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**WHEN JUSTICE DEPENDS ON IT: THE NEED FOR  
PROFESSIONAL STANDARDS FOR MITIGATION  
DEVELOPMENT IN ALL CRIMINAL CASES**

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## I. INTRODUCTION

Mitigation investigation and the presentation of the evidence it yields has been an integral part of capital defense work for decades, and it has become increasingly essential in criminal defense advocacy more widely.<sup>1</sup> In the last fifty years since the United States Supreme Court ushered in the modern death penalty, the role of mitigation has evolved both in terms of the scope of evidence that is considered potentially mitigating and the cases in which courts view it as relevant.<sup>2</sup> A central feature of this evolution has been the

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1. Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 AM. J. CRIM. L. 1, 2 (2018); Hugh M. Mundy, *It's Not Just for Death Anymore: How Capital Mitigation Investigation Can Enhance Experiential Learning and Improve Advocacy in Law School Non-Capital Criminal Defense Clinics*, 50 CAL. W. L. REV. 31, 33 (2013).
2. See Russell Stetler, *The History of Mitigation in Death Penalty Cases*, in SOCIAL WORK, CRIMINAL JUSTICE, AND THE DEATH PENALTY 34, 34-35 (Lauren A. Riccardelli ed., 2020).

passage of professional standards of care to guide the development and presentation of mitigation evidence in these high stakes cases.<sup>3</sup>

Early concepts of what evidence could mitigate a potential sentence of death often focused on the historical trauma, damage, or dysfunction experienced by a person charged with a death-eligible crime.<sup>4</sup> Over the last several decades, however, this blinkered conception has blossomed into a holistic approach that requires defense teams to investigate and develop the full spectrum of personhood and present decision-makers with a multidimensional biography<sup>5</sup> of the accused.<sup>6</sup> This includes one's generational history, the impacts of social structures on outcomes,<sup>7</sup> how culture and race influence development, perspectives and beliefs that in turn inform behaviors,<sup>8</sup> and the capacity for growth.<sup>9</sup> At its core, mitigation evidence is the story of a human life—past, present, and future—and all the facets that shape human potential.<sup>10</sup> It is through the presentation of such evidence that authentic understanding between decision-makers and the accused develops; this is because the presentation of mitigation evidence dispels false narratives about crime and who commits acts that are deemed unlawful.<sup>11</sup> The result is a more compassionate process and individualized justice.<sup>12</sup>

3. See Am. Bar Ass'n, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 919 (2003) [hereinafter *2003 ABA Guidelines*]; Am. Bar Ass'n, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677, 677 (2008) [hereinafter *Supplementary Guidelines*].
4. Emily Hughes, *Mitigating Death*, 18 CORNELL J.L. & PUB. POL'Y 337, 347–49 (2009).
5. Julie Urbanik, *Applied Geonarratives: Arts-Based Social Geography in Criminal Defense Mitigation*, SOC. SCIS. & HUMANS. OPEN, May 11, 2021, at 1.
6. Throughout this article, we refer to people facing criminal charges as “the accused” in an effort to avoid the dehumanizing effect of many other labels used to describe people being prosecuted by the criminal legal system.
7. See Urbanik, *supra* note 5.
8. Stephen M. Quintana et al., *Race, Ethnicity, and Culture in Child Development: Contemporary Research and Future Directions*, 77 CHILD DEV. 1129, 1129–30 (2006); see also Hector Betancourt & Steven Regeser López, *The Study of Culture, Ethnicity, and Race in American Psychology*, 48 AM. PSYCH. 629, 629 (1993).
9. Hughes, *supra* note 4; see also Russell Stetler & Aurélie Tabuteau, *The ABA Guidelines: A Historical Perspective*, 43 HOFSTRA L. REV. 731, 735 (2015).
10. See Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 843–44 (2008).
11. Walter I. Gonçalves Jr., *Narrative, Culture, and Individuation: A Criminal Defense Lawyer's Race-Conscious Approach to Reduce Implicit Bias for Latinxs*, 18 SEATTLE J. SOC. JUST. 333, 333–35 (2020).
12. See Craig Haney, *Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 547–48 (1995).

Beyond the expanded scope of topics considered as mitigation in death penalty cases, mitigation's evidentiary relevance has also evolved in other types of criminal cases.<sup>13</sup> Most notably, the presentation of mitigating evidence has taken on a central role in the cases of individuals under the age of eighteen years old at risk of receiving a life sentence without the possibility of parole (JLWOP) for murder.<sup>14</sup> As defense teams in both capital and JLWOP cases have observed, the presentation of mitigating evidence coupled with defense theories informed by these crucial investigations have led to far fewer death and JLWOP sentences respectively.<sup>15</sup>

In both capital and JLWOP cases, professional guidelines were developed to codify a minimum standard of care for the collection and development of humanizing evidence in these cases.<sup>16</sup> Moreover, the guidelines clearly articulate the expectations of counsel, the mitigation specialist, and other defense team members in providing

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13. See Beth Caldwell, *Appealing to Empathy: Counsel's Obligation to Present Mitigating Evidence for Juveniles in Adult Court*, 64 ME. L. REV. 391, 392–93 (2012) (discussing mitigation in juvenile cases).
  14. *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (holding automatic/mandatory life without parole sentences for juveniles unconstitutional even upon conviction for capital murder); *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016) (making retroactive *Miller's* protection, leading to over 2000 resentencing and parole proceedings across the United States). It is also worth noting that mitigation has been central to non-capital felony cases in federal courts since 2005. See *United States v. Booker*, 543 U.S. 220, 226 (2005) (holding that federal sentencing guidelines were no longer mandatory and only advisory). This holding resulted in judges having the discretion to sentence a convicted individual to less than the guidelines recommended. See OFF. OF GEN. COUNS., U.S. SENT'G COMM'N, DEPARTURE AND VARIANCE PRIMER 1 (2014), [https://www.uscc.gov/sites/default/files/pdf/training/primers/2014\\_Primer\\_Departure\\_Variance.pdf](https://www.uscc.gov/sites/default/files/pdf/training/primers/2014_Primer_Departure_Variance.pdf) [<https://perma.cc/2YBY-5KTM>].
  15. This anecdotal observation is supported by objective evidence; the precipitous decline in both new death sentences and executions across the United States in the 2000s tracks the standardization of mitigation investigation and presentation as a norm in capital defense. See LEGAL DEFENSE FUND, DEATH ROW U.S.A.: SPRING 2022, at 6 (2022) (documenting a more than two-decade trend of decline in U.S. death-row population since July 2001); Maurice Chammah, *What's Behind the Decline in the Death Penalty?*, THE MARSHALL PROJECT (Oct. 2, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/10/02/what-s-behind-the-decline-in-the-death-penalty> [<https://perma.cc/4BPH-NCB9>] (discussing how the creation of state-funded defender offices that employ social workers and incorporate resident mitigation specialists into capital defense teams has greatly contributed to the decline in new death sentences); see also Brandon L. Garrett, THE END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 10–11 (2017).
  16. See Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 693–94 (2008).

the accused an adequate defense.<sup>17</sup> Importantly, the development of these professional guidelines was informed by the practice of mitigation investigation as it had already begun on the ground.<sup>18</sup> As the Supreme Court has explicitly acknowledged,<sup>19</sup> without these guidelines, postconviction review of trial counsel's performance would be difficult; standards enable reviewing courts to identify what was deficient about counsel's representation by providing "guides to determin[e] what is reasonable" performance.<sup>20</sup>

There currently exists no comparable nationwide professional guidance governing the collection and presentation of mitigation evidence for other types of criminal cases.<sup>21</sup> And yet, as was the case with capital and JLWOP cases at the time professional standards were promulgated, the development and presentation of mitigation evidence is already happening in all manner of criminal cases throughout the country.<sup>22</sup> For instance, as federal mandatory sentencing guidelines were invalidated and rendered advisory,<sup>23</sup> and states were in the process of returning to indeterminate rather than determinate sentencing,<sup>24</sup> the need for the development and presentation of information related to the background and circumstances of the accused has multiplied. Thus, as was the case in capital and juvenile defense, the time has arrived to articulate the

17. See 2003 ABA Guidelines, *supra* note 3, at Guideline 4.1; see also *Supplementary Guidelines*, *supra* note 3, at Guidelines 4.1, 10.4.
18. Russ Stetler and others have written extensively about how the on-the-ground practice of mitigation investigation led to and shaped the development of these norms. See, e.g., Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 638–39 (2013); see also O'Brien, *supra* note 16 (explaining the research and process underlying the development of the 2008 Supplementary Guidelines).
19. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (“[W]e long have referred [to these ABA Standards] as ‘guides to determining what is reasonable.’”) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (finding trial counsel ineffective after discussing the duties imposed by the ABA Guidelines)).
20. *Id.*
21. See Mundy, *supra* note 1, at 53–63 (discussing the application of the only available professional guidelines to other types of criminal cases).
22. See, e.g., *id.*
23. *United States v. Booker*, 543 U.S. 220, 226–27, 245–46 (2005); *Pepper v. United States*, 562 U.S. 476, 481 (2011).
24. See, e.g., MICHAEL TONRY, U.S. DEP’T OF JUST. OFF. OF JUST. PROGRAMS, SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY, EXECUTIVE SESSIONS ON SENTENCING AND CORRECTIONS (1999); LISA M. SEGHELLI & ALISON M. SMITH, CONG. RSCH. SERV., RL32766, FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS, AND POLICY OPTIONS 12 (2007), <http://www.fas.org/sgp/crs/misc/RL32766.pdf> [<https://perma.cc/9TME-5972>].

minimum standard of care required for the investigation and presentation of mitigation in all criminal cases.

Systems of indigent defense are often plagued with insufficient resources needed to provide zealous representation to clients<sup>25</sup> facing the loss of freedom and the collateral consequences that come from being system-involved.<sup>26</sup> The passage of guidelines would reflect the recognition that the resources to provide properly trained mitigation specialists in all criminal cases will not simply appear; as in capital and JLWOP cases, professional standards applicable to every criminal case will provide defense counsel with authority under which to request resources for the requisite services.<sup>27</sup> Jurisdictions must invest in justice—in a system that not only appoints an attorney to an accused person who does not possess the means to pay for a defense but provides a defense that takes into account their life and circumstances.<sup>28</sup> Potential costs at the front end of the process pale in comparison to the costs lost to the individual and the community in wasted human potential.<sup>29</sup>

As work continues towards addressing mass incarceration,<sup>30</sup> the role of mitigation in creating authentic connection and context between an individual who has been accused or convicted of a crime and decision-makers is ever more urgent. Placing the full picture of a person, and their dignity, at the center of their legal case is the most powerful tool to stemming the tide of incarceration.<sup>31</sup> Incorporation

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25. See, e.g., Phil McCausland, *Public Defenders Nationwide Say They're Overworked and Underfunded*, NBC NEWS (Dec. 11, 2017, 5:55 AM), <https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111> [<https://perma.cc/VC56-F365>].
  26. For more on collateral consequences, see AM. BAR ASS'N, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: JUDICIAL BENCH BOOK* (2018).
  27. See *2003 ABA Guidelines*, *supra* note 3, at Guideline 2.1.
  28. See discussion *infra* Part V.
  29. Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, THE MARSHALL PROJECT (Dec. 17, 2019, 5:00 AM), <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration> [<https://perma.cc/9PC9-3FU2>] (“[T]he United States spends more than \$80 billion each year to keep roughly 2.3 million people behind bars . . . [However, this calculation] leaves out myriad hidden costs that are often borne by prisoners and their loved ones[.]”).
  30. See generally KATHERINE BECKETT, *ENDING MASS INCARCERATION: WHY IT PERSISTS AND HOW TO ACHIEVE MEANINGFUL REFORM* (2022) (discussing the various changes pursued by mass incarceration reform advocates).
  31. See, e.g., Miriam Gohara, *Narrative Context and Rehabilitating Rehabilitation: Federal Sentencing Work in Yale Law School's Challenging Mass Incarceration Clinic*, 27 CLINICAL L. REV. 39, 52 (2020) (“In the absence of specific, humanizing information about a defendant's formative experiences, sentencers are left to defer to traditional schema, or narratives, about crime and criminals.”).

of mitigation evidence buttressed by professional standards of care in all criminal cases will only result in more just and equitable outcomes for each human being involved.<sup>32</sup>

Parts II and III of this article provide a brief history and evolution of the legal doctrines governing admissibility and relevance of mitigation evidence.<sup>33</sup> Section IV.A sketches the basic components of a competent mitigation investigation and argues for specific minimum standards in all criminal cases,<sup>34</sup> drawing on proven methodology that is the professional norm in capital and JLWOP cases—conducting repeated, face-to-face, in-person interviews,<sup>35</sup> obtaining records releases or authorizations from not only the client but generations of their family members, and performing the searching and thorough multi-generational investigation practices encompassed by the Guidelines.<sup>36</sup> The final section, Section IV.B, discusses how mitigation improves outcomes for clients and implications for broader collateral benefits.<sup>37</sup>

While recognizing the limitations that often impair the provision of adequate defense services, this article advocates for the passage and existence of institutional guidelines that articulate a minimum standard of care which can be used to advocate for wider adoption of mitigation practice and allocation of the necessary resources required for its efficacy.<sup>38</sup> Moreover, without such a baseline, the provision of services currently being provided will be inconsistent and arbitrary,

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32. See Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 HOFSTRA L. REV. 1161, 1186 (2018).

33. See *infra* Parts II–III.

34. See *infra* Section IV.A.

35. See *Supplementary Guidelines*, *supra* note 3, at Guideline 10.11.C (“Team members must conduct in-person, face-to-face, one-on-one interviews with the client, the client’s family, and other witnesses . . . [m]ultiple interviews will be necessary . . .”).

36. See *id.* at Guideline 10.11.B (“The investigation into a client’s life history must [include, but is not limited to] multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior . . .”).

37. See *infra* Section IV.B.

38. For this reason, the existing ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases specifically impose an independent duty on *jurisdictions* to “adopt and implement a plan formalizing the means by which high quality legal representation in death penalty cases is to be provided in accordance with [the] Guidelines.” 2003 ABA Guidelines, *supra* note 3, at Guideline 2.1.A. Similar duties on the courts should be mandated by the standardized guidelines we propose here, which may be appropriately scaled in scope by comparison to the death penalty guidelines but should impose the same core duties and obligations.

ensuring further disparities in outcomes for scores of individuals facing the loss of freedom.

## II. A BRIEF HISTORY OF MITIGATION

### A. *Mitigation Practice is Rooted in Death Penalty Defense*

Discretionary sentencing was common throughout the United States by the early twentieth century.<sup>39</sup> Yet, as sentencing practices moved from standardless discretion vested in juries to judges to sentencing commissions or prescribed guidelines that constrained judicial decision-making, decision-maker discretion and individualized consideration in many jurisdictions became more limited.<sup>40</sup> In the 1970s, a movement from indeterminate to determinate sentencing—accompanied by a philosophical shift from rehabilitation toward retribution and incapacitation—saw the former discretionary sentencing practices give way to mechanical applications of statutory guidelines in many types of criminal cases.<sup>41</sup>

Indeed, the birth of capital mitigation, which drew from the longstanding view that individual consideration was appropriate in sentencing,<sup>42</sup> grew from a similar trajectory in capital sentencing practices. The early 20th century saw an American death penalty defined by discretionary jury-based sentencing absent consistent standards; the arbitrary and capricious results of this system led to constitutional reform in the 1970s driven by a series of seminal Supreme Court decisions.<sup>43</sup> What emerged was a new set of statutory schemes that almost uniformly removed the ultimate sentencing

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39. See Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 570, 571 (2005) (describing the era of indeterminate sentencing).

40. See *id.* at 573, 575 (2005) (noting that both the goal and the result of sentencing commissions was to rein in the polarities of extremely lenient and extremely draconian sentences); David Bjerck, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion in Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 591–92 (2005). *But cf. id.* at 592 (noting that the loss of sentencing discretion by judges has the effect of shifting the discretion to prosecutors, sometimes with unintended effects).

41. See William W. Berry III, *Individualized Sentencing*, 76 WASH. & LEE L. REV. 13, 25 (2019).

42. See Gertner, *supra* note 39, at 571 (noting that indeterminate sentencing valued the judge's role in "individualizing the sentence to reflect the goals of punishment").

43. *Constitutionality of the Death Penalty in America*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/constitutionality-of-the-death-penalty-in-america> [https://perma.cc/K55C-CBHY] (last visited Apr. 12, 2023).

decision from chambers,<sup>44</sup> instead vesting sentencing juries with the “guided discretion” that defines the modern era of capital punishment.<sup>45</sup>

In 1972, the Court in *Furman v. Georgia* determined by a vote of 5–4 that the death penalty as administered in the United States was unconstitutional in practice.<sup>46</sup> Although there was a lack of consensus on the reasoning, the minimum for a majority agreement on this outcome resulted in the nullification of existing death sentences nationwide and a de facto moratorium on executions during this period.<sup>47</sup>

In the wake of *Furman*, states that wanted capital punishment moved quickly to enact statutes that could satisfy the concerns of the Supreme Court.<sup>48</sup> In 1976, several of these newly crafted statutes reached the Court for review.<sup>49</sup> The statutes considered by the Court fell into one of two general categories: schemes that attempted to provide guidance for determining the appropriate sentence<sup>50</sup> or those that made a sentence of death mandatory upon conviction of a death-eligible crime.<sup>51</sup>

The Supreme Court approved as constitutional those statutes that established specific procedures aiming to guide sentencer discretion,

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44. See, e.g., *Ring v. Arizona*, 536 U.S. 584, 588–89 (2002) (holding that a person facing capital punishment has the right to have a jury—rather than a judge—find an aggravating factor that makes the defendant eligible for the death penalty); see also *Constitutionality of the Death Penalty in America*, *supra* note 43. *But cf.* *Spaziano v. Florida*, 468 U.S. 447 (1984) (upholding then-existing Florida sentencing scheme in which the jury’s sentencing recommendation was merely advisory and judicial override was permitted), *overruled by* *Hurst v. Florida*, 577 U.S. 92 (2016).
45. See Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 669 (2016); see also Jill M. Cochran, *Courting Death: 30 Years Since Furman, Is the Death Penalty Any Less Discriminatory? Looking at the Problem of Jury Discretion in Capital Sentencing*, 38 VAL. U. L. REV. 1399, 1400–31 (2004).
46. See *Furman v. Georgia*, 408 U.S. 238, 256–57 (1972) (Douglas, J., concurring).
47. Kim Bellware, *Death Penalty’s 50-Year Rise and Fall Since Supreme Court Struck It Down*, WASH. POST (Jul. 6, 2022, 7:00 AM), <https://www.washingtonpost.com/history/2022/07/06/furman-georgia-supreme-court-death/> [https://perma.cc/3K7L-BMHX].
48. See Stetler and Tabuteau, *supra* note 9, at 733.
49. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).
50. See *Gregg*, 428 U.S. at 197–98; *Jurek*, 428 U.S. at 267–69; *Proffitt*, 428 U.S. at 246–52 (three companion guided discretion cases).
51. See *Roberts*, 428 U.S. at 331; *Woodson*, 428 U.S. at 285 (two mandatory schemes).

including bifurcated trials.<sup>52</sup> In rejecting mandatory death sentencing,<sup>53</sup> the Court identified the “failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death” as a “constitutional shortcoming” of the mandatory schemes.<sup>54</sup> Moreover, the Court also affirmed the central role of extending mercy “on the basis of factors too intangible to write into a statute.”<sup>55</sup>

The development and presentation of mitigating evidence thus emerged in the context of the bifurcated trial structure of modern capital prosecutions; it is grounded in the constitutional requirement that a death sentence is never mandatory but must always be the result of individualized sentencing considerations.<sup>56</sup>

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52. See *Gregg*, 428 U.S. at 221–22 (approving Georgia’s bifurcated trial proceeding in which guilt was determined beyond a reasonable doubt, the jury was asked to determine death eligibility by finding one of ten enumerated circumstances beyond a reasonable doubt, a separate trial on penalty was held, and mandatory proportionality review was conducted by the Georgia Supreme Court); *Jurek*, 428 U.S. at 273–77 (approving Texas’s statute which codified a separate death-eligible criminal offense defining capital murder and asked sentencing juries to answer two “special issue” questions before a death verdict could be imposed); *Proffitt*, 428 U.S. at 247–49 (finding that Florida’s weighing scheme, which differed from Georgia and Texas but most closely tracked the Model Penal Code, also adequately narrowed the class of defendants eligible for the death penalty and addressed *Furman*’s concerns).

53. See *Roberts*, 428 U.S. at 335 (finding Louisiana’s scheme, which similarly made the death penalty mandatory for a range of offenses, unconstitutional for the reasons identified in *Woodson*).

54. *Woodson*, 428 U.S. at 303.

55. *Gregg*, 428 U.S. at 222 (White, J., concurring).

56. This doctrinal foundation is evident in the definitional language of Supplemental Guideline 1.1, which tracks the Supreme Court’s language in *Woodson*:

Mitigation evidence includes, but is not limited to, *compassionate factors stemming from the diverse frailties of humankind*, the ability to make a positive adjustment to incarceration, the realities of incarceration and the actual meaning of a life sentence, capacity of redemption, remorse, execution impact, vulnerabilities related to mental health, explanations of patterns of behavior, negation of aggravating evidence . . . positive acts or qualities, responsible conduct in other areas of life . . . any evidence bearing on the degree of moral culpability.

*Supplementary Guidelines*, *supra* note 3, at Guideline 1.1.A. (emphasis added); *cf.* *Woodson*, 428 U.S. at 304.

*B. The Constitutional Importance of Mitigation and Individualized Sentencing Has Been Repeatedly Reaffirmed by Supreme Court Decisions*

In the years that followed the implementation of new capital sentencing statutes, the Supreme Court developed a body of Eighth Amendment law that regulated and ostensibly enforced this individualization requirement by protecting mitigating evidence's role in sentencing.<sup>57</sup> It explained that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable."<sup>58</sup> For example, "[t]he defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing appropriate punishment."<sup>59</sup> Eighth Amendment jurisprudence is clear that states cannot bar "the consideration of . . . [any] evidence if the sentencer could reasonably find that it warrants a sentence less than death."<sup>60</sup>

Though the Supreme Court has never held that a specific circumstance is per se mitigating, it has over and over again emphasized that "the severity of the appropriate punishment necessarily depends on the culpability of the offender."<sup>61</sup> On this principle, the Court has found that the death penalty is categorically barred for those whose culpability is inherently lessened—or mitigated—by two specific characteristics: intellectual disability, as

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57. *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (holding that states may not explicitly "preclude consideration of relevant mitigating factors" by law); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (holding that sentencers may not refuse to consider relevant mitigating evidence); *Morgan v. Illinois*, 504 U.S. 719, 736–39 (1992) (requiring jurors to consider relevant mitigating factors); *Tennard v. Dretke*, 542 U.S. 274, 283–85 (2004) (concluding that jurisdictions may not screen or attempt to determine what mitigating evidence is relevant to a specific crime or charge).

58. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (citations omitted).

59. *Simmons v. South Carolina*, 512 U.S. 154, 163 (1994).

60. *Tennard*, 542 U.S. at 285 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990)); see also *Boyde v. California*, 494 U.S. 370, 377–78 (1990) ("The Eighth Amendment requires that the jury be able to consider and give effect to" a capital accused's mitigating evidence).

61. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (holding the imposition of the death penalty unconstitutional for those with intellectual disability).

measured by clinical diagnostic criteria,<sup>62</sup> and youth under the age of eighteen at the time of the crime.<sup>63</sup>

Observing that “under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes[,]”<sup>64</sup> the Court held that not only could a sentence of death never be imposed on a juvenile person, but even a sentence of life without parole for juveniles convicted of *non-homicide* offenses was similarly unconstitutional.<sup>65</sup> Those who had been sentenced to life without parole for non-homicide crimes must be afforded a “meaningful opportunity to obtain release.”<sup>66</sup> Just a few years later, *mandatory* life without parole for persons convicted of homicide as a juvenile was held to be unconstitutional,<sup>67</sup> and this rule was soon made retroactive.<sup>68</sup>

The developing constitutional regulation of extreme and mandatory sentencing for juveniles convicted of serious crimes led to a wave of resentencing and parole hearings in the 2010s, with each proceeding presenting a new opportunity for mitigation development and presentation.<sup>69</sup> In fact, the Court in *Miller* was explicit: “*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”<sup>70</sup>

At the same time, the shift away from mandatory sentencing and towards consideration of a broader universe of information about a convicted person prior to sentencing was similarly unfolding in other types of criminal cases. The 1980s were defined by retributive sentencing philosophies and punitive sentencing practices,<sup>71</sup> exemplified by the Federal Sentencing Guidelines, which took effect

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62. Hall v. Florida, 572 U.S. 701, 719–20 (2014).

63. Roper v. Simmons, 543 U.S. 551, 569–73 (2005).

64. Graham v. Florida, 560 U.S. 48, 59 (2010).

65. *Id.* at 74–75.

66. *Id.* at 75.

67. Miller v. Alabama, 567 U.S. 460, 465 (2012).

68. Montgomery v. Louisiana, 577 U.S. 190, 200 (2016).

69. Approximately 2,800 people were serving mandatory life without parole sentences for non-homicide crimes committed when they were juveniles at the time of the *Montgomery* decision. See THE CAMPAIGN FOR THE FAIR SENT’G OF YOUTH, *MONTGOMERY V. LOUISIANA SIX YEARS LATER: PROGRESS AND OUTLIERS* 5 (2022), <https://cfsy.org/wp-content/uploads/Montgomery-v.-Louisiana-Six-Years-Later-Progress-and-Outliers.pdf> [<https://perma.cc/F7YG-LXEB>].

70. *Miller*, 567 U.S. at 489.

71. Michael Tonry, *Sentencing in America, 1975-2025*, 42 CRIME & JUST. 141, 169–75 (2013).

in 1987 and severely curtailed judicial sentencing discretion in federal court.<sup>72</sup> But in the early 2000s, the Supreme Court issued a series of decisions—the consolidated cases of *United States v. Booker* and *United States v. Fan-Fan* (2005), then *Gall v. United States* (2007), *Kimbrough v. United States* (2007), and finally *Pepper v. United States* (2011)—holding that the rigidly punitive Sentencing Guidelines were no longer mandatory but instead merely advisory.<sup>73</sup> The collective effect of these decisions was to empower federal judges to once again consider a broad range of sentencing factors in determining an appropriate sentence, including those not specified in the Federal Sentencing Guidelines.

Though the retreat from mandatory guidelines following *Booker* and subsequent cases has once again revealed deep-rooted disparities in sentencing that disadvantage young men of color,<sup>74</sup> defense attorneys continue to develop and implement new advocacy strategies that take into account the whole person in non-capital cases.<sup>75</sup> These post-*Booker* strategies appear to have influenced federal prosecutors; studies show they join defendants in supporting downward departures from the Federal Sentencing Guidelines at higher rates than judges do.<sup>76</sup> Finally, though there is high variability across states regarding sentencing practices, the majority of states bestow judges with virtually unfettered sentencing authority;<sup>77</sup> this, in turn, enables defense counsel to present a wide breadth of information while advocating for convicted clients. In those jurisdictions that do retain sentencing guidelines, traditional mitigation in the form of information related to the circumstances of

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72. See Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, J. CRIM. L. & CRIMINOLOGY 691, 698 (2010).

73. *United States v. Booker*, 543 U.S. 220 (2005); *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Pepper v. United States*, 562 U.S. 476 (2011).

74. See generally Bryan Holmes & Christopher D'Amato, *Judicial and Prosecutorial Decision-Making: Assessing the Effects of Race, Gender, and Age on Federal Downward Sentencing Departures, 2013–2016*, 43 J. CRIME & JUST. 449, 451 (2020).

75. Mona Lynch, *Booker Circumvention? Adjudication Strategies in the Advisory Sentencing Guidelines Era*, 43 N.Y.U. REV. L. & SOC. CHANGE 59, 92 (“As a federal defender characterized it, ‘there are more cards to play. There’s actually a job to do when we can actually advocate for something less than the guidelines.’”).

76. See generally Holmes & D’Amato, *supra* note 74.

77. Richard S. Frase, *Forty Years of American Sentencing Guidelines: What Have We Learned?*, 48 CRIME & JUST. 79, 117 (2019).

the offense, previous criminal history or lack thereof, and veteran status is often contemplated by statute.<sup>78</sup>

*C. Recent Legislative Advancements Have Expanded the Application of Mitigation*

Most recently, legislation has been passed in several states and the District of Columbia that provides incarcerated people an opportunity for postconviction sentencing modifications.<sup>79</sup> Such individualized reviews provide yet another opportunity (and often specifically advise petitioners) to present decision-makers with mitigating evidence, perhaps for the first time.<sup>80</sup> For example, Washington D.C.'s 2016 Incarceration Reduction Amendment Act afforded courts the ability to consider "the defendant's personal history, their commitment to change and rehabilitation in prison, [and] statements from victims and prosecutors" in determining whether a sentencing reduction was appropriate.<sup>81</sup>

78. Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U.L. REV. 161, 201 (2016) (discussing state sentencing statutes and practices that consider the character of the defendant and his likelihood to recidivate); Elizabeth S. Vartkessian, *Including Assets-Based Mitigation in Sentencing*, 31 CRIM. JUST. POL'Y REV. 857, 869 (2020).

79. *See, e.g.*, CAL. PENAL CODE § 1170(d)(1)(A) (West 2023) (providing, *inter alia*, that "a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has been incarcerated for at least 15 years, the defendant may submit to the sentencing court a petition for recall and resentencing"); D.C. CODE ANN. § 24-403.03(a), (b) (West 2022) (allowing people under twenty-five at the time of the crime to petition for sentencing review after serving fifteen years, amending prior 2017 version allowing review for those under eighteen at the time); LA. STAT. ANN. § 15:574.4.A.(6)(a) (2022) (providing for parole review after fifteen years for those sentenced to life without parole under three-strikes laws); WASH. REV. CODE ANN. § 9.94A.730(1) (West 2022) (providing, with certain limitations, that "any person convicted of one or more crimes committed prior to the person's eighteenth birthday may petition the indeterminate sentence review board for early release after serving no less than twenty years of total confinement"); *see also* MD. CODE ANN., CRIM. PROC. §§ 6-235, 8-110 (West 2022).

80. This is so because mandatory sentences of life without parole for juveniles were constitutional until 2012. *See Miller v. Alabama*, 567 U.S. 460, 489 (2012). In other words, many of the thousands of juveniles sentenced to life without parole were automatically sentenced upon conviction and never afforded an opportunity to present evidence at sentencing, meaning that no sentencer previously had "the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles" that the individualized sentencing decisions require. *Id.*

81. *DC Council Passes Second Look Amendment Act of 2019*, DC CORR. INFO. COUNCIL (May 10, 2021), <https://cic.dc.gov/release/dc-council-passes-second-look-amendment-act-2019> [<https://perma.cc/WFQ7-Q3SG>].

Finally, mitigation investigation and the presentation of such evidence have long been central to requests for executive clemency—pardons, commutations, or reprieves—including those in military courts.<sup>82</sup> While executive clemency exists outside the judiciary, it has often been referred to as the “fail safe” of our criminal justice system.<sup>83</sup> By its very nature, clemency is “an act of grace,”<sup>84</sup> and requests for clemency often put forth the personal history of a convicted person in an effort to persuade the decision-maker that the individual is deserving of mercy. These requests often included information related to the mental health and intellectual functioning of a convicted person<sup>85</sup> as well as their capacity for redemption and personal growth since the commission of the crime for which they have been convicted.

In sum, the necessity of a reliable mitigation investigation and the presentation of mitigating evidence has become a central feature of criminal defense well beyond capital cases and is now recognized in serious felony sentencing and post-sentencing contexts.

### III. THE EVOLUTION OF MITIGATION PRACTICE AND THE CODIFICATION OF STANDARDS OF CARE

Just as the breadth of mitigation’s relevance and reach has grown, so too has the scope of the work of mitigation specialists; this evolution led to and informed the development of professional standards of care that guide the investigation and presentation of mitigating evidence in certain types of cases.<sup>86</sup>

#### A. *The Evolving Scope of Mitigation Practice*

During the early days of capital defense work, mitigation investigation was more narrowly focused on the accused and perhaps their immediate family and environment.<sup>87</sup> As practitioners began to

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82. Earl W. Johnson, *Recommendations for Clemency by Courts-Martial*, 15 JAG J. 131, 131–32 (1961).

83. *Herrera v. Collins*, 506 U.S. 390, 415–16 (1993).

84. *United States v. Wilson*, 32 U.S. 150, 160 (1833).

85. See generally Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1520, 1525 (2000).

86. See 2003 ABA Guidelines, *supra* note 3; see also *Supplementary Guidelines*, *supra* note 3; see also THE CAMPAIGN FOR THE FAIR SENT’G OF YOUTH, TRIAL DEFENSE GUIDELINES: REPRESENTING A CHILD CLIENT FACING A POSSIBLE LIFE SENTENCE (2015) [hereinafter CFSY GUIDELINES].

87. See Haney, *supra* note 10, at 845–46, 853–55, 882; see also Maurice Chammah, *Scharlette Holdman, a Force for the Defense on Death Row, Dies at 70*, N.Y. TIMES

investigate more broadly and deeply into the background of clients and communities, pioneers in the field of mitigation began to recognize the need to investigate at least three generations of an accused person's family tree.<sup>88</sup> Through these investigations, mitigation specialists learned about other family members—seemingly less connected to the client—who might have shared some of the same challenges.<sup>89</sup> These discoveries are often valuable as more than just background information. For example, if certain types of mental health concerns were present in other family members decades before, this history can illuminate hereditary vulnerabilities and “genetic loading” that predispose clients to mental health concerns of their own.<sup>90</sup> It is now well-established that a comprehensive social history can also help combat government narratives of malingering.<sup>91</sup> Likewise, experiences of neglect or abuse often do not occur within the client's family unit alone but are instead learned behaviors passed down by previous generations and parenting practices.<sup>92</sup> In order to observe patterns of functioning and behavior, it is commonly acknowledged as essential to look back at least this far in one's history.<sup>93</sup>

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(July 22, 2017), <https://www.nytimes.com/2017/07/22/us/scharlette-holdman-dead.html> [<https://perma.cc/R4JF-4TYU>].

88. O'Brien, *supra* note 16, at 725.

89. Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 966–67, 970 (2008) (“When there are signs of mental health issues, the [mitigation] investigation must reach back at least three generations to document genetic history, patterns and effects of familial medical conditions, and vulnerability to mental illness as well as exposure to substance abuse, poverty, environmental toxins and other factors that may have negative influenced the health of the defendant and his family . . . . Special care should be taken to identify family members whose mental illness is or was similar to that of the defendant and alert the mental health expert, who will likely want to talk to these family members and carefully review their mental health records himself.”).

90. *See, e.g.*, Stephen V. Faraone et al., *Neuropsychologic Functioning Among the Nonpsychotic Relatives of Schizophrenic Patients: The Effect of Genetic Loading*, 48 BIOL. PSYCH. 120, 124 (2000).

91. *See, e.g.*, Dudley & Leonard, *supra* note 89, at 966–67.

92. *See, e.g.*, Carolyn A. Greene et al., *Intergenerational Effects of Childhood Maltreatment: A Systematic Review of the Parenting Practices of Adult Survivors of Childhood Abuse, Neglect, and Violence*, CLINICAL PSYCH. REV., July 23, 2020, at 2.

93. *See Supplementary Guidelines, supra* note 3, at Guideline 10.11.B. (requiring defense teams to investigate, *inter alia*, “multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior”); *see also id.* at Guideline 10.11.C. (requiring “in-person, face-to-face, one-on-one interviews” with not just the client but “the client's family, and other witnesses who are familiar with the client's life, history, or family history”) (emphasis added).

Professional norms for client interviewing also evolved from pointed, invasive, questionnaire-style inquiries into conversations informed by mitigation specialists' understanding and skills in developing relationships.<sup>94</sup> Rapport-building is now a central tenet of a skilled and effective practice,<sup>95</sup> especially given that many clients carry the impacts of pervasive and complex trauma.<sup>96</sup> Time, patience, and trust became the foundation of these investigations.<sup>97</sup>

The same lessons were adapted and applied to interviewing life history witnesses in each case.<sup>98</sup> This shift reflected an understanding that the formative experiences of those accused of capital crimes, including deep histories of trauma, are usually not isolated or unique to them but rather endemic within a family unit and, at times, a community.<sup>99</sup> Mitigation specialists learned that their own observations of environment, affect, and behavior were just as important to evidentiary conclusions as the information that life history witnesses could provide themselves.<sup>100</sup> And the absence of information or insight from a witness often proved just as informative as its presence.<sup>101</sup>

Document collection, a task equally essential as interviewing, evolved from gathering records from those places recalled by the accused and cooperating family members into a comprehensive process of blanketing requests to independently-identified service providers rather than simply relying on the memory of a person to

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94. See *id.* at Guideline 10.11.C; BIANCA CODY MURPHY & CAROLYN DILLON, INTERVIEWING IN ACTION: RELATIONSHIP, PROCESS, AND CHANGE, 112–13 (1998).

95. *Supplementary Guidelines*, *supra* note 3, at Guideline 5.1.C. (indicating mitigation specialists “must be able to establish rapport with witnesses, the client, the client’s family and significant others that will be sufficient to overcome barriers those individuals may have against the disclosure of sensitive information and to assist the client with the emotional impact of such disclosures”).

96. Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923, 929–30, 954–56 (2008).

97. See *Supplementary Guidelines*, *supra* note 3, at Guideline 10.11.C. (requiring multiple interviews to “establish trust [and] elicit sensitive information”).

98. *Id.* at Guideline 5.1.C.

99. See Haney, *supra* note 10, at 572.

100. See Sean D. O’Brien et al., *Put Down the Phone! The Standard for Witness Interviews is In-Person, Face-To-Face, One-On-One*, 50 HOFSTRA L. REV. 339, 341 (2022).

101. This assertion is borne out by the experience of the authors and many other practicing mitigation specialists around the country. For example, an absence of self-awareness or lack of memory in a caretaker might indicate a potential intellectual disability or mental health issue, leading to further avenues of investigation and providing valuable insight into the early years of the accused.

determine where to look.<sup>102</sup> Mitigation specialists became genealogists: unearthing family connections, observing how generations within a family died, and mapping the movements of people (whether by choice or due to external forces) from one location to another.<sup>103</sup> The expansion of document collection practices and more probative time spent with all individuals offering even a small piece of each human story led mitigation specialists to continually expand their investigations. Effective practitioners learned to gather leads from all sources, viewing investigation as cyclical and allowing it to develop organically rather than relying on any one source of information for direction.<sup>104</sup>

Mitigation specialists also began to look beyond biology, undertaking more wide-ranging investigations in the search to understand the *systems* that shaped their client's experiences.<sup>105</sup> These additional areas of inquiry include the type and quality of housing; the health and safety of the living environment, including exposure to toxins; educational supports; access to adequate medical and mental health services; the nature and quality of interactions with social service providers, including law enforcement; religion; the functioning of caretakers; and other experiences that influence how a person behaves.<sup>106</sup>

All of this collected information had to be synthesized. To do so, mitigation specialists learned to create secondary documents such as genealogies, chronologies, and social histories for use by counsel as demonstratives or by experts as summation for their opinion.<sup>107</sup> As more materials were collected, mitigation specialists necessarily became adept at maintaining and organizing the case file in ways that enabled the defense team to observe patterns and generate themes within the client's life.<sup>108</sup> Mitigation specialists developed systems to

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102. See *Supplementary Guidelines*, *supra* note 3, at Guideline 5.1.F. ("Mitigation specialists must possess the knowledge and skills to obtain *all* relevant records pertaining to the client *and others*.") (emphasis added).

103. *Id.* at Guideline 10.11.B.

104. *See id.*

105. See Hughes, *supra* note 4, at 358.

106. *Supplementary Guidelines*, *supra* note 3, at Guidelines 10.11.B., 10.11.F.; see generally Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883, 883 (2008).

107. *Supplementary Guidelines*, *supra* note 3, at Guideline 5.1.D. ("The mitigation specialist must be able to furnish information in a form useful to counsel and any experts through methods including, but not limited to: genealogies, chronologies, social histories, and studies of the cultural, socioeconomic, environmental, political, historical, racial and religious influences on the client in order to aid counsel . . .").

108. See O'Brien, *supra* note 16, at 756–57.

ensure that all members of the team could work collaboratively with these secondary documents and generate the best defense possible for the accused.<sup>109</sup>

Finally, mitigation is a multidisciplinary profession and has been since its inception.<sup>110</sup> The field has drawn on the work and methodology of various professions such as journalism, anthropology, ethnography, social work, psychology, law, and sociology.<sup>111</sup> These disciplines and their respective skills and methodologies have informed the current standard of care: a broad approach to unearthing reliable information from witnesses, becoming immersed in the community, and recognizing the importance of observing behavior in addition to whatever a witness could verbally share.<sup>112</sup> Being present *in-person* with witnesses is recognized as essential because mitigation specialists understand how signs and symptoms of mental health and trauma can be visibly noted and expressed in ways that mere words may not convey.<sup>113</sup>

### B. *The Evolving Tools of Mitigation Practitioners*

As noted, mitigation specialists draw from a wide array of professional backgrounds, including education and training in medical and social sciences.<sup>114</sup> Defense counsel often do not possess comparable expertise in these areas and therefore requires another member of the defense team to understand the connection between biological, psychological, and social development and outcomes.<sup>115</sup> This is especially true as recent advances in these areas have in some cases been used to advocate for *harsher* or more punitive sentencing.<sup>116</sup> This conversion of potentially-mitigating evidence

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109. See *Supplementary Guidelines*, *supra* note 3, at Guidelines 5.1.D., 10.11.D.

110. See Chammah, *supra* note 87; Stetler, *supra* note 32, at 1164–76 (describing early mitigation practitioners).

111. See, e.g., Isabel Wright, *Anthropology and Capital Case Litigation*, in *DOUBLE VISION: ANTHROPOLOGISTS AT LAW* 29 (Randy Frances Kandel ed., 1992) (examining the role an anthropologist plays in researching and testifying of mitigating circumstances in death penalty cases).

112. See, e.g., Holdman & Seeds, *supra* note 106, at 902–03, 907.

113. See O'Brien et al., *supra* note 100.

114. See generally *Supplementary Guidelines*, *supra* note 3, at 678 (specifying no particular educational background but laying out the tasks and skills a mitigation specialist must demonstrate).

115. *Id.* at Guideline 5.1.B–E.

116. Mirko Bagaric, *A Rational (Unapologetically Pragmatic) Approach to Dealing with the Irrational—The Sentencing of Offenders with Mental Disorders*, 29 HARV. HUM. RTS. J. 1, 13, 20–21 (2016) (“[T]he average sentence imposed on defendants suffering

provides another reason why defense counsel must include team members with knowledge regarding the collection and presentation of this evidence in order to combat efforts to use hardship and personal limitations as a reason to punish more severely in criminal cases.<sup>117</sup>

Mitigation specialists have also extended their work beyond life history investigation to include coalition-building within communities and reaching out to leaders within neighborhoods, schools, and religious institutions.<sup>118</sup> As mitigation has become a mainstay of JLWOP cases and sentencing modifications, mitigation specialists have become experts on re-entry planning.<sup>119</sup> Utilizing their skills and training to incorporate the information collected through the mitigation investigation, mitigation specialists collaborate with the client during the re-entry planning process to focus on the individual strengths and supports needed for a successful and lasting return to the community.<sup>120</sup>

The tools of mitigation continue to evolve and change dramatically as society does. Internet investigation is now a central component of mitigation work.<sup>121</sup> This includes scouring social media such as Facebook, Instagram, TikTok, and Snapchat; newspaper and archival research; courthouse searches through available databases (though going in-person to paper archives for older records remains necessary); and managing electronic discovery including body-worn camera footage, cell phone data, and other media.<sup>122</sup>

Mitigation specialists have also learned the skills necessary to work with trauma survivors while adeptly navigating and respecting their

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from mental illness is longer than the average sentence imposed on defendants who do not have [a] mental health diagnosis but who committed the same crime.”)

117. See generally Michelle E. Barnett et al., *Differential Impact of Mitigating Evidence in Capital Case Sentencing*, 7 J. FORENSIC PSYCH. RSCH. & PRAC. 39, 44–45 (2007).

118. See Gohara, *supra* note 31, at 82 (describing the kinds of information gathered through mitigation investigation in myriad settings relevant to the defendant’s mitigation narrative, re-entry planning, and community reintegration); see also Janet Moore et al., *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1287 (2014).

119. See, e.g., Dana Cook et al., *Miller, Montgomery, and Mitigation: Incorporating Life History Investigations and Reentry Planning into Effective Representation for ‘Juvenile Lifers’*, THE CHAMPION, Apr. 2017, at 44, 45.

120. See *id.* at 52.

121. Sean D. O’Brien & Quinn C. O’Brien, *I Know What You Did Last Summer: A User’s Guide for Internet Investigations*, THE CHAMPION, June 2017, at 18, 18–19.

122. See *id.* at 19.

needs and interests.<sup>123</sup> In addition to using these skills with clients and their families, more and more mitigation specialists are being trained on the correct way to engage in victim outreach.<sup>124</sup> This deeper understanding of the importance of giving a voice to survivors enables mitigation specialists to better evaluate whether a defense-initiated victim outreach (DVO) expert should be retained by the defense team,<sup>125</sup> and, if so, which particular expert might be appropriate for a case. Many mitigation specialists have alerted defense teams of the need to engage a specially trained person, outside of the defense team, who is able to assist survivors in communicating with the defense should they wish to do so.<sup>126</sup>

Mitigation specialists engaged in non-capital work often prepare mitigation submissions or reports for judges and other decision-makers, such as boards of pardons and parole, to rely on.<sup>127</sup> These reports include the generational history of the accused, a detailed analysis of their incarceration through the lens of their history, and tailored re-entry planning.<sup>128</sup> Mitigation specialists have learned to infuse these reports with images that trace the client's development and life for decision-makers—depicting childhood, adolescence, and adulthood through photos provides a visual aid to anchor the humanity of the client at all times and to combat reductionist narratives.<sup>129</sup> Likewise, mitigation specialists have utilized other

123. See Arlene Bowers Andrews, *American Bar Association Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases: Implications for Social Work*, 57 SOC. WORK 155, 159 (2012).

124. See *id.* at 158–59.

125. *Id.* at 159 (cautioning that “[s]erving in more than one role on a case can lead to conflicts of interest, conflicts of commitment, or dual relationships and should be avoided.”).

126. Mickell Branham & Richard Burr, *Understanding Defense-Initiated Victim Outreach and Why It Is Essential in Defending a Capital Client*, 36 HOFSTRA L. REV. 1019, 1025 (2008) (“The victim liaison must not only be appropriately trained. She or he cannot be a member of the defense team. The victim liaison is retained as an expert and has the same relationship as any other expert with the defense team”).

127. Gohara, *supra* note 31, at 46.

128. See, e.g., Cook et al., *supra* note 119, at 45–46.

129. *Powerful Visual Advocacy for Criminal Defense Mitigation*, LEGAL ARTS: VISUAL PERSUASION BLOG (Apr. 15, 2021), <https://legalarts.com/visual-persuasion-blog/powerful-visual-advocacy-for-criminal-defense-mitigation/> [<https://perma.cc/H6JN-J749>]. This is essential particularly in the face of the government's use of crime scene and autopsy photographs to create a powerful narrative. Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. STATE L.J. 1003, 1046 (2014) (noting that mock jurors' disgust increased when confronted with disturbing photographs of a

media, such as video,<sup>130</sup> to help decision-makers understand the trajectory of a client's life.<sup>131</sup>

1. The Passage of Professional Standards for Capital Defense<sup>132</sup>

In 2003, the American Bar Association (ABA) promulgated the professional standards for defense representation in capital cases (Guidelines);<sup>133</sup> these Guidelines represent the minimum expectations of counsel, codify the importance of mitigation investigation and integration into the entire case, and inform the performance of the full defense team.<sup>134</sup> The Guidelines were developed *from the ground up*,<sup>135</sup> and are therefore not aspirational, “but rather distill the combined experiences of numerous individuals working in all parts of the field into a document that embodies ‘the current consensus about what is required to provide effective defense representation in capital cases.’”<sup>136</sup>

These standards were years in the making and ultimately approved by a unanimous vote of the ABA House of Delegates—a diverse body of elected ABA membership responsible for directing the policy of the nation's largest professional legal association.<sup>137</sup> The delegation that passed the Guidelines included prosecutors, former judges, defense attorneys, civil litigators, and others who agreed that the standards set out in the Guidelines were essential to protect the rights of capital defendants.<sup>138</sup> A central animating principle of the

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murder victim, “which in turn increased the jurors’ confidence in a guilty verdict. This effect got stronger as jurors’ anger increased.”)

130. Katrina Daniel, *Practice Points: Telling a Story in a Mitigation Video*, THE CHAMPION, Sept.–Oct. 2022, at 59, 59.
131. See, e.g., Stephanie Clifford, *A Flattering Biographical Video as the Last Exhibit for the Defense*, N.Y. TIMES (May 24, 2015) (discussing the power of visual narrative).
132. Sean O’Brien, Russell Stetler, and others have written about the process and history behind the development of the ABA Guidelines. See sources cited *supra* notes 18, 32.
133. *Compare* GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (AM. BAR ASS’N 1989), with 2003 ABA Guidelines, *supra* note 3 (showing the substantial updates from the 1989 to 2003 ABA Guidelines).
134. See 2003 ABA Guidelines, *supra* note 3.
135. *Id.* at Guideline 1.1.
136. Eric M. Freedman, *Introduction*, 31 HOFSTRA L. REV. 903, 903 (2003).
137. See *ABA House of Delegates*, AM. BAR. ASSOC., [https://www.americanbar.org/groups/leadership/house\\_of\\_delegates/](https://www.americanbar.org/groups/leadership/house_of_delegates/) [https://perma.cc/G5JX-HUWW] (last visited Apr. 12, 2023).
138. Freedman, *supra* note 136, at 912 (“I close with one observation to set in context the pages that follow. The revised Guidelines came to the floor of the House of Delegates with the co-sponsorship of a broad spectrum of ABA entities and passed without a single dissenting vote. This was symbolic of the philosophy that has animated the project since its inception in the 1980s, and that I as the current Reporter hope will

Guidelines' passage was the recognition that "[a]ll actors in the system share an interest in the effective performance of [capital defense] counsel; such performance vindicates the rights of defendants, enables judges to have confidence in their work, and assures the states that their death sentences are justly imposed."<sup>139</sup>

In 2005, recognizing that "the ABA Guidelines have provided valuable guidance on the qualifications and performance of counsel," a group of experienced capital defense attorneys, mitigation specialists, and mental health professionals "perceived a clear need for similar standards describing the skills and functions of mitigation specialists."<sup>140</sup> Three years of research and development led to the 2008 passage of the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (Supplementary Guidelines), which aimed to "guide the function of capital defense teams at all stages, educate judges and indigent defense agencies on necessary funding, resources and training, and serve as a template for post-conviction teams to recognize and challenge substandard work."<sup>141</sup>

2. Capital Mitigation Standards Laid the Foundation for the Passage of Standards for Criminal Defense Representation of Children Facing Life Sentences

The ethos and substance of the Guidelines and Supplementary Guidelines formed the basis of the 2015 Trial Defense Guidelines: Representing A Child Client Facing A Possible Life Sentence, promulgated, by the Campaign for Fair Sentencing of Youth (CFSY).<sup>142</sup> A core feature of the CFSY Guidelines included professional norms that aimed to minimize barriers to disclosure from clients and witnesses.<sup>143</sup> This is achieved through repeated in-person, face-to-face, one-on-one interviews with the client, family, and as many people who have known the child client as possible.<sup>144</sup> Likewise, the thorough and searching records collection that forms a

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continue to guide the future evolution of the field as a whole: 'All actors in the system share an interest in the effective performance of [capital defense] counsel; such performance vindicates the rights of defendants, enables judges to have confidence in their work, and assures the states that their death sentences are justly imposed.'").

139. *Id.*

140. O'Brien, *supra* note 16, at 697.

141. *Id.*

142. *See generally* CFSY GUIDELINES, *supra* note 86.

143. *See id.* at 9.

144. *Id.* at 12, 15–16.

core pillar of mitigation investigation in capital defense work is also the standard of care for representing child clients.<sup>145</sup>

#### IV. CAPITAL MITIGATION'S FOUNDATIONAL PROMISE: GUIDELINES GOVERNING THE MITIGATION FUNCTION IN ALL CRIMINAL CASES

The broad mandate of mitigation in capital cases has evolved into a multidisciplinary deep dive into an accused person's individual trajectory<sup>146</sup> and become integral to defense strategy in other types of cases.<sup>147</sup> Information gathered through mitigation investigation has proven the relevance of one's humanity in criminal defense writ large, enabling defense teams to incorporate individualized facts and circumstances into presentations that challenge or mitigate the culpability of a person facing criminal charges.<sup>148</sup> Mitigation is a necessity in every case, but absent guidelines, it is not always treated as such.<sup>149</sup> With a clearly defined standard of care in mitigation practices across the criminal legal system, however, the full potential of mitigation for all those facing carceral sentences can be realized.

##### A. *Qualifications and Role of the Mitigation Specialist*

As described above, the evolution of mitigation has benefited from its multidisciplinary nature.<sup>150</sup> Mitigation as a profession is dynamic and continues to draw on a wide variety of academic knowledge, professional expertise, and lived histories.<sup>151</sup> Keeping the profession of mitigation open to various disciplinary backgrounds not only enables a wider pipeline to the work but also provides a means for continuing to build diversity in the ranks of criminal defense and

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145. *Id.* at 15–16 (describing the responsibilities attributed to an investigator in a case involving a child defendant).

146. *See* Stetler, *supra* note 32, at 1210–11 (describing mitigation files as “archive[s] . . . for understanding the biological, psychological, and social influences that contribute to the public health risk for violence; and for seeing the humanity, the capacity for redemption and change, even of those responsible for horrific crimes.”).

147. *See infra* Section IV.B.

148. *See* Stetler, *supra* note 32, at 1189 (“The increase in the number of dedicated, specialized capital defense offices at trial and in post-conviction units with in-house mitigation specialists has made death sentences and executions rarer than at any previous time in the post-*Furman* era.”).

149. *See* Donna Lieberman, Opinion, *We Accept Assembly-Line Justice for the Poor. But We Shouldn't*, WASH. POST (Jan. 23, 2016, 3:44 PM), <https://www.washingtonpost.com/news/in-theory/wp/2016/01/23/we-accept-assembly-line-justice-for-the-poor-but-we-shouldnt/> [<https://perma.cc/9DX4-EW4X>].

150. *See supra* notes 123–26 and accompanying text.

151. *See supra* Part III.

ensures that the field will remain innovative.<sup>152</sup> In short, this is a skills-based profession—there is no single degree or certification that qualifies a person as a mitigation specialist.

As the multidisciplinary nature of mitigation continues to be inclusive of practitioners of all professional and academic backgrounds, guidelines should specify the type of training and experience expected of a qualified mitigation specialist.<sup>153</sup> Instructive qualification requirements can be found in both the Supplementary and CSFY Guidelines; mitigation specialists must possess a wide-ranging skillset and working knowledge of mental health, trauma, interviewing skills, research, and law, among other areas related to the growth and development of an individual.<sup>154</sup> Mitigation work cannot be conducted effectively without the proper training, which includes familiarity with the professional guidelines related to mitigation in capital and JLWOP cases, as well as the relevant legal standards set out by United States Supreme Court precedent.<sup>155</sup> Qualified mitigation specialists must attend training seminars, hosted by reputable national organizations, that adhere to the core principles of mitigation investigation.<sup>156</sup>

Furthermore, it is essential that those taking on the role of the mitigation specialist in criminal cases understand their function as a member of the defense team, particularly where the role and accompanying obligations and ethics may conflict with prior education or training.<sup>157</sup> For example, mental health clinicians (and, more specifically, licensed clinical social workers) have developed a growing presence in criminal defense teams in an effort to move

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152. Hughes, *supra* note 4, at 339–40, 343–46.

153. Compare 2003 ABA Guidelines, *supra* note 3, at Guideline 5.1, with CFSY GUIDELINES, *supra* note 86, at Guideline 4.1–4.2 (discussing guidelines for mitigation specialist responsibilities in cases involving a child with a possible life sentence).

154. See sources cited *supra* note 153.

155. See *supra* Part II. For this reason, national trainings and conferences on capital mitigation frequently include sessions taught by law professors and practitioners that cover the evolution of mitigating evidence in capital cases, as well as recent legal developments that might impact the mitigation investigation and presentation.

156. In the field of capital mitigation, these seminars include the National Legal Aid & Defender Association Life in the Balance Seminar, National Association of Criminal Defense Lawyers Making the Case for Life, Advancing Real Change, Inc. annual mitigation training and numerous annual programs around the country sponsored by the Administrative Office for the U.S. Courts.

157. Hughes, *supra* note 4, at 361–87 (explaining how previous training and experience from a multitude of disciplines differs from what is required in that individual's role as a mitigation specialist).

toward holistic defense.<sup>158</sup> However, the standards and practice common in other professions, like social work, do not always align with the admissibility of evidence and sought-after outcomes of the criminal legal system.<sup>159</sup> Diagnoses and treatment are often arrived at through clinical trial and error; however, this methodology and potential for multiple or conflicting expert opinions does not fare well in the eyes of a potential jury, judge, or prosecutor.<sup>160</sup>

As a core member of a criminal defense team, the mitigation specialist does not testify.<sup>161</sup> As the ABA Guidelines emphasize, “lead counsel bears overall responsibility for the performance of the defense team,” and this is true in any case.<sup>162</sup> Attorneys—and members of the defense team—are bound by duties of loyalty to the client and confidentiality;<sup>163</sup> so too is the mitigation specialist.<sup>164</sup> The aim of the mitigation specialist is to learn all that can be learned about the client, which necessarily includes sensitive information about allegations—related to the charged crimes or otherwise—and topics that may not be ethical or relevant to share with individuals outside of the defense team.<sup>165</sup> In furtherance of this aim, mitigation specialists must minimize barriers to disclosure, including confidentiality concerns, through the building of rapport.<sup>166</sup> As legal ethicist Lawrence Fox has observed, “The very *raison d’être* of the confidentiality obligation is the fact that, as hard as it is to convince clients they should share their innermost concerns with their lawyers, one way to overcome that reluctance is to pledge that the lawyers’ lips are sealed.”<sup>167</sup> However, if a mitigation specialist takes the stand, rules of discovery will likely compel disclosure of any information considered or uncovered during the investigation.<sup>168</sup> This in turn risks

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158. *Id.* at 343–44.

159. *See, e.g., id.* at 361–62; *cf. Supplementary Guidelines, supra* note 3, at Guideline 10.11.

160. *See generally* Hughes, *supra* note 4, at 361–87.

161. Andrews, *supra* note 123, at 157.

162. 2003 ABA Guidelines, *supra* note 3, at Guideline 10.4(b).

163. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 1 (AM. BAR ASS’N 2020) (explaining that avoiding conflicts of interest stems from duty of loyalty); MODEL RULES OF PRO. CONDUCT 1.6 (AM. BAR ASS’N 2020) (proposing rules for guarding confidentiality).

164. As the Supplementary Guidelines make clear, *all* defense team members “are bound by rules of professional responsibility that govern the conduct of counsel respecting privilege, diligence, and loyalty to the client.” *Supplementary Guidelines, supra* note 3, at Guideline 4.1(C).

165. Andrews, *supra* note 123, at 157.

166. *Supplementary Guidelines, supra* note 3, at Guideline 5.1(C).

167. Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 HOFSTRA L. REV. 775, 800 (2008).

168. Andrews, *supra* note 123, at 158–59.

waiver of the work product privilege, jeopardizes client confidentiality, and creates barriers to the full and open disclosure of sensitive information by witnesses.<sup>169</sup>

Mitigation specialists must also be able to produce voluminous and detailed work product, including memoranda of interviews with the client and witnesses, logs of efforts to obtain records, witness lists, chronologies, family trees, and other working documents that distill information into possible themes and theories for counsel.<sup>170</sup> If counsel determines that a mitigation report is to be drafted for submission to the court or another decision-maker, the mitigation specialist is often responsible for authoring the document.<sup>171</sup> This should include information about the past, present, and future of the client, and provide detailed individualized re-entry plans.<sup>172</sup>

It is the duty of all defense team members, including the mitigation specialist, to be aware and mindful of discovery rules related to all documented work.<sup>173</sup> As a general rule, however, the mitigation specialist falls under the same privilege as counsel because they are a core member of the defense team.<sup>174</sup> This means that their materials are rightly considered attorney-client work product and should be shielded from disclosure.<sup>175</sup>

### 1. Cultural Competency

All team members must commit to and seek to develop cultural competency or cultural humility.<sup>176</sup> “In the context of mitigation,

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169. See Hughes, *supra* note 4, at 341 n.12 (“The distinction between a mitigation specialist who serves as a testifying expert at trial and a mitigation specialist who serves as a consulting member of the capital defense team is critical. Testifying experts waive protections such as attorney-client privilege and work product, whereas non-testifying consultants arguably retain such protections.” (citing Fox, *supra* note 167, at 802)).

170. See, e. g., Fox, *supra* note 167, at 795–96 (discussing importance of mitigation specialist’s file, memoranda, and documentation in flagging “powerful mitigating evidence” for counsel).

171. Counsel is responsible for the division of responsibility within defense teams, see *Supplementary Guidelines*, *supra* note 3, at Guidelines 5.1, 10.4, 10.11, and as the harvester and curator of the relevant information this task is often best performed by the mitigation specialist.

172. Cook et al., *supra* note 119, at 44, 46.

173. Fox, *supra* note 167, at 802.

174. MODEL RULES OF PRO. CONDUCT r. 5.3 cmt. 3 (AM. BAR ASS’N 1983).

175. Fox, *supra* note 167, at 802.

176. See Shamaila Khan, *Cultural Humility vs. Cultural Competence—and Why Providers Need Both*, HEALTHCITY (Mar. 9, 2021), <https://healthcity.bmc.org/policy-and-industry/cultural-humility-vs-cultural-competence-providers-need-both>

culturally competent investigation is more than an admirable and desirable skill. It is a standard of performance.”<sup>177</sup> Cultural competency is most commonly seen through a lens of race, but culture is inclusive of much more, including gender, sexual identity, age, nationality, and language.<sup>178</sup> Culture “is an ever-developing dialogue” between individual and environment; it encompasses the patterns by which individuals “make sense of the events through which they live,”<sup>179</sup> patterns “by which we parent, build families, perform work, define education, seek community, find hope, and overcome or fall prey to adversity.”<sup>180</sup> Cultural competency is an ongoing process<sup>181</sup> and requires dedication to developing awareness and humility, “recognizing clients as experts of their own culture, [and] committing to lifelong learning.”<sup>182</sup>

The mitigation specialist must be culturally competent. By fully integrating a defense team member who is deeply familiar with and experienced in the client’s cultural reality, the quality of representation and the likelihood of a positive disposition both increase.<sup>183</sup> Inclusion and prioritization of more culturally competent members of the defense team, especially as trained and experienced mitigation practitioners, ultimately benefits the accused and minimizes barriers to disclosure.<sup>184</sup> Cultural competency allows for unspoken knowledge and understanding that does not have to be

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[<https://perma.cc/98JN-UWD2>] (discussing the more recent shift to “cultural humility” as reflecting an acknowledgment that the language of “competence” is problematic for its suggestion “that there is categorical knowledge a person could attain about a group of people, which leads to stereotyping and bias,” and because “it denotes that there is an endpoint to becoming fully culturally competent.”).

177. Holdman & Seeds, *supra* note 106, at 896.

178. *Id.* at 885–86.

179. *Id.* (citing Clifford Geertz, *The Impact of the Concept of Culture on the Concept of Man*, in *THE INTERPRETATION OF CULTURES* 33, 363 (1973) (quotations omitted)).

180. *Id.* at 886.

181. *Id.* at 906–07.

182. See *Social Workers’ Ethical Responsibilities to Clients*, NAT’L ASS’N. OF SOC. WORKERS, <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English/Social-Workers-Ethical-Responsibilities-to-Clients> [<https://perma.cc/KSZ8-JPHJ>] (last visited Apr. 12, 2023).

183. See, e.g., Todd Haugh, *Can the CEO Learn from the Condemned? The Application of Capital Mitigation Strategies to White Collar Cases*, 62 AM. U.L. REV. 1, 2 (2012) (discussing the utility of strategic mitigation techniques in white-collar defense).

184. See Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, *THE CHAMPION*, Jan.–Feb. 1999, at 36 (discussing common barriers to disclosure and observing that “[o]vercoming these barriers will often mean involving someone in the defense team with whom the client will feel more at ease.”); Holdman & Seeds, *supra* note 106, at 920.

learned or uncovered;<sup>185</sup> a shared cultural language circumvents much of the preliminary work necessary to familiarize oneself with the practices, worldview, and systems of meaning-making inherent in an individual's culture and background.<sup>186</sup> But cultural competency is not a short cut; indeed, a culturally-competent approach "eschews reliance on stereotype."<sup>187</sup> The mitigation specialist assigned or hired to assist on a case should therefore continuously seek to develop cultural competence to work most effectively with the client and witnesses,<sup>188</sup> while maintaining an "inside-out" approach to culture—reflecting the idea that one's own insights and experience inform and define "how an individual interprets and determines the consequences of his social and cultural conditions, interprets his relations with society's institutions and rules, and interprets his life."<sup>189</sup> In other words, the work still requires intensive, in-person, individual rapport building with individual witnesses regardless of cultural proximity or shared characteristics.<sup>190</sup>

## 2. Client and Witness Interviews

The two core tenets of capital and JLWOP mitigation investigation—interviews and document collection—hold true in mitigation investigations in other contexts as well.<sup>191</sup> The continuing arc of social history development, from gathering narratives to wielding such information as underlying data for expert conclusions and onward to presentation, remains the trajectory of mitigation investigations in all cases.<sup>192</sup> The field of mitigation must not compromise the proven value and reliability of repeated, face-to-face, in-person interviews no matter the severity of the case.<sup>193</sup> Like other professions where reliability is paramount, this is the standard practice: "Police officers, social workers, parole officers, and defense investigators knock on doors and visit subjects in their homes. In the

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185. See Holdman & Seeds, *supra* note 106, at 922 (discussing the ability of a culturally-competent mitigator to uncover and present client stories in a more empathetic manner).

186. See *id.* at 905.

187. *Id.* at 887.

188. *Id.* at 885.

189. *Id.* at 887.

190. See *id.* at 906–07.

191. See O'Brien et al., *supra* note 81, at 340–41.

192. See *Supplementary Guidelines*, *supra* note 3, at Guideline 1.1.

193. See *id.* at Guideline 10.11 ("Team members must conduct in-person, face-to-face, one-on-one interviews with the client, the client's family, and other witnesses . . . [m]ultiple interviews will be necessary . . .").

medical profession, the most important tool ‘is the face-to-face interview’ because other methods of acquiring information ‘are inherently limited.’”<sup>194</sup>

In all criminal cases, the mitigation specialist must conduct unannounced, in-person interviews with the client and other potential mitigation witnesses.<sup>195</sup> This ensures that information is accurate and reliable.<sup>196</sup> Maximizing the accuracy of information provided in an interview requires the mitigation specialist to first build rapport with the witness.<sup>197</sup> Although some information may be easy to share, many of the topics that must be explored in a mitigation investigation are highly sensitive.<sup>198</sup> A competent mitigation investigation will surface dark, shameful family secrets; it “exposes raw nerves, re-traumatizes, scratches at the scars nearest the client’s heart.”<sup>199</sup> It is often only in the context of strong rapport, built through warm and nonjudgmental tone, smiles, eye contact, and calming body language, that witnesses have the space and support to speak truthfully and expansively about sensitive topics central to a comprehensive mitigation investigation.<sup>200</sup> The accuracy of a witness’s recollection about such topics depends on whether they are in an appropriate state of mind to disclose such information;<sup>201</sup> this in turn requires a mitigation specialist who has spent a significant amount of time developing a dynamic that will enable the witness to make such disclosures.<sup>202</sup> Like mitigation specialists, individuals in other professions engaged in soliciting sensitive information from people recognize the importance of human connection to obtain accurate information.<sup>203</sup>

A mitigation specialist performs interviews by going unannounced to the home of a potential witness.<sup>204</sup> “By going to the home of a witness or family member, the mitigation specialist will observe things about the interview subject that would not be visible in the

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194. O’Brien et al., *supra* note 100, at 340 (quoting BENJAMIN JAMES SADOCK & VIRGINIA ALCOTT SADOCK, KAPLAN & SADOCK’S SYNOPSIS OF PSYCHIATRY: BEHAVIORAL SCIENCE/CLINICAL PSYCHIATRY 6 (9th ed. 2003)).

195. O’Brien et al., *supra* note 81, at 342.

196. *See id.*

197. *See Supplementary Guidelines, supra* note 3, at Guidelines 5.1.C, 10.11.C.

198. *See* Holdman & Seeds, *supra* note 106, at 902.

199. *See* O’Brien, *supra* note 16, at 739.

200. *See* O’Brien et al., *supra* note 100, at 345, 347–48.

201. *See id.* at 346–47.

202. *See id.* at 347–48.

203. *See id.* at 347.

204. *See id.* at 342.

office, thus providing a deeper perspective[.]”<sup>205</sup> Making arrangements ahead of time by phone can result in several barriers to speaking with witnesses, including the witness not answering or hanging up on an unknown or unwanted caller; witnesses being concerned about not being able to see and verify the identity of the person with whom they are speaking; witnesses suggesting that they are open to meeting in person, but then deciding not to; witnesses refreshing or shaping their memories in ways unknown to the interviewer on the other end of the line that distort rather than aid in their recollections; or a witness contacting other witnesses and coordinating in ways that result in a loss of control over the timing of contact with those individuals, which can create potential privacy issues.<sup>206</sup> Finally, being in person allows a mitigation specialist to ensure that the conversation is taking place out of earshot of anyone else.<sup>207</sup> This is crucial because, as “[h]ealth care providers recognize[,] . . . ‘most patients do not speak freely unless they have privacy and are sure that their conversations cannot be overheard.’”<sup>208</sup>

Finally, mitigation investigation is inherently field-based work.<sup>209</sup> More can be learned about people, their habits, beliefs, and values by a single visit to their homes than can be learned in any number of conversations over the phone or even by video.<sup>210</sup> The items on a person’s wall, the presence or absence of furniture, how a home is cared for, maintained, and organized, whether there is central air or heating, if there is a particular smell or odor, whether there is a place to eat with others, if the walls have paint chips that have peeled away, if there are pets and how they are treated, and who stops by the home or calls are some but not all of the important data points which cannot be obtained through other means.<sup>211</sup> This in-person approach assures that a well-trained and experienced mitigation specialist can glean additional information from observing the environment as well as the witness.<sup>212</sup>

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205. O’Brien, *supra* note 16, at 746.

206. See O’Brien et al., *supra* note 100, at 342, 349–50.

207. *Id.* at 349.

208. *Id.* (quoting BENJAMIN JAMES SADOCK & VIRGINIA ALCOTT SADOCK, SYNOPSIS OF PSYCHIATRY 7 (10th ed. 2009)).

209. See Cassandra Stubbs & Elizabeth Vartkessian, *Capital Investigation One Year into the Pandemic: When Field Work Can Resume (And Why That Day is Not Yet Here)*, THE CHAMPION, May 2021, at 20, 22.

210. See MURPHY & DILLON, *supra* note 94, at 28.

211. See *id.*

212. O’Brien et al., *supra* note 100, at 350–53.

The standard practice of mitigation interviewing, therefore, requires ongoing, regular in-person contact with clients and witnesses, often resulting in multiple follow-up conversations as new information is obtained and as trust continues to form.<sup>213</sup> This repetition has been at the core of effective rapport-building and facilitates the disclosure of sensitive topics such as abuse, trauma, and mental illness often cloaked under societal stigma and shame.<sup>214</sup>

### 3. Document/Record Collection

Document collection and subsequent analysis must be recorded with parity to interviewing documentation.<sup>215</sup> Obtaining releases for searching privately held records must be secured from not only the accused but generations of their family members, and the thorough multi-generational investigation inclusive of neighborhood, community, and sociopolitical risk factors must be maintained.<sup>216</sup>

Releases, rather than court orders or subpoenas, should be used. Using releases prevents the defense from disclosing their investigation to the government, an obligation they do not have.<sup>217</sup> Moreover, it protects the privacy of the accused and other family member witnesses; if counsel does not need to use the records in court, the documents will go no further.<sup>218</sup> In contrast, using court orders and subpoenas often result in potentially sensitive documents becoming part of the public record, providing no such security.<sup>219</sup>

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213. See *Supplementary Guidelines*, *supra* note 3, at Guideline 10.11(C).

214. *E.g.*, Stubbs & Vartkessian, *supra* note 209, at 22.

215. See *Supplementary Guidelines*, *supra* note 3, at Guidelines 4.1(C), 5.1(F).

216. See *id.* at Guideline 5.1(C).

217. In almost every state, defense investigation and work product are protected by the attorney-client privilege, and disclosure cannot be compelled by the state. See MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2020); MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS'N 2020).

218. Obtaining records through release rather than through judicial process means that the documents may be kept in the confidential client file. See Fox, *supra* note 167, at 800-02 (discussing the obligation to maintain “the confidentiality of the legal and factual investigative work of the defense team”). Certain records are also protected from disclosure by the federal Health Insurance Portability and Accountability Act (HIPAA) and analogous state laws, which apply to attorneys in possession of the protected health information of others.

219. Many jurisdictions now make their criminal case dockets available to the public online for free, or provide that documents may be downloaded for a small fee. See, *e.g.*, *Search Our Records and Documents*, OFF. OF HARRIS CNTY. DIST. CLERK, <https://www.hcdistrictclerk.com/eDocs/Public/Search.aspx> [<https://perma.cc/QAH9-6JJ4>] (last visited Apr. 12, 2023) (providing free search and access to all dockets and documents publicly filed in criminal cases).

At a minimum, the mitigation specialist needs to collect records concerning immediate or nuclear family members (mother, father, siblings—whether biological or otherwise), grandparents, aunts, uncles, cousins, nieces, nephews, offspring, and any caretakers.<sup>220</sup> These records should include: any and all available courthouse records, including criminal, civil, misdemeanor, and traffic courts; education; employment; all institutional records from departments of corrections, youth detention facilities, or diversion programs; immigration; social services such as social security disability insurance or child protection; police records, including calls for service, medical; mental health; and military.<sup>221</sup>

Mitigation specialists also need to gather documentary evidence regarding the social systems in which the client lived, including, but not limited to: the presence of environmental toxins, quality of education, availability of healthy foods, and (lack of) safety within the community.<sup>222</sup> The data gleaned from inquiry into these larger systems is relevant to an individual's development and disposition.<sup>223</sup>

Collection of records also includes the collection of photographs, videos, musical recordings, artwork, letters, and other artifacts of the accused's life.<sup>224</sup> As mitigation investigation is rooted in unearthing shared experiences and common moral dilemmas,<sup>225</sup> it is essential that the defense team take every opportunity to humanize their client through audio and visual narratives.

#### 4. Document Analysis and Working with Defense-Retained Experts

The mitigation specialist is chiefly responsible for understanding and interpreting the records collected and alerting counsel to any available leads or concerns.<sup>226</sup> They must possess knowledge for how to cull records for potential witnesses, additional sources, and further avenues of investigation.<sup>227</sup> Synthesizing these records into potential demonstratives, genograms, and underlying chronologies

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220. See *Supplementary Guideline*, *supra* note 3, at Guideline 10.11(B), (F).

221. See *id.* at Guideline 10.11(D) (“It is the duty of team members to gather documentation to support the testimony of expert and lay witnesses, including, but not limited to, school, medical, employment, military, and social service records . . .”).

222. See *id.* at Guidelines 5.1(D), 10.11(B).

223. See Haney, *supra* note 10, at 844, 856.

224. See *Supplementary Guidelines*, *supra* note 3, at Guideline 10.11(G).

225. See Haney, *supra* note 10, at 877–88.

226. See *Supplementary Guidelines*, *supra* note 3, at Guideline 5.1(F).

227. See *id.* at 683.

for relevant experts is a regular part of mitigation practice.<sup>228</sup> Documenting a multi-generational life history is inherently voluminous, and the work of a mitigation specialist in translating the information into a digestible format is critical to efficient and effective representation.<sup>229</sup> For example, mitigation specialists, as a standard, are responsible for drafting a complete and thorough life history timeline, which can then be used by a neuropsychologist or other mental health expert as a foundation to their clinical conclusions.<sup>230</sup>

It is substandard and inappropriate for defense teams to have a client evaluated without having conducted a thorough inquiry into the life and functioning of their client.<sup>231</sup> This is both potentially harmful to the client and wasteful of the often limited resources available to the defense team.<sup>232</sup> It can be harmful to allow a mental health expert to evaluate an accused person without a referral question.<sup>233</sup> Counsel must know enough about the accused to direct the expert's inquiry and to ensure the appropriate tests are being administered.<sup>234</sup> Moreover, without the benefit of collateral information provided to the expert by counsel and sourced by the mitigation specialist, the examiner may form an opinion that is dangerously inaccurate.<sup>235</sup> There are many labels within psychology and psychiatry that are deeply dehumanizing and often better attributable to experiences of trauma.<sup>236</sup> In the absence of context and the life history evidence that a mitigation specialist can obtain, damaging mental health labels could be wrongly imposed on an accused person, following them

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228. *See id.* at 683, 692.

229. *See Supplementary Guidelines, supra* note 3, at Guideline 5.1(D).

230. *See id.* at Guideline 10.11(D), (E); *see also* Dudley & Leonard, *supra* note 89, at 973.

231. Dudley & Leonard, *supra* note 89, at 973; Kathleen Wayland & Sean D. O'Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 HOFSTRA L. REV. 519, 572–73 (2013).

232. *See* Wayland & O'Brien, *supra* note 231, at 586.

233. *See id.* at 588; *see also* John Blume & Pamela Leonard, *Principles of Developing and Presenting Mental Health Evidence in Criminal Cases*, THE CHAMPION, Nov. 24, 2000, at 63 (discussing use of referral questions).

234. *See* Wayland & O'Brien, *supra* note 203, at 531–32.

235. *See* Julie Goldenson et al., *Trauma-Informed Forensic Mental Health Assessment: Practical Implications, Ethical Tensions, and Alignment with Therapeutic Jurisprudence Principles*, 28 PSYCH., PUB. POL., & L. 226, 232 (2022) (“The inherent potential for misdiagnosis is compounded when evaluating ethnic and cultural minorities” and forensic mental health examiners “would be well-served to understand the growing body of literature on complex trauma and comorbidities . . . .”) (internal citations omitted).

236. *See* Wayland & O'Brien, *supra* note 231, at 543.

throughout any period of incarceration or after.<sup>237</sup> Effective and ethical criminal defense teams must carry on the standard practice of conducting mitigation investigations prior to retaining experts and seeking their opinions.<sup>238</sup>

*B. How Mitigation Improves Client Outcomes*

The use of mitigation specialists and the fruits of their investigation are standard operating procedure for defense advocates dedicated to uncovering and communicating conditions and events that, in turn, enable decision-makers to understand and respond to the mitigating, humanizing details of a client's life.<sup>239</sup> Competent defense practitioners consider and utilize life-history evidence at nearly every point in the adjudicative process: in advocating for more appropriate charging decisions; in pre-trial negotiations; in trials on the merits and in sentencing proceedings; in appeals and post-conviction; in clemency proceedings; in probation and parole considerations; in sentencing modifications; and in defense-initiated victim outreach.<sup>240</sup> The relevance and utility of mitigation evidence has only been expanded by the passage of new laws related to sentencing modifications and other types of "second look" proceedings.<sup>241</sup>

In non-capital, non-JLWOP criminal cases where the judicial process may not contemplate the same capacity for individual consideration, effective mitigation still has a role to play.<sup>242</sup> For one, a particular advantage of having a mitigation specialist as a member of the defense team is the enhanced ability to identify and prioritize various issues with some degree of insight or expertise that counsel may lack.<sup>243</sup> Moreover, the unique skillset of a trained mitigation specialist carries with it the potential to unearth exculpatory evidence even where such evidence is not immediately obvious, thus facilitating a broader and more persuasive defense strategy. For example, mitigation investigations can uncover pre-arrest onset of

237. *See id.*

238. *See, e.g.,* Dudley & Leonard, *supra* note 89, at 974–75.

239. *See* Haney, *supra* note 10, at 559–60.

240. *See* Branham & Burr, *supra* note 126, at 1027–28 (explaining that "[q]uestions about . . . the social history of the defendant are often eventually asked by victims" and the role of the victim liaison in discussing these issues).

241. *See* recently passed laws cited *supra* note 79.

242. Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41, 85 (2013).

243. *See id.* at 55–56; *see also* *Supplementary Guidelines*, *supra* note 3, at Guideline 5.1(C).

psychotic symptoms or a mental decline in the lead-up to the offense, providing both a potential legal defense and sentencing mitigation.<sup>244</sup> Mitigation investigation can also begin to document genetic predisposition to such events or environmental factors and stressors presenting conditions of risk.<sup>245</sup> A comprehensive mitigation investigation can bolster a legal defense of insanity or reduced culpability due to mental state<sup>246</sup> and suggest treatment or support systems that would enable a client to function effectively and safely in their community.<sup>247</sup>

Another common thread of mitigation investigation is an exploration of the nature of an accused's parenting and familial relationships, including the relationships between them and their children.<sup>248</sup> Such an inquiry can develop evidence and testimony that powerfully rebuts traditional prosecution narratives which often mischaracterize those facing criminal charges as having total disregard for human life or as selfish and reckless individuals who lack consideration for humanity.<sup>249</sup>

In sum, mitigation investigation that begins at the outset of a case allows for development of these themes and others that impact or challenge the evidence of an individual's culpability.<sup>250</sup> These themes can then be incorporated into the regular mechanics of a criminal defense workup at all stages of the case, from arrest through clemency.<sup>251</sup>

Common themes of mitigation narratives to date have included life events or conditions that impair a client's ability to achieve their full potential as a contributing member of society.<sup>252</sup> As discussed above, a multi-generational social history can uncover a genetic loading for mental illness or addiction, and documentation of an individual's childhood development can offer insight into current cognitive

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244. See, e.g., Michael Winkelman, *Cultural Factors in Criminal Defense Proceedings*, 55 HUM. ORG. 154, 157 (1996).

245. Haney, *supra* note 10, at 880–81.

246. See Dudley & Leonard, *supra* note 89, at 976.

247. See *id.* at 988.

248. See *Supplementary Guidelines*, *supra* note 3, at Guideline 1.1(A) (defining mitigating evidence as, *inter alia*, the “compassionate factors stemming from the diverse frailties of humankind” including the “execution impact” on the defendant's loved ones).

249. See Haney, *supra* note 10, at 881.

250. Craig Haney, *On Mitigation as Counter-Narrative: A Case Study of the Hidden Context of Prison Violence*, 77 UMKC L. REV. 911, 915–16 (2009).

251. See, e.g., Cook et al., *supra* note 119, at 44.

252. Haney, *supra* note 10, at 880–81; Russel Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 UNIV. OF PA. J.L. & SOC. CHANGE 237, 261–62 (2007-2008).

functioning and adaptive behavior.<sup>253</sup> A fulsome understanding of these events and conditions provides a client-centric framework for more effective intervention, in some cases as an alternative disposition to imprisonment.<sup>254</sup> Taking into account the historical factors and context surrounding an individual facing criminal prosecution lays the foundation for a more individualized approach that can better address the underlying causes of behavior and, ideally, improve outcomes.

Armed with a comprehensive social history and the foundational insights it provides, those working within the criminal legal system are better equipped to develop functional treatment and successful rehabilitation plans for the accused, pursue opportunities for restorative justice, and achieve a quantifiable decrease in recidivism by identifying a structure and means to achieve these positive outcomes.<sup>255</sup>

## V. CONCLUSION

The presentation of mitigation evidence matters in all criminal cases. Collection of detailed information about a person accused or convicted of any crime is essential because an understanding of the full capacity and experiences of an individual allows for more informed decision-making at every stage of a criminal prosecution.<sup>256</sup> As this article and others have shown, the evolution of mitigation investigation has been long and arduous, and mitigation's relevance and scope is continually expanding.<sup>257</sup> The institutionalization of mitigation in capital and youth cases has increased the utilization of

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253. See John H. Blume & Pamela Blume Leonard, *Principles of Developing and Presenting Evidence of Mental Retardation*, THE CHAMPION, May 2022, at 60–61 (flagging the foundational necessity of first “conduct[ing] a thorough social history investigation”).

254. For example, many jurisdictions have established specific mental health diversion courts, which offer wraparound services and non-carceral diversion opportunities for accused with mental health issues. See, e.g., Christine M. Sarteschi et al., *Assessing the Effectiveness of Mental Health in Courts: A Quantitative Review*, 39 J. CRIM. JUST. 12, 19 (2011) (finding that available studies surveyed in 2011 suggested that mental health courts provided an effective intervention, linking individuals to treatment options and reducing the risk of recidivism).

255. *Id.* at 18–19.

256. See Miriam Gohara, *Narrating Context and Rehabilitating Rehabilitation: Federal Sentencing Work in Yale Law School's Challenging Mass Incarceration Clinic*, 27 CLINICAL L. REV. 39, 52–53 (2020).

257. See *supra* Part I.

humanity as a counternarrative in our adversarial system.<sup>258</sup> Conceptualizing mitigation as a central part of a criminal legal defense at the outset enables defense teams to achieve positive outcomes ensures the inclusion of at least one team member who reminds all involved to center humanity and narrative development as strategic tools in the defense team's arsenal.<sup>259</sup> Mitigation, while doctrinally rooted in the constitutional mandate of individualized sentencing in capital cases, has been proven in practice to offer a widely applicable mechanism by which to infuse informed advocacy into the defense of any criminal charge.<sup>260</sup>

Absent properly collected and developed mitigation evidence, however, decision-makers in any case are left with an artificially limited picture of the accused, typically informed only by the charges against them, the government's investigation, and any previous criminal accusations.<sup>261</sup> It is a version of the accused in which their personhood has been intentionally wiped out.<sup>262</sup> All advocacy on behalf of an accused person should therefore seek to incorporate an understanding of the individual being judged and convey their humanity.<sup>263</sup> Consideration of mitigating circumstances and the breadth of current statutory and constitutional law providing for their admissibility and relevance offers an avenue to achieve more humane outcomes in every case.<sup>264</sup>

Permitting decisions to be made about an accused's life and liberty by an authoritative decision-maker operating without an understanding of that person's history runs counter to the values at the foundation of the American system of criminal law and punishment.<sup>265</sup> Competent criminal defense practitioners understand mitigation is a way to counter the mainstream narratives that malign and otherize their clients by putting forth connective and life-

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258. See Haney, *supra* note 10, at 841–42 (discussing the “crime master narrative” and the dehumanizing effects of media, political discourse, public discussion, and prosecution strategies in criminal cases).

259. See *supra* Part IV.

260. See O'Brien, *supra* note 16, at 713–14.

261. See *supra* Section IV.B.

262. See Haney, *supra* note 10, at 841–42 (discussing the “crime master narrative” and the dehumanizing effects of media, political discourse, public discussion, and prosecution strategies in criminal cases).

263. See *id.* at 879–80.

264. See, e.g., David McCord & Mark W. Bennett, *The Proposed Capital Penalty Phase Rules of Evidence*, 36 CARDOZO L. REV. 417, 441–45 (2014) (discussing which kinds of evidence are admissible—and which should be admissible—in mitigation, and the various effects on decision-makers).

265. See, e.g., U.S. CONST. amends. V, VI, VIII, XIII, XIV.

affirming narratives instead, thus making it harder for decision-makers to treat an accused or convicted person as less than human.<sup>266</sup>

Mitigation is a constitutional requirement of the modern death penalty and has played a key role in countless favorable dispositions.<sup>267</sup> Through these experiences, we know that the narratives of a complex life—a person’s history—carry the power to connect us all through our shared humanity.<sup>268</sup> As debate continues surrounding how to grapple with mass incarceration, racial disparities in sentencing, criminalization of poverty and mental illness, and other problems that plague today’s criminal legal system, practitioners of mitigation will continue to emphasize the centrality of mitigating evidence and assist attorneys and advocates as they incorporate mitigation in every aspect of their work.<sup>269</sup>

Mitigation’s role as an integrated standard of criminal representation is essential to fair and just sentencing in every case, and its efficacy and equal application throughout the criminal legal system requires the passage of and adherence to standardized professional guidelines.

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266. See *supra* Section IV.A.3.

267. See *supra* Part II.

268. See *supra* Part II.

269. See *The Center for Holistic Defense*, THE BRONX DEFENDERS, <https://www.bronxdefenders.org/holistic-defense/center-for-holistic-defense/> [https://perma.cc/VGH7-MYLQ] (last visited Apr. 12, 2023) (highlighting that many public defender and legal aid offices are embracing a holistic defense model, incorporating mitigation investigation and principles into the defense of criminal and civil cases for indigent clients).

