not to have it, for the very reason that lawyers are more expensive than prison guards," said Professor Franklin E. Zimring, Director of the Earl Warren Legal Institute at the University of California, Berkeley, Boalt Hall Law School. "It's that simple."

At the top of the legal pyramid, the California Supreme Court spends approximately half of its time reviewing death penalty appeals. In remote Sierra County, California, only a handful of death penalty cases have cost over $400,000, one-tenth the annual budget of the county, and thus preventing the county from filling vacant police officer positions and forcing the deferral of other necessary services. New death penalty legislation enacted in New York State provides for a pool of approximately $1.5 million, or less than one-third the amount necessary for any particular county to prosecute through the entire appellate process the death penalty to its actual implementation. California is spending approximately $118 million a year on death penalty cases. The core pragmatic and empirical question is the amount of police officer and other crime fighting resources that could be put at the community's disposal for the prevention of crime if incarceration for life without parole, rather than the death penalty, was the available alternative.

IV. CONCLUSION

For all of the legal, constitutional, pragmatic, and empirical reasons set forth above, the death penalty is an utter failure, and a constitutional disgrace. Since February of 1990, executions in South Africa have been suspended; likewise, even Russia has suspended implementation of the death penalty, leaving the United States in the unsavory company of Communist China, Iran, Iraq, and a handful of other totalitarian regimes in the world which still use capital punishment.

We are thus reduced to the blood vengeance of an eye for an eye and a tooth for a tooth, the lens through which the scriptural message of love and compassion is so grossly distorted. For the black letter literalists who believe in such blood vengeance, consider the other crimes for which capital punishment, in the context of the ancient Hebraic people, was also imposed: contempt of parents, trespass upon sacred ground, sorcery, bestiality, sacrifices to foreign gods, profaning the Sabbath, adultery, incest, homosexuality, and prostitution.

As Pope John Paul II states expressly in his most recent papal encyclical, "The Gospel of Life," in a contemporary, capitalist, political economy of a society with sufficient material resources, it is effectively impossible to imagine scenarios warranting the implementation of the death penalty. Let us continue to bear in mind that no one is beyond the redemptive power of God, that the innocent are being executed, and that the paradigm victim of capital punishment was Himself the Prince of Peace. Remember the eloquent and poignant words of Justice Blackmun as he stated in his powerful dissent in *Callins v. Collins*, in 1994. "Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to conclude that the death penalty experiment has failed."