

Michigan Law Review

Volume 91 | Issue 6

1993

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Recommended Citation

Welsh S. White, *Capital Punishment's Future*, 91 MICH. L. REV. 1429 (1993).

Available at: <https://repository.law.umich.edu/mlr/vol91/iss6/23>

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CAPITAL PUNISHMENT'S FUTURE

Welsh S. White*

CAPITAL PUNISHMENT IN AMERICA. By *Raymond Paternoster*. New York: Lexington Books. 1991. Pp. xvii, 307. \$35.

The execution of Robert Harris in California on April 21, 1992, indicates that the pattern of American executions, which has changed dramatically over the past three decades, may be ready to shift again. During the mid-1960s, executions, which had occurred at the rate of about fifty per year in the late 1950s,¹ slowed to a trickle and then stopped.² As a result of a series of Supreme Court decisions, culminating in *Furman v. Georgia*,³ which held the then-existing system of capital punishment unconstitutional, no executions occurred from June 2, 1967 until January 17, 1977. In the late 1970s, executions resumed under a new legal structure,⁴ but until the mid-1980s few people were actually executed.⁵ Starting in 1984, defendants have been executed at the rate of about twenty per year, but these executions have taken place primarily in six southern states.⁶ Although many defendants in large nonsouthern states have been sentenced to death,⁷ Harris was

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1. See Department of Justice, *National Prisoner Statistics, Capital Punishment 1930-1970*, 46 N.P.S. BULL. Aug. 1971, at 8.

2. *Id.*

3. 408 U.S. 238 (1972).

4. *Gregg v. Georgia*, 428 U.S. 153 (1976), and its companion cases introduced a new era of capital punishment. In these cases, the Court held that punishment by death was not automatically unconstitutional, but to impose capital punishment a state had to adopt safeguards to ensure the death penalty would be imposed in a just and rational manner. In particular, the Court indicated that any capital punishment scheme must include safeguards designed to address two concerns: first, reducing the extent to which the death penalty is arbitrarily applied; second, providing for individualized sentencing. See generally WELSH S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 5-6 (1987).

5. Between 1977 and 1984, only 11 people were executed. Moreover, four of those 11 have been characterized as "voluntaries" because, after being sentenced to death, they did not pursue all legal remedies for avoiding execution. See generally Victor L. Streib, *Executions Under the Post-Furman Capital Punishment Statutes: The Halting Progression from "Let's Do It" to "Hey, There Ain't No Point in Pulling So Tight,"* 15 RUTGERS L. J. 443 (1984).

6. Between the Court's 1976 decisions and December 31, 1992, 188 executions took place. Of these, 145, or 77.1%, took place in the states of Texas, Florida, Louisiana, Georgia, Virginia, and Alabama. See DEATH ROW, U.S.A., Winter, 1992, at 5 (bulletin published by NAACP Legal Def. and Educ. Fund, Inc.).

7. As of October 31, 1992, for example, California had 341 defendants on death row, Illinois 147, Ohio 120, and Pennsylvania 143, making a total of 751 from these four states alone. DEATH

one of the first to be executed after full pursuit of all legal remedies.⁸ Harris' execution foreshadows nationwide application of capital punishment, which means that substantially more defendants are likely to be executed.

Against this backdrop, Raymond Paternoster's informative book on capital punishment is timely and significant.⁹ *Capital Punishment in America* is not a work of original research, but a consideration of some of the most important issues relating to capital punishment. After providing an overview of capital punishment in the United States, Paternoster considers capital punishment's legal and constitutional issues, the death penalty's operation, and arguments for and against the death penalty and concludes with a prediction that capital punishment will eventually disappear. Clearly written, with helpful tables and extensive references, the book is valuable either as a text for students who have not yet studied capital punishment or as a source for those who want to explore a particular aspect of the subject in greater detail.

I. AN OVERVIEW OF CAPITAL PUNISHMENT

Capital Punishment in America aims to provide a comprehensive picture of the death penalty in this country and to predict its future. The book's success in presenting a clear picture of the various aspects of capital punishment is decidedly uneven, however. Not surprisingly, given his background as a social scientist, Paternoster stands on surer ground when he deals with the empirical or philosophical aspects of capital punishment than when he tackles legal or constitutional issues. Moreover, the unclear picture that Paternoster's latter discussion provides of both death penalty litigation and the direction of death penalty jurisprudence constitutes an insecure foundation for his bold prediction of capital punishment's demise.

Paternoster is most effective in analyzing the empirical data relating to capital punishment's application. Although this material is somewhat technical, Paternoster's exposition provides a reasonably clear picture of who is being executed. His review of the empirical studies indicates that, even in states that have a substantial death row population, juries impose the death sentence on convicted murderers

Row, U.S.A., Fall, 1992, at 11-14, 20-21, 27-29, 30-32 (bulletin published by NAACP Legal Def. and Educ. Fund, Inc.).

8. Others such as Charles Walker of Illinois, who was executed on September 12, 1990, did not fully pursue their legal remedies. See *id.* at 7.

9. Raymond Paternoster is professor of criminology at the University of Maryland's Institute of Criminal Justice and Criminology. His previous articles have examined the death penalty's application in particular states, especially South Carolina. See, e.g., Raymond Paternoster & Ann Marie Kazyaka, *An Examination of Comparatively Excessive Death Sentences in South Carolina 1979-1987*, 17 N.Y.U. REV. L. & SOC. CHANGE 475 (1990); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: The Case of Victim-Based Racial Discrimination*, 18 LAW & SOC. REV. 437 (1984).

in only about twenty percent of the cases (pp. 168-69). He also maintains that, except in cases with the most aggravated circumstances,¹⁰ no close correlation exists between findings of aggravated circumstances and imposition of the death penalty (pp. 165-67). Moreover, the data convincingly demonstrate that the victim's race is an important variable in capital sentencing. Assuming that all other factors are similar, the killer of a white victim in Georgia is more than five times as likely to be sentenced to death than the killer of a nonwhite victim (p. 134), and, of all possible racial combinations, blacks who kill whites are most often sentenced to death (p. 157). These data, buttressed by similar findings from other states, provide ample support for Paternoster's conclusion that the death penalty continues to be arbitrarily imposed (pp. 182-83).

Paternoster's consideration of the penological arguments for and against the death penalty also provides a valuable picture of certain aspects of capital punishment. His analysis of the empirical data relating to capital punishment's efficacy as a deterrent reinforces the truth of Professor Charles Black's statement, made nearly two decades ago: "[A]fter all possible inquiry, including the probing of all possible methods of inquiry, we do not know, and for systematic and easily visible reasons cannot know, what the truth about this 'deterrent' effect may be."¹¹ In addition, Paternoster's chapter on capital punishment's cost (pp. 187-216), while not comprehensive,¹² effectively

10. The aggravating circumstances used in the empirical studies cited by Paternoster generally include not only those defined by statute but also those that appear to have been important to sentencing juries in the past. Pp. 165-75. This approach, however, has pitfalls. Because aggravating factors are subjective and difficult to quantify, people might reasonably view a particular case as extremely aggravated even when relatively few "aggravating circumstances" are present. Thus, the researchers' assessment of a particular case's level of aggravation could be subject to challenge.

11. CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 33 (2d. ed. 1974). In supporting this conclusion, Paternoster provides an excellent summary of recent studies relating to capital punishment's deterrent effect. In particular, he discusses Issac Ehrlich's study purporting to show that capital punishment had a substantial deterrent effect on the murder rate between 1933 and 1969. Pp. 224-25. Relying on a variety of more recent studies, Paternoster incisively criticizes Ehrlich's conclusions, pointing out, for example, that the deterrent effect found by Ehrlich disappears when the years 1962 to 1969 are removed from his study and that other researchers, using methods similar to Ehrlich's, failed to find a similar deterrent effect when they examined homicide rates over slightly different periods. P. 226.

12. In considering the cost and process of a capital trial, Paternoster discusses pretrial costs, trial costs, and appeals. Pp. 191-209. Drawing from a variety of articles and empirical studies, he suggests that each of these costs is substantially higher in capital cases than in noncapital ones. Paternoster fails to point out, however, that this conclusion does not apply when, as is often the case, the state provides only meager resources for the defense of indigent capital defendants. See Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 68 U. ILL. L. REV. (forthcoming 1993) (manuscript on file with author). Moreover, in addressing the question of capital punishment's economic efficacy, Paternoster need not have limited his consideration to litigation costs. For example, he could have compared the cost of maintaining those sentenced to death as opposed to those sentenced to life imprisonment. Because of security considerations, the cost of maintaining a defendant for even a few years on death row is considerably higher than the cost of incarcerating a prisoner in the general popula-

refutes the argument that retaining the death penalty as our harshest penalty is economically beneficial. Paternoster also fairly presents and then incisively criticizes some of the other leading contemporary arguments in favor of the death penalty (pp. 246-70). Overall, this part of *Capital Punishment in America* lucidly describes the most important arguments for and against capital punishment.

Paternoster's treatment of the legal and constitutional issues surrounding capital punishment is less successful. In his discussion of the current legal system, he presents an accurate summary of several of the Supreme Court's most important capital punishment decisions but fails to place these cases in a framework that intelligibly depicts capital punishment's overall legal structure. Following Robert Weisberg's classic article relating to the Supreme Court's death penalty jurisprudence,¹³ Paternoster summarizes the Court's decisions in *Lockett v. Ohio*¹⁴ and *Zant v. Stephens*,¹⁵ but, unlike Weisberg, he does not use these cases to draw clear conclusions about either the Court's role in regulating capital punishment¹⁶ or the nature of capital punishment litigation.¹⁷

Consideration of the Court's treatment of ineffective representation in capital cases provides a useful prism for examining these issues. Paternoster details several striking examples of incompetence, including a case in which the defendant's attorney, in his argument to the jury, referred to his client as "nigger";¹⁸ one in which defense counsel had not yet read the state death penalty statute at the time of the trial;¹⁹ and another in which the defense attorney was parking his car when the key prosecution witness was testifying.²⁰ After noting that innumerable similar examples exist,²¹ Paternoster reviews and analyzes the Court's decision in *Strickland v. Washington*²² and concludes that the *Strickland* test does not adequately deal with the problem of attorney incompetence in capital cases (p. 89). Because Paternoster fails to pro-

tion for life. See generally Robert L. Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45, 56-57 (1989).

13. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.

14. 438 U.S. 586 (1978).

15. 462 U.S. 862 (1983).

16. See Weisberg, *supra* note 13, at 395 ("The Supreme Court seems to have decided that it no longer wants to use constitutional law to foster legal formulas for regulating moral choice at the penalty trial.")

17. See *Id.* at 360-83.

18. *Goodwin v. Balkcom*, 684 F.2d 794, 805 n.13 (11th Cir. 1982).

19. *Hyman v. Aiken*, 824 F.2d 1405, 1415 (4th Cir. 1987).

20. *House v. Balkcom*, 725 F.2d 608, 612 (11th Cir.), *cert. denied*, 469 U.S. 870 (1984).

21. A major study found that horrendous examples of ineffectiveness, similar to those recounted by Paternoster, are "legion." TASK FORCE ON DEATH PENALTY HABEAS CORPUS, A.B.A. CRIMINAL JUSTICE SECTION, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES 55 (Ira P. Robbins rep., 1990).

22. 466 U.S. 668 (1984).

vide an overall context for assessing counsel's role in capital cases, however, his brief analysis of *Strickland* yields no significant insight into either the impact of counsel's inadequacies on capital punishment litigation or the nature of the legal system's response to the problems generated by counsel's frequent inadequacies. In order to provide a fuller basis for evaluating Paternoster's prediction of capital punishment's demise, I will briefly address these issues.

II. DEFENSE COUNSEL'S ROLE IN CAPITAL CASES

A capital trial differs from most criminal trials in that it has two phases. If the defendant is convicted of a capital offense in the first phase, the case proceeds to a penalty phase at which the sentencer (usually the same jury that convicted the defendant) will have to decide whether the defendant should be sentenced to death or some lesser punishment. At the penalty trial, the prosecutor is permitted to introduce evidence relating to statutorily defined aggravating circumstances, and the defense is allowed to introduce mitigating evidence relating to either the defendant's background or the circumstances of the offense. In most jurisdictions, the sentencer then determines whether the death penalty should be imposed through a weighing of the aggravating and mitigating circumstances.²³

In many capital cases, the prosecutor will be able to present an overwhelming case at the guilt stage. In these cases, defense counsel's central mission will be to present an affirmative "case for life" through the introduction of mitigating evidence at the penalty stage.²⁴ Counsel has several objectives in presenting such evidence: to make the jury empathize with the defendant;²⁵ to convince the jury that the defendant will not be a future danger if his life is spared;²⁶ and, most importantly, to make the sentencer understand the reason for the defendant's crime.²⁷

Presenting mitigating evidence that will achieve these objectives is difficult because mitigating evidence is strikingly different from the ev-

23. See Weisberg, *supra* note 13, at 306.

24. See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 325 (1983).

25. See Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different*, 42 MERCER L. REV. 695, 703-08 (1991).

26. Some sentencing statutes specifically provide that the defendant's future danger is a factor to be taken into account by the sentencer in arriving at its decision. See TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(b) (West Supp. 1992) ("On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury: (1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society . . ."); see also VA. CODE ANN. § 19.2-264.2 (Michie 1990). Even when the statute does not refer to this factor, experienced defense counsel believe future danger will often be important to the sentencer. See, e.g., Lyon, *supra* note 25, at 707.

27. See WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 79-80* (1991).

idence presented at most trials. Evidence presented in a typical trial is designed to answer questions relating to discrete events, such as whether the car went through the red light at the time of the accident or whether the defendant had the intent to kill at the time he fired the fatal shot. Mitigating evidence, on the other hand, deals with broad stretches of history. In order to explain the kind of person the defendant is and the reason for his crime, witnesses may need to testify to the defendant's entire life, even including events that occurred before he was born.²⁸ To find such evidence, defense counsel must investigate every aspect of the defendant's life, exploring all of his significant relationships and experiences. Moreover, to gain an adequate understanding of the defendant's aberrational behavior, counsel will often need to have experts in mental health or related disciplines conduct thorough examinations of the defendant.²⁹ To present the mitigating evidence effectively, counsel must then review a great mass of material to identify witnesses and events that will make the defendant's life meaningful to the jury.

The critical importance of mitigating evidence at the penalty stage cannot be overestimated. Although the Supreme Court has held that in some circumstances counsel might reasonably decide not to investigate for the purpose of presenting mitigating evidence,³⁰ experienced defense attorneys uniformly reject this judgment. At the penalty trial, the jury is typically required to weigh aggravating and mitigating circumstances and to impose the death penalty if the former outweigh the latter.³¹ At the beginning of the penalty trial, the balance usually tilts toward aggravation because, having convicted the defendant of a capital offense, the jury will generally believe that at least one aggravating circumstance is present.³² As the jury is inclined toward death unless the defense provides a reason to spare the defendant,³³ the failure to present mitigating evidence constitutes a virtual invitation to impose the death penalty.

Moreover, the effective presentation of mitigating evidence can make a difference in almost any capital case. Although Paternoster's survey of the empirical evidence shows that the death penalty is imposed most frequently in the most aggravated cases,³⁴ experienced

28. For example, defense counsel may want to present mitigating evidence establishing that the defendant suffered from fetal alcohol syndrome during his mother's pregnancy. See White, *supra* note 12, at 7.

29. See *id.*, at 30-32.

30. See Burger v. Kemp, 483 U.S. 776, 794 (1987); Strickland v. Washington, 466 U.S. 668, 699 (1984).

31. See Weisberg, *supra* note 13, at 306.

32. See, e.g., Blystone v. Pennsylvania, 494 U.S. 299, 306 (1990) (holding that crime for which defendant was convicted involved aggravating circumstance of "commit[ing] a killing while in the perpetration of a robbery").

33. See Lyon, *supra* note 25, at 696.

34. See *supra* text accompanying note 8.

capital defense attorneys can cite cases in which the introduction of persuasive mitigating evidence trumped even overwhelming evidence of aggravation.³⁵ Although the nature and extent of the prosecutor's aggravating evidence is undoubtedly significant, capital defense attorneys assert that evidence establishing the defendant's humanity and explaining the nature of his problem will be even more critical. By explaining the defendant's life, including the reason for his crime, defense counsel will often be able to establish a bond between the defendant and the jury, with the result that the jury will not be willing to impose a death sentence.³⁶

Among a capital defense attorney's many other responsibilities, one of the most critical is to preserve the capital defendant's legal rights so that, in the event of a death sentence, they can be asserted on appeal. As Paternoster indicates, the Court's death penalty jurisprudence has turned capital punishment litigation into a veritable minefield of legal issues (p. 85). In order to represent a capital defendant effectively, a defense attorney must not only be familiar with the specific legal issues governing the defendant's case but also have enough knowledge of death penalty jurisprudence to raise any state law or federal constitutional issues likely to be of consequence in the proceedings against the defendant.

III. THE LEGAL SYSTEM'S RESPONSE TO PROBLEMS GENERATED BY INADEQUATE REPRESENTATION IN CAPITAL CASES

As Paternoster indicates, inadequate representation in capital cases is a widespread problem.³⁷ Moreover, in many capital cases apparently zealous defense attorneys — either due to oversight or, perhaps, as a result of circumstances beyond their control — fail to present critical evidence. In Robert Harris' case,³⁸ for example, defense counsel presented extensive mitigating evidence relating to the defendant's background but neglected to present evidence that the defendant had organic brain damage.³⁹ In other cases, counsel's limited resources preclude the extensive investigation needed to uncover critical mitigat-

35. See White, *supra* note 12, at 66.

36. *Id.*, at 59-60.

37. See *supra* notes 18-21 and accompanying text.

38. See *Harris v. Vasquez*, 943 F.2d 930 (9th Cir. 1990).

39. Harris was examined by two defense psychiatrists appointed by the trial court pursuant to the Supreme Court's ruling in *Ake v. Oklahoma*, 470 U.S. 68 (1985). These psychiatrists apparently found no evidence that Harris was brain damaged and did not testify at his penalty trial. Relying upon testimony by other psychiatrists that he was severely brain damaged, Harris subsequently claimed that he was denied effective psychiatric assistance at his penalty trial. The Ninth Circuit denied Harris a hearing on this issue, ruling that the right to psychiatric assistance established in *Ake* does not encompass the right to effective psychiatric assistance. 943 F.2d at 956.

ing evidence; in still others, counsel's inadequate knowledge of the law results in a failure to preserve significant legal issues for appeal.

The legal system's response to the problems generated by such deficient representation has generally been disappointing. In *Strickland*, the Court held that to establish ineffective assistance of counsel a defendant must show both that his attorney's representation "fell below an objective standard of reasonableness" and that the defendant was "prejudice[d]" by his attorney's substandard performance.⁴⁰ The Court's application of its test indicated that even in capital cases the standard of reasonableness is quite low. The Court held that counsel's failure to investigate for the purpose of presenting psychiatric and character evidence at the penalty trial was reasonable because, under the circumstances, introduction of this mitigating evidence would probably have been unhelpful and might have been counterproductive.⁴¹

Lower courts' application of *Strickland* has produced some appalling results. In *Mitchell v. Kemp*,⁴² for example, the defendant pled guilty to murder. At the penalty trial, the prosecution established as aggravating factors that the murder occurred during the commission of an armed robbery and aggravated assault. The defense presented no mitigating evidence. Predictably, the defendant was sentenced to death. The defense could have presented powerful mitigating evidence relating to the defendant's background, including his upbringing in an impoverished family, the role he played in trying to care for his siblings,⁴³ and his outstanding record in high school.⁴⁴ Counsel, however, made "no attempt to interview any potential mitigating witnesses."⁴⁵ In fact, other than speaking to the defendant's father over the telephone on two occasions, counsel did not even contact any member of the defendant's family. Moreover, he "made no inquiries into [defendant's] academic, medical, or psychological history."⁴⁶

40. *Strickland v. Washington*, 466 U.S. 668, 688, 692 (1984).

41. *Strickland's* circumstances were unusual. Against the advice of counsel, defendant David Washington waived his right to an advisory jury at his capital sentencing hearing, thus leaving his sentencing exclusively to the trial judge. As a sentencer, this judge had a reputation as one who "thought it important for a convicted defendant to own up to his crime," 466 U.S. at 673, a reputation that was seemingly confirmed when he stated during Washington's plea colloquy that he had "a great deal of respect for people who are willing to step forward and admit their responsibility." 466 U.S. at 672. Under these circumstances, Washington's counsel had some basis for believing the judge would be more lenient if Washington refrained from presenting evidence in mitigation of his criminal responsibility.

42. 762 F.2d 886 (11th Cir. 1985), *cert. denied*, 483 U.S. 1026 (1987).

43. 762 F.2d at 888.

44. The defendant "had been captain of the football team; leader of the prayer before each game; an above-average student; [and a participant in many extracurricular activities, including] student council, school choir, glee club, [and] math club . . ." 483 U.S. at 1028 (Marshall, J., dissenting from denial of cert.).

45. 483 U.S. at 1027 (Marshall, J., dissenting from denial of cert.).

46. 483 U.S. at 1027 (Marshall, J., dissenting from denial of cert.).

Nonetheless, the Eleventh Circuit concluded that counsel's decision not to investigate was not unreasonable and that, in any event, the attorney's failure did not result in prejudice to the defendant.⁴⁷

Other interpretations of *Strickland* have been less restrictive. Perhaps reflecting the views expressed in guidelines such as those published by the American Bar Association in 1989,⁴⁸ some federal courts, including the Eleventh Circuit, have displayed an increasing awareness of capital defense counsel's obligation to investigate for the purpose of presenting mitigating evidence at the penalty stage,⁴⁹ along with at least an embryonic awareness of counsel's obligation to make reasonable strategic decisions relating to that stage.⁵⁰ These cases suggest that the reasonableness prong of the *Strickland* test may eventually be interpreted to reflect the professional judgment of knowledgeable capital defense attorneys.

Since 1987, the Court has remained silent on the issue of ineffective assistance of counsel in capital cases.⁵¹ In its habeas decisions, however, the Court has displayed a distinct lack of sympathy for problems generated by inadequate representation and for the plight of capital defendants generally. In a line of decisions beginning with *Wainwright v. Sykes*,⁵² the Court has barred criminal defendants from raising on habeas issues that were not properly presented in the state courts because of defense attorneys' ignorance or negligence.⁵³ In *McCleskey v. Zant*,⁵⁴ decided in 1991, the Court expanded *Sykes* to impose the same restrictions on a capital defendant's ability to raise new claims not presented in a prior habeas petition. Furthermore, in a case decided this past term, the Court sharply limited the circumstances under which a capital defendant can establish an exception to these holdings. *Sawyer v. Whitley*⁵⁵ held that to establish an exception the capital defendant must show "by clear and convincing evidence that but for the

47. 762 F.2d at 889.

48. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guidelines 11.4.1 & 11.8.3 (1989) [hereinafter ABA GUIDELINES].

49. See, e.g., *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991) (holding counsel ineffective for failure to investigate for mitigating evidence), cert. denied, 112 S. Ct. 2282 and cert. denied, 112 S. Ct. 2290 (1992); *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991) (same), cert. denied, 112 S. Ct. 1516 (1992). See generally *White*, supra note 12.

50. See *Chambers v. Armontrout*, 907 F.2d 825 (8th Cir. 1990) (holding that failure to investigate and present critical defense testimony in a capital case was ineffective assistance of counsel), cert. denied, 111 S. Ct. 369 (1990). See generally *White*, supra note 12, at 52.

51. Since *Burger v. Kemp*, 483 U.S. 776 (1987), the Court has not directly considered an ineffective assistance of counsel claim in a capital case.

52. 433 U.S. 72 (1977).

53. See, e.g., *Murray v. Carrier*, 477 U.S. 478 (1986); *United States v. Frady*, 456 U.S. 152 (1982); *Engle v. Isaac*, 456 U.S. 107 (1982). See generally *Maria L. Marcus, Federal Habeas Corpus After State Court Default: A Definition of Cause and Prejudice*, 53 *FORDHAM L. REV.* 663, 695-703 (1985).

54. 111 S. Ct. 1454 (1991).

55. 112 S. Ct. 2514 (1992).

constitutional error, no reasonable juror would find [the defendant] eligible for the death penalty under [the applicable state] law."⁵⁶ Thus, a showing that the constitutional error probably resulted in the defendant's death penalty, or even that it almost certainly resulted in his death penalty, will not be sufficient. The defendant must demonstrate that, in the absence of the error, he *could not* have been sentenced to death.

These holdings are particularly significant because, as Paternoster notes, capital defendants have until recently had a remarkably high success rate in federal habeas corpus cases.⁵⁷ Under our system of justice, federal habeas corpus is the last opportunity for correcting constitutional errors in capital cases. By restricting the circumstances under which such errors will be considered on the merits, the Court reduces a significant safeguard and widens the path toward execution.

The Court is not alone in seeking to reduce a capital defendant's safeguards. Over the past two sessions of Congress, bills setting even greater limits on capital defendants' rights to present claims in the federal courts have been proposed.⁵⁸ These proposals range from imposing a deadline on the capital defendant's right to file a habeas petition⁵⁹ to sharply curtailing all criminal defendants' access to federal habeas corpus.⁶⁰ Although these measures have not been enacted, their political viability reflects a public mood increasingly favorable to capital punishment⁶¹ and increasingly frustrated by a system that tolerates lengthy delays between imposition and execution of a death sentence.

IV. CAPITAL PUNISHMENT'S FUTURE

Given the current legal and political climate, Paternoster's predic-

56. 112 S. Ct. at 2523.

57. P. 208. The reversal rate in capital habeas petitions was "60%-75% as of 1982, 70% as of 1983, and 60% as of 1986." Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 521 (1988) (footnotes omitted).

58. See generally Vivian Berger, *Justice Delayed or Justice Denied? — A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665 (1990).

59. See, e.g., The Thurmond-Specter bill, Amendment 1687 to S. 970, 101st Cong., 2d Sess., 136 CONG. REC. S6805-07 (daily ed. May 23, 1990). See generally Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y. REV. L. & SOC. CHANGE 451, 452 n.2 (1991) (listing several congressional bills proposing time limitations for habeas corpus petitions).

60. See Neil A. Lewis, *4 Key Issues in Dispute on Package to Fight Crime*, N.Y. TIMES, Nov. 27, 1991 at B8 (discussing congressional conference approval of a bill curtailing a death row inmate's habeas challenge if it is determined that the inmate received a full and fair hearing in the state courts).

61. In a recent Texas poll, 92% of respondents favored capital punishment. See James Pinkerton, *Crime Poll Finds Many Fear Even a Daytime Walk*, HOUS. CHRON., Aug. 7, 1992, at A28. National opinion polls show that about three quarters of all Americans support capital punishment. See *Know Who You're Pulling For*, STAR TRIB., Sept. 6, 1992, at A23.

tion that "capital punishment will simply wither away over the years" (p. 286) seems unlikely, at least for the near future. While Paternoster correctly states that executions have averaged no more than ten per year since 1977, this figure is misleading. From 1987 to 1992, executions have averaged about eighteen per year,⁶² and, during 1992, thirty-one executions were performed.⁶³ Thus, the pace of executions is increasing.

Moreover, the current political climate seems likely to accelerate this trend. During the recent presidential campaign, then-Governor Clinton not only proclaimed his support for the death penalty in a paid political advertisement⁶⁴ but highlighted that support by interrupting his campaign to approve two Arkansas executions.⁶⁵ The Republicans, especially Vice President Quayle, nevertheless criticized Clinton on the ground that his statement supporting Governor Mario Cuomo, a death penalty opponent, as a potential Supreme Court appointee indicated that he was not a committed proponent of capital punishment.⁶⁶ The political climate is also reflected in the proposed federal legislation relating to the death penalty.⁶⁷

Nevertheless, Paternoster makes some pertinent arguments in support of his prediction. His discussion of public attitudes toward capital punishment is especially interesting. Citing opinion surveys by William Bowers,⁶⁸ he shows public support for the death penalty is greatly diminished when people are confronted with the choice between the death penalty and the alternative punishment of life without the possibility of parole plus restitution. Whereas between seventy and eighty percent initially express support for death as a punishment for murder, fewer than one third continue to do so when the death penalty is compared with this alternative punishment (p. 275). As Paternoster states, this result reflects the public's ambivalence toward capital punishment, suggesting that an alternative punishment that adequately protects the public may be preferred. Paternoster uses these data to

62. From January 1, 1987 to December 31, 1991, 89 defendants were executed. Thus, during that five-year span, the number of executions averaged 17.8 per year. See DEATH ROW, U.S.A., *supra* note 7, at 5.

63. See DEATH ROW, U.S.A., *supra* note 6, at 10.

64. See Harry Berkowitz, *They're on the Ad-tack*, NEWSDAY, Oct. 9, 1992, at 43.

65. See Peter Applebome, *The 1992 Campaign: Death Penalty; Arkansas Execution Raises Questions on Governor's Politics*, N.Y. TIMES, Jan. 25, 1992, at A8 (reporting that Clinton interrupted campaign to deny clemency for condemned killer Rickey Ray Rector); *Killer Executed After Clinton Denies Clemency*, ASSOC. PRESS, May 8, 1992 (reporting that Clinton interrupted campaign to review the case of condemned killer Steven Douglas Hill).

66. Thomas Wicker, *The Democrats as the Devil's Disciples*, N.Y. TIMES, Aug. 30, 1992, at D3.

67. See *supra* text accompanying notes 53-55.

68. Pp. 275-76; see William J. Bowers, *Massachusetts Voters Want an Alternative to the Death Penalty* (unpublished report from Department of Criminal Justice, Northeastern University, Boston, Massachusetts).

contend that educating the public about the possibility of alternative punishments may hasten capital punishment's abolition (p. 281).

In addition, Paternoster seeks to place the capital punishment debate in a broader context. Using data from Amnesty International, he points out that our continued use of capital punishment places the United States in some rather unenviable company. Iran, Iraq, Libya, South Africa, and other states with repressive regimes continue to employ the death penalty. In contrast, the great majority of Western democracies do not (p. 285). Drawing upon *Capital Punishment and the American Agenda*, an insightful book by Franklin Zimring and Gordon Hawkins,⁶⁹ Paternoster asserts that the experience of other Western democracies suggests that the present political climate does not preclude the possibility of capital punishment's abolition in the near future (p. 285-87).

These thought-provoking observations provide a basis for questioning the long-term viability of capital punishment in this country. Nevertheless, one would be naive to suppose that either the results of public attitude surveys or the experience of other Western democracies will affect the pace of American executions in the near future. Preferences expressed to a social scientist will not readily translate into a meaningful shift in public opinion. Moreover, prognosticating abolition on the basis of the experience of Western European democracies seems dubious in view of the significant cultural and demographic differences between the United States and the countries of Western Europe.⁷⁰ Given the present legal and political climate in this country, the pace of executions will continue to accelerate over the next five years. Over the past several years, defendants have been sentenced to death at the rate of at least 160 per year.⁷¹ If, as seems likely, at least one third of those sentenced to death are eventually executed, the pace of executions by the mid-1990s will be at least fifty per year — exceeding the pace in the 1950s.

Long-term predictions are more difficult. When we moved to the brink of abolition during the Warren Court era, two problems with our system of capital punishment seemed especially significant: first, the death penalty had a deleterious effect on our system of justice;⁷²

69. FRANKLIN ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* (1987).

70. Some of the most obvious differences include homicide rates, population density, extent of racial tensions, and national decisionmaking processes. See Welsh S. White, *Patterns in Capital Punishment*, 75 CAL. L. REV. 2165, 2167 (1987) (book review).

71. Over the past six years, the population of death row has climbed from 1838 to 2676 despite the fact that approximately 180 defendants have been executed. Compare DEATH ROW, U.S.A., *supra* note 6, at 1 with DEATH ROW, U.S.A., Spring 1986, at 1 (bulletin published by NAACP Legal Def. and Educ. Fund, Inc.).

72. In 1959, when the American Law Institute was considering whether to recommend abolition, Justice Robert H. Jackson was prepared to argue that capital punishment "unnecessarily multiplie[s] trials and appeals [and] that the entire judicial process was sentimentalized and sen-

second, the death penalty was unfairly applied. Through its examination of empirical studies and other data, *Capital Punishment in America* demonstrates that both of these problems not only continue to exist but are in fact more serious than they were under the pre-*Furman* system of capital punishment. Although not emphasized by Paternoster, the role of capital defense counsel is particularly significant. If, as some courts are beginning to recognize,⁷³ effective assistance of counsel in a capital case generally requires extensive investigation of every aspect of the defendant's history, examination of the defendant by expert witnesses, and extensive introduction of mitigating evidence at a penalty trial, we will have to choose between the substantial expenditure of resources necessary to provide every capital defendant with effective assistance of counsel and a system in which our failure to provide every capital defendant with this most basic procedural safeguard exacerbates the death penalty's arbitrary application. When the political climate changes so as to permit a more objective examination of capital punishment, recognition of these intractable problems may again lead us toward abolition.

sationalized by injection of life-and-death questions." MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 22 (1973).

73. See *supra* text accompanying notes 45-47.