California Western Law Review

Volume 50 | Number 1 Article 3

2013

# It's Not Just for Death Cases Anymore: How Capital Mitigation Investigation Can Enhance Experiential Learning and Improve Advocacy in Law School Non-Capital Criminal Defense Clinics

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# *IT'S NOT JUST FOR DEATH CASES ANYMORE*: HOW CAPITAL MITIGATION INVESTIGATION CAN ENHANCE EXPERIENTIAL LEARNING AND IMPROVE ADVOCACY IN LAW SCHOOL NON-CAPITAL CRIMINAL DEFENSE CLINICS

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## INTRODUCTION

Within the last two decades, the total number of defendants facing federal criminal charges has skyrocketed.[1] In 1995, 54,980 defendants were charged in federal courts throughout the country.[2] By 2011, that number nearly doubled to 101,149 defendants.[3] Almost 90,000 defendants—about 90-percent of those charged—entered pleas of guilty.[4] Strikingly, only 274 defendants—less than one percent—were acquitted after a jury trial.[5] In many states, the percentages of criminal defendants who pleaded guilty in 2011 are very similar to the federal totals.[6] In effect, the term "trial lawyer" in the criminal

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1. *See Judicial Facts and Figures*, U.S. COURTS (2011), http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2011/Table505.pdf.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. For instance, in Pennsylvania, county-by-county statistics reflect higher percentages of guilty pleas than in federal courts. *See* PA. COMM'N ON SENTENCING,

defense context has become oxymoronic. A more apt characterization is "guilty plea lawyer."

In every case involving a guilty plea, the defendant will be sentenced for the offense of conviction.[7] Needless to say, in light of the enormous number of defendants who plead guilty, the effective assistance of counsel at sentencing is vital.[8] By the same token, the ethical and professional requirements for sentencing counsel are considerable.[9] Under American Bar Association ("ABA") standards, "[d]efense counsel should present to the court [at sentencing] any ground which will assist in reaching a proper disposition favorable to the accused."[10] Indeed, the United States Supreme Court has long held that the need for competent counsel may be *greater* at sentencing than in the determination of guilt because at sentencing "a judge usually moves within a large area of discretion and doubts. . . . Even the most self-assured judge may well want to bring to his aid every

SENTENCING IN PENNSYLVANIA: ANNUAL REPORT 46 (2011), *available at* http://pcs.la.psu.edu/publications-and-research/annual-reports/2011-revised-10-11-2012/view In Montgomery County, 98% of the 5,521 defendants charged in 2011 entered pleas of guilty while less than 1% opted for a jury trial. *Id.* at 47. In Bucks County, 98% of the 5,147 defendants charged in 2011 entered guilty pleas while less than 1% opted for a jury trial. *Id.* at 46. In less populous Butler County, every one of the 1,252 defendants charged in 2011 pleaded guilty. *Id.* In Illinois, between 2000-2010 (the most recent years for which data are available), the Illinois Sentencing Policy Advisory Council reported that "trials accounted for less than 5% of felony convictions in eighty-two of Illinois' 102 counties; looked at the other way, guilty pleas accounted for 95% or more of felony convictions in eighty-two of Illinois' 102 counties." ILL. SENTENCING POL'Y ADVISORY COUNCIL, RESEARCH BRIEFING UPDATE: ILLINOIS FELONY SENTENCING – A RETROSPECTIVE 4 (2012).

7. For analysis of federal criminal cases, see U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2011 1 (2012), *available at* http://www.ussc.gov/Research_and_Statistics/Research_Publications/2012/FY11_Overview_Federal_Criminal_Cases.pdf ("The United States Sentencing Commission received information on *86,631* federal criminal cases in which the offender was sentenced in fiscal year 2011. Among these cases, 86,201 involved an individual offender and 160 involved a corporation or 'organizational' offender.") (emphasis added) (footnotes omitted).

8. *See, e.g.*, Lafler v. Cooper, 132 S. Ct. 1376, 1385-86 (2012) (affirming that Sixth Amendment right to effective assistance of counsel applies at sentencing).

9. *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-8.1 (1993).

10. *Id.* § 4-8.1(b).

consideration that counsel for the accused can appropriately urge."[11] As a result, the failure of defense counsel to investigate, prepare, and present mitigating factors at sentencing can constitute ineffective assistance under the Sixth Amendment.[12]

Fulfilling this duty in capital cases means that the defense team must conduct an exhaustive and meticulous investigation about matters including the defendant's "childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings."[13] In turn, the evidence unearthed during the investigation must be transformed into a coherent, compelling, and comprehensive narrative of the defendant's life for the mitigation presentation.[14] However, this meticulousness during sentencing was solely reserved for capital cases until 2005.

The professional and constitutional obligations of defense counsel in non-capital sentencing hearings have taken on heightened significance since the Supreme Court's 2005 ruling in *United States v. Booker*.[15] In *Booker*, the Court declared that the mandatory United States Sentencing Guidelines violated the Sixth Amendment right to trial by jury.[16] To remedy the violation, the *Booker* majority rendered

11. Carter v. Illinois, 329 U.S. 173, 178 (1946).

12. *See, e.g.*, Grigg v. United States, 3:13-cv-00040 (Doc. No. 23) (M.D. Tenn. July 16, 2013) (concluding that defense counsel rendered ineffective assistance under the Sixth Amendment due to his failure to investigate potentially mitigating evidence, file mitigating evidence with the court before defendant's sentencing hearing, or argue on behalf of defendant during the sentencing hearing); *see also* Berry v. Wolfbarger, No. 08-12894, 2010 WL 2681173 (E.D. Mich. July 6, 2010).

13. Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 324 (1983).

14. Michael N. Burt, *The Importance of Storytelling at All Stages of a Capital Case*, 77 UMKC L. REV. 877, 879 (2009) ("'If there is one dominant theme that explains [a successful defense], it is that the capital defendant's attorney must tell a powerful and coherent story of injustice . . . .'") (quoting WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES 178 (2006)) (alteration in original).

15. *See* United States v. Booker, 543 U.S. 220 (2005) (expanding the role of the court's discretion at sentencing, and thus expanding the defense counsel's role in highlighting factors in the defendant's favor at sentencing under 18 U.S.C. § 3553(a) (2000)).

16. *Id.* at 245.

the Sentencing Guidelines "effectively advisory,"[17] holding that the Sentencing Guidelines are only one of several factors that must be considered at sentencing.[18] In addition to the Sentencing Guidelines, the Court cited broad statutory factors courts should consider, including the "history and characteristics of the defendant" and the "nature and circumstances of the offense."[19] Tracking the statutory mandate, the Court reasoned that lower courts must impose sentences that are "sufficient, but not greater than necessary"[20] to achieve four essential goals: punishment, deterrence, protection of the public, and rehabilitation of the defendant.[21]

While both capital and non-capital sentencing hearings call for extensive mitigation investigation, critical differences still exist. Notably, in capital proceedings, the story—"stripped of legalese"—is at the heart of the sentencing.[22] This makes sense. After all, capital sentencing hearings involve presentations to juries, not judges.[23] The primary objective of the defense team in capital sentencing proceedings is achieving a sentence of life without the possibility of parole.[24] As a result, the narrative is unconcerned with legal considerations regarding the appropriate range of imprisonment or terms of post-release supervision.

Conversely, in non-capital federal proceedings, the defendant is sentenced by a judge who must cite both statutory authority and

17. *Id.*; *see also* Gall v. United States, 552 U.S. 38, 62 (2007) (Alito, J., dissenting) (affirming the holding in *United States v. Booker* that the United Stated Sentencing Guidelines are merely advisory).

18. *Booker*, 543 U.S. at 261.

19. *Id.* at 249 (quoting 18 U.S.C. § 3553(a)(1)) (internal quotation marks omitted).

20. *See* 18 U.S.C. § 3553(a).

21. *Booker*, 543 U.S. at 259-60.

22. Sean D. O'Brien, *Death Penalty Stories: Lessons in Life-Saving Narratives*, 77 UMKC L. REV. 831, 836 (2009).

23. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 206-07 (1976) (affirming the constitutionality of bifurcated capital proceedings including a "guilt phase" during which the jury determines the defendant's guilt or innocence and, upon conviction, a "penalty phase" during which the jury decides whether the defendant should be put to death).

24. *See* Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 360 (1993) ("[A] capital defense attorney's central mission is to present the defendant's 'case for life' . . . .").

sentencing guidelines to justify the sentence.[25] Thus, "legalese" matters. That is, counsel in a non-capital case must link the mitigation presentation to the corresponding statutory sentencing factors and guidelines.[26] Without this legal tether, counsel's narrative, even if compelling, may not result in the desired outcome.

Non-capital defense lawyers also face pragmatic obstacles to undertaking a "quasi-capital" mitigation investigation. First, mitigation investigation is costly and time-consuming.[27] Most defense lawyers, especially public defenders, are burdened with high caseloads and have limited investigative resources.[28] Second, non-capital defense lawyers often lack the experience and expertise of their capital brethren to effectively identify key mitigation evidence and use such evidence to paint a compelling portrait of the defendant at sentencing.[29] Third, unlike the teams who represent capital defendants, the non-capital lawyer is generally the defendant's sole advocate.[30]

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25. *See* Booker, 543 U.S. at 245-46 (holding that federal courts must consider the United States Sentencing Guidelines ranges, but also may "tailor the sentence" according to the factors enumerated in 18 U.S.C. § 3553(a)).

26. *Id.*

27. Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View from the Federal Bench*, 36 HOFSTRA L. REV. 819, 825-30 (2008) (discussing the "considerable amount of time" and high cost of a comprehensive mitigation investigation).

28. *See, e.g.*, *Sequestering Justice: How the Budget Crisis is Undermining Our Courts: Hearing Before the Subcomm. on Bankr. and the Courts of the S. Comm. on the Judiciary*, 113th Cong. 4 (2013) (statement of Hon. Julia S. Gibbons, Chair, Jud. Conf. Comm. on the Budget) ("[T]he pace at which criminal cases requiring court-appointed counsel has continued unabated, while resources in the [Federal] Defender Services program are diminishing."), *available at* http://news.uscourts.gov//sites/default/files/Judge-Gibbons-Testimony-07.23.13.pdf; *see also* Donald J. Farole, Jr. & Lynn Langton, *A National Assessment of Public Defender Office Caseloads*, 94 JUDICATURE 87 (2010) (reporting on the overwhelming caseloads and budget shortfalls experienced by state and local public defender offices).

29. *See* RUSSELL STETLER, NAT'L LEGAL AID & DEFENDER ASS'N, WHY CAPITAL CASES REQUIRE MITIGATION SPECIALISTS, *available at* http://www.nlada.org/DMS/Documents/998934720.005 ("[L]awyers . . . generally lack the skills to conduct life-history investigation.").

30. *See* Am. Bar Ass'n, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 952 (2003) [hereinafter *ABA Guidelines in Death Penalty*

For non-capital criminal defense lawyers, increasingly complex post-*Booker* mitigation investigations are compounded by the ever-increasing number of defendants entering guilty pleas and facing sentencing. One method to confront both emerging challenges is the creation of a manageable, cost-effective, and replicable mitigation investigation model, tailored to the specific needs of non-capital counsel. In fact, a blueprint for non-capital cases may be drawn from the essential techniques of capital mitigation investigation.

As this article proposes, law school criminal defense clinics provide an excellent environment to design and implement a non-capital mitigation investigation protocol based on the techniques used in death penalty cases. From a pedagogical perspective, such a model promotes student development of foundational lawyering skills and values, especially in the vital area of "narrative thinking characteristic of everyday practice."[31] From a pragmatic standpoint, creation of a mitigation investigation model benefits clinic clients and boosts the likelihood that similar investigative methods will become a staple of the student's post-graduate practice.

Part I charts the evolution of capital mitigation investigation and highlights recent jurisprudence signaling a movement of concepts associated with capital mitigation to non-capital cases. Part II provides a brief history of clinical legal education and outlines the structure and pedagogical goals of the non-capital criminal defense clinic. Finally, Part III explores how the use of a capital mitigation investigative model in non-capital criminal defense clinics advances clinical pedagogical goals.

## PART I
## *THE EVOLUTION OF CAPITAL MITIGATION INVESTIGATION*

Mitigation evidence in capital cases encompasses "facts about the defendant's character or background, or the circumstances of the

*Cases*] (recommending each capital defense team should consist of no fewer than two defense attorneys, an investigator, and a mitigation specialist).

31. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 96-97 (2007) (explaining that the "twofold aspect of professional expertise" required of lawyers is comprised of "analytical" and "narrative modes of reasoning").

particular offense, that may call for a penalty less than death."[32] Capital mitigation jurisprudence traces its origins to *Furman v. Georgia*, in which the Supreme Court temporarily ended the death penalty while planting the seeds for the growth of mitigation evidence.[33] In *Furman*, a narrow and fractured majority effectively eliminated every state death penalty statute by holding that discretionary death penalty laws—or those which give juries the unfettered choice to impose death—violate the Eighth Amendment's bar against "cruel and unusual punishment."[34] In one of five separate concurring opinions, Justice Potter Stewart wrote that the failure of such laws to provide meaningful sentencing guidance to jurors resulted in the "wanton[]" and "freakish[]" imposition of death sentences.[35] In another concurring opinion, Justice William Brennan captured the essence of mitigation, emphasizing that the core concern "underlying" the Eighth Amendment "is nothing less than the dignity of man."[36]

In *Gregg v. Georgia*, the Court upheld the constitutionality of a post-*Furman* statute which separated death penalty proceedings into two phases: a guilt stage and a sentencing phase.[37] In the initial stage, the jury or judge determined the defendant's guilt or innocence.[38] Upon a finding of guilt, the proceedings moved to a second phase during which the jury or judge decided whether the defendant should be put to death for the offense.[39] The Court concluded that the bifurcated scheme comported with Eighth Amendment restrictions as it contained structural mechanisms that reduced the risk of capriciously imposed death sentences.[40] Namely, during the

32. Franklin v. Lynaugh, 487 U.S. 164, 188 (1988) (O'Connor, J., concurring) (citing California v. Brown, 479 U.S. 538, 541 (1987)).

33. Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam).

34. *Id.*

35. *Id.* at 309-10 (Stewart, J., concurring) ("[The death sentences at issue] are cruel and unusual in the same way that being struck by lightning is cruel and unusual.").

36. *Id.* at 270 (Brennan, J., concurring) (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)) (internal quotation marks omitted).

37. Gregg v. Georgia, 428 U.S. 153, 162-69 (1976).

38. *Id.* at 162-63.

39. *Id.*

40. *Id.* at 195.

sentencing phase, the jury was limited to consideration of certain aggravating and mitigating factors.[41] In the majority's view, these restrictions provided procedural safeguards to the sentencing phase and distinguished the law from overly discretionary statutes.[42] After *Gregg*, the dual guilt and sentencing phase structure established the basic template for death penalty statutes across the country.[43]

While *Gregg* was chiefly concerned with imposing limits on jurors' sentencing discretion, two companion cases dealt with the constitutionality of statutes which eliminated discretion altogether.[44] In *Woodson v. North Carolina* and *Roberts v. Louisiana*, the Court struck down state laws mandating death for certain offenses.[45] The *Woodson* Court held that mandatory death penalty statutes offer an unacceptable alternative to laws allowing "arbitrary and wanton jury discretion" as they preclude "particularized consideration of relevant aspects of the character and record of each convicted defendant."[46] Likewise, in *Roberts*, the Court held that a Louisiana death penalty statute substituting "standardless jury discretion" with a "harsh[] and inflexible[]" mandatory standard overwhelms the constitutional requirement to "guide the jury in the exercise of its power to select those . . . who will receive death sentences."[47]

*Gregg*, *Woodson*, and *Roberts* established the constitutional framework for individualized sentencing of capital defendants. Subsequent cases established the expansive breadth and scope of admissible mitigation evidence.[48] In *Lockett v. Ohio*, the Supreme

41. *Id.* at 196-97.

42. *Id.* at 196-206 (holding that appellate review of the jury's application of the aggravating and mitigation factors precludes the "random or arbitrary imposition of the death penalty").

43. *See* Craig M. Cooley, *Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists*, 30 OKLA. CITY U. L. REV. 23, 40 (2005) ("Since *Gregg*, capital trials have been divided into two phases": a "guilt or innocence phase" and a "penalty phase.").

44. *See* Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

45. *Woodson*, 428 U.S. at 305; *Roberts*, 428 U.S. at 336.

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

47. *Roberts*, 428 U.S. at 332, 334-36.

48. While the scope of mitigation has broadened since *Gregg*, the aggravating factors a jury may consider at sentencing remain structured. The Supreme Court,

Court opened the mitigation floodgates, holding that the capital jury may consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[49] The decisions that followed exemplified *Lockett*'s inclusive language, approving the use of mitigation evidence stretching from the defendant's early childhood to predictors of his future conduct.[50] Indeed, the Court has continually reiterated that a capital jury may consider a "potentially infinite" number of mitigating factors at sentencing.[51] Concomitantly, the Court has established a low bar for the relevance of mitigation evidence, stating that admissibility hinges only on whether a juror could reasonably believe the evidence to be mitigating.[52] In addition, the Court has refused to require a "nexus" between the proffered

however, has endorsed the use of victim impact evidence during the sentencing phase to "'keep the balance [between mitigation and aggravation evidence] true.'" Payne v. Tennessee, 501 U.S. 808, 827 (1991) (quoting Snyder v. Massachusetts, 291 U.S. 97, 122 (1934)) (holding that the Eighth Amendment does not bar victim impact evidence).

49. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

50. *See* Eddings v. Oklahoma, 455 U.S. 104, 114-17 (1982) (reversing sentence of death due to state court's failure to admit in mitigation evidence of the "background and mental and emotional development of a youthful defendant"); Skipper v. South Carolina, 476 U.S. 1, 7 (1986) (holding that sentencing jury could consider defendant's "disposition to make a well-behaved and peaceful adjustment to life in prison" as relevant to consideration of a life sentence instead of death).

51. *See, e.g.*, Ayers v. Belmontes, 549 U.S. 7, 21 (2006) (approving admission by state court of "forward-looking" mitigation evidence as predictor of defendant's future conduct as one of the "potentially infinite mitigators"); Buchanan v. Angelone, 522 U.S. 269, 276 (1998) ("[O]ur cases have established that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence."). *But see* California v. Brown, 479 U.S. 538, 542 (1987) (affirming use of an instruction admonishing jury not to be "swayed by 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling'" during sentencing phase of capital proceedings).

52. Tennard v. Dretke, 542 U.S. 274, 284-85 (2004) ("Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.") (quoting McKoy v. North Carolina, 494 U.S. 433, 440 (1990)) (internal quotation marks omitted)).

mitigation evidence and the offense itself.[53] Together, these standards have spawned a near-boundless mitigation universe.[54]

*A Primer on Capital Mitigation Investigation*

As the investigation, discovery, and use of mitigation evidence is essential in capital cases, the corresponding obligations on defense counsel are demanding. Simply put, defense counsel *must* conduct a meticulous and intensive mitigation investigation.[55] The Supreme Court has uniformly rejected that defense counsel can make a so-called "strategic decision" to limit or abandon mitigation investigation.[56] Likewise, counsel cannot "'sit idly by, thinking that investigation would be futile.'"[57] Nor can counsel rely on the client's representations as to the lack of mitigation evidence or "statement[s]

53. *Id.* at 287-89.

54. *See, e.g.*, *id.* at 287 (identifying evidence of low IQ as relevant mitigating evidence); Poyson v. Ryan, 685 F. Supp. 2d 956 (D. Ariz. 2010) (identifying substance abuse as a relevant mitigating factor); Jones v. Polk, 401 F.3d 257, 262-64 (5th Cir. 2005) (identifying defendant's remorse for offense as a relevant mitigating factor); Bigby v. Dretke, 402 F.3d 551 (5th Cir. 2005) (identifying chronic paranoid schizophrenia as a relevant mitigating factor); *Ex parte* Hood, 304 S.W.3d 397, 401 (Tex. Crim. App. 2010) (discussing defense counsel's introduction of poverty and possible brain damage as mitigation evidence); McGowan v. Thaler, 675 F.3d 482 (5th Cir. 2012) (recognizing childhood neglect as a mitigating factor); Nelson v. Quarterman, 472 F.3d 287, 316 (5th Cir. 2006) (identifying borderline personality disorder and abandonment during childhood as relevant mitigating factors).

55. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 395-99 (2000) (holding that counsel's failure to commence mitigation investigation until a week prior to trial and failure to discover evidence relating to defendant's "nightmarish childhood" and borderline mental retardation constituted ineffective assistance under the Sixth Amendment); Rompilla v. Beard, 545 U.S. 374, 381-83 (2006) (holding that defense counsel was constitutionally ineffective due to his failure to examine a court file relating to a prior conviction that the Commonwealth planned to use as aggravating evidence).

56. Wiggins v. Smith, 539 U.S. 510, 524 (2003) (citing the "well-defined norms" set forth in the American Bar Association Guidelines in holding that defense counsel's "rudimentary knowledge" of his client's personal history and failure to expand the mitigation investigation beyond the facts in the pre-sentence investigative report fell below both professional and constitutional standards).

57. *ABA Guidelines in Death Penalty Cases*, *supra* note 30, at 1021 (quoting Voyles v. Watkins, 489 F. Supp. 901, 910 (N.D. Miss. 1980)).

that evidence . . . is not to be collected or presented."[58] Instead, counsel must undertake "extensive and generally unparalleled investigation into personal and family history . . . begin[ning] with the moment of [the client's] conception."[59]

Notwithstanding the Supreme Court's resounding language about the duty to present mitigation evidence, the Court has given comparatively little guidance as to how defense counsel should investigate the defendant's history, compile relevant information, or construct a compelling sentencing presentation.[60] As a result, in the aftermath of *Lockett*, "defense teams were largely at a loss to figure out what to do with their newfound freedom."[61] As a further obstacle, most defense counsel lacked the time or training to meet the Court's new demands.[62] In light of the enormity and complexity of the mitigation process, capital defense teams began enlisting the assistance of "private investigators, . . . psychologists, journalists, anthropologists, and social workers."[63] From these diverse backgrounds, "defense team members giving undivided attention to the client's life story" became known as "mitigation specialists."[64]

In 2003, the ABA updated its existing guidelines for representation of capital defendants (hereinafter "the ABA

58. *Id.* at 1015; *See also* Rompilla, 545 U.S. at 379 (counsel was not entitled to rely on defendant's statement that he had "an unexceptional background" as basis to curtail mitigation investigation).

59. *ABA Guidelines in Death Penalty Cases*, *supra* note 30, at 1022 (quoting Russel Stetler, *Mitigation Evidence in Death Penalty Cases*, CHAMPION, Jan./Feb. 1999, at 35) (internal quotation marks omitted).

60. Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 848 (2008) (describing the "unevenness" with which defense counsel undertook mitigation investigation after *Lockett*).

61. Emily Hughes, *Mitigating Death*, 18 CORNELL J.L. & PUB. POL'Y 337, 348 (2009) (quoting Jesse Cheng, *The Capital Ethnography Project*, CHAMPION, July 2006, at 53, 53) (internal quotation marks omitted).

62. Berrigan, *supra* note 27, at 828 ("Lawyers are adept at legal analysis, fitting facts to legal principles, dissecting prior jurisprudence . . . . [They] are not trained in the communication (particularly listening) skills needed, nor perhaps do they have the time or patience, to delve deeply into the life history of their client.").

63. Hughes, *supra* note 61, at 343-44.

64. Russell Stetler, *Mitigation Investigation: A Duty that Demands Expert Help but Can't Be Delegated*, CHAMPION, Mar. 2007, at 61, 62.

Guidelines") and added language requiring every capital defense team to include a mitigation specialist.[65] Mitigation specialists play several vital roles for the defense.[66] Importantly, they "compile[] a comprehensive and well-documented psycho-social history" of the defendant "based on an exhaustive investigation."[67] In addition, they "analyze[] the significance of the information in terms of impact on development" and "find[] mitigating themes" in the defendant's background.[68] Further, mitigation specialists assist in the identification and location of experts to examine the defendant or testify on his behalf.[69] Mitigation specialists also guide the defense team in crafting a thorough, cogent, and persuasive story of the defendant's life.[70] As part and parcel of these multiple tasks, mitigation specialists often become the primary contact for the incarcerated client.[71] In this way, mitigation specialists are central to earning the client's trust and confidence, an indispensable function that impacts virtually every aspect of representation.[72]

65. *ABA Guidelines in Death Penalty Cases*, *supra* note 30, at 959.

66. The duties of mitigation specialists differ based upon the demands of the case. Thus, the following list is non-exhaustive and intended only to provide examples of common obligations. For a closer examination of the mitigation specialist's diverse contributions to the defense team, see Stetler, *supra* note 64, at 62-63.

67. *ABA Guidelines in Death Penalty Cases*, *supra* note 30, at 959; *see also* 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 (2008) ("The fundamental duty of a mitigation specialist is to conduct a comprehensive life history investigation of the client and identify all relevant mitigation issues . . . .").

68. *ABA Guidelines in Death Penalty Cases*, *supra* note 30, at 959.

69. *Id.*

70. *Id.*; *see also* Cooley, *supra* note 43, at 49-50 ("The Court's limitless rule with respect to mitigation evidence enables defense counsel to construct a comprehensive, illustrative, and life-saving social history of capital defendants.").

71. *ABA Guidelines in Death Penalty Cases*, *supra* note 30, at 960 ("The mitigation specialist often plays an important role . . . maintaining close contact with the client and his family while the case is pending.").

72. *See* White, *supra* note 24, at 338 (discussing the difficulty of establishing a "relationship of trust" between the capital client and counsel and the value of "patien[ce]," "loyalty," and "understand[ing] the client's view of reality" in overcoming mistrust); Berrigan, *supra* note 27, at 825 ("[Mitigation specialists] must be able to establish rapport with . . . the client, the client's family and

"A comprehensive life history investigation requires the collection, organization, and analysis of data" about the defendant.[73] This process entails two fundamental components: extensive records collection and in-depth interviews with "almost anyone who was ever part of the defendant's life."[74] Records collection is essential in building a framework for the mitigation narrative.[75] The mitigation specialist should obtain, as a starting point, records of the defendant's medical, educational, and employment history.[76] In addition, records of the defendant's prior incarceration or institutionalization, contact with social services or other governmental agencies, or military service often contain revealing historical information.[77] The scope of records acquisition is broad, varied, and case-specific.[78] It may encompass documents as personal as the defendant's birth certificate and as far-reaching as studies detailing environmental contaminants to which the defendant, and entire communities, may have been

significant others . . . .") (quoting *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677, 682 (2008) [hereinafter *Supplementary Guidelines in Death Penalty Cases*]) (internal quotation marks omitted); *see also ABA Guidelines in Death Penalty Cases*, *supra* note 30, at 960 ("The rapport developed in this process can be the key to persuading a client to accept a plea to a sentence less than death.").

73. Dudley & Leonard, *supra* note 67, at 966.

74. *See* Hughes, *supra* note 61, at 344 (discussing the latter fundamental component of the defendant's life history investigation).

75. Dudley & Leonard, *supra* note 67, at 966-67.

76. Cooley, *supra* note 43, at 55, 63-64 (Records to be obtained "include, but are not limited to," birth, schools, employers, military institutions, juvenile court, prison, medical, and psychiatric records.).

77. *Id.*; *see also* Berrigan, *supra* note 27, at 826 (Records to be obtained "include school records, such as academic, disciplinary, and evaluative reports; medical records of accidents and illnesses; mental health evaluations; social services data, including welfare, adoption, or foster care records; juvenile delinquency and adult criminal records; employment history, military records, and any other institutional accounts.").

78. Additional challenges to records acquisition include the "various methods and mechanisms for requesting records" and the process of determining the specific waivers and releases required for the records sought. *Supplementary Guidelines in Death Penalty Cases*, *supra* note 72, at 683. For more on this subject, see Berrigan, *supra* note 27, at 825, and Cooley, *supra* note 43, at 61 (noting that a background in social work is "ideal," in part, because it "enables mitigation specialists to . . . hunt down the necessary documentation" about the defendant).

exposed.[79] The Supplementary Guidelines highlight the spacious parameters of records acquisition, calling for any document that sheds light on the defendant's "capacity for redemption, remorse, . . . positive acts or qualities," or "degree of moral culpability."[80]

Interviews are similarly critical.[81] At the outset of the case, the mitigation specialist conducts the first in a series of interviews with the defendant.[82] The initial conversation usually entails only an introduction and explanation of the mitigation specialist's role on the defense team.[83] The defendant's ability and willingness to convey important information may be hampered by his distrust of the mitigation specialist, by mental illness or cognitive impairment, or by the emotional trauma of facing a capital charge.[84] Therefore, follow-up interviews with the defendant are crucial.[85] From an investigative standpoint, the ongoing process invariably yields information with which to delve more deeply into the defendant's background.[86] Of equal value, multiple interviews help strengthen the defendant's confidence in the defense team and allow the mitigation specialist to gain insight into the defendant's ability to communicate, interact, and develop interpersonal relationships.[87]

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79. Hughes, *supra* note 61, at 346.

80. *Supplementary Guidelines in Death Penalty Cases*, *supra* note 72, at 679.

81. *See* Dudley & Leonard, *supra* note 67, at 968-69; *see also* Berrigan, *supra* note 27, at 824 ("[Mitigation specialists] must be able to identify, locate and interview relevant persons . . . .") (quoting *Supplementary Guidelines in Death Penalty Cases*, *supra* note 72, at 682) (internal quotation marks omitted).

82. Dudley & Leonard, *supra* note 67, at 969.

83. *Id.*

84. *See* Haney, *supra* note 60, at 877 (commenting on the possibility that "certain capital defendants" will be "initially uncooperative" or "suspicious of the interviewers' motives" or unwilling to discuss "sensitive, personal, or painful" information); *see also* Dudley & Leonard, *supra* note 67, at 969 (noting that "if a defendant's mental illness presents difficulties between the defense team and the client, observations, data, and insight acquired by the mitigation specialist will inform mental health experts.").

85. *See* Dudley & Leonard, *supra* note 67, at 969.

86. *See id.* at 969-70.

87. *Id.* (listing additional benefits of a series of interviews, including allowing the mitigation specialist to "observe, over time, the defendant's gait, mental state, affect regulation, memory, comprehension of writing and speech, adaptation to incarceration, capacity to form interpersonal relationships, and remorse.").

To create an inclusive, detailed, and accurate social history, the interview process extends far beyond the defendant's cell.[88] Additional interview subjects typically include family members, friends, neighbors, former employers or coworkers, and any other individuals who may lend insight into the defendant's background.[89] Through interviews, the mitigation specialist endeavors to learn "everything there is to know about the defendant" and those who have impacted his life—"even his nemeses."[90] The interview process, though, is fraught with obstacles. Subjects are reluctant to speak to an advocate for the defendant in some cases, especially if the facts surrounding the charges are shocking.[91] In addition, family members may be loath to disclose abuse or neglect of the defendant during childhood or adolescence.[92] The interview process rarely results in a tidy and consistent chronology of the defendant's life.[93] As a result, the mitigation specialist must construct a credible and cohesive social history from different, and sometimes conflicting, accounts.[94]

Mitigation specialists' analysis of the voluminous information must be multi-faceted, complicated, and "painstaking."[95] One key objective is identification of noteworthy patterns or "mitigating themes" in the defendant's life around which to structure the narrative.[96] Also critical is review of the evidence for indicators of

88. *See id.*; *see also* Hughes, *supra* note 61, at 344-47 (discussing the plethora of information mitigation specialists seek to uncover).

89. Berrigan, *supra* note 27, at 826 (stating that the list of potential interviewees may extend to "institutional employees" if the defendant has been incarcerated in the past).

90. Hughes, *supra* note 61, at 346.

91. Berrigan, *supra* note 27, at 826 (noting that accusations of a "horrendous crime" may "drive [interview subjects] away").

92. *Id.* (discussing the "understandabl[e] reluctan[ce]" of family members to "disclose maltreatment or failure"); Haney, *supra* note 60, at 877.

93. Haney, *supra* note 60, at 877 (highlighting the importance of reconciling the "numerous facts, events, and interrelationships" into a "thematic and coherent" account).

94. *Id*. at 875-76.

95. *Id*. at 876-77 (describing the mitigation specialist's "emotionally wrenching" experience of "absorbing the pain that is present in the life stories of the persons" interviewed).

96. Hughes, *supra* note 61, at 346 (quoting *ABA Guidelines in Death Penalty Cases*, *supra* note 30, at 859) (internal quotation marks omitted).

learning disabilities, psychological disorders, or other cognitive impairments that may affect the defendant's competency or necessitate evaluation or treatment by experts.[97] At times the mitigation investigation may uncover witness accounts of the charged offense or other evidence that proves central to the theory of the defense.[98] Thus, the defense team must also review the mitigation evidence for its potential trial value.[99]

Construction of a "life history chronology" often serves as "the most basic organizing tool" for various types of evidence, including records and interview transcripts.[100] In a chronology of the defendant's life, "trends" or "causal factors" typically "emerge" that provide a springboard for more detailed follow-up.[101] Another useful compilation technique is the creation of "genograms" (also known as "family trees") to map the defendant's family history and identify common threads related to mental illness or substance abuse.[102] In similar fashion, the development of "ecological charts" (or "ecomaps") can help the mitigation specialist trace societal or environmental conditions that may have impacted the defendant's development.[103]

The evidence must also be analyzed through the lens of the defendant's cultural background and heritage.[104] In many capital

97. Berrigan, *supra* note 27, at 827.

98. While most commonly associated with sentencing, the mitigation narrative is also often critical during plea negotiations, at trial, or even to the determination of a specific charge filed. Therefore, the process of constructing a full and detailed account of the defendant's personal history must begin "as quickly as possible." *ABA Guidelines in Death Penalty Cases*, *supra* note 30, at 1023.

99. *Id.*; *see also* Berrigan, *supra* note 27, at 829 (Aside from its possible use at trial, mitigation evidence "may even persuade the prosecution to forgo capital punishment and settle for life imprisonment on a guilty plea.").

100. Dudley & Leonard, *supra* note 67, at 973.

101. *Id*. ("For example, records indicating that the client's mother drank alcohol during her early teenage years would lead the mitigation specialist to question the mother, her family, and friends regarding her history of alcohol use. . . .").

102. *Id*. at 974.

103. *Id*.

104. *See* Guy Ben-David, *Cultural Background as a Mitigating Factor in Sentencing in the Federal Law of the United States*, 47 NO. 4 CRIM. L. BULL. ART 1 (2011) (discussing the importance of information about a defendant's cultural

cases, cultivating a persuasive narrative involves debunking myths associated with the defendant's race, ethnicity, or religious views.[105] The mitigation narrative may require an explanation of the defendant's struggle with assimilation into an unfamiliar community or other "cultural dislocations."[106] Similarly, the abuse or maltreatment of the defendant, as detailed in the narrative, may have roots in cultural norms or practices.[107] To this end, the ABA Guidelines specifically recognize the impact of "cultural or religious influence" as a possible mitigation factor.[108]

Finally, the defense team must compose a mitigation narrative through which the defendant's life will be made real to jurors.[109] The narrative must, of course, be "accurate" and "credible."[110] But, "creating a resonant mitigation case [also] requires constructive imagination."[111] According to pioneering mitigation specialist

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background in mitigation, as stereotypes about race, culture, and ethnicity can lead to "erroneous predictions of dangerousness" or propensity for rehabilitation).

105. *Id*.

106. Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883, 897 (2008) (quoting Mak v. Blodgett, 970 F.2d 614, 617 & n. 5 (9th Cir. 1992) (internal quotation marks omitted).

107. *Id*. at 912; *see also* Ben-David, *supra* note 104, at n.96 (quoting United States v. Gaviria, 804 F. Supp. 476, 478 (E.D. N.Y. 1992)) (explaining that a woman's criminal culpability may be affected by the coercion of a spouse, and a "male's control" over his spouse may be the "result" of "cultural norms").

108. *ABA Guidelines in Death Penalty Cases*, *supra* note 30, at 1022, 1026 ("If a client is a relatively recent immigrant, counsel must learn about the client's culture, about the circumstances of his upbringing in his country of origin, and about the difficulties the client's immigrant community faces in this country.").

109. For an insightful look into the power of the narrative in the trial context, see John H. Blume, Sheri L. Johnson & Emily C. Paavola, *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069, 1088 (2007) ("Stories provide useful structures: plot, characters, time frames, motives, and settings, which help jurors process and understand what is otherwise complex and sometimes unfamiliar information.").

110. Haney, *supra* note 60, at 876; *see also* Burt, *supra* note 14, at 880 ("[D]efense attorneys cannot engage in fiction or . . . invent a character out of whole cloth to suppress the 'real' image of their client, already convicted of a heinous crime.") (quoting Cary Federman, Book Review, 42 NO. 6 CRIM. L. BULL. ART. 6 (2006) (second alteration in original) (internal quotation marks omitted)

111. Eric M. Freedman, *Introduction: Re-Stating the Standard of Practice for Death Penalty Counsel: The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 663, 669 (2008).

Scharlette Holdman, the process of transforming voluminous mitigation evidence into a structured and persuasive narrative is "'a very specialized, complex undertaking.'"[112] Holdman says, "'That narrative is not there for the asking . . . . It requires not just knowledge and skill but experience in how you search for, identify, locate, recognize, and preserve the information.'"[113]

A convincing narrative paints a holistic portrait of the defendant rather than "simply present[ing] a catalog of seemingly unrelated mitigating factors."[114] Likewise, it must transcend a blow-by-blow chronicling of the defendant's traumatic history.[115] The narrative should reflect both the defendant's suffering and his "admirable attempts to overcome the obstacles that have been placed before [him]."[116] Detailed illustrations of specific impactful moments of the defendant's life help to highlight his uniqueness and humanity.[117] In providing a multi-dimensional view of the defendant, the narrative offers the jury a viable alternative to the prosecution's portrayal of the defendant as "pure evil."[118]

In similar fashion, the narrative must extend beyond a third person account of the events that impacted the defendant and integrate the perspectives of those who observed or shared in his life experiences.[119] Doing so lends credibility and immediacy to the narrative and, more critically, compels the audience to bear witness to the defendant's struggles.[120] Further, the narrative should provide a

112. Jeffrey Toobin, *The Mitigator: A New Way of Looking at the Death Penalty*, NEW YORKER, May 9, 2011, http://www.newyorker.com/reporting/2011/05/09/110509fa_fact_toobin.

113. *Id*.

114. O'Brien, supra note 22, at 835 (quoting *ABA Guidelines in Death Penalty Cases*, *supra* note 30, at 1061) (internal quotation marks omitted).

115. Haney, *supra* note 60, at 880 ("An authentic life narrative includes all facets of the defendant's life story, including . . . . evidence [of his] admirable qualities.").

116. *Id*.

117. Burt, *supra* note 14, at 884 (discussing the use of detail to "draw the reader into the client's life and community.").

118. Craig Haney, *On Mitigation as Counter-Narrative: A Case Study of the Hidden Context of Prison Violence*, 77 UMKC L. REV. 911, 919 (2009).

119. Dudley & Leonard, *supra* note 67, at 976.

120. *Id*.

broad backdrop for past behavior and actions by illustrating how "forces the defendant did not choose and over which he had little or no control" influenced his life.[121] The narrative, then, must juxtapose those outside "forces" against the defendant's past success or potential to thrive under less dire circumstances.[122]

At best, mitigation narratives reveal the "unknown story" of the defendant through the thoughtful reconstruction of the events, circumstances, and conditions that colored his life.[123] In so doing, the narrative compels its audience to measure the defendant's life in totality rather than by the single act for which he was convicted.[124] When this happens, the work of the mitigation specialist enlivens Justice Brennan's words in *Furman* by safeguarding the dignity of the capital defendant, regardless of the outcome in the case.[125]

### *Capital Mitigation Investigation and Non-Capital Cases: "Slow but Steady Advances"*

In a 2008 article, Craig Haney, a University of California psychology professor and expert on the psychological effects of incarceration, described "slow but steady advances" in the "Supreme Court's understanding" of "how central mitigation is to a constitutional system of death sentencing."[126] This "progression," Haney posited, was most fully realized in *Wiggins v. Smith* and

121. Haney, *supra* note 60, at 881.

122. *Id*. at 880-81.

123. Russell Stetler, *The Unknown Story of a Motherless Child*, 77 UMKC L. REV. 947, 951-62 (2009) (detailing the creation of the "unknown story" of the defendant's tumultuous life and mental illness after re-investigation into his background).

124. Haney, *supra* note 60, at 880 (explaining that the narrative must "accurately depict[]" the defendant "as someone whose value and worth extends beyond the worst things he has done."); *see also* O'Brien, *supra* note 22, at 831 (noting that "life-saving [mitigation] narratives" have the potential to "evoke" in jurors a blend of compassion, "mercy," and "understanding sufficient to spare" the convicted from execution.).

125. Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring).

126. Haney, *supra* note 60, at 836-37; *see also* O'Brien, *supra* note 22, at 837 ("A co-author of the Stanford Prison Experiment, Dr. Haney has long been concerned about the dehumanizing effects of capital punishment and incarceration on both inmates and correctional officers.").

*Rompilla v. Beard*.[127] In both cases, the Court determined that counsel was constitutionally ineffective for failure to properly investigate or present mitigating evidence during the sentencing phase of capital proceedings.[128] Haney noted that, in *Wiggins*, the Court "finally acknowledged–in a clear and definitive way–the importance of developing and, when appropriate, presenting a mitigating social history."[129] Haney further noted that, in *Rompilla*, the Court took a further step, opining that *some* mitigation investigation is an insufficient substitute for a "comprehensive and vigorous" one.[130] Writing for the Court, Justice Souter acknowledged that Rompilla's defense counsel conducted a partial mitigation investigation but stated that "undiscovered mitigating evidence" about Rompilla's history of poverty and abuse "taken [with other evidence], might well have influenced the jury's appraisal of [his] culpability."[131]

Since Haney's article, the Supreme Court has continued to confirm the need for mitigating evidence at sentencing.[132] Interestingly, its most recent, and perhaps strongest affirmation, came in two non-capital cases, *Miller v. Alabama* and *Jackson v. Hobbs*.[133] In these companion consolidated cases, the Court highlighted the importance of an in-depth presentation of the offender's background and the circumstances of his offense in mitigation of his sentence.[134] Both *Miller* and *Jackson* involved 14-year-old boys who were sentenced to a mandatory term of life imprisonment for first-degree murder.[135]

127. *Haney*, *supra* note 60, at 851-55 (discussing Wiggins v. Smith, 539 U.S. 510 (2003); Rompilla v. Beard 545 U.S. 374 (2005)).

128. *Wiggins*, 539 U.S. at 534; *Rompilla*, 545 U.S. at 383.

129. *Haney*, *supra* note 60, at 851.

130. *Id*. at 853.

131. *Id*. at 855 (quoting *Rompilla*, 544 U.S. at 393) (internal quotation marks omitted).

132. *See, e.g*., Porter v. McCollom, 558 U.S. 30, 30-31, 40 (2009) (per curiam) (holding that defense counsel's failure to "uncover and present" mitigating evidence regarding defendant's mental health, family background, or military history constituted ineffective assistance of counsel).

133. Miller v. Alabama, 132 S. Ct. 2455 (2012).

134. *Id.* at 2467-68.

135. *Id*. at 2460.

Kuntrell Jackson was charged with felony murder and aggravated robbery in Arkansas after participating in the hold-up of a video store during which one of his cohorts shot and killed the store clerk.[136] Following his trial conviction, the court imposed a statutorily mandated sentence of life imprisonment without the possibility of parole.[137] Evan Miller and a friend ended a night of drinking and drug use in Alabama by beating a neighbor and setting fire to his trailer.[138] The neighbor died and Miller was tried as an adult for murder in the course of arson.[139] He was convicted after a trial and, like Jackson, received a mandatory life-without-parole sentence.[140] Both defendants challenged their sentences in state proceedings, arguing that a life sentence imposed upon a juvenile violates the Eighth Amendment ban on cruel and unusual punishment.[141] Neither prevailed and the Supreme Court granted the ensuing petitions for certiorari.[142]

The Court struck down both sentences as unconstitutional.[143] In so doing, the majority began from the premise that the Eighth Amendment prohibition against "excessive sanctions" stems "from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and offense."[144] Notably, the majority then applied and extended the logic of two prior cases involving juveniles: *Roper v. Simmons* and *Graham v. Florida*.[145] "*Roper* held that the Eighth Amendment bars capital punishment for children,"[146] and *Graham* "likened life without parole for juveniles to the death penalty" and rejected such sentences for *non*-homicide

136. Miller v. Alabama, 132 S. Ct. 2455, 2461 (2012).

137. *Id*.

138. *Id*. at 2462.

139. *Id*. at 2462-63.

140. *Id*. at 2463.

141. *Id*. at 2461, 2463 (Jackson did not appeal his sentence but later filed a state petition for habeas corpus relief; Miller appealed his sentence.).

142. *Id*.

143. *Id.* at 2469.

144. *Id.* at 2463 (quoting Roper v. Simmons, 543 U.S. 551, 560 (2005) (internal quotation marks omitted).

145. *Id*. at 2463-68 (citing *Roper*, 543 U.S. at 569-71; Graham v. Florida, 560 U.S. 48 (2010)).

146. *Id.* at 2463 (discussing *Roper*, 543 U.S. at 578).

offenses.[147] In step with *Roper* and *Graham*, the *Miller* court opined that a mandatory life-without-parole sentence for a juvenile convicted of homicide is disproportionately severe given the "class of offender[]."[148]

Importantly, the *Miller* majority also relied on *Woodson*—the North Carolina case in which the Court barred statutorily mandated death sentences—in support of its favorable position towards individualized sentences for juveniles.[149] The *Miller* Court stressed that mandatory life sentences for juveniles foreclose essential sentencing considerations such as: (1) the offender's "family and home environment;" (2) "the way familial and peer pressures may have affected [the offender]"; (3) "the circumstances of the . . . offense, including the extent of [the offender's] participation"; and (4) "the possibility of rehabilitation."[150]

Turning to the specific case facts, the Court observed that Jackson's "age could well have affected his calculation of the risk that [the shotgun] posed" and cited his "background and immersion in violence," including his family history of gun-related violence.[151] Miller's case also included substantial mitigating factors, beginning with an early childhood pockmarked by physical abuse, followed by at least four suicide attempts, which culminated with heavy drug and alcohol use on the night of the incident.[152] While the Court readily acknowledged that both defendants deserved "severe punishment," "a sentencer needed to examine all [possible mitigating factors] before concluding that life without any possibility of parole was the appropriate penalty."[153]

While the *Roper-Graham-Miller* trilogy concerns the sentencing of juveniles, two aspects of the cases suggest a continued shift demonstrating how central mitigation is to *all* sentencing. First, the line of cases originated with *Roper*, a capital case, before the Court

147. Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012) (discussing *Graham*, 560 U.S. at 81-82).

148. *Id.* at 2471-73.

149. *Id.* at 2467 (discussing Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

150. *Id.* at 2468.

151. *Id.*

152. *Id.* at 2469.

153. *Id.*

extended the same principles applied in capital cases to non-capital cases.[154] Second, the ruling of unconstitutionality rested on the proportionality of sentencing as measured against a range of mitigating factors.[155] The Court in *Miller* cited *Woodson*, a capital case, as instructive about the value of individualized sentencing in non-death cases.[156] Specifically, the Court reiterated that the critical flaw in *Woodson*'s mandatory capital sentencing mechanism was its failure to give "significance to 'the character and record of the individual offender or the circumstances' of the offense, and [its] 'exclud[ing] from consideration . . . the possibility of compassionate or mitigating factors.'"[157] Again, while *Woodson* contemplated a death statute, the Court's extension of similar concerns to a non-capital sentence is striking.

## PART II
## *THE ROLE OF CLINICAL LEGAL EDUCATION IN IMPROVING MITIGATION INVESTIGATION AND PRESENTATION*

*Miller*'s bridging of the two historically "different" worlds of capital and non-capital jurisprudence highlights the critical value of mitigation evidence in all cases, as well as the obligation of defense counsel to dig deeply into the client's past.[158] Despite the clear mandate from the Supreme Court and the ABA, many criminal

154. Miller v. Alabama, 132 S. Ct. 2455, 2466-67 (2012). Indeed, the *Miller* Court observed that its decision in *Graham* was "unprecedented" for its treatment of a term of life imprisonment as "akin to the death penalty." *Id.*

155. *Id.* at 2464-66. Mitigating factors include "lack of maturity" and "vulnerab[ility]" to "negative influences," developmental issues such as the "fundamental differences between juvenile and adult minds," and the comparatively favorable "prospects for reform" between children and adults. *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)) (internal quotation marks omitted).

156. *Id.* at 2467.

157. *Id.* (third alteration in original) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

158. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment . . . ."); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (noting that the death penalty is "qualitatively different from any other sentence" (quoting *Woodson*, 428 U.S. at 305) (internal quotation marks omitted)); Ring v. Arizona, 536 U.S. 584, 605-06 (2002) (reiterating that there is "no doubt that '[d]eath is different'" (alteration in original) (quoting counsel)).

defense lawyers—especially those in the non-capital world—still possess a limited view of mitigation.[159] As mitigation specialist Jesse Cheng explains, "Lawyers are not trained in the communication or listening skills needed [for mitigation investigation. To the contrary,] lawyers are trained to find the right facts to fit the right doctrinal boxes or principles of case law in order to advance their arguments. But mitigation is a considerably more expansive practice."[160]

A 2007 Carnegie Foundation-funded study on legal education (hereinafter "the *Carnegie Report*") supports Cheng's critique.[161] Drawing on cognitive science, the study's authors posit that law schools are very good at teaching "'analytic' or 'paradigmatic'" thinking.[162] Analytic thinking, the process associated with the traditional casebook lecture, "detaches things and events from the situations of everyday life and represents them in more abstract and systematic ways."[163] Skills such as "ranking and ordering," "[e]stablishing cause-and-effect," and identifying "logical relationships" fall within this category.[164] While the development of these skills is essential for law students, the practice of law also depends on expertise in "narrative modes of thinking."[165] Narrative thinking, in contrast to analytic, is premised on the theory that "things and events acquire significance by being placed within a story, an ongoing context of meaningful interaction."[166] The study emphasizes that effective legal practice requires "fluency" in both narrative thinking and analytic thinking.[167]

As the *Carnegie Report* recommends, clinical legal education offers one avenue for students to receive training in the practice-oriented skills associated with narrative thinking.[168] Clinical

159. E-mail from Jesse Cheng, Capital Mitigation Specialist, to author (Jan. 5, 2013, 11:05 p.m. EST) (on file with author).

160. *Id.*

161. SULLIVAN ET AL., *supra* note 31, at 96-97.

162. *Id.* (quoting JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS (1985)).

163. *Id.* at 96.

164. *Id.* at 96-97.

165. *Id.* at 97.

166. *Id.* at 96.

167. *Id.* at 97.

168. *Id.* at 96-97, 195.

programs, say the study's authors, comprise an important part of "integrative strategy" to complement the historically theory-focused approach of law schools.[169] A look at the origins and development of law school legal clinics lends insight into how contemporary clinical education helps shape "the analytical and practical habits of mind that professional practice demands."[170]

*A Brief History of Law School Clinics*

In 1933, John Bradway, the director of the Legal Aid Clinic at the Duke University School of Law, proposed in a landmark article to "bridge[] the gap between the theory of law school and the practice of the profession" by integrating clinics into the traditional curriculum.[171] Bradway argued that clinical education teaches students to apply substantive and procedural law from coursework "in the solution of actual unsolved human problems"[172] and analyze legal questions from their beginnings rather than as "a completed case embalmed on a printed page."[173] In tandem with "instruction by lectures and textbooks,"[174] Bradway championed the role of clinics in developing "well rounded student[s]"[175] who demonstrate "proficiency, dependability, social viewpoint, and the other characteristics of a good lawyer in active practice."[176] Bluntly, he warned: "The student suffers if he does not have clinical [legal] training."[177]

While the concept of clinical legal education originated in the early twentieth century, Bradway's indictment of "law in books"

169. *Id.* at 191, 195-96.

170. *Id.* at 97 ("How to blend the analytical and practical habits of mind that professional practice demands is, we believe, the most complex and interesting pedagogical challenge in the preparation of legal practitioners.").

171. John S. Bradway, *Some Distinctive Features of a Legal Aid Clinic Course*, 1 U. CHI. L. REV. 469, 470 (1933).

172. *Id.*

173. *Id.* at 471.

174. *Id.* at 472.

175. *Id.* at 477.

176. *Id.* at 478-79.

177. *Id.* at 477.

provided a clarion call for advocates of "learn[ing] by doing."[178] He was joined by other critics of "needlessly abstract" law school curricula.[179] In a 1933 article, Judge Jerome Frank compared law students without practical training to "prospective dog breeders who never see anything but stuffed dogs."[180] Soon thereafter, Columbia professor Karl Llewellyn argued that law schools should withhold a student's degree until the successful completion of a post-graduate apprenticeship.[181] Without the introduction of meaningful and innovative methods to train students, Llewellyn predicted that law school education would remain "inadequate, wasteful, blind and foul."[182] His colorful admonition notwithstanding, theory-centered courses remained the bulwark of legal education for the next several decades.[183]

The modern law school clinic began to take shape in the late 1960s amidst changing views about the role and function of the legal profession.[184] In the wake of new federal anti-poverty initiatives and the robust civil rights movement, broad coalitions of lawyers embraced a philosophy that the law could act as an instrument for positive social change.[185] Further, the 1963 Supreme Court decision in *Gideon v. Wainwright*, requiring counsel for indigent criminal

178. Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 945 (1997) (quoting JOHN S. BRADWAY, BASIC LEGAL AID CLINIC MATERIALS AND EXERCISES ON TAKING HOLD OF A CASE AT LAW 6 (1950)) (internal quotation marks omitted).

179. Karl N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 675 (1935).

180. Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 912 (1933).

181. Llewellyn, *supra* note 179, at 675-76.

182. *Id.* at 677-78 ("We put out course-books, which make one man's experience in part available to many other men. But as to *method* of teaching–there we balk at communication, we balk at analysis. This is idiocy, plain and drooling.").

183. *See* Blaze, *supra* note 178, at 941 (describing the growth in clinical legal education movement beyond the 1950s).

184. Norman Fell, *Development of a Criminal Law Clinic: A Blended Approach*, 44 CLEV. ST. L. REV. 275, 277 (1996).

185. Alan W. Houseman, *Legal Aid History*, *in* POVERTY LAW MANUAL FOR THE NEW LAWYER 18, 19-20 (2002), *available at* http://web.jhu.edu/prepro/law/Pre-Law.Forms.WordDocs/Public.Interest.Law.1.pdf.

defendants charged with felonies,[186] created a demand for competent defense attorneys.[187] Buoyed by grants from the Council on Legal Education for Professional Responsibility ("CLEPR"), a non-profit organization established by the Ford Foundation, a wave of law school clinics emerged to provide free legal assistance to low-income communities, help fulfill *Gideon*'s mandate, and promote equal access to the justice system.[188] Over the life of CLEPR funding, nearly half of the law schools in the country created clinical programs.[189]

The rapid rise of clinics, aside from their place within the social justice trends of the era, was hastened by evolving views about the pedagogical value of practical training for law students.[190] The growth of reform-minded legal activism brought with it a new regard for experiential learning designed to prepare law students for direct client representation.[191] To be sure, skills-based curricula were still widely regarded as progressive and, in most cases, inferior to the traditional "case-dialogue" model.[192] Nonetheless, legal clinics offered an ideal setting for a growing number of students interested in putting casebook lectures into practice while responding to a larger moral and social calling.[193]

186. Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

187. *See* Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1463 (1998) (discussing the growth of legal clinics to serve social justice considerations, particularly to provide "free legal services to indigent clients.").

188. *Id.* at 1464-66. At the same time, the value of law students representing indigent client was not lost on the Supreme Court. In his concurring opinion in *Argersinger v. Hamlin*, 407 U.S. 25, 44 (1972), Justice Brennan observed that "law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including cases reached by [our] decision [requiring that criminal defendants facing possible incarceration must be represented by counsel]."

189. Mary Berkheiser, *Frasier Meets Clea: Therapeutic Jurisprudence and Law School Clinics*, 5 PSYCHOL. PUB. POL'Y & L. 1147, 1153 (1999).

190. Fell, *supra* note 184, at 278.

191. SULLIVAN ET AL., *supra* note 31, at 92.

192. *Id.* at 92-93 ("[Traditional] [c]urricula did not change much, but some law schools began to experiment with teaching the rules of professional responsibility within practice settings . . . .").

193. Suzanne Valdez Carey, *An Essay on the Evolution of Clinical Legal Education and Its Impact on Student Trial Practice*, 51 U. KAN. L. REV. 509, 513 (2003); Dubin, *supra* note 187 at 1466.

Over the last four decades, clinical legal education has slowly developed into "an integral component of law school instruction."[194] Though at times halting, the growth of clinics has been spurred by continued critiques that law schools prize doctrine over skills development.[195] In 1992, the ABA released the *MacCrate Report*, encouraging law schools to address the disparity between legal education and the actual practice of law through the development of clinical programs.[196] More recently, the authors of the *Carnegie Report* concluded that law schools have unmet duty to equip students with "the reflective capacity and motivation to pursue genuine expertise."[197] To better shape competent practitioners, the study's recommendations include that third-year law students "engage in advanced clinical training."[198] The *MacCrate* and *Carnegie Reports* have proved instrumental in boosting the presence of legal clinics and reaffirming their critical role within law schools.[199]

*The Law School Criminal Defense Clinic: A Basic Structure*

As Bradway envisioned, contemporary law school clinics provide students with opportunities to work with clients, collaborate with practicing attorneys, craft case strategies, and participate in court

194. Valdez Carey, *supra* note 193, at 509.

195. Dubin, *supra* note 187, at 1468.

196. AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 5 (1992), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report).authcheckdam.pdf.

197. SULLIVAN ET AL., *supra* note 31, at 173.

198. *Id.* at 195.

199. Dubin, *supra* note 187, at 1469 ("From 1992 to 1998, the number of law school faculty teaching in clinical courses has increased from approximately 850 to 1150."); *see also* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION viii (2007), *available at* http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf ("The central message in both *Best Practices* and in the contemporaneous Carnegie report is that law schools should . . . broaden the range of lessons they teach, reducing doctrinal instruction that uses the Socratic dialogue and the case method . . . .").

hearings.[200] Through clinical education, students acquire a spectrum of essential lawyering skills and receive a first chance to apply procedural and substantive law in a "real life" context.[201] Additionally, students develop professional responsibility by learning to balance the day-to-day demands of a case, resolve ethical quandaries, and effectively communicate with the bar and bench.[202] Moreover, in the spirit of their 1960s predecessors, many current law school clinics serve the public interest through representation of low-income clients who would otherwise be unable to afford competent counsel.[203]

Criminal defense clinics exemplify a model designed to combine the experiential learning ideals upon which clinical legal education was founded with the essential access to justice concerns brought to the forefront by *Gideon*.[204] Structurally speaking, most criminal defense clinics resemble small law firms housed within the law school.[205] A clinic director—or, in some cases, two co-directors—

200. Ann Marie Cavazos, *The Journey Toward Excellence in Clinical Legal Education: Developing, Utilizing and Evaluating Methodologies for Determining and Assessing the Effectiveness of Student Learning Outcomes*, 40 SW. L. REV. 1, 7 (2010).

201. William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 471-73 (1995); *see also* PHILIP G. SCHRAG & MICHAEL MELTSNER, REFLECTIONS ON CLINICAL LEGAL EDUCATION 250 (1998) ("Exploring ethical dilemmas before they are resolved, and while students and teachers must make agonizing decisions and then live with the consequences, makes . . . clinic work lively.").

202. Blaze, *supra* note 178, at 949 ("The difference between [skills and professional responsibility—as defined by University of Tennessee Legal Clinic founder Charles H. Miller—]'is roughly comparable to the difference between the carpenter's ability to hammer a nail . . . and, on the other hand, the architect's capacity to design and supervise the construction of a building which is suitable to the needs of his client.'" (quoting CHARLES H. MILLER, LIVING PROFESSIONAL RESPONSIBILITY: CLINICAL APPROACH 5 (1973) (unpublished manuscript)).

203. Valdez Carey, *supra* note 193, at 517-18.

204. *Id.* at 519 ("Cases litigated in service-oriented or law-reform clinics can be used in reaching educational goals for law students as well as achieving positive outcomes for clients or instigating societal or legal reform.").

205. The structural model I discuss is reflective of a typical "in-house" criminal defense clinic, but other models exist. For more about the "in-house" model, see Robert R. Rigg, *Teaching* Gideon *— The Development and Challenges of a Criminal Defense Program*, 7 T.M. COOLEY J. PRAC. & CLINICAL L. 111, 118-19 (2004); Fell, *supra* note 184, at 284-85; and SCHRAG & MELTSNER, *supra* note 201,

supervises a small group of student-attorneys.[206] The student-attorneys are awarded temporary licenses to practice law.[207] Typically, the clinic receives cases through collaboration with the public defender or via direct appointment by the court.[208] Cases are chosen based on the nature of the crime charged, the prospect of a trial or other contested motions, and the likelihood of resolution within a semester or academic year.[209] In most states, the client must provide written consent to student representation.[210]

Clinic caseloads are manageable, at least in comparison to the avalanche of cases routinely handled by court-appointed defense counsel.[211] Generally, teams of two or three student-attorneys are assigned to one case.[212] Students share and divide responsibilities, functioning as client counselors, case investigators, and courtroom advocates.[213] Ideally, the same students participate in a single case from the initial client meeting through the case's conclusion.[214]

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at 252 (discussing the value of clinics with "at least two instructors, because clinical teaching involves so many novel teaching problems, and is so stressful, that a clinical teacher needs at least one colleague with whom to share problems on virtually a daily basis.").

206. Fell, *supra* note 184, at 285 ("The average ratio is eight to ten students to one faculty member.").

207. Cavazos, *supra* note 200, at 12; Valdez Carey, *supra* note 193, at 516 ("Today, every state and most federal courts have rules that allow law students who are enrolled in clinics to represent clients in court under the direct supervision of a law school faculty member or a licensed attorney.").

208. Rigg, *supra* note 205, at 115 (discussing the challenges of receiving clients through the county public defender's office versus direct appointment of cases by the court).

209. *Id.* at 121-22.

210. Quigley, *supra* note 201, at 492.

211. Rigg, *supra* note 205, at 111-19 ("The class size is limited to four student-attorneys and each are assigned normally to no more than ten clients [charged with misdemeanors]."); *see also* SCHRAG & MELTSNER, *supra* note 201 at 247 ("At CALS, we have always chosen to make the students' case load very low so that they could examine with great care every one of their decisions and actions.").

212. SCHRAG & MELTSNER. supra note 201, at 248 ("The reason for . . . collaboration [in clinics] is that joint effort usually produces better results . . . than individual work.").

213. Cavazos, *supra* note 200, at 28-29; Quigley, *supra* note 201 at 484-85.

214. According to Lynda Johnston at Stanford Law School:

Through involvement from start to finish, students learn to forge lasting client relationships, establish short- and long-term case objectives, and manage various court-imposed deadlines.[215]

Typically, the clinic director functions as an advisor, assisting students in developing a theory of the case, determining the appropriate motions to file, and navigating the court system.[216] More broadly, the director helps students clarify the overarching goals of representation based upon the nature of the case, the desires and expectations of the client, and the probable outcome.[217] When unexpected obstacles invariably arise, the director encourages students to "figure out a creative alternative . . . and . . . find the courage to deviate from the accepted norm of practice."[218] At a minimum, the director seeks to give the student-attorney an opportunity to play an impactful role in the case while ensuring that the client receives effective assistance of counsel throughout.[219]

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> The Stanford Law School Criminal Defense Clinic receives its cases exclusively on referral from the Santa Clara County Public Defender's Office and the San Mateo County Bar Association's Private Defender Program. With respect to selection criteria, our students represent only misdemeanor defendants. [The clinic director] chooses cases for the pedagogical opportunities they present for our students. In my observation, all the cases allow the students to take mastery (under very intensive instructor supervision) over the entire trajectory of a case, from pretrial conference through settlement, dismissal, or jury trial, and, if appropriate, through appeal.

E-mail from Lynda Johnston, Legal Assistant, Stanford Law School, to author (Aug. 5, 2013, 2:05 p.m. EST) (on file with author).

215. *Id.*

216. *See* Cavazos, *supra* note 200, at 30-31 (discussing the ideal communication between the supervisor and student-attorney).

217. *See* SCHRAG & MELTSNER, *supra* note 201, at 242-52 (discussing the goals of clinical education programs and how their various structures can achieve those goals).

218. *Id.* at 250-51; *see also* Quigley, *supra* note 201 at 486 (discussing a system in which the director acts as lead counsel at the outset of the case but gradually cedes control as the "confiden[ce] and competen[ce]" of students increase.).

219. Quigley, *supra* note 201 at 485; Michael Meltsner & Philip G. Schrag, *Scenes from a Clinic*, 127 U. PA. L. REV. 1, 24 (1978) ("The tension between our roles as facilitators of intern-oriented learning and as supervisors on cases affecting actual clients' interests is a constant, major theme in our work.").

In addition to case management, supervisors must consider the student-attorney's professional development.[220] Often, clinic directors require students to maintain and periodically submit a journal reflecting on their work.[221] Using the journal entries as a springboard for follow-up discussion, the director meets with students individually to offer guidance, support, or suggestions for problem-solving.[222] Additionally, most clinics include a "classroom component" in which students formulate litigation tactics, bolster trial skills, and discuss challenges with cases or clients.[223] In class, the clinic director provides "feedback," constructive "critiques," and additional opportunities for "reflection."[224] In contrast to a typical law school course in which the sole evaluative opportunity is a final exam, these ongoing assessments foster a collaborative environment in which the director and student work together to enhance the quality of client representation and the overall clinical experience.[225]

## PART III
## *CAPITAL MITIGATION INVESTIGATION IN NON-CAPITAL CRIMINAL DEFENSE CLINICS: DEVELOPING A "THEORY FOR PRACTICE"*

The process of representing "real clients" in the clinical setting "[p]otentially . . . encompasses everything about being a lawyer."[226] In light of the "almost infinite" number of "opportunities for [clinical] teaching and learning" in the process of "client representation," a

220. For a fascinating discussion of the challenges and rewards of student supervision in law school clinics, see Michael Meltsner, James V. Rowan & Daniel J. Givelber, *The Bike Tour Leader's Dilemma: Talking About Supervision*, 13 VT. L. REV. 399 (1989).

221. J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLIN. L. REV. 55, 75 (1996).

222. *Id.*

223. *See* STUCKEY, supra note 199, at 145 (requiring as a "best practice" of in-house clinics the inclusion of "classroom components that help accomplish the educational goals of the course."); *see also* Philip G. Schrag, *Constructing a Clinic*, 3 CLIN. L. REV. 175, 236-37 (1996); Rigg, *supra* note 205, at 117.

224. Cavazos, *supra* note 200, at 9-10.

225. *Id.*

226. *See* STUCKEY, *supra* note 199, at 139 ("It is impossible to describe fully what a student might learn by participating as a lawyer in the representation of real clients.").

"clear understanding[]" of "educational goals" is vital.[227] Of equal importance is the development of effective strategies or models to pursue these goals–or what the *Carnegie Report* authors might call a "theory for practice."[228] A "theory for practice," according to the study, is "a kind of toolkit of well-founded procedures within clearly delineated areas of professional work."[229] On one hand, a "theory for practice" can serve as the conceptual framework within which to articulate, enliven, and replicate clinical goals from one case or semester to the next.[230] In addition, a "theory for practice" can "provide scaffolding" to "aid [student-attorneys] in navigating the complexities and uncertainties of developing case theory."[231]

The techniques of capital mitigation investigation can provide a "theory for practice" to achieve several pedagogical goals of non-capital criminal defense clinics, especially as they relate to sentencing advocacy. In addition, an investigative protocol can function as a framework—or "scaffolding"—to help student-attorneys compile, analyze, and present mitigation evidence. Moreover, in light of the time-consuming and complex nature of mitigation investigation, creation of a standard clinical protocol can facilitate similar investigation for recent graduates who face oppressive caseloads and limited resources as public defenders.[232]

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227. *Id*.

228. SULLIVAN ET AL., *supra* note 31, at 100-01.

229. *Id*. at 101-03 (Stated another way, "[i]n the realm of teaching expert practice, theories are really statements of technique in the classic sense of well-tested procedures for achieving specific outcomes in certain kinds of situations.").

230. *Id*. ("Just as the case-dialogue method at its best can represent in a public way the processes of reasoning embedded in complex legal opinions, it is likewise possible to articulate the conceptual models involved in the important skills that define effective lawyering: in developing evidence, interviewing, counseling, drafting documents, conducting research, and negotiating.").

231. *Id*. at 103. A theory for practice can also help clinical students define, clarify, and reflect upon "key values" of the legal profession, some of which are not always readily definable—e.g., "the importance of seeking justice and providing access to justice." *See* STUCKEY, *supra* note 199, at 140.

232. As Professor Phyllis Goldfarb writes in reference to the "theory for practice," "[b]oth the Carnegie Hall-bound musician and the *Carnegie Report*-bred lawyer undergo a theoretically grounded developmental process of enacting underlying principles in performance, and only then do the principles acquire meaning, value, and life." Phyllis Goldfarb, *Back to the Future of Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 279, 290 (2012).

### *Capital Mitigation Investigation and Clinical Goals:*[233] *Learning Lawyering Skills*

Implementing a basic capital mitigation investigative model helps student-attorneys develop traditional lawyering skills such as investigating facts, acquiring records, interviewing witnesses, counseling clients, and writing persuasively.[234] For example, through creation of a records collection protocol, student-attorneys learn the essential steps to obtain educational, medical, or governmental records and the process of analyzing those documents.[235] Invariably, the records-acquisition process also includes unwanted lessons about bureaucratic entanglements that delay the receipt of documents and the importance of early requests for release. More subtly, in the pursuit of records, student-attorneys gain an important lesson in the trust-building that precedes a request for a client's signature to release sensitive records.

Similarly, the process of conducting intensive interviews with the client and select others is critical training for the student-attorney. As one clinical text describes, client interviewing combines the "intellectual challenge" of assessing the client's legal problem with the "emotional challenge" of establishing a working relationship with a person who is often under considerable stress.[236] Mitigation-focused interviews magnify these challenges in several ways. First, due to the

233. The educational goals I discuss are shared by most "live client" law school clinics, not just non-capital criminal defense clinics. In addition, the goals are representative, not exhaustive. The sources from which the goals are drawn include Schrag, *supra* note 223, at 245-47; STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS, (4th ed. 2011); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33 (2001), and my own experience as a clinician.

234. *See* Schrag, *supra* note 223, at 185, 187.

235. As an ancillary point, the release process also helps the student become familiar with the releases required for specific records. In some cases, records may be acquired with a boilerplate release. In others, however, a unique form is required. For instance, most hospitals and other medical facilities require a release tailored to the requirements of the Health Insurance Portability and Accountability Act (HIPAA). In the same vein, refusal to release documents by a medical facility, prison, educational institution, or other body will, in many cases, provide the student-attorney an opportunity to secure and serve a subpoena *duces tecum* for the sought-after records.

236. KRIEGER & NEUMANN , *supra* note 233, at 88.

sensitivity of the topics explored during mitigation interviews, the student-attorney must become especially adept at identifying and addressing inhibitors that obstruct the client's candor.[237] Further, in mitigation, the student-attorney must listen actively and empathetically to the client, a difficult skill to master.[238] Moreover, the student-attorney's use of a "client-centered" approach to representation, while vital to the mitigation interview, is uniquely challenging in this context.[239] Client-centered lawyering "treat[s] the client as an effective collaborator (rather than as "a helpless person [in need of] rescue)."[240] Often, though, mitigation interviews turn up information that paints the client in a desperate light. To encourage the client's disclosure of trauma, abject poverty, or addiction while simultaneously endorsing his role as an empowered and capable case collaborator requires a delicate touch. Among other benefits, however, the client-centered approach "promotes the dignity of clients" in the midst of painful admissions and facilitates a personal relationship that often results in more productive dialogue.[241]

*Discovering Social Justice*

The records collection and interview process offer noteworthy examples of the way mitigation investigation often leads the student-attorney to a fuller understanding of law and social justice.[242] As Professor Phyllis Goldfarb writes, "[t]eaching lawyering in the context of assisting individuals and communities subordinated by social structures . . . opens dimensions for learning."[243] These "dimensions" include a "greater awareness" of the professional obligation to

237. *Id.* at 91 (possible client "inhibitors" include embarrassment about divulging a legal problem, inability to remember events, and "cultural, social, age, or dialect barriers").

238. *Id.* at 92.

239. *Id.* at 22 (quoting DAVID A. BINDER & SUSAN M. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977)).

240. *Id.*

241. *Id.* at 23 (quoting DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 168 (1974) (internal quotation marks omitted).

242. Goldfarb, *supra* note 232, at 302-03; *see also* Dubin, *supra* note 187, at 1477-78.

243. Goldfarb, *supra* note 232, at 304.

promote "fairness, equality under the law, and equal access to justice" and an "understanding of what subordination means in people's lives and how it operates on a regular basis."[244]

Teaching lawyering, as it relates to mitigation-intensive sentencing advocacy, is an especially effective method to instill social justice values in students. By studying the client's life experiences in-depth, the student-attorney gains a sense of the "relationship between law and issues of social justice at both broad[-]based and personal levels."[245] Broadly, the student-attorney develops insight into ways in which an ostensibly fair, just, and impartial legal process often disproportionately penalizes marginalized communities.[246] More personally, the realization of such disparity often causes the student-attorney to question previous notions of "how the world works" and leads to a changed societal perspective.[247] The development of a social justice-influenced perspective has both immediate and lasting benefits. In the short term, the student-attorney, through a deeper understanding of the client, will likely become a more zealous advocate for the client's interests. Over the long run, the impactful experience of representation will inform the student-attorney's professional choices with respect to public or pro bono service.

*Developing Cross-Cultural Awareness*

In similar fashion, mitigation investigation serves to build a core clinical teaching objective: cross-cultural awareness.[248] Cross-cultural awareness, as the term implies, occurs when law students "learn by

244. *Id*. at 302-04.

245. Dubin, *supra* note 187, at 1477 (quoting Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLIN. L. REV. 37, 43 (1995)) (internal quotation marks omitted).

246. *See id*. at 1477-78 (positing that "many law students come to [law school]" without "significant exposure" to the "victims of injustice" and have limited experience dealing with an "unresponsive legal system") (quoting Quigley, *supra* note 245, at 52-53) (internal quotation marks omitted).

247. *Id*. (quoting Quigley, *supra* note 245, at 51) (internal quotation marks omitted).

248. For a detailed and fascinating discussion on teaching diversity issues in clinics, see generally Bryant, *supra* note 233.

interacting closely with people from other cultures."[249] "When lawyers and clients come from different cultures," writes Professor Susan Bryant, "several aspects" of representation are "implicated," including the "capacity to form trusting relationships, . . to develop client-centered case strategies and solutions, [and] to gather information."[250] Bryant emphasizes that "non-judgmental thinking" is central to developing cross-cultural awareness.[251] Such thinking, she writes, encompasses the ability to "enter into the cultural imagination of another" and reframe as "'normal things that at first seem bizarre or strange.'"[252]

Mitigation investigation encourages this synergistic thought process. As previously discussed, the capital mitigation specialist must view evidence from the perspective of the client's cultural background, and dismantle false assumptions about race, ethnicity, or religion to contextualize experiences with which the jury may be unfamiliar. If, for example, student-attorneys make "assumptions and judgments" about the client that "grow out of [their] own cultural blinders," an intensive exploration into the client's background often generates positive self-reflection.[253] In much the same way, mitigation investigation helps "expose [student-attorneys] to the limitations of relying on their own experiences to interpret client behavior."[254] In other words, rather than resting on first impressions, an in-depth investigation exalts "the importance of searching for alternative explanations" for the client's actions.[255] Finally, as Bryant stresses, cross-cultural awareness requires the development of "deep listening skills."[256] Much like active listening, "deep listening"

249. Schrag, *supra* note 223, at 182.

250. Bryant, *supra* note 233 at 41-42.

251. *Id*. at 56.

252. *Id*. (quoting RAYMONDE CARROLL, CULTURAL MISUNDERSTANDINGS: THE FRENCH-AMERICAN EXPERIENCE 2 (1988)).

253. *Id*. at 88. As Bryant describes, "students will begin asking themselves questions such as: Why I am judging this client negatively? Is it because we have different values, experiences, or opportunities?" *Id.*

254. *Id*. at 93.

255. *Id*.

256. *Id*. at 94 ("Most students who were encouraged in their childhood to pursue a legal career probably received this advice because they displayed a tendency to argue, not because they were good listeners.").

involves patience, empathy, and an ability to recognize "non-verbal cues" from both sides that may impede the exchange.[257] As "deep listening skills" are not easily acquired, Bryant encourages student-attorneys to "look for red flags—clues that something is going wrong" during client interviews.[258] In noting and reflecting on "red flags," student-attorneys are apt to discover the source of the miscommunication and formulate an approach to improve subsequent interaction.[259] By requiring student-attorneys to work with clients in depth, detail, and around sensitive subject matter, mitigation investigation is an ideal forum to practice and cultivate deep listening skills.

*Integrating Facts and Law*

Non-capital mitigation investigation also teaches clinical students to think about the relationship between facts, evidence, and legal theory. Specifically, unlike the "pure story" of the capital mitigation narrative, the non-capital narrative must be framed with the applicable sentencing statutes or guidelines in mind. Thus, the non-capital student-attorney must consider, for example, how hospital records reflecting the client's multiple prescription drug overdoses should be handled in light of the federal statutory mandate that "the sentence imposed . . . promote[s] respect for the law" and "provide[s] the defendant with needed . . . medical care, or other correctional treatment in the most effective manner."[260] If the records are utilized, the student-attorney must then devise an effective strategy to move them into evidence. Professor Philip Schrag calls this process "[c]oping with facts."[261] Schrag notes the tendency in clinics to spend "far more time discovering *facts*" and turning "those facts into admissible *evidence*" than considering legal theory (in contrast to the approach in doctrinal courses to "take facts as given and study only law and policy").[262] Because "working on cases inevitably requires

257. *Id*. at 94-95.
258. *Id*. at 95.
259. *Id*.
260. 18 U.S.C. § 3553(a)(2)(A)-(D) (2010).
261. Schrag, *supra* note 223, at 182 (emphasis omitted).
262. *Id*.

the appropriate linkages to be made," Schrag strives to help students understand the relationship between facts, legal theory, and evidence in his clinic.[263] By requiring students to link mitigation facts, sentencing law, and evidentiary concerns, the non-capital presentation exemplifies the coping process Schrag describes.

*Building Creativity and Courage*

As Schrag and others suggest, a critical piece of clinical teaching is instilling in students the confidence and ingenuity to devise creative solutions for complex legal problems.[264] Clinical students, Schrag writes, are "startled by how successful they can be by allowing themselves to be imaginative."[265] The mitigation narrative demands both creativity and courage. Faced with a daunting amount of often conflicting and complicated evidence, the student-attorney must craft a persuasive and credible presentation. Doing so requires not only astute analysis of the evidence but also the imagination to reconstruct the client's history in the most compelling light. Moreover, the presentation, by its very nature, deviates from the legal jargon and case citations that dominate most court pleadings. Rather, the mitigation narrative, in the words of the *Carnegie Report*, centers on the placement of "things and events . . . within a story."[266] As a result, the presentation necessitates that the student-attorney have the conviction to break from the well-traveled path of antiseptic legal arguments and, instead, tell a story rich in detail, imagery, and emotion. Fortunately, the impact of the student-attorney's courage and creativity as measured in less-punitive, more rehabilitation-focused sentences is, to paraphrase Schrag, often startling.

*Improving Advocacy*

Most important, the use of a capital mitigation investigation model forwards a baseline goal of all criminal defense clinics: providing zealous representation.[267] The mitigation narrative may be

263. *Id.*
264. *Id*. at 184-85.
265. *Id*. at 184.
266. SULLIVAN ET AL., *supra* note 31 at 96, 122-23.
267. *See* Rigg, *supra* note 205, at 112-14.

utilized during plea negotiations or integrated into pre-sentencing pleadings in place of boilerplate introductory language and generic pleas for leniency. Even in misdemeanor cases, in which incarceration for one year or less is at stake, a cohesive and moving mitigation presentation can have a significant impact on the case outcome.[268]

Ellen Shultz, a capital mitigation specialist who has worked in the Eastern and Northern Districts of Virginia, believes a basic capital mitigation protocol is "readily transferable" to non-capital cases.[269] For such a model, Shultz recommends creation of "a contact list, records list, and social history timeline" through initial interviews with the client and others close to him.[270] The mitigation narrative based on the resulting evidence can serve to enlighten the court about the defendant's "history and characteristics" at sentencing.[271]

As the following excerpts from sentencing narratives exemplify, a mitigation investigation based on a model like the one Shultz describes can produce powerful results. First, from a review of school records, a vivid snapshot of the defendant's turbulent childhood and the "need for the sentence . . . to provide [him] with needed educational or vocational training," is possible:[272]

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268. For instance, in Illinois, as elsewhere, offenders convicted of a misdemeanor may be sentenced to up to one year in jail. JUNAID AFEEF ET AL., ILL. CRIM. JUST. INFO. AUTH., POLICIES AND PROCEDURES OF THE ILLINOIS CRIMINAL JUSTICE SYSTEM 6 (2005), *available at* http://www.icjia.state.il.us/public/pdf/researchreports/policies_and_procedures_of_the_illinois_criminal_justice_system_aug2012.pdf. Unlike felony convictions, however, after which the probability of a custodial sentence is high, a sentencing court has "several options" in misdemeanor cases. *Id.* at 25. Examples include a "diversion program" in which judgment in the case is suspended for "a specific period of time [and] [i]f the offender complies with all conditions set by the court, the offender will be released without a conviction." *Id.* Another example is drug probation for first offenders in which successful completion of a substance abuse treatment program may result in an expunged conviction. *Id.* at 26. In light of the alternative sentencing options available in misdemeanor cases, presentation of mitigating evidence about the defendant's background and history may be especially critical.

269. E-mail from Ellen Shultz, Capital Mitigation Specialist, to author (Aug. 8, 2013, 9:24 a.m. EST) (on file with author).

270. *Id.*

271. *Id.*

272. 18 U.S.C. § 3553(a)(2)(D) (2010).

> Paul was shuffled between homes and schools frequently. Beginning in first grade, he attended six schools in as many years, sometimes transferring in the middle of the academic year back to a school he previously attended. The instability had a detrimental impact on Paul's academic and social development. He was held back in first grade after attending two different schools and moving three times. He repeated the grade, but remained at the same home and school for the entire academic year. In a stable environment, Paul's performance improved dramatically. He received a cumulative grade of A in mathematics, A in spelling, B in language arts, and C in reading. By contrast, in second grade, Paul lived at three separate addresses and attended as many schools. He received grades of D or F in all aforementioned subjects. The disruptive pattern continued as Paul was moved through different schools and residences, including two foster homes, over the next four years. He dropped out of school in the seventh grade.[273]

In another narrative, client interviews supported by foster care records shape an argument about the client's "lesser role" as a courier in a drug trafficking enterprise:[274]

> In the days after her mother's arrest on drug charges, Sheri's step-father returned from Illinois. Unable to locate a relative in Clarksville to care for Sheri or her two siblings, he took the children to an impoverished, crime-ridden neighborhood in Chicago. Once there, Sheri began suffering physical abuse at the hands of her step-father and his girlfriend. The children were soon sent to an aunt, who lacked the interest or resources to provide for them. Social services intervened, and Sheri and her siblings were split into different homes. Sheri would never live with her brother or sister again. She was not even nine-years-old.[275]

273. Sentencing Memorandum (M.D. Tenn. June 9, 2009) (on file with author).

274. *See* 18 U.S.C. § 3553(a)(1) (providing that the court should consider the "nature and circumstances of the offense" when determining a particular sentence); U.S. SENTENCING GUIDELINES MANUAL § 3B1.2(a) (2010) (providing that if the defendant was a "minimal participant" in the offense their offense level may be reduced by four levels under the Sentencing Guidelines).

275. Sentencing Memorandum (M.D. Tenn. Apr. 11, 2005) (on file with author).

In another excerpt, interviews with the client and family members capture the impact of the client's early childhood in war-torn El Salvador to mitigate his unlawful entry into the United States and subsequent gang involvement:

> As the civil war escalated, bloodshed and suffering became a daily reality for the residents of Albornoz. Located close to a government military base, the town was a target for revolutionaries. Seven-year-old Ronald saw bodies in the streets and heard constant gunfire as he lay in bed at night. Often, school was cancelled amidst rumors of approaching guerrilla troops. For a time, Ronald's family shuffled between their home and the western village of Arce in an effort to escape the violence. The respite was always short-lived, though, and the journey often proved more harrowing than daily life in Albornoz.[276]

Finally, records documenting the recent incarceration of a client's estranged spouse demonstrate the client's extraordinary "family ties and responsibilities" as a single parent:[277]

> James is a single father. Should he be imprisoned, the family will be hard-pressed to find an alternate care-giver for the boys. James's wife, Melissa, is not a suitable choice. Though Melissa is the boys' birth mother, she has been estranged from the family since 1999. Melissa has been recalcitrant in fulfilling her child support obligations and has been jailed on several occasions for non-payment. Also, in 2001, she was convicted of theft of property for stealing money and cellular phone from her brother "to trade for drugs." In addition, she was arrested on January 18, 2007 in Williamson County on felony vehicle theft charge. She is currently on bond and awaiting trial on March 20, 2006.[278]

276. Sentencing Memorandum (M.D. Tenn. Sept. 19, 2008) (on file with author).

277. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (2004) ("Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.").

278. Sentencing Memorandum (M.D. Tenn. Feb. 12, 2007) (on file with author).

## CONCLUSION

The enormous volume of criminal defendants who enter guilty pleas combined with *Booker*'s widening of judicial sentencing discretion make mitigation investigation in non-capital cases more critical than ever. However, despite the unprecedented demand for effective advocacy, few non-capital defense counsel possess the skill, resources, or time to conduct intensive investigation or put forth innovative mitigation presentations.

To respond to this need, law school criminal defense clinics offer an ideal arena to introduce mitigation-intensive advocacy. As a "theory for practice," techniques used by capital mitigation specialists are especially instructive. First, a model drawn from capital mitigation investigation advances several longstanding goals of clinical education. In addition, as the "very depth of the involvement" of live client representation "can be debilitating" for student-attorneys, such a model offers structure and guidance in the complex area of mitigation investigation.[279] Further, a clinical model based on capital mitigation investigation can help student-attorneys to develop a comparable protocol for later use in practice. Most critically, the implementation of capital mitigation techniques in criminal defense clinics will enable student-attorneys to better advocate for outcomes that reflect the dignity, humanity, and individuality of every client.

279. Jennifer Howard, *Learning to 'Think Like a Lawyer' Through Experience*, 2 CLIN. L. REV. 167, 180 (1995) (quoting Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284, 287 (1981)) (internal quotation marks omitted).