



**TRAUMA-INFORMED JUSTICE
A BETTER APPROACH FOR SENTENCING**

**JUST US FOR JUSTICE
FALL CJA CLE - NOVEMBER 5, 2025**

BIOGRAPHY & BACKGROUND

Ms. Kubiak is an Assistant Federal Public Defender for the Western District of New York. Since January 2023, she has been the Training Director. In addition, Fonda currently serves as a committee member for the Jury Diversification Project and the Community Outreach Subcommittee working to increase jury diversification in the Courts in our District as well as New York State Courts in the 8th Judicial District and focusing efforts on implanting systemic change.

Fonda has extensive experience in federal and state criminal defense having practiced in Western New York for the past 30 years. Fonda has taught widely on various topics of criminal defense. In addition, She is an Adjunct Professor at the University at Buffalo School of Law teaching Trial Techniques, Direct and Cross-Examination of Expert Witnesses in Criminal Cases and coaching National Trial Teams.





We need to move
away from what's
wrong with you,
to what happened
to you.

*What Happened To You? Conversations on Trauma,
Resilience, and Healing*

Oprah Winfrey

UNTIL WE NAME THE PAIN, WE CAN'T HEAL IT

- **Disruption – Pre-Incarceration Trauma**
 - The pain started long before the prison walls — childhood trauma, poverty, abandonment. Survival mode began early.
- **Disconnection – Incarceration Trauma**
 - Prison teaches you to shut down to survive. You lose touch with yourself, your feelings, and your emotions.
- **Distress – Post-Incarceration Trauma**
 - Freedom doesn't feel free when your mind is still locked up. Triggers. Anxiety. Hypervigilance.
- **View - Vicarious Trauma**
 - And then there's us — the families, partners, correction officers, parole and probation officers, mentors, volunteers and Reentry professionals who see and carry the pain too.

LAYERS OF TRAUMA



PRE-INCARCERATION



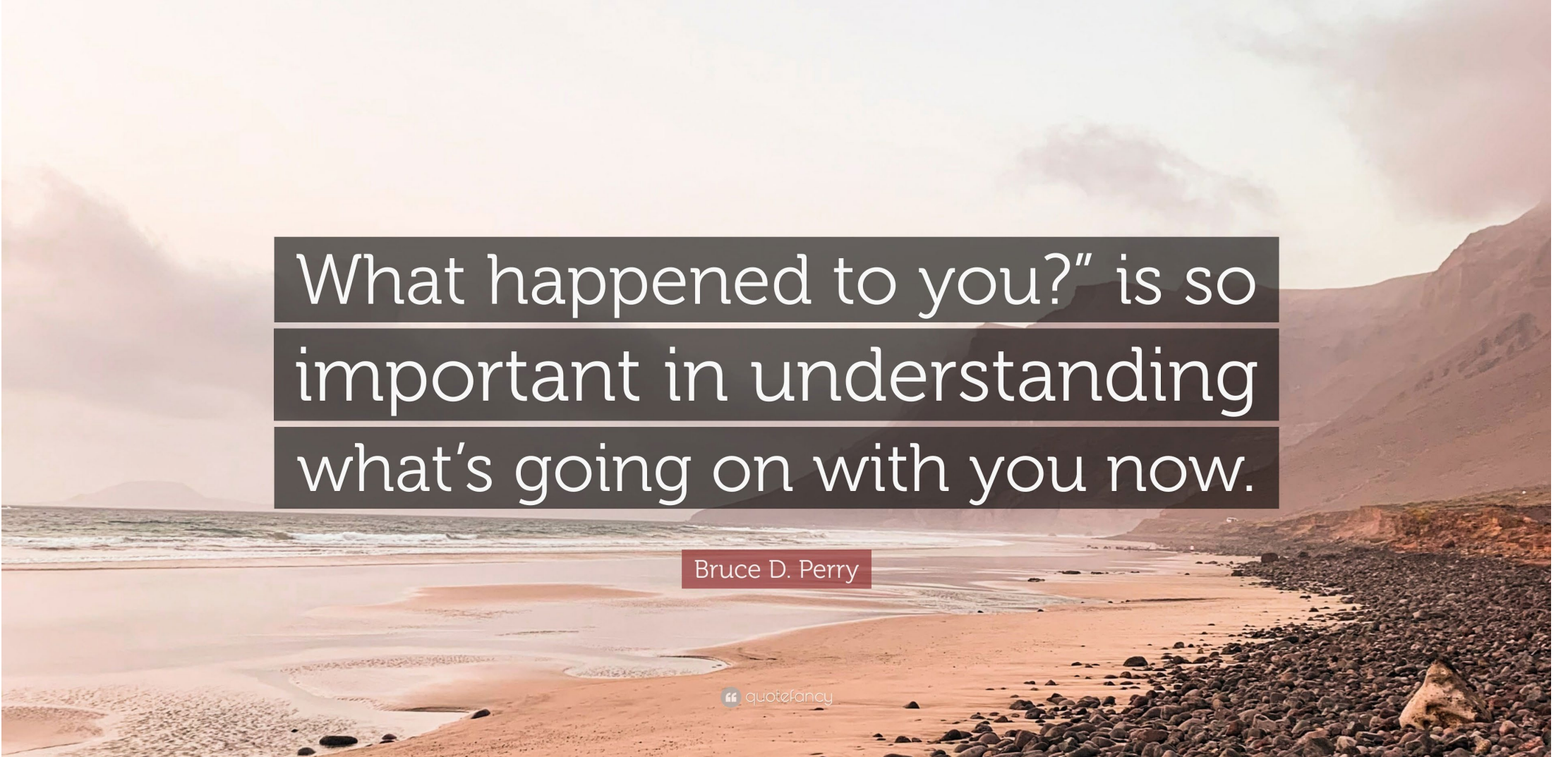
INCARCERATION



POST-INCARCERATION



VICARIOUS TRAUMA



What happened to you?" is so
important in understanding
what's going on with you now.

Bruce D. Perry

 quote fancy

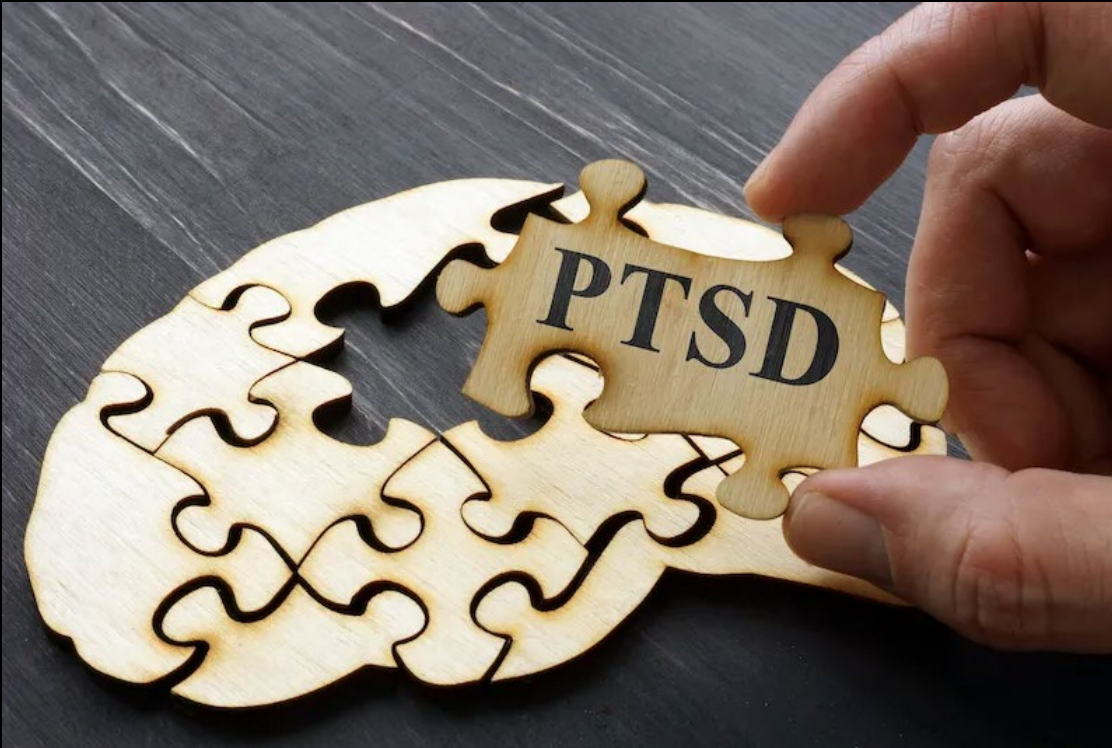
TRAUMA IS PERVASIVE IN THE JUSTICE SYSTEM

In the American justice system, 96% of woman and 89% of men have experienced significant trauma, often driven by an early childhood history of sexual or domestic abuse. These defendants often fall victim to a self-destructive cycle fueled by anger and erratic emotional behaviors, which can involve acts of violence along with alcohol and drug misuse.



Many also suffer from forms of social exclusion, poverty, and homelessness. They are more likely to engage in serious risk-taking conduct, which means they are more likely to be arrested and appear in court.

TRAUMA INFORMED JUSTICE



- Recently courts have begun to recognize trauma as a major driving force behind certain types of criminal behavior.
- An essential feature of a trauma-informed justice is the understanding that an individual's behaviors are not always a result of character flaws, nor are they necessarily symptoms of mental illness. Rather, they can be behavioral ploys used to cope with the impact of traumatic experience. This awareness does not excuse the defendant's criminal behavior, rather it should cause the court to adopt a new sentencing approach that could be more successful in reducing recidivism.

A TRAUMA INFORMED APPROACH TO SENTENCING ADVOCACY

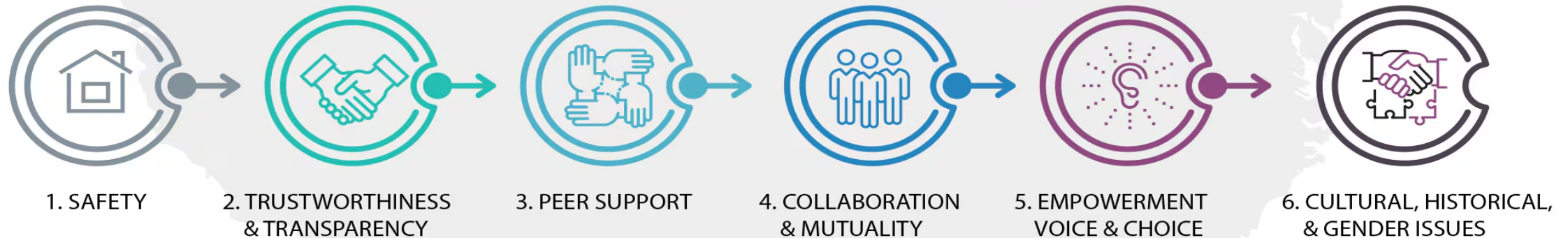
- A trauma-informed approach in federal sentencing integrates developmental, psychological, and social context into the judicial process, emphasizing both mitigation and rehabilitation while maintaining public safety and legal fairness. This approach recognizes that many defendants' criminal behaviors are influenced by cumulative trauma, including childhood adversity, community violence, or systemic deprivation.



6 GUIDING PRINCIPLES TO A TRAUMA-INFORMED APPROACH

The CDC's [Center for Preparedness and Response \(CPR\)](#), in collaboration with SAMHSA's [National Center for Trauma-Informed Care \(NCTIC\)](#), developed and led a new training for CPR employees about the role of trauma-informed care during public health emergencies. The training aimed to increase responder awareness of the impact that trauma can have in the communities where they work.

Participants learned SAMHSA'S six principles that guide a trauma-informed approach, including:

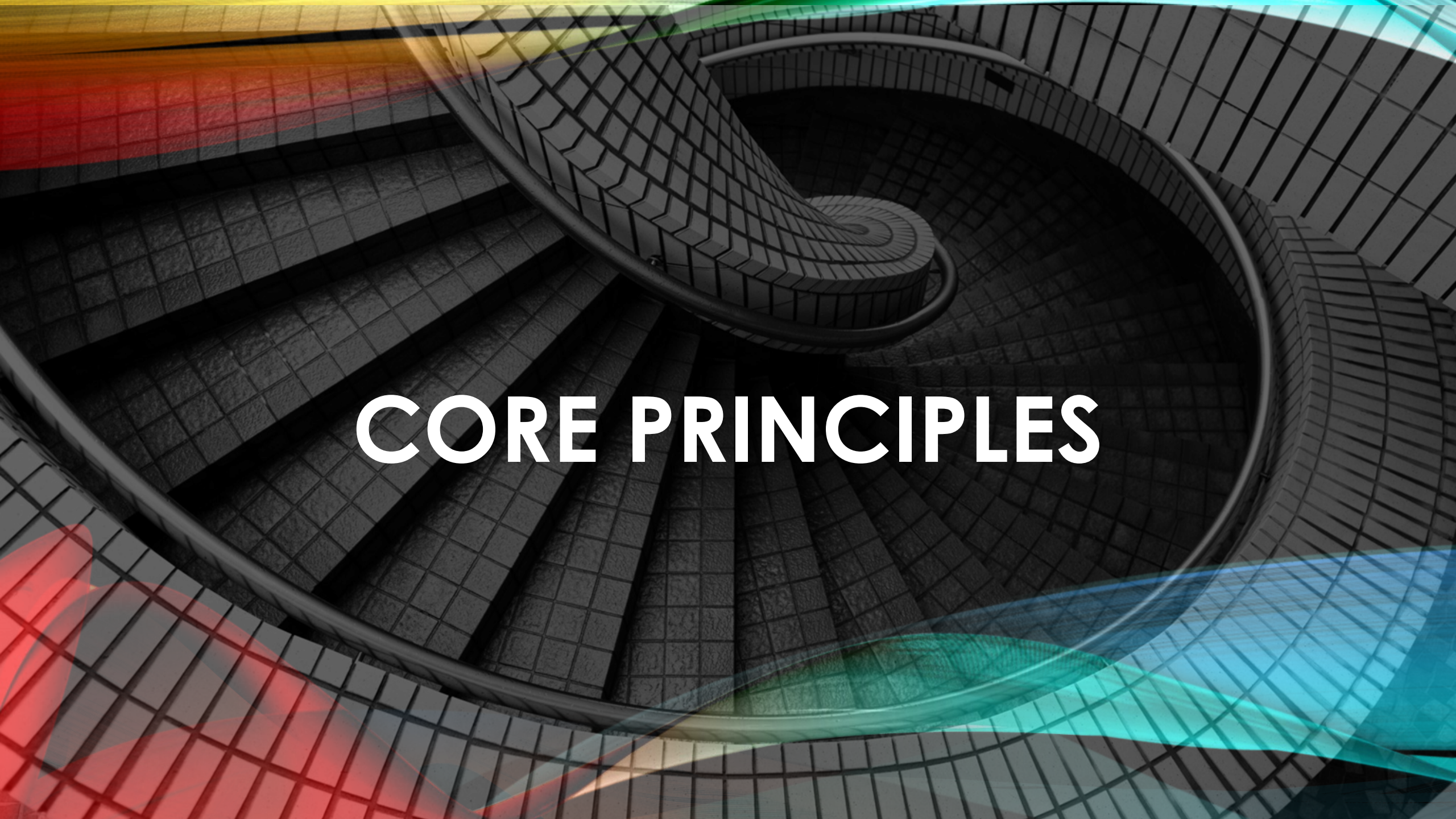


Adopting a trauma-informed approach is not accomplished through any single particular technique or checklist. It requires constant attention, caring awareness, sensitivity, and possibly a cultural change at an organizational level. On-going internal organizational assessment and quality improvement, as well as engagement with community stakeholders, will help to imbed this approach which can be augmented with organizational development and practice improvement. The training provided by [CPR](#) and [NCTIC](#) was the first step for CDC to view emergency preparedness and response through a trauma-informed lens.

SOCIAL-HISTORY-FOCUSED MITIGATION

- Social-history-focused mitigation stood to benefit defendants across cases, not only individually.
- Shift Courts focus away from individual defendants' poor choices to interdisciplinary social-history context for crime would in turn promote rehabilitative, rather than strictly punitive, sentencing
- Once a court considers the social science explaining the concrete behavioral impacts of trauma, any defendant presenting trauma-related mitigation would gain the benefit of that court's understanding, even if the later defendant's own attorney did not present such social science data





CORE PRINCIPLES

RECOGNITION OF TRAUMA



Judges, attorneys, and court personnel acknowledge that experiences such as childhood abuse, neglect, poverty, systemic oppression, or combat exposure can contribute to criminal behavior



Trauma affects brain development and executive functioning, which can lead to impulse control issues, emotional dysregulation, and adaptive coping behaviors (e.g., substance use)

INDIVIDUALIZED SENTENCING (SENTENCING CALCULUS)

Sentencing should balance statutory goals (punishment, rehabilitation, deterrence, and community safety) with an understanding of personal history.

Trauma-informed sentencing explicitly considers trauma-related mitigation alongside other factors to achieve proportional and effective outcomes.

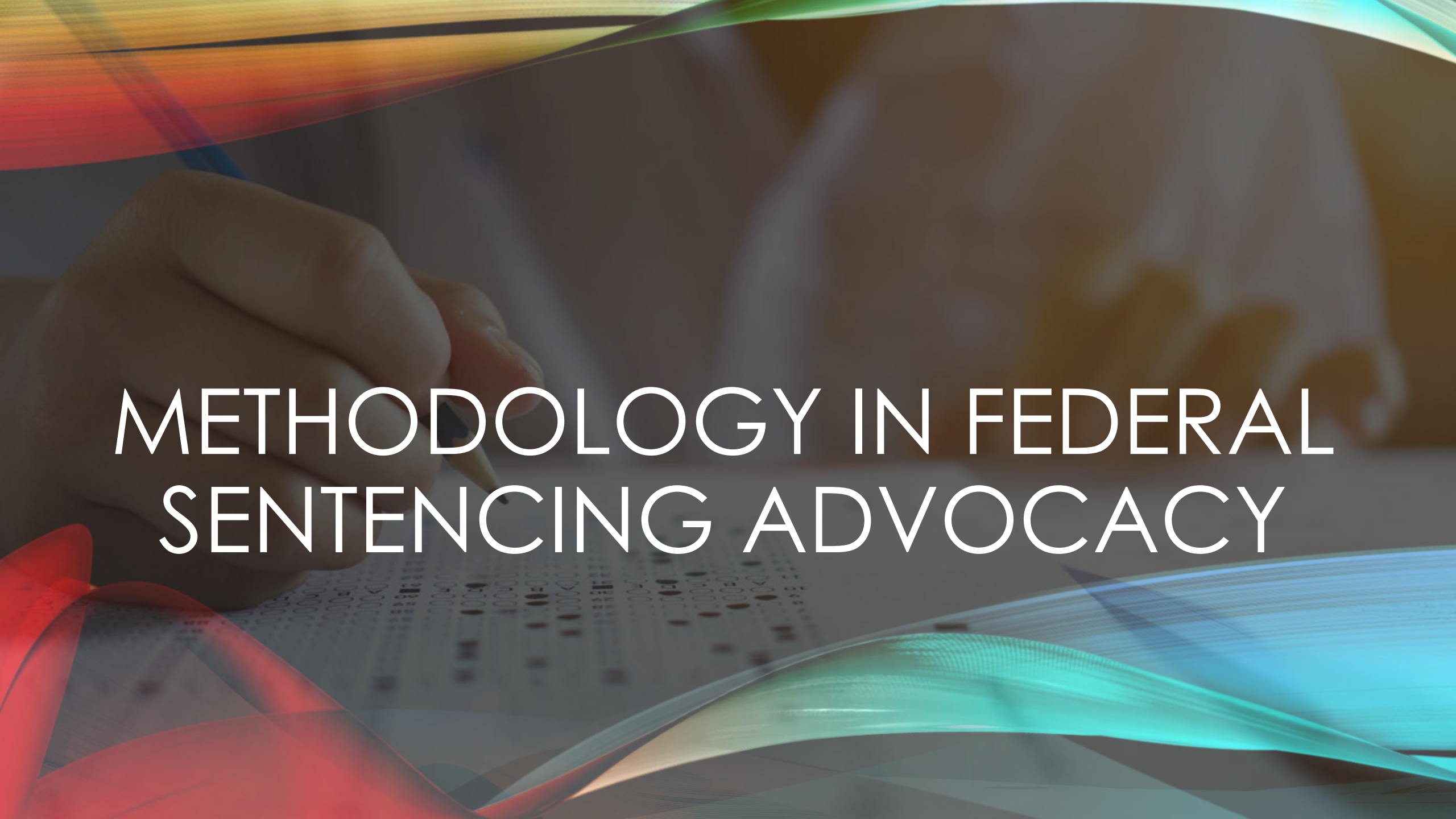
PROCEDURAL FAIRNESS AND RESPECT



Courts should ensure that defendants' voices are heard and that they feel treated with dignity, promoting engagement and increasing the efficacy of rehabilitative measures.



Key principles—voice, neutrality, respectful treatment, and trustworthy authorities—are central to fostering an environment where trauma-symptom behaviors are not unnecessarily criminalized.

The background of the slide features a hand holding a pen, writing on a document. The document has some faint, illegible text and a grid-like pattern. Overlaid on the image are several colorful, wavy, translucent bands in shades of red, orange, yellow, and blue, creating a dynamic and modern aesthetic.

METHODOLOGY IN FEDERAL SENTENCING ADVOCACY

COMPREHENSIVE INVESTIGATIONS

- Defense teams gather extensive social histories, highlighting adverse childhood experiences, systemic disadvantages, or circumstances that reduced culpability.
- Collaboration with mental health professionals, social workers, and mitigation specialists ensures credible, evidence-based presentation of trauma.





INTERDISCIPLINARY MITIGATION TEAMS

Employ an interdisciplinary approach, combining law, social work, psychology, and medical expertise.

This approach helps secure variances from standard sentencing guidelines via compelling narratives of the defendant's lived experiences.

EVIDENCE- BASED FRAMEWORKS

Studies on behavior change, recidivism, and rehabilitation inform sentencing strategies.



Programs may incorporate therapeutic jurisprudence or justice reinvestment concepts, aiming to reduce recidivism while addressing underlying trauma.

INCORPORATION OF VICTIM AND COMMUNITY CONSIDERATIONS

- Trauma-informed advocacy balances recognition of defendants' trauma with respect for victims and community safety.
- Victim impact statements and risk assessments can contextualize trauma without excusing criminal conduct.



OUTCOMES AND BENEFITS

Reduced Sentences: Clinics report variances of multiple years below guideline ranges through trauma-based mitigation.



Enhanced Judicial Understanding: Regular exposure to trauma-informed arguments broadens judges' appreciation of life histories and systemic factors.



Systemic Influence: Cross-case impact supports broader sentencing reforms by illustrating how social science-informed mitigation produces fairer, more effective outcomes.



Focus on Rehabilitation: Promotes approaches that improve post-incarceration success, addressing recidivism, mental health, and social integration.

STRATEGIC CONSIDERATIONS FOR ATTORNEYS

1

Present trauma-related evidence clearly and concisely in sentencing memoranda and oral arguments.

2

Utilize expert testimony to explain neurobiological and psychosocial effects of trauma.

3

Employ client-centered narrative strategies to humanize the defendant while emphasizing capacity for rehabilitation.

4

Integrate trauma-informed practices in plea negotiations, alternative sentencing proposals (e.g., drug courts, mental health programs), and reentry planning.

KEY RESOURCES AND FRAMEWORKS



SAMHSA 4 Rs: Realize, Recognize, Respond, Resist re-traumatization.



CMIC Publications: “Grace Notes” (2013) and “In Defense of the Injured” (2018) provide blueprints for trauma-informed sentencing advocacy.



Judicial Training Programs: Pilot programs and continuing education for judges on trauma-informed approaches ensure consistent implementation.

CONCLUSION

- Trauma-informed federal sentencing advocacy transforms the traditional mitigation process by systematically applying scientific, psychological, and social insights to the individualized sentencing calculus. This approach not only promotes equitable treatment for defendants with histories of trauma but also advances outcomes focusing on rehabilitation, community safety, and systemic justice reform.



NARRATING CONTEXT AND REHABILITATING REHABILITATION: FEDERAL SENTENCING WORK IN YALE LAW SCHOOL'S CHALLENGING MASS INCARCERATION CLINIC

MIRIAM GOHARA¹

ABSTRACT

The Challenging Mass Incarceration Clinic (CMIC) at Yale Law School has been representing clients in federal sentencing and state postconviction cases since 2016. Drawing on a blueprint I set forth in a 2013 article, the clinic teaches a model of noncapital sentencing practice that builds on the best capital defense sentencing practices and seeks to transform judges' and prosecutors' assumptions about criminal sentencing.

In this article, I set forth CMIC's theoretical underpinnings and detail our interdisciplinary, trauma-informed approach to sentencing advocacy and clinical practice. I then describe CMIC's case outcomes, including variances which have reduced each of our clients' prison time an average of five years below the United States Sentencing Guidelines range and more than 18 months below prosecutors' recommended sentences. CMIC's work has also produced innovations to traditional client-centered, holistic lawyering; enhanced approaches to working with experts; and yielded insights into the incorporation of defense-based victim outreach in appropriate cases.

Our experiences in CMIC raise several areas for future research, including whether the model will produce the kind of fundamental sentencing reform I predicted in my earlier work, and questions about fairness, risks, data, and scalability. I am publishing this article with the hope and intention that other law school clinics will borrow from and improve on CMIC's model.

¹ Clinical Associate Professor of Law, Yale Law School. Many thanks to Matt Kellner for invaluable research assistance, to Olivia Layug Balbarin and Kate Levien for careful edits, and to Muneer Ahmed, Tracey Meares, Jeff Selbin, Fiona Doherty, Oona Hathaway, and Claire Priest as well as to members of the Fall 2019 NYU Clinical Writers' Workshop for essential feedback and excellent suggestions. Special thanks to First Assistant Federal Defender Kelly Barrett, with whom I co-teach CMIC and who has been an essential thought partner to me and cherished role model and mentor to our students. Finally, enormous thanks to Brett Dignam, who introduced me to the wonders of clinical teaching and on whose shoulders I stand.

INTRODUCTION

The Challenging Mass Incarceration Clinic (CMIC) at Yale Law School has been representing clients in federal sentencing and state postconviction cases since 2016. The clinic's practice follows the blueprint I set forth in a 2013 article, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*.² *Grace Notes* called on public defenders and law school clinics to adopt an interdisciplinary, mitigation-rich approach to sentencing advocacy in order to present courts with the salience of defendants' life histories to their sentences.³

In a second article, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, I deepened *Grace Notes*' examination of trauma as a potent basis for sentencing mitigation.⁴ Both *Grace Notes* and *In Defense of the Injured* prescribed a model of noncapital sentencing practice that draws from the best capital defense sentencing practices. CMIC teaches students how to advocate zealously on behalf of individual clients and to transform judges' and prosecutors' assumptions about criminal sentencing.

This article describes how CMIC students learn to provide their clients with gold standard representation. It also explains how the students' innovative federal sentencing practice provides judges with a basis for reconsidering the role of incarceration in punishment and rehabilitation. The CMIC students' work is especially important at a time when public consciousness about mass incarceration's impact on millions of people has reached heights unimaginable even a decade ago and has produced bipartisan federal criminal justice reform.⁵

² Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41, 72-73 (2013).

³ *Id.* at 45, 48-49, 73.

⁴ Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 AM. J. CRIM. L. 1 (2018).

⁵ See Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J.F. 791, 796 (2019); Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 820-21 (2017); Natalie Andrews, *Senate Passes Landmark Criminal-Justice Overhaul Bill in Bipartisan Vote*, WALL ST. J. (Dec. 18, 2018), <https://www.wsj.com/articles/senate-passes-landmark-criminal-justice-overhaul-bill-in-bipartisan-vote-11545185430> (discussing passage of the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018)); Memorandum from Robert Blizzard, Pub. Op. Strategies, to Interested Parties re: National Poll Results 1 (Jan. 25, 2018), <https://www.politico.com/f/?id=00000161-2ccc-da2c-a963-efff82be0001> ("By a 76%-21% margin, voters believe the country's criminal justice system needs significant improvements versus it's working pretty well as it is. Fully two-thirds of Republicans (68%), and substantial majorities of both Independents (78%) and Democrats (80%) believe the system needs significant improvements. An overwhelming number of women (80%) want changes to the system."). CMIC's practice also capitalizes on Supreme Court precedent retreating from decades of determinate sentencing. See *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *United States v. Booker*, 543 U.S. 220, 264-65 (2005); see also Gohara, *supra* note 2, at 56

The article proceeds in several parts. Part I summarizes *Grace Notes*' framework and claims, and it deepens the explanation of the clinic's theoretical underpinnings. Part II details CMIC's interdisciplinary, trauma-informed approach to sentencing advocacy and clinical practice, and Part III describes clinic case outcomes. Although this is not a quantitative study, the clinic has obtained variances to nine clients' sentences that have saved them a combined 46.5 years in prison time below the prescribed range in the United States Sentencing Guidelines, or an average reduction of more than five years each.⁶

Part IV examines new insights that have emerged from putting the theory into practice and identifies unanswered questions and avenues for future research. The new insights from the clinic's work include: innovations to traditional client-centered, holistic lawyering; enhanced approaches to working with experts; and incorporation of defense-based victim outreach in appropriate cases. Areas for future research include whether the clinic's model will produce the fundamental sentencing reform I predicted in *Grace Notes*,⁷ and questions about fairness, risks, data, and scalability.

I am publishing this article with the hope and intention that other law school clinics will borrow from and improve on CMIC's model.

I. CLAIMS AND THEORIES

A. Claims

In *Grace Notes*, I argued that interdisciplinary mitigation practice based on noncapital clients' social histories would ameliorate individual sentences by recalibrating judges' and prosecutors' estimation of blameworthiness.⁸ Courts' shift in focus away from individual defendants' poor choices to interdisciplinary social-history context for crime would in turn promote rehabilitative, rather than strictly punitive, sentencing.⁹ At a systemic level, capital-style mitigation advocacy in noncapital cases would turn sentencing hearings into fact-finding tribunals establishing a record of the social conditions that give rise to clients'

("The *Miller/Jackson* cases, the first to extend the requirement of individualized sentencing to noncapital cases, have provided a limited opening for investigation and presentation of robust noncapital mitigation.").

⁶ CMIC has represented clients in nine federal sentencing hearings, which is too small a sample from which to derive generalizable findings. Initial sentencing outcomes suggest that the clinic's social history mitigation has produced promising results. However, as I describe in the final section of the piece, a larger sample size and carefully designed regression analysis would be necessary to test whether the clinic's practice model consistently achieves lower sentences than traditional noncapital sentencing advocacy.

⁷ Gohara, *supra* note 2, at 49.

⁸ *Id.* at 48, 65.

⁹ *Id.* at 77; Gohara, *supra* note 4, at 48-49.

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involvement in crime.¹⁰ Exposing social harms as contributing factors to clients' criminal wrongdoing would point experts, policymakers, and practitioners to the need for resources to redress those social harms.¹¹

I also proposed that social-history-focused mitigation stood to benefit defendants across cases, not only individually.¹² Once a court considers the social science explaining the concrete behavioral impacts of trauma, any defendant presenting trauma-related mitigation would gain the benefit of that court's understanding, even if the later defendant's own attorney did not present such social science data. *Grace Notes* projected cross-case impact of social-science-informed mitigation as a long-term goal of mitigation-centered defense advocacy.¹³ As described below, CMIC's six semesters show that the cross-cutting benefit of the clinic's approach on courts' understanding of the salience of social history mitigation need not take long at all.

Finally, I recommended partnership between law school clinics and public defense offices as a means of promoting robust noncapital mitigation practice in the broader criminal defense community.¹⁴ Toward this end, CMIC partners with the District of Connecticut Federal Defender's Office (FDO). This collaboration also provides students the benefit of co-supervision by me as their clinical professor and full-time public defenders with expertise in local practice. The District of Connecticut's First Assistant Federal Defender, Kelly Barrett, co-teaches the clinic. Our collaboration has informed both the FDO's sentencing practice and its private bar training, thereby changing the norms of local practice.

B. Theories

CMIC's theoretical underpinnings are faithful to the twin pillars I set forth in *Grace Notes*: context and rehabilitation.¹⁵

1. Context

In CMIC's seminar and in casework supervision sessions, stu-

¹⁰ Gohara, *supra* note 2, at 69.

¹¹ *Id.* at 46 n.17, 48, 69.

¹² *Id.* at 77.

¹³ *Id.* Gary Bellow described and prescribed the benefits of "focused case strategy" in the civil legal aid context in *Turning Solutions into Problems: The Legal Aid Experience*, 34 NAT'L LEGAL AID & DEFENDER ASS'N BRIEFCASE 106, 121-22 (1977).

¹⁴ Gohara, *supra* note 2, at 72-73 ("The proposal here, instead, is that public defender offices and other attorneys with available resources take the lead in devoting time and funding to meaningful investigation into mitigating circumstances relevant to their client's blameworthiness and capacity for rehabilitation."); see also Gohara, *supra* note 4, at 5-7.

¹⁵ Gohara, *supra* note 2, at 65.

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dents engage deeply with questions concerning the legitimacy of punishing people who have committed crimes and whom the state has failed in various respects to protect. Students develop their own ideas for how to use social history mitigation and develop case theories that put arguments about the salience of social context before sentencing courts. They learn to think meaningfully about why and how courts ought to consider clients' entire life histories before sentencing them.

CMIC's core, underlying principle is that just and proportionate sentences depend on courts' consideration of defendants' social histories.¹⁶ This principle stems from two mitigation theories: "whole life" and "societal standing to punish." The "whole life" theory posits that a sentencer must consider the totality of the suffering that a convicted person has suffered in his whole life before determining how much more suffering to impose on him when punishing his criminal wrongdoing.¹⁷ A subset of "whole life" theory is one in which a sentencer considers whether a defendant's suffering has diminished his capacity. For example, behavioral science shows that childhood abuse and neglect and extreme poverty impact the ability to control impulses, regulate emotions, as well as form lasting prosocial relationships.¹⁸ Childhood exposure to violence also impacts working memory and executive functions, such as the ability to plan ahead and delay gratification.¹⁹ As Emad Atiq and Erin Miller explain in their argument for unlimited consideration of these "severe environmental deprivations" as capital mitigation, courts should not hold defendants with these diminished capacities fully responsible and therefore deserving of maximum punishment.²⁰ In CMIC students' casework, the same logic applies to noncapital mitigation, with evidence of clients' rehabilita-

¹⁶ Emad H. Atiq & Erin L. Miller, *The Limits of Law in the Evaluation of Mitigating Evidence*, 45 AM. J. CRIM. L. 167, 171 (2018) ("We argue that *Lockett* [v. *Ohio*, 438 U.S. 586 (1976)], *Eddings* [v. *Oklahoma*, 455 U.S. 104 (1982)], and *Tennard* [v. *Dretke*, 542 U.S. 274 (2004)], together, stand for the proposition that a practice of restrictive consideration of mitigating evidence where the restrictions are imposed because judges feel bound by the law (in a sense to be made precise) is unconstitutional."); *id.* at 184-85 ("But the sentencing question is not whether the defendant should be altogether excused. The question is whether he deserves to be held *fully* responsible and maximally punished."); Gohara, *supra* note 4, at 12-13; Gohara, *supra* note 2, at 57-58 ("[J]ustice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense *together with the character and propensities of the offender*." (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (emphasis added))).

¹⁷ Atiq & Miller, *supra* note 16, at 185; Victor Tadros, *Poverty and Criminal Responsibility*, 43 J. VALUE INQUIRY 391, 393 (2009) ("By perpetrating distributive injustice against the poor, we lose standing to hold them responsible for what they have done.").

¹⁸ BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* 58-63, 68-70 (2014).

¹⁹ *Id.*

²⁰ Atiq & Miller, *supra* note 16, at 181.

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tion as an additional antidote to long prison terms.

The “societal standing to punish” mitigation theory considers as the central moral question sentencers’ standing to punish in the context of social harms and institutional failure. Proponents of “societal standing to punish” as a basis for mitigation advance various justifications.²¹ As Tommie Shelby puts it, “When a society falls below the threshold for tolerable injustice and its governing institutions are responsible for the injustices (for either perpetrating them or not preventing them), the state’s *right to punish crime is compromised*.”²² One reason that the state generally has authority to punish is that the person who commits crime violates the social compact. By that compact, one who benefits from the state’s protection of fundamental liberties and equitable distribution of benefits and burdens is subject to the state’s punishment if he transgresses the compact.²³

However, some philosophers have argued that the state loses the authority to punish people whom it fails to protect, even when they violate the social compact. In Victor Tadros’s view, the state loses its authority to punish if it is complicit in proliferating the social conditions that give rise to crime.²⁴ In this version of the theory, the state contributes to wrongdoing and shares in its responsibility by failing to prevent social conditions such as poverty which it can foresee result in crime and which it has the power to ameliorate.²⁵

Yet, according to Shelby, even when the state lacks moral authority to punish, it retains enforcement rights if its criminal justice system operates in a reasonably fair and impartial manner.²⁶ This is permissible so that the state may intervene to protect other vulnerable people from unjustified harm.²⁷ That enforcement, however, should not depend exclusively on punishment. Rather, it should include political enfranchisement of people convicted of crime, voluntary rehabilitation programs for them, and social reforms that establish and maintain a just and equitable basic structure.²⁸

Courts are unlikely to harbor doubt about their legitimacy to impose punishment. Clinic students’ work therefore aims to direct judges’ attention to the ways the state has transgressed the social com-

²¹ TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM* 244 (2016).

²² *Id.*

²³ *Id.*

²⁴ Tadros, *supra* note 17.

²⁵ *Id.* at 408. R. A. Duff’s variation on this philosophy asserts that the state lacks standing to punish crimes that it commits itself, such as theft, deceit, or unjustified violence. See R. A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 186-88 (2001).

²⁶ SHELBY, *supra* note 21, at 246.

²⁷ *Id.* at 248.

²⁸ *Id.* at 250-51.

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pact by failing to protect the impoverished communities in which clients and often many generations of their families have lived. The students' pleadings point courts to the social conditions, including poverty, addiction, lack of basic educational and employment opportunities, and inadequate health care, which the state permits to proliferate in clients' communities, and which give rise to crime.²⁹ Students' written and oral advocacy then points to alternatives to prison (punishment) that would remedy (through rehabilitation) some of the direct impacts on our clients of the state's failures to protect them or to ensure even adequate distribution of basic services to their communities.

In CMIC, students introduce facts and argument that draw on "whole life" and "societal standing to punish" mitigation. To operationalize both principles, students present the social milieu of clinic clients' lives at widening circles of influence: individual, family, neighborhood, city, economic, historical, and geographical. They do so to show that a web of decisions, only the most proximate of which were our clients', proliferated the conditions that gave rise to their crimes.³⁰ The textual analysis of CMIC sentencing hearing transcripts in later sections of this article shows how judges in CMIC cases have drawn implicitly on these mitigation theories in ameliorating punishment.

2. Rehabilitation

The second tenet of CMIC's model is our emphasis on rehabilitation.³¹ In capital mitigation, when the options are most often death or life without parole, the defense team's task is often oriented toward proving that the client is capable of living peacefully behind bars. In noncapital mitigation, the defense team must establish the client's prospects for, or demonstrated record of, rehabilitation in order to make the case for reduced prison time or alternatives to incarceration.³² At the same time that CMIC students learn to establish the

²⁹ This advocacy is in keeping with Shelby's assertion that punishment imposed by a society complicit in the social harms that perpetuate crime must include rehabilitative opportunities for those convicted of crime.

³⁰ Gohara, *supra* note 4, at 13, 49-50.

³¹ In addition to the federal sentencing work, in order to deepen the clinic's examination of models of rehabilitation, CMIC has begun to learn from and represent men incarcerated in an innovative unit of a Connecticut prison which was modeled on a German program for 18- to 25-year-old prisoners. See Miriam Gohara, *A Prison Program in Connecticut Seeks to Find out What Happens When Prisoners Are Treated as Victims*, CONVERSATION (Mar. 7, 2019), <https://theconversation.com/a-prison-program-in-connecticut-seeks-to-find-out-what-happens-when-prisoners-are-treated-as-victims-111809>. This work has profoundly informed the clinic's advocacy and the rehabilitative possibilities it recommends in sentencing and in postconviction applications.

³² Gohara, *supra* note 2, at 51.

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context of clinic clients' law-breaking, they learn to make a case for rehabilitation. Students build a record that points to clients' healing and treatment, rather than their bare incapacitation, as the most effective means of deterring them from future crime and promoting lasting public safety.³³

In order to persuade courts to impose nonprison sentences, CMIC students assemble effective rehabilitation plans and comprehensive documentation of clients' hard work at rebuilding their lives after convictions. Our work on clients' rehabilitation plans has also provided clients with the support that they lacked before their federal arrests. For some clients, that has included successful participation in addiction treatment plans, educational programs, and employment in trades such as carpentry, food service, and commercial truck driving.

In sharp contrast to the rehabilitation rubric that translated into indeterminate sentencing and unbridled judicial and parole-board discretion that inspired the adoption of the mandatory Federal Sentencing Guidelines, CMIC students design rehabilitation plans to keep our clients out of prison or to limit their prison time to a clearly defined term.³⁴ Clinic students advocate for rehabilitation plans that lay out an achievable framework with clear benchmarks. For example, they may present evidence of clients' engagement with particular mental health or addiction treatment, or point to clients' specific educational and vocational accomplishments. In other words, our rehabilitation proposals are a far cry from the "lofty goals of rehabilitation . . . with no directions or means of achievement" that led federal sentencing away from unguided discretion to mandatory and determinate sentences under the Guidelines regime.³⁵ Rather, clinic students prepare rehabilitation strategies for courts that chart a middle path, identifying clear mitigating factors that would benefit from treatment, social services, or other interventions.

Clinic students have argued in some cases that the federal sentencing statute's directive to impose sentences that provide treatment "in the most effective manner" presents a justification for rehabilita-

³³ See Mirko Bagaric, Gabrielle Wolf & William Rininger, *Mitigating America's Mass Incarceration Crisis Without Compromising Community Protection: Expanding the Role of Mitigation in Sentencing*, 22 LEWIS & CLARK L. REV. 1, 40-41 (2019) (citing empirical sources); Gohara, *supra* note 4, at 53.

³⁴ See MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 12-25, 89-90, 93, 95 (1972); KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 34 (1998) (describing Andrew Von Hirsch's rejection of rehabilitation philosophy that supported indeterminate sentencing).

³⁵ FRANKEL, *supra* note 34, at 95. The elimination of federal parole and unguided discretion defused much of the pre-Guidelines concern about prioritizing rehabilitation as a sentencing theory. See STITH & CABRANES, *supra* note 34, at 2, 37.

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tion.³⁶ As the argument goes, noncustodial rehabilitation-oriented sentences are the principally effective means of achieving the other purposes of punishment: “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”³⁷ (retribution); deterrence;³⁸ public protection;³⁹ and “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”⁴⁰ In the alternative, clinic students have argued that judges should impose prison terms below the advisory guidelines, which remain available to guide judges’ sentencing discretion.⁴¹

To demonstrate to courts that rehabilitation is effective, a major component of CMIC students’ work involves facilitating clients’ pre-sentencing involvement in employment, educational, and therapeutic opportunities. The students’ advocacy in this regard has demonstrated that a community-based sentence is available and effective to deter clients from breaking the law. The clinic’s proposed sentences also often include a period of supervision and community service to meet the court’s interest in accountability and public protection.⁴² Clients’

³⁶ 18 U.S.C. § 3553(a)(2)(D); see Erica Zunkel, *18 U.S. Code § 3553(a)’s Undervalued Sentencing Command: Providing a Federal Criminal Defendant with Rehabilitation, Training, and Treatment “In the Most Effective Manner,”* 9 N.D. J. INT’L & COMP. L. 49, 52-53 (2019); Michael Tonry, *Making American Sentencing Just, Humane, and Effective* 15-17 (Minn. Legal Studies Research Paper No. 16-32, 2016).

³⁷ 18 U.S.C. § 3553(a)(2)(A).

³⁸ *Id.* § 3553(a)(2)(B).

³⁹ *Id.* § 3553(a)(2)(C).

⁴⁰ *Id.* § 3553(a)(2)(D); see Zunkel, *supra* note 36, at 57-60, 72-75.

⁴¹ See 18 U.S.C. § 3553(a)(3).

⁴² See Michael Tonry, *Community Punishments in a Rational Society* 12-13 (Minn. Legal Studies Research Paper No. 17-05, 2017) (explaining why community-based programs are more likely to reduce recidivism than prison). Fiona Doherty has written extensively and persuasively about the deleterious impacts of noncarceral supervision. See, e.g., Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 295 (2016) [hereinafter Doherty, *Obey All Laws*] (“[T]he state seeks to regulate many aspects of a probationer’s behavior—far beyond what is covered by the criminal law—as a consequence of being on probation. Because standard conditions reach beyond the criminal law, they necessarily also broaden the behavior that constitutes recidivism.”); *id.* at 346-48 (“The language of probation conditions propels the probation officer into lawmaker status. . . . Even more than the prosecutor, the probation officer is a hidden and unaccountable lawmaker. . . . These role dynamics are particularly important, because the violation need only be proven by a preponderance of the evidence.”); *id.* at 348 (describing how “reduced due process rights,” lower burden of proof, and the probationer’s prior criminal conviction leave the probationer with “little leverage at revocation” hearings, which may disproportionately impact the poor and marginalized); Fiona Doherty, *Testing Periods and Outcome Determination in Criminal Cases*, 103 MINN. L. REV. 1699, 1704 (2019) [hereinafter Doherty, *Testing Periods*] (“[F]or defendants facing addiction, mental health issues, or disadvantaged social circumstances, [plea bargains offering various conditions as an alternative to incarceration] may be stacked against them from the beginning.”). Her arguments and the extent to which the clinic should curtail its dependence on

direct statements of remorse and concrete efforts to make their victims or communities whole have also been crucial to demonstrating that the sentence will adequately reflect the clients' understanding of the seriousness of the offense and respect for the law. For clients who are in prison before sentencing, emphasizing their participation in available programs has been an important factor that judges have accounted for when sentencing them below the Guidelines.

Clinic students' sentencing memoranda have also cited studies showing the scarcity of effective mental health, educational, vocational, or addiction treatment in federal prisons. This authority demonstrates that prison is unlikely to meet 18 U.S.C. § 3553(a)(2)(D)'s requirement that the sentence meet the defendant's treatment needs in the most effective manner.⁴³ CMIC students argue that prisons are violent, and violence breeds crime.⁴⁴ Gambling, drugs, and alcohol are readily accessible in prisons.⁴⁵ Prisons isolate people from their families and other networks of support. For traumatized people suffering from addiction, prisons are not effective sites of treatment and healing. In contrast, they are likely to compound the conditions that lead people into prisons in the first place. Moreover, the paucity of educa-

probation in lieu of prison or as part of a reduced prison term deserve full examination but are not the focus of this article.

⁴³ See Zunkel, *supra* note 36, 57-60, 72-75 (proposing that defense counsel should argue and provide corroborative data that out-of-custody sentences meet the purposes of punishment and will provide defendants treatment "in the most effective manner," while in-custody sentences will not; also arguing that courts should abide by § 3553(a)'s directive to provide treatment "in the most effective manner" by imposing noncustodial sentences when the most effective treatment is available in the community).

⁴⁴ ALLEN J. BECK, MARCUS BERZOFKY, RACHEL CASPAR & CHRISTOPHER KREBS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12—UPDATE 13, 17, 27-8 (2014); Nancy Wolff & Jing Shi, *Childhood and Adult Trauma Experiences of Incarcerated Persons and Their Relationship to Adult Behavioral Health Problems and Treatment*, 9 INT'L J. ENVTL. RES. PUB. HEALTH 1908, 1909 (2012); Nancy Wolff & Jing Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, 15 J. CORRECTIONAL HEALTHCARE 58 (2009).

⁴⁵ U.S. DEP'T OF JUST., OFFICE OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS' CONTRABAND INTERDICTION EFFORTS 3 (2016), <https://oig.justice.gov/reports/2016/e1605.pdf> (reporting 3,713 instances of narcotics discoveries, "including marijuana, heroin, and cocaine," in BOP facilities between fiscal years 2012 and 2014); Maroya S. Walters, Nandini Sreenivasan, Bobbie Person, Mark Shew, Daniel Wheeler, Julia Hall, Linda Bogdanow, Karyn Leniek & Agam Rao, *A Qualitative Inquiry About Pruno, an Illicit Alcoholic Beverage Linked to Botulism Outbreaks in United States Prisons*, 105 AM. J. PUB. HEALTH 2256, 2258 (2015) (noting that in a survey of prisoners and staff in federal prison and in a community correctional center, respondents "reported that pruno [an alcoholic drink] was made and consumed throughout all security levels. Several inmates mentioned drinking pruno in other state and federal prisons; a few inmates knew of pruno made in county jails."); Robert J. Williams, Jennifer Royston & Brad F. Hagen, *Gambling and Problem Gambling Within Forensic Populations: A Review of the Literature*, 32 CRIM. JUST. & BEHAV. 665 (2005).

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tional and employment opportunities in prisons deprives incarcerated people of the ability to advance their learning or gain vocational skills that allow them to earn money and support themselves upon their release.⁴⁶

CMIC students contrast our clients' opportunities outside of prison with these barriers to rehabilitation in prison by documenting and presenting witnesses to our clients' engagement with addiction treatment, employment, educational and training programs, and prosocial family and community supports. The students' work thereby demonstrates that prison is far from the most effective manner of either rehabilitating our clients or deterring them from future crime. In arguing for rehabilitation, students therefore aim to show courts, prosecutors, and other justice stakeholders that investing in health and safety for our clients and their communities will promote better health and safety for all communities. Given the likelihood that judges are concerned with rehabilitation, both for the sake of individual defendants and for the sake of the community to which they return, this argument is another means by which to reframe judges' thinking about the rehabilitative, or criminogenic, impact of prisons.

By contextualizing their lifetime adversity and demonstrating rehabilitation's effectiveness, our advocacy points to the implications of redressing the social harms that so often underlie our clients' crimes. As Danielle Sered emphasizes:

Safety and community well-being are supported by efforts and structures that prevent harm from occurring in the first place. Because violence is contextual, most effective prevention efforts include the broad distribution of the social supports that make violence unlikely and healing accessible, including quality schools, housing, jobs, health care, mental health and substance abuse treatment, and after-school programs.⁴⁷

True and lasting public safety depends on investing in community resources that heal people who break the law. A great deal of the clinic's mitigation investigation shows that our clients awaiting punishment have suffered serious harms, that those harms may diminish their capacity, or that the state bears responsibility for failing to pro-

⁴⁶ Kanyakrit Vongkiatkajorn, *Why Prisoners Across the Country Have Gone on Strike*, MOTHER JONES (Sept. 19, 2016), <https://www.motherjones.com/politics/2016/09/prison-strike-inmate-labor-work/> (citing ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (2010)); see also U.S. COMM'N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST LOW-INCOME COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS 90 (2017).

⁴⁷ DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 179 (2019).

tect them from, or contributing to, social conditions that proliferate crime. In such cases, the clinic students argue that rehabilitation-focused sentencing is a proportionate and effective response to clients' offenses. CMIC's investigation and presentation of our clients' life histories, described in later sections of this article, bears this truth.

II. METHODS FOR OPERATIONALIZING *GRACE NOTES*' BLUEPRINT

Philip N. Meyer defines legal narrative as "factual and truthful storytelling meticulously built upon a record."⁴⁸ This definition aptly describes what CMIC teaches students in practice. This section describes the methods CMIC students employ to assemble the mitigation record, to develop the narrative tools that imbue the events in clients' lives with meaning relevant to their criminal cases, and to telegraph the story to prosecutors, probation officers, and judges, all of whom play central roles in sentencing.

CMIC students are the lead advocates on clinic cases. They maintain the primary relationships with clients and witnesses, gather facts, assemble the evidentiary record, analyze the law, author briefs, and devise and carry out victim-outreach strategies. They also lead efforts to develop relationships with crucial stakeholders, such as correctional staff and law enforcement officers who have interacted with clinic clients, as well as prospective employers, prosecutors, and retained experts. They prepare for and accompany clients to meetings with federal probation officers who write the presentence reports that factor heavily in federal judges' sentencing decisions. They draft the letters objecting to and supplementing probation officers' draft presentence reports, which is, in practice, the beginning of mitigation advocacy at the sentencing phase of a federal case.⁴⁹ Students also pre-

⁴⁸ Philip N. Meyer, *Are the Characters in a Death Penalty Brief Like the Characters in a Movie?*, 32 Vt. L. Rev. 877, 877-78 (2008).

⁴⁹ *United States v. Booker*, 543 U.S. 220, 251 (2005) ("Federal judges have long relied upon a presentence report, prepared by a probation officer, for information . . . relevant to the manner in which the convicted offender committed the crime of conviction."); *id.* at 252 (A judge may "reject a plea-bargained sentence if he determines, after reviewing the presentence report, that the sentence does not adequately reflect the seriousness of the defendant's actual conduct."); Sharon M. Bunzel, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 957-58 (1995) ("[T]he Guidelines have co-opted the PSR, ironically transforming what was once a tool of rehabilitative sentencing into an integral component of determinate sentencing."). The presentence report is also critical to post-sentencing advocacy and treatment of incarcerated people. See *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 5-6 (1988) (After sentencing, the presentence report is transferred to the Bureau of Prisons, "where it may be used in determining a defendant's classification as an inmate, . . . choosing an appropriate treatment program, or deciding eligibility for various privileges."); U.S. DEP'T OF JUSTICE, U.S. PAROLE COMM'N, RULES AND PROCEDURES MANUAL § 2.19-04 (2010) ("[T]he presentence report traditionally, and appropriately, has been given a great deal of weight

sent oral arguments in court. They shoulder this responsibility step-by-step while learning a complex method of legal practice that draws heavily on nonlegal disciplines. Interdisciplinary teamwork, which has included collaboration with social workers, mitigation specialists, and mental health experts is essential.⁵⁰

Capital mitigation techniques based on interdisciplinary, trauma-informed fact-gathering form the crux of CMIC's methods.⁵¹ In particular, borrowing from the medical theory of biopsychosocial practice, CMIC students learn to be attentive to multi-layered factors, from the molecular to the social, that influence clients' behavior and experiences.⁵² Students learn that in law, as in medicine, successful practice depends on collecting an accurate history of the client's life, building a trusting alliance with the client, exercising attentive observation and nonjudgmental curiosity, and examining practitioners' bias, including its influence on their intuitions.⁵³

The clinic's curriculum therefore begins with lessons on approaching conversations with (often traumatized) clients and witnesses and the critical role of social history records. Once students begin to learn about their clients' backgrounds, in clinic seminar we turn to contextualizing the clients' experiences within their families, neighborhoods, schools, previous encounters with the criminal legal system, and their cultural, racial, socio-economic, gender, and other social contexts. Social workers describe this approach as investigating and describing clients' micro (self/individual), mezzo (families, neighborhoods, schools, other proximate social environments), and macro (cultural, racial, socio-economic, gender) environments or ecosystems.⁵⁴

Through intensive fact investigation, students assemble the invariably incomplete record of our clients' pasts. This incomplete record has permitted the dominant narrative upon which clients' convictions have been based. Conventional crime narratives have deep roots in

by the Commission in making fact findings" in parole hearings, though the Commission cannot, under guiding statutes and regulations, treat the presentence report as "an unsailable source of factual information.").

⁵⁰ See Susan Bryant, *Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession*, 17 VT. L. REV. 459 (1993).

⁵¹ Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 966-67 (2008).

⁵² Francesc Borrell-Carrió, Anthony L. Suchman & Richard M. Epstein, *The Biopsychosocial Model 25 Years Later: Principles, Practice, and Scientific Inquiry*, 2 ANNALS FAM. MED. 576, 576 (2004).

⁵³ *Id.* at 579-80.

⁵⁴ Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, J.L. & POL'Y 133, 140 (2004).

American storytelling.⁵⁵ They include depictions of criminals who are endemically evil, two-dimensional, inscrutable, and therefore irredeemable.⁵⁶ These conventional narratives create emotional distance between the defendant and the decisionmaker bearing the responsibility to set his punishment.⁵⁷ In the absence of specific, humanizing information about a defendant's formative experiences, sentencers are left to defer to traditional schema, or narratives, about crime and criminals.⁵⁸

In contrast, mitigation narratives, like the ones CMIC students learn to assemble, provide sentencers with a basis for empathy and a stake in providing the defendant with better options than were available before his arrest or that would await him absent positive interventions.⁵⁹ They provide decisionmakers with tools to correct faulty assumptions about mental illness, exposure to trauma, racial stereotypes, and the cause-and-effect of crime.⁶⁰ Lack of mitigation, or incomplete "mitigation" records that consist of bare lists of risk factors or good character traits without explanation and storytelling that provide a basis for empathy, leave decisionmakers to rely on cognitive shortcuts that work against mercy.⁶¹ CMIC teaches students that shifting the sentencing paradigm away from individual wrongdoing and retributive deserts to "whole life" and "societal standing to punish" theories requires reshaping case narratives. New narratives that displace conventional characterization of our clients' motivations and culpability recalibrate decisionmakers' understanding of what constitutes proportionate punishment.⁶²

CMIC students use the intensive fact investigation of clients' life

⁵⁵ Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 559 (1995).

⁵⁶ PHILIP N. MEYER, STORYTELLING FOR LAWYERS 75-76 (2014).

⁵⁷ Sean D. O'Brien & Kathleen Wayland, *Implicit Bias and Capital Decision-Making: Using Narrative to Counter Prejudicial Psychiatric Labels*, 43 HOFSTRA L. REV. 751, 752 (2015).

⁵⁸ Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 700-01 (1994); Kathleen Wayland & Sean O'Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 HOFSTRA L. REV. 519, 527 (2013).

⁵⁹ Craig Haney, *On Mitigation and Counternarrative: A Case Study of the Hidden Context of Prison Violence*, 77 UMKC L. REV. 911, 918 (2009).

⁶⁰ Sherwin, *supra* note 58, at 701-04.

⁶¹ ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 21 (2002); Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237, 253 (2007-08); Marshall Dayan, *The Penalty Phase of the Capital Case: Good Character Evidence*, CHAMPION, June 1991, at 15.

⁶² See ANTHONY G. AMSTERDAM & RANDY HERTZ, TRIAL MANUAL 6 FOR THE DEFENSE OF CRIMINAL CASES § 7.3 (6th ed. 2016) (The Role of Narrative Theory in Case Planning).

trajectories, described in the next section, to produce a renewed, comprehensive record of their clients' social histories with which they displace the dominant narrative and explain the basis for mitigating punishment. Following best capital defense practices, CMIC students assemble a body of mitigation that includes lay witnesses, experts, and documents that will explain the roots of clients' frailties, impairments, and failures, but also their hopes, accomplishments, aspirations for healing, and commitment to reform.⁶³ The specific data and humanizing anecdotes that comprise and corroborate clients' life trajectories provide an alternative to the default schema, which would otherwise be replete with information gaps that decisionmakers will fill with stereotypes to the detriment of clients.⁶⁴ To create a robust, comprehensive mitigation case, CMIC students learn interviewing and mapping, described next.

A. Interviewing

The lifeblood of mitigation investigation is client and witness interviews, combined with the collection of social history records.⁶⁵ Therefore, an essential feature of CMIC's approach to representing clients is teaching students the techniques with which to interview clients and life-history witnesses. Teaching client interviewing presents rich pedagogical opportunities. For example, examination of interview goals, the impact of language and question formation on the attorney-client rapport, and how to mitigate the power imbalance inherent in professional storytelling, are all areas that clinical scholarship has examined.⁶⁶ Early CMIC seminars draw on this tradition and focus on client interviewing, case theory development, and storytelling.

⁶³ See WELSH S. WHITE, *LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES* 105-07 (2006).

⁶⁴ Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1461-62 (1997); Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 259 (2009).

⁶⁵ Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 725-26 (2008) ("Competent life history investigations require interviewing the client and virtually everyone who has ever known the client, and finding every piece of paper regarding the client ever generated.") (citation omitted); *id.* at 745-46 (discussing "[o]ne of the most important skills of the mitigation specialist is the ability to interview effectively").

⁶⁶ See Robert Dinerstein, Stephen Ellman, Isabelle Gunning & Ann Shalleck, *Legal Interviewing and Counseling: An Introduction*, 10 CLIN. L. REV. 281, 289-93 (2003); GAY GELHORN, LYNNE ROBINS & PAT ROTH, *Law and Language: An Interdisciplinary Study of Client Interviews*, 1 CLIN. L. REV. 245 (1994); Laurie Shanks, *Whose Story Is It Anyway?: Guiding Students to Client-Centered Lawyering Through Storytelling*, 14 CLIN. L. REV. 509 (2008) (comparing legal interviewing techniques with anthropological interviewing methods).

Early clinic classes also center on discussion of Rebecca Skloot's *The Immortal Life of Henrietta Lacks*, a book that all CMIC students read before the semester begins.⁶⁷ I assign Skloot's book as one model of a social history investigated and recounted by an outsider to the community of the people whose story she tells. CMIC employs tried-and-true clinic interviewing exercises as well. During the first seminar, students pair off, interview each other, and tell their partners' stories to the class.⁶⁸ This allows them to experience what it feels like to be responsible for telling another person's story out loud and to have someone else tell their stories. In a later clinic seminar, students conduct a mock client interview with actors playing clients based on hypothetical scenarios that both the students and their "clients" have reviewed in advance.⁶⁹ The actors' scenarios contain much more detail than I reveal to the students, to approximate the relative ignorance (compared with the clients' knowledge base) with which lawyers must approach real initial client interviews. Everyone in the class, including the actors, then provides feedback to the students on their interviews to tease out areas of reflection such as: how to identify and prepare for goals of a client interview; how to moderate tone, language, and pace of conversation; how much to self-disclose; and how to set realistic expectations for the scope of representation and immediate follow-up.

In addition to these well-established clinical pedagogical approaches to client interviewing, CMIC students learn to conduct interviews using questions and interpersonal approaches that are sensitive to the impacts of trauma and have proven to be most effective at eliciting the most sensitive mitigation in our clients' backgrounds.⁷⁰

⁶⁷ REBECCA SKLOOT, *THE IMMORTAL LIFE OF HENRIETTA LACKS* (2010). Skloot's book is a biography of Henrietta Lacks, an African-American woman whose cancer cells researchers at Johns Hopkins harvested without her consent in the 1950s. The cancer cells were so aggressive that they remain alive in research laboratories around the world, over sixty years after they caused Mrs. Lacks's death. Skloot is a white woman from the Pacific Northwest who assembled Mrs. Lacks's multigenerational family biography by interviewing Mrs. Lacks's family members, numerous collateral witnesses, and scientists, and by drawing on a wide range of records and contemporaneous media sources. She wove Mrs. Lacks's individual story into the broader story of her family's history from enslavement to the Jim Crow South, to modern-day Baltimore, in the context of the social and scientific forces at play when Johns Hopkins doctors exploited her. CMIC students study the book as an example of storytelling across difference, meticulously investigated social history, and tying personal narratives in with wider social and historical phenomena. For a critique of Skloot's approach to the Lacks family's story, see Vanessa Northington Gamble, *The Immortal Life of Henrietta Lacks Reconsidered*, 44 HASTINGS CTR. REP. 1 (2014).

⁶⁸ Laurie Shanks describes this teaching tool in detail in *Whose Story Is It Anyway? Guiding Students to Client-Centered Lawyering Through Storytelling*. Shanks, *supra* note 66, at 516-22.

⁶⁹ Shanks describes a variation on this interviewing exercise as well. *Id.* at 512-16.

⁷⁰ See Sara E. Gold, *Trauma: What Lurks Beneath*, 24 CLIN. L. REV. 201, 229, 238

CMIC students learn methods adapted from the best capital defense practices. I teach students to begin with the premise, borrowed from emergency room physician Dr. John Rich's book on the trauma of young African-American men he treats at his medical clinics, *Wrong Place, Wrong Time*, that clients are "neither sick, nor bad, but injured."⁷¹ I train students beginning in the seminar's second meeting about how to recognize and respond to clients' signs and symptoms of trauma and how traumatic experiences impact many clients' engagement of the lawyer-client relationship.⁷² We emphasize that nonjudgmental awareness of all the information that students' investigation yields will both enhance their attorney-client relationships and net the most promising mitigation record available.⁷³

A student team might learn details about a client's and his family's experience of the condition of his childhood home through open-ended, nonjudgmental questions and day-in-the-life interviewing that begin broadly and then narrow to pinpoint anchoring facts.⁷⁴ "Tell me about your house. Describe the entrance. What kind of door did the house have? What kind of lock was on the door? What color was the house? What was the outside of the house built from?" and so on, until the team reaches the interior of the house and asks about the layout, the furnishings, the floor coverings, and the composition and decoration of the walls.

Day-in-the-life interviewing is a complementary approach that begins by asking the client or witness to describe a day in his life beginning from his earliest memory and at other particular periods of time. "Where did you sleep? How would you wake up in the morning? What would you do next? What happened after that?" and so on. This approach is in contrast to questions such as "Who did you share a room (or a bed) with?" or "Who woke you up in the morning?" or "How did you get to school?"—all of which presume facts that may not have already been established. Nonpresumptuous questions are essential. Our clients may not have had a room or a bed. They may not have had anyone to wake them up, and they may not have gone to school regularly. Students learn the implication of the difference be-

(2018); Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923, 958-61 (2008).

⁷¹ Gohara, *supra* note 4, at 1 n.1 (citing JOHN A. RICH, *WRONG PLACE, WRONG TIME: TRAUMA AND VIOLENCE IN THE LIVES OF YOUNG BLACK MEN* 66 (2009)).

⁷² Gold, *supra* note 70, at 13-21.

⁷³ Susan Bryant's "parallel universe thinking" exercise is essential and well-worn in CMIC supervision, seminar, and case rounds. See Susan Bryant, *The Five Habits: Building Cross-Cultural Competence*, 8 CLIN. L. REV. 33, 41-42 (2001). In this exercise, students brainstorm every possible explanation for a given client or case scenario, without jumping to conclusions or judging the value of any of the possibilities. *Id.* at 70-71.

⁷⁴ See Dudley & Blume Leonard, *supra* note 51, at 968.

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tween “Where did you go to school?” which presumes that a client went to school, and “Where did you spend your days when you were six years old?” CMIC students learn that unless and until conversations with our client or records reviews have established those premises, day-in-the-life questions should remain as broad and open-ended as possible to avoid signaling unproductive presumptions.

CMIC students also learn how closed-ended or presumptuous questions can damage the attorney-client relationship and shut down communication and avenues for investigating facts essential for advocacy.⁷⁵ For example, asking a client whether they have been sexually abused is likely to be counterproductive.⁷⁶ Instead, after establishing a strong rapport with a client over a period of time, a student might ask a client what they remember about their first kiss. This might reveal that the client’s first kiss was with a neighbor in their 20s when our client was a young adolescent. Our client might have perceived the relationship as consensual, or at least complicated, and would never have thought to mention it under the category of “sexual abuse.” That first kiss might nevertheless have been formative and relevant to the work of a mental health or other mitigation expert the team might engage to connect dots or explain aspects of our client’s behavior.

Students document the information they learn from interviews in systematic and uniform work product templates that map clients’ lives. The next section describes that aspect of the practice.

B. Mapping

In her groundbreaking book *Representing Children*, Jean Koh Peters describes “Mapping the Child’s Universe,” using the metaphor of stellar cartography and “the twin suns of the theory of the case and the child-in-context.”⁷⁷ Peters goes on to describe an iterative means by which the lawyer for the child is constantly mapping and revising her client’s universe, as she incorporates additional evidence and data about the case.⁷⁸ Essential to this method is that as soon as the lawyer learns information, she maps it. This is the same principle competent capital defense teams deploy to gather and organize their clients’ social history data and on which CMIC students’ record-building is based.

Students learn that mapping a client’s universe by presenting a detailed, interdisciplinary narrative of facts, social science, and expert

⁷⁵ See Wayland, *supra* note 70, at 958-61.

⁷⁶ Gold, *supra* note 70, at 229-30 (citing sources).

⁷⁷ JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS* 182 (3d ed. 2007).

⁷⁸ *Id.* at 185.

opinions provides them tools with which to persuade decisionmakers to mitigate punishment. As clinic case outcomes described below show, doing so benefits individual clients. In addition, mapping creates a record of social harms common to many defendants who appear in front of these same decisionmakers daily and who stand to benefit from the interdisciplinary, corroborative explanations the clinic provides on behalf of its clients.

CMIC students have remarked that the clinic's model teaches them that defense work need not always be defensive—it can and ought to be affirmative and have a system-wide impact. CMIC's systemic impact arises from the clinic's presentation of social science data on the effects of adversities and vulnerabilities many clinic clients face in the context of their individual cases. For example, every CMIC client has been exposed to significant familial or community violence. Many have experienced food insecurity or homelessness, and a substantial cohort has developed substance use or gambling disorder. CMIC students present these mitigating circumstances and their impacts in their clients' individual cases with the aim of obtaining the least restrictive punishment. In doing so, they educate prosecutors, probation officers, and judges about the scientifically recognized effects of these adverse experiences, which benefits future defendants with common experiences. In other words, once these stakeholders learn about these impacts, they cannot unlearn them. As such, and perhaps differently from advocacy models where engaging in civil impact litigation may be in tension with individual clients' interests,⁷⁹ in CMIC's model individual case representation and systemic reform are mutually reinforcing.

CMIC students learn that this model of advocacy depends on building the evidentiary record, developing a persuasive case theory, and supporting both with legal authority. They also learn that meticulous case management is fundamental to ethical, competent lawyering. CMIC students therefore map their clients' universes using uniform, consistent recording methods. We teach students to build the mitigation record by collecting, managing, and analyzing clients' life history documents and recording life history interviews with the client and collateral witnesses.⁸⁰ Organizing these mitigation building blocks re-

⁷⁹ See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 490, 507, 512 (1976) (observing how, in context of school desegregation civil rights cases, “Black parents who prefer alternative remedies are poorly served by the routine” impact litigation strategies and “[t]he lawyers’ freedom to pursue their own ideas of right,” concluding that “[i]t is essential that lawyers ‘lawyer’ and not attempt to lead clients and class” in order to resolve “the apparent-and sometimes real-conflicts of interest between lawyer and client”).

⁸⁰ CMIC students as a general rule do not audio- or video-record interviews, because

quires the students to create and maintain work product templates in which they enter the evidentiary record. In each case, student work product includes: memoranda recording all interviews; records logs, indexes, and digests; a client's life history timeline; an investigation plan; and a case theory memo.

Each week before case supervision, students send supervisors the complete and updated set of work product templates. This weekly review permits supervisors to provide feedback and all team members to see and reflect on the evidence as they collect it. It informs investigation strategy and encourages teams to stay open and flexible about case theory as they gather the evidence. This is fundamental to the nonjudgmental, curiosity-driven investigation of the client's biopsychosocial context, modeled on related medical practice theory.⁸¹

Following each interview with clients or witnesses, students write their notes and impressions of the conversations. Memos of client meetings include descriptions of the client's physical appearance, mood, hygiene, and conditions of the client visit. Documenting this information is essential to tracking the client's mental and physical health and functioning and to remaining vigilant to signs or symptoms of illness.⁸² To provide another example, in a conversation with a client's grandmother, a team might learn that our client grew up in an old home that was often in disrepair and about which the family frequently complained to the landlord about peeling paint and exposed insulation. These leads will go into the theory memo as an entry on our client's possible exposure to household toxins. They will also go into the investigation plan as a to-do item to research environmental investigations, reports, or civil lawsuits arising in connection with our client's address or neighborhood. It will become the subject of interviews with our client and witnesses to their household's conditions. The facts and impressions gathered in these memoranda constitute

recording can be a barrier to disclosure. Rather, they document their impressions and substantive content of the interviews in privileged memoranda that they draft after their meetings with clients and witnesses.

⁸¹ Borrell-Carrió et al., *supra* note 52, at 579-80.

⁸² Dudley & Blume Leonard, *supra* note 51, at 969 (By conducting a "series of in-depth interviews," one can "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. Such insight is invaluable to the defense team, and it provides data that is significant to the assessments of the mental health experts."); O'Brien, *supra* note 65, at 747 (discussing the importance of face-to-face interviews to detect nonverbal cues, noting that "[h]ygiene, grooming, and appropriateness of clothing can provide important clues about mood or mental health" and citing psychiatric texts BIANCA CODY MURPHY & CAROL DILLON, *INTERVIEWING IN ACTION: PROCESS & PRACTICE* 60 (1998), and BENJAMIN JAMES SADOCK & VIRGINIA ALCOTT SADOCK, *KAPLAN & SADOCK'S SYNOPSIS OF PSYCHIATRY* 8 (9th ed. 2003)); Wayland, *supra* note 70, at 955-56.

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one set of building blocks for the evidentiary record and case theory.

Another building block essential to building a mitigation case is a comprehensive, discernible, and accessible set of a client's life history records (such as medical, educational, military, social service, financial, and vital). Contemporaneous records documenting events bearing on a client's development, health, functioning, and behavior are especially persuasive evidence. Agencies with no stake in the current proceedings generate them often long before clients were ever involved in crime.⁸³ CMIC students create and maintain a records log outlining all the categories of records they need to collect, the particular institutions under each category, and the status of requests for records from each.

Once institutions and agencies furnish records, CMIC teams set about learning what information they contain. They capture that information in various iterations. For example, a student looking to support the assertion that our client announced to his pre-school teacher a wish to burn his house down because it is a place where he gets hurt will easily be able to locate the record of this incident by searching a records digest and index. An annotated timeline of the client's life is another means students use to chart information they obtain from records and interviews. Events include obvious ones such as the client's birth, but also moves from home to home, births or deaths of family members, changes of schools, events comprising a client's criminal record, relocation between prisons or cells within them, or tickets for prison infractions.

The more detailed the timeline, the better the students' ability to track events taking place in the same timeframe of our client's life. For example, timeline entries might help students notice that around the time that our client went to school and announced that he would like to burn his house down, a child welfare worker went to his home to investigate a report of excessive corporal punishment. Or a client racked up five tickets in prison while he was incarcerated with a particular cell-mate in the state's youth prison, notorious as a "gladiator school," but once he was moved to a more secure facility and began taking vocational courses, he stopped receiving tickets. Timeline entries are often useful for creating other visual aids such as charts showing a sharp decline in prison infractions that might accompany

⁸³ O'Brien, *supra* note 65, at 726 ("Such contemporaneous records are intrinsically credible and may document events which the client and other family members were too young to remember, too impaired to understand and record in memory, or too traumatized, ashamed, or biased to articulate.") (citing Affidavit of Russell Stetler); Stetler, *supra* note 61, at 256 ("[J]urors also show skepticism toward defense experts, who appear to be 'hired guns' unless their opinions are supported by contemporaneous information from lay witnesses.").

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briefing.

As they develop the factual records, students conduct legal and social science research and strategize about the application of law, psychology, addiction science, and medical evidence to emergent issues. They also coalesce the strands of investigation into emerging theories into a document the clinic terms “the theory memo.” The theory memo is an annotated global document where students and supervisors add ideas, themes, and case theories.⁸⁴ For example, an entry on the theory memo might be, “Client’s Mother’s Death When He Was Ten Years Old Ruptured His Loving Early Life.” Citation to any corroborating records or interview memos follows. This document becomes the basis of case theory and advocacy. Its annotated themes provide an ongoing basis for case brainstorming, creative strategizing, and follow-up investigation plans to address tensions or gaps in the record. The theory memo’s entries facilitate reference to the evidentiary record when students advocate with prosecutors, probation officers, and of course in their brief-writing. All ideas, no matter how seemingly tangential or unlikely, with any plausible relationship to the case are welcome in the theory memo. This maintains the clinic’s pedagogical principle of nonjudgmental awareness. The significance of particular events in the client’s life will reveal itself only as the case investigation evolves, facts coalesce in relation to one another, and the students research relevant social or medical science. The students develop narrative and legal argument from this foundation.

III. METHODS IN OPERATION AND OUTCOMES

Synthesis of the factual record and the case theory, implicating underlying clinic pillars of context (social history and social science) and rehabilitation, is critical to all of our advocacy. The clinic’s methods have resulted in sentences below the Federal Sentencing Guidelines and prosecutors’ recommendations at higher rates than the national and District of Connecticut averages.

The following examples illustrate.⁸⁵

⁸⁴ All students are equally responsible for updating the work product, so all students’ ideas contribute to the evidentiary record and the case theory development. The fact that as much of the evidence and theory development takes place on paper in the work product templates as it does during supervision sessions and team meetings provides students who may be tentative or shy about sharing ideas orally, especially in a new group, plenty of opportunities for contribution. Bryant, *supra* note 50, at 505-10.

⁸⁵ This section describes anonymously and in the aggregate clinic students’ work on behalf of CMIC clients. Two clients graciously provided their permission for me to disclose more specific narratives, which I have in the cases of Clients C and F.

A. Case Examples

1. The Drug Epidemic in Some Clients' Communities

CMIC students have researched and reported on the devastating intergenerational impact of drugs on some clients' communities. For example, on behalf of a client who had experienced the intergenerational impact of the crack cocaine epidemic in the South Bronx, one student drafted the following:

From the mid-1980s through the 1990s, use of crack cocaine increased sharply, "particularly within Black and Hispanic communities." In 1989, the *New York Times* reported that "among New York's poor . . . crack has become the drug of choice." Michael Marriott, *After 3 Years, Crack Plague in New York Only Gets Worse*, N.Y. TIMES (Feb. 20, 1989), <http://www.nytimes.com/1989/02/20/nyregion/after-3-years-crack-plague-in-new-york-only-gets-worse.html>. The same year, the Federal Drug Enforcement Administration concluded that "there is no question that the past three years of crack trafficking and abuse have had a more deleterious effect on the quality of life in New York than any other drug episode in history." *Id.* From 1986 to 1989, widespread availability of crack cocaine contributed to a tripling of both the number of cocaine users in New York and of cases in which parents under the influence of drugs abused or neglected their children. *Id.*

In the South Bronx . . . the Crack Epidemic was particularly devastating. John Kifner, *In South Bronx, Drugs Already Claim Victory*, N.Y. TIMES (Sep. 8, 1989), <http://www.nytimes.com/1989/09/08/nyregion/in-south-bronx-drugs-already-claim-victory.html>. In 1989, the *New York Times* characterized South Bronx streets as a "battlefield" on which "the war on drugs was still being lost." *Id.* [A lay historian] recalls the introduction of crack cocaine as a turning point in his community. As he recollects, "friends, families, and neighbors no longer trusted one another." Ex. I, Letter to the Court from [Lay Historian]. Further, children "did not have the protection they were so accustomed to [because their] parents were drug addicted, and eventually the cohesiveness of the family was destroyed." *Id.*⁸⁶

This vignette exhibits how CMIC students learn to weave the macro-level crack epidemic, with the epidemic's mezzo-level neighborhood impact, and the micro-level family consequences, which of course, encircled our client's own upbringing. It also demonstrates the manner in which the students link the fruits of their investigation—in this instance interviews with a central lay historian (our client's uncle) familiar with a client's family and neighborhood, someone who had grown up in the South Bronx in the relevant timeframe—to contem-

⁸⁶ Student research on file with the author.

poraneous journalistic reporting, a technique which corroborates some clients' families' experiences and underscores the multi-layered context of addiction-related offenses. This approach supports both the "whole life" and "diminished societal standing to punish" mitigation philosophies.

2. *The Relationship Between Addiction and Childhood Exposure to Violence*

In a number of pleadings, CMIC students have cited the landmark Adverse Childhood Experiences, or "ACEs" study, which identified the lifelong impact of exposure to various types of adverse childhood experiences, such as abuse, neglect, or addicted parents.⁸⁷ Nearly all of our clients have been victims of or witnessed shootings, some of them fatal and some of them striking close friends. An example of how students incorporate social science into a sentencing memo to explain the salience of exposure to violence on crime-related behavior follows:

Exposure to childhood trauma affects brain development and leads to difficulty controlling impulses and delaying gratification. In fact, studies show that children who experience four or more traumatic events are four to twelve times more likely than the general population to suffer from alcoholism. This research suggests that adults who experienced trauma during childhood often use alcohol and drugs to self-medicate and cope. Scientists have also discovered a link between childhood trauma and gambling disorder. A recent twin cohort study found that witnessing another individual badly hurt or killed increased the risk of becoming a pathological gambler by 183 percent, and experiencing a physical attack increased the risk of becoming a pathological gambler by 239 percent. Other research has revealed a dramatic link between alcoholism and gambling disorder, finding that people diagnosed with problem gambling were 23 times more likely to be diagnosed as alcohol dependent than those who were not problem gamblers. The connection between alcoholism and gambling disorder is profound.⁸⁸

The students' practice of combining detailed, corroborated social history, social science, and evidence of rehabilitation has impacted federal courts' perceptions of the circumstances giving rise to our cli-

⁸⁷ Vincent J. Felitti, Robert F. Anda, Dale Nordenberg, David F. Williamson, Alison M. Spitz, Valerie Edwards, Mary P. Koss & James S. Marks, *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults (The Adverse Childhood Experiences (ACE) Study)*, 14 J. AM. PREVENTATIVE MED. 245 (1998). See also *Adverse Childhood Experiences (ACEs)*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/childabuseandneglect/acestudy/index.html> (last visited June 26, 2020).

⁸⁸ Client H Sentencing Memo at 21-22 (filed under seal).

ents' crimes and their views of what sentences our clients deserve. As later case summaries show, the clinic's cases involve serious crimes, two-thirds of them violent or involving the sale or illegal possession of firearms. The point of the work is to show that even when people commit terrible harms, perhaps especially when people commit terrible harms, courts should calibrate their punishments to account for the context of their lives and their prospects for rehabilitation.⁸⁹

3. *The Rise of Economic Distress and Gambling Addiction Simultaneously with Connecticut's Burgeoning Casino Industry*

On behalf of clients charged with gambling addiction-related offenses, CMIC students have also described the simultaneous rise of Connecticut's casino industry and economic crimes in the state:

The impact of the Foxwoods and Mohegan Sun casinos on Connecticut and its residents has been well documented. See SPECTRUM GAMING GROUP, *Gambling in Connecticut: Analyzing the Economic and Social Impacts* (2009), http://www.ct.gov/dosr/lib/dosr/june_24_2009_spectrum_final_final_report_to_the_state_of_connecticut.pdf [hereinafter "*Spectrum Report*"]. While the casinos have considerably boosted the economy and lowered the unemployment rate, they have also exacted a significant toll on many nearby residents and communities. This toll has manifested in myriad ways. However, none of these manifestations has been more notable than the resulting increase in economic crime. In 1992, the year Foxwoods opened, state and federal law enforcement officials made fifty-one embezzlement arrests. *Crime in Connecticut: 1992 Annual Report*, DEP'T OF PUB. SAFETY DIVISION OF STATE POLICE 30-31 (1992), <http://www.dpsdata.ct.gov/dps/ucr/data/1992/Crime%20in%20Connecticut%201992.pdf>. By 2007, the number had increased to 244, a nearly 500 percent increase in Connecticut over that fifteen-year period. *Crime in Connecticut 2007: Connecticut Summary Statistics*, DEP'T OF PUB. SAFETY DIVISION OF STATE POLICE 27 (2007), <http://www.dpsdata.ct.gov/dps/ucr/data/2007/Connecticut%20Summary%20Statistics%202007.pdf>. During the same period nationwide, the increase was thirty-eight percent. *Spectrum Report* at 14. Moreover, there is evidence that many of those who stole from their employers used either part or all of those funds to gamble at Foxwoods or Mohegan Sun. *Id.* at 143. From 1998 to 2008, there were at least thirty-

⁸⁹ Indeed, the federal sentencing statute says so. 18 U.S.C. § 3553 (requiring the sentencing court to consider the history and characteristics of the offender as well as the nature and circumstances of the offense, and the purposes of punishment, including rehabilitation); Mark Osler & Mark W. Bennett, *A "Holocaust in Slow Motion?": America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. FOR SOC. JUST. 117, 149 (2014).

one newspaper articles involving separate incidents that reported that funds embezzled from Connecticut businesses and organizations were used to gamble at Connecticut casinos. *Id.* at 14. One columnist even went so far as to label southeastern Connecticut “the embezzlement capital of the world.” David Collins, *Counting Up Casino Impacts*, *THE DAY* (July 29, 2009).⁹⁰

The history that the students researched, assembled, and reported has provided a basis for arguing that gambling addiction-related offenses are part of a larger set of social forces that have impacted people living in proximity to the casinos. The rise of the casinos correlated with a rise in economic crimes, a significant number of whose proceeds went to support gambling habits.

B. Outcomes

In *Grace Notes*, I proposed that individualized, intensive social-history-focused sentencing advocacy would ameliorate noncapital punishment.⁹¹ As of the end of 2019, CMIC had litigated nine federal sentencing cases, so the sample size at the time of this article’s publication is small. However, case outcomes suggested that CMIC’s work had influenced local judicial expectations and understanding of social history mitigation and significantly reduced our clients’ sentences relative to federal guidelines and prosecutors’ recommendations.

1. Sentences Imposed Compared to Federal Guidelines and Prosecutors’ Recommendations

Although they are no longer mandatory,⁹² the Federal Sentencing Guidelines retain a powerful advisory and anchoring effect on district court judges. Judges must, by law, consider the Guidelines in imposing sentences, and they begin sentencing considerations with federal probation officers’ presentence reports, a substantial section of which include Guidelines calculations.⁹³ Appellate courts also subject wider deviations from the Guidelines to greater scrutiny.⁹⁴ Notwithstanding

⁹⁰ Client A Sentencing Memo at 2-3.

⁹¹ Gohara, *supra* note 2, at 41, 48, 85.

⁹² *United States v. Booker*, 543 U.S. 220, 244-45 (2005).

⁹³ See Mark W. Bennett, *Addicted to Incarceration: A Federal Judge Reveals Shocking Truths About Federal Sentencing and Fleeting Hopes for Reform*, 87 UMKC L. REV. 3, 18 n.89 (2018).

⁹⁴ See *Recent Cases*: *United States v. Ortiz*, 621 F.3d 82, 124 HARV. L. REV. 2091, 2095 (2011) (reviewing the Second Circuit case and saying “[m]ost district courts that have addressed the question candidly admit that they are heavily influenced—though not bound—by the Guidelines” (citing cases) and “appellate courts subject greater ‘deviations’ to more exacting scrutiny than lesser ones and afford more deference to deviations in cases ‘outside the ‘heartland’ of the Guidelines than to deviations based on policy disagreements that apply ‘even in a mine-run case’”).

the continued force of the Guidelines, CMIC's advocacy has saved nine clients 558 months in prison below the Guidelines (46.5 years, or an average of more than five years per client) and 180 months in prison below prosecutors' recommendations (15 years, or an average of 20 months per client).⁹⁵

CMIC's percentage of below-Guidelines sentences is also significantly higher than the national and District of Connecticut averages. Data from the United States Sentencing Commission show that since the beginning of Fiscal Year 2016, 47.4% of cases nationwide resulted in a sentence below the Guidelines range for any reason.⁹⁶ In the District of Connecticut during that same period, 64.5% of defendants received a sentence below the guidelines range.⁹⁷ Since the clinic began

⁹⁵ Data on file with the author. *See infra* Table 1 (CMIC Outcomes, by Client, Measured in Prison Terms (in months)). It is important to note the distinction between Guidelines departures and Guidelines variances. A departure from the Guidelines requires proof of specific legal errors, while a variance may be based on consideration of any of the sentencing factors in the federal sentencing statute, 18 U.S.C. § 3553. *See* OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM'N, DEPARTURE AND VARIANCE PRIMER (2014), https://www.ussc.gov/sites/default/files/pdf/training/primers/2014_Primer_Departure_Variance.pdf. As I have written previously, restrictions on defense presentation of evidence of childhood disadvantage has attached to both departures and variances. *See* Gohara, *supra* note 4, at 25-26. However, this prohibition is in tension with 18 U.S.C. § 3553's requirement that judges be permitted to consider any history or characteristics of the offender. Federal defenders around the country are provided ongoing training and resources in how to investigate and present evidence of childhood maltreatment in light of the post-*Booker* ascent of judicial discretion. *See The Law of Sentencing Under Booker and Its Progeny*, DEFENDER SERVICES OFFICE TRAINING DIVISION, <https://www.fd.org/sentencing-resources/law-sentencing-under-booker-and-its-progeny> (last visited July 9, 2020). The clinic's below-Guidelines sentences are achieved through judges' application of variances rather than departures and offer one model for how defenders might go about social history mitigation pursuant to 18 U.S.C. § 3553's "History and Characteristics of the Defendant" provision.

⁹⁶ Data on file with the author (obtained from U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET, FISCAL YEAR 2019, DISTRICT OF CONNECTICUT 12 tbl.8 (2019) [hereinafter 2019 D. CONN. STAT.], <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2019/ct19.pdf>; U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET, FISCAL YEAR 2018, DISTRICT OF CONNECTICUT 12 tbl.8 (2018) [hereinafter 2018 D. CONN. STAT.], <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2018/ct18.pdf>; U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET, FISCAL YEAR 2017, DISTRICT OF CONNECTICUT 11 tbl.8 (2017) [hereinafter 2017 D. CONN. STAT.], <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2017/ct17.pdf>; U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET, FISCAL YEAR 2016, DISTRICT OF CONNECTICUT 11 tbl.8 (2016) [hereinafter 2016 D. CONN. STAT.], <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2016/ct16.pdf>).

⁹⁷ Approximately one-third (34.8%) of those below-Guidelines sentences in the District of Connecticut were the result of government-sponsored departures based on substantial cooperation, under USSG 5k1.1, or an early disposition, under USSG 5k3.1. Nationally, at least half (51.3%) of the below-Guidelines sentences during this period resulted from government-sponsored departures. *Id.*

in September 2016 through the present, as the table below shows, CMIC has achieved sentences below the Federal Sentencing Guidelines and the prosecutors' recommended sentences in eight of its nine cases (88.9%).⁹⁸ In every case in which the prosecution recommended a prison sentence, courts sentenced CMIC clients to sentences below those recommendations.⁹⁹ This latter metric is especially salient, given that prosecutors are experienced, repeat actors in federal sentencing litigation, who are well-versed in recommending sentences that they believe defendants deserve in proportion to their crimes and that they are likely to believe courts will deliver.¹⁰⁰

In the clinic's cases involving firearms offenses, the below-Guidelines and below-prosecution variances are even more pronounced. All four of CMIC's firearms cases between the clinic's inception in September 2016 and September 2019 received below-Guidelines sentences (100%), compared with 43.3% of firearms cases nationwide and 56.5% of firearms defendants who appeared before the District of Connecticut.¹⁰¹ As data from the U.S. Sentencing Commission show, during the period between 2011 and 2017, the District of Connecticut imposed nongovernment sponsored below-Guidelines sentences at rates that largely reflect the national average.¹⁰² Notably, two of CMIC's four firearms clients (50%) received no prison time as part of their sentences. Nationally, since the clinic's inception, only 4.8% of federal firearms defendants received a sentence that did not include

⁹⁸ See *infra* Table 1 (CMIC Outcomes, by Client, Measured in Prison Terms (in months)).

⁹⁹ *Id.*

¹⁰⁰ BRUCE FREDERICK & DON STEMEN, VERA INST. OF JUSTICE, *THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING* 100, 275-76 (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/240334.pdf> (according to a survey of two moderately large prosecutors' offices, "[p]rosecutors know what the extremes are in judges' sentencing decisions and shoot for the middle. Basically, there is a sense of what the going rate is among the collective of judges in the district and prosecutors tailor decisions to what the going rate or norm is."); Ronald F. Wright, Jenny Roberts & Betina Cutaia Wilkinson, *The Shadow Bargainers*, CARDOZO L. REV. (forthcoming 2020) (manuscript at 14 n.50) (SSRN), <https://ssrn.com/abstract=3577322>; Arlen Specter, Book Review, *Conviction: The Determination of Guilt or Innocence Without Trial*, 76 YALE L.J. 604, 607 (1967) (A prosecutor's "distilled experience enables . . . bargain[ing] on the middle ground of what experience has shown to be 'justice.'").

¹⁰¹ 2019 D. CONN. STAT., *supra* note 96, at 16 tbl.10; 2018 D. CONN. STAT., *supra* note 96, at 16 tbl.10; 2017 D. CONN. STAT., *supra* note 96, at 18-19 tbl.10; 2016 D. CONN. STAT., *supra* note 96, at 18-19 tbl.10.

¹⁰² U.S. SENTENCING COMM'N, INTER-DISTRICT DIFFERENCES IN FEDERAL SENTENCING PRACTICES: SENTENCING PRACTICES ACROSS DISTRICTS FROM 2005-2007, at 57 (2020), https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200122_Inter-District-Report.pdf (reporting that the rate of nongovernment sponsored below-Guidelines firearms sentences imposed in the District of Connecticut was within 5.1% of the overall national average between 2011 and 2017).

prison time.¹⁰³ Within the District of Connecticut, only 3.6% of firearms cases resulted in a nonprison sentence.¹⁰⁴

This trend of lower sentences for CMIC clients holds within certain other categories of offenses, as well. For example, in two of the clinic's three fraud cases, the clients received sentences below the Guidelines range (66.7%). In the third fraud case, the court still sentenced the client to a prison term twelve months shorter than the sentence the prosecution had requested. Nationally, 53.4% of individuals charged with fraud received a variance or a downward departure since FY 2016.¹⁰⁵ Those rates were higher within the District of Connecticut, where the Court imposed a sentence below the Guidelines range in 73.2% of fraud cases.¹⁰⁶ However, a recent report from the U.S. Sentencing Commission indicates that, between 2011 and 2017, the District of Connecticut's sentencing practices in fraud cases were largely representative of the national average.¹⁰⁷

TABLE 1: CMIC OUTCOMES, BY CLIENT, MEASURED IN PRISON TERMS (IN MONTHS)

	Guidelines	Prosecution	Defense	Judgment
A	21	--	0	0
B	33	--	--	18
C	240	240	--	72
D	210	--	120	146
E	78	120	60	108
F	57	--	0	12
G	360	--	--	140
H	41	--	0	0
I	18	0	0	0

¹⁰³ 2019 D. CONN. STAT., *supra* note 96, at 8 tbl.4; 2018 D. CONN. STAT., *supra* note 96, at 8 tbl.4; 2017 D. CONN. STAT., *supra* note 96, at 7 tbl.4; 2016 D. CONN. STAT., *supra* note 96, at 7 tbl.4.

¹⁰⁴ 2019 D. CONN. STAT., *supra* note 96, at 9 tbl.5; 2018 D. CONN. STAT., *supra* note 96, at 9 tbl.5; 2017 D. CONN. STAT., *supra* note 96, at 8 tbl.5; 2016 D. CONN. STAT., *supra* note 96, at 8 tbl.5.

¹⁰⁵ 2019 D. CONN. STAT., *supra* note 96, at 16 tbl.10; 2018 D. CONN. STAT., *supra* note 96, at 16 tbl.10; 2017 D. CONN. STAT., *supra* note 96, at 18-19 tbl.10; 2016 D. CONN. STAT., *supra* note 96, at 18-19 tbl.10.

¹⁰⁶ 2019 D. CONN. STAT., *supra* note 96, at 16 tbl.10; 2018 D. CONN. STAT., *supra* note 96, at 16 tbl.10; 2017 D. CONN. STAT., *supra* note 96, at 18-19 tbl.10; 2016 D. CONN. STAT., *supra* note 96, at 18-19 tbl.10.

¹⁰⁷ See U.S. SENTENCING COMM'N, *supra* note 102, at 49 (reporting that the rate of nongovernment sponsored below-Guidelines fraud sentences imposed in the District of Connecticut was within 1.9% of the overall national average during that period).

These data are preliminary. As I explain in Section IV.B, below, a much larger sample size and rigorous regression analysis would be necessary to isolate all the factors that might contribute to the clinic's sentencing outcomes, which is beyond the scope of this article. However preliminary, though, the data suggest that even in cases involving serious offenses, when mitigation explains and contextualizes crime, judges are amenable to arguments for reduced or no prison time that account for the defendant's own history of serious adversity and include evidence of and prospects for rehabilitation.

2. *Strains of CMIC's Philosophy in Federal Sentencing Hearings*

The following analysis of some of CMIC's federal sentencing hearings demonstrates that in clinic cases, courts have relied on evidence of clients' whole-life context, rehabilitation, and social and medical science in determining their sentences.¹⁰⁸ As the transcripts show, judges' stated reasons include their beliefs that defendants' own histories of extreme adversity made them more deserving of reduced punishment. Sometimes judges seem to conclude so because defendants' own trauma diminished their capacities. Other times they state that defendants have suffered enough or that social institutions that should have come to their aid failed to. In every case, the judge's conclusion that the defendant has the capacity for rehabilitation, or has demonstrated exceptional rehabilitation presentencing, has been central.

The following case examples also demonstrate the fruits of CMIC's principal pedagogical goal to teach students the highest standards of defense sentencing advocacy. Each case shows how students learned to conduct client and witness interviews that reveal deeply sensitive but salient evidence of clients' adversities, to identify and

¹⁰⁸ The clinic's use of medical paradigms in investigating and explaining the impact of clients' exposure to trauma, addictions, and other factors that the clinic has argued influenced their involvement in crime must be distinguished from Tommie Shelby's critique of what he has termed "the medical model." In Shelby's definition, the medical model is a constrained framework for improving the material conditions of people living in segregation and poverty. See SHELBY, *supra* note 21, at 2. He terms it a "medical" model because it assumes a permanent set of structures, like fixed human anatomy that physicians must work within when treating disease. This assumption of an immutable structure limits Shelby's medical model's proponents to remedying social disadvantage by "alleviating the burdens of the poor," rather than disassembling and rebuilding the structures in which poverty and segregation have flourished. *Id.* To the contrary, the clinic's importing of medical and other extra-legal disciplines into its exploration of clients' life experiences and mitigation advocacy deconstructs the dominant punishment paradigm, which calibrates sentences based on an individual's wrongdoing and an actuarial grid. In its place, the clinic presents medical and social science to argue for a discount for predictable medical and behavioral responses to extreme poverty, exposure to violence, and addiction, among the mitigating factors that tend to recur most frequently in clinic cases.

collect corroborating documents, and to assemble a detailed record of their clients' whole lives. Each case shows how students learned to argue sophisticated, nuanced case theories that contextualized clients' offenses and presented specific, achievable rehabilitation frameworks as alternatives to lengthy prison terms. The excerpts of hearing transcripts show judges' incorporation of clinic case theories at sentencing.

a. Trauma, Addiction, and Firearms Sales

In clinic cases, CMIC students have developed case theories explaining why someone who has been the victim of gun violence might participate in the trade of illegal firearms. Students have studied and built case records showing the impact of trauma on clients' addictions to substance use or gambling. Students have worked with an expert in problem gambling and with experts in substance use disorders. Those experts have explained that exposure to trauma can lead to emotional numbing that causes people to engage in addictive behavior and dissociate from the consequences of their actions.¹⁰⁹

By way of rehabilitation, students have recorded clients' successful participation in addiction treatment programs, problem-solving courts, and gainful employment such as construction and commercial truck driving. A key component of the students' advocacy includes facilitating the attendance of family and other supporters at our clients' sentencing hearing. At several of our sentencing hearings, the entire bank of benches behind the defense team has been full of clients' supporters, such as relatives, past and present employers, former teachers, and treatment providers, to visibly demonstrate to the court our clients' network of positive support. In one case, our clients' deep bench had a tangible impact on the prosecutor, who turned to face our client's family and other supporters as he spontaneously reconsidered his position during the hearing, from recommending prison time to agreeing to time served.¹¹⁰

Client F, who had pled to sale of firearm charges, was sentenced to prison time. Analysis of his case demonstrates the limits of mitigation when a court believes that prison time is necessary to hold a defendant retributively accountable for his crime. Client F's offense conduct involved selling several high-magazine guns to people who told him they were convicted felons, which enhanced his sentencing liability.¹¹¹ Videotapes of Client F boasting about his gun sales to un-

¹⁰⁹ Client H Sentencing Tr. at 10-11.

¹¹⁰ *Id.* at 36, 39-40.

¹¹¹ Client F Sentencing Tr. at 35-36, 45-46, 49. At sentencing in the District of Connecticut, the court expressed particular concern about this offense in light of the Sandy Hook massacre that killed 26 people at an elementary school, mostly first graders and their edu-

dercover agents also figured prominently at sentencing.¹¹² In Client F's case, the students argued for time served,¹¹³ and the prosecutor recommended an unspecified period of incarceration.¹¹⁴ Client F had several felony convictions for drug possession, drug sale, and larceny, before the crime on which we represented him, and was facing 57-71 months in prison under the Guidelines for possession of a firearm as a convicted felon.¹¹⁵

The students' record of Client F's social history, plus explanation of the health impacts, including addiction, of his violence-filled early years, disrupted the conventional sentencing narrative's narrow focus on the crime. The new medico-legal narrative explained his addiction and his own exposure to violence as the root of his offense.¹¹⁶ The students' framing also foregrounded the client's exceptional rehabilitation.¹¹⁷ As this case's outcome shows, however, even though the court accepted and carefully considered context and rehabilitation at sentencing,¹¹⁸ in the court's estimation, they were insufficient to completely outweigh the need for prison.¹¹⁹

The students' advocacy focused on Client F's having grown up in a home with two addicted parents who subjected each other to extreme violence in front of him and his brother, as well as Client F's early access to drugs and alcohol for his own consumption.¹²⁰ At sentencing, the students' advocacy focused on Client F's sobriety—800 days until that point—and his devotion to his carpentry work and to his family, who were all there to support him in court.¹²¹ Client F had also graduated successfully from Support Court, a voluntary problem-solving court that connects federal defendants in the District of Connecticut with addiction treatment services and support groups.¹²² The students requested a sentence of no jail time, home confinement, su-

cators. *Id.* at 17; see *Sandy Hook Shooting: What Happened?*, CNN, <http://www.cnn.com/interactive/2012/12/us/sandy-hook-timeline/index.html> (last visited Aug. 29, 2019).

¹¹² See, e.g., Client F Sentencing Tr. at 45 (Prosecutor calling Client F's demeanor and words on the tapes "chilling" and cavalier); see also *id.* at 35-37, 49.

¹¹³ Client F Sentencing Memo at 41, 48-51, 53-59.

¹¹⁴ Client F Sentencing Tr. at 46-47; Client F Government's Sentencing Memo at 4-5.

¹¹⁵ Client F Presentence Report at 7-8.

¹¹⁶ Client F Sentencing Memo at 39-41.

¹¹⁷ See, e.g., Client F Sentencing Tr. at 18-20.

¹¹⁸ *Id.* at 40-41 (The Court to Client F: "I will just tell you, your rehabilitation effort I do think is extraordinary. . . . You deserve a lot of credit. I intend to recognize that in the sentence I impose, because it's very hard.").

¹¹⁹ *Id.* at 51 (expressing concern about "whether it would promote respect for the law if [the Court] were not to impose a sentence of imprisonment").

¹²⁰ Client F Presentence Report at 11-12, 14.

¹²¹ Client F Sentencing Tr. at 12, 18-19, 28.

¹²² *Id.* at 18. See *Support Court*, U.S. DISTRICT CT., DISTRICT CONN., <http://www.ctd.uscourts.gov/support-court> (last visited Oct. 9, 2019).

pervision, and community service so that our client could continue his drug treatment in the community and maintain his employment.¹²³

In the initial stages of the case, the prosecutors openly questioned whether Client F was an addict at all, or whether he sold guns simply because he was venal and greedy. The court's acceptance as fact that Client F was a recovering drug addict was a direct result of the students' advocacy strategy—to explain and prove, by interviewing life history witnesses who were able to provide credible, detailed accounts of our client's childhood and his history of drug and alcohol dependence, that he suffered from addiction. The well-documented and corroborated social history mitigation case that students assembled displaced the narrative of Client F's gun sales as driven by greed.

The evidentiary record permitted the sentencing narrative to focus not on the question of Client F's motives, which by the time of sentencing all parties and the court accepted to be addiction, but instead on the question of how much of a sentencing discount Client F should receive for his adverse childhood circumstances and the extraordinary rehabilitation from the addiction that fueled his gun sales.¹²⁴ As in other cases, an important part of the rehabilitation record that the students presented included evidence of Client F's supportive prosocial networks. At sentencing, the court emphasized Client F's family's dedication to him as he achieved his sobriety.¹²⁵ The record included letters of support from Client F's wife and daughters as well as his wife's in-court attestation to the changes she had observed over their two-decade marriage, as her husband descended into addiction and then committed to sobriety and rehabilitation after his arrest.¹²⁶

Given his success in Support Court and law-abiding life in the community since his arrest, students argued that a prison term was demonstrably unnecessary to deter him or to rehabilitate him. The students argued that prison was not necessary for general deterrence either, because the terms of federal supervision are strict, onerous, and violating them runs a high risk of detention.¹²⁷ The central question remaining at Client F's sentencing hearing was whether incarceration was necessary to punish him retributively for his crime.¹²⁸

The court sentenced Client F to a year and a day in prison and three years of supervised release with mandated programs and 300

¹²³ Client F Sentencing Tr. at 21.

¹²⁴ *Id.* at 43-44 (AUSA), 50-51 (Court).

¹²⁵ *Id.* at 51, 52.

¹²⁶ Client F Sentencing Memo, exs. B, F, G, H; *id.* at 25-32.

¹²⁷ Client F Tr. at 21.

¹²⁸ *Id.*

hours of community service.¹²⁹ Notwithstanding the prison sentence, the court's pronouncement of sentence made plain that the students' presentation carried the day. The court cited Client F's extraordinary rehabilitation and the students' sentencing memorandum's description of the violent, alcohol-filled environment in which Client F grew up, which explained his susceptibility to addiction.¹³⁰ This sentence was well below the Guidelines, but still a substantial prison sentence well above the defense's recommendation.¹³¹ The court's sentencing statement demonstrates the tension the court, which had before it a robust mitigation record, nevertheless grappled with between holding Client F accountable for an offense that posed a serious threat to public safety and discounting his punishment according to his own frailties and strides toward rehabilitation:

So, as I look at all sides here, I'm simply not able to agree with your counsel's suggestion that I should not impose a term of imprisonment. I don't think that's appropriate here. I am concerned about the reasons of just punishment of the seriousness of what you did here over the period of at least several months. And I'm concerned whether it would promote respect for the law if I were not to impose a sentence of imprisonment on a felon who sells multiple guns, including the most dangerous kind, to other felons or people who he thinks are felons.

On the other hand, I'm going to vary downward, well downward from what the Sentencing Guidelines would recommend here. I'm going to vary downward on grounds of the childhood challenges that you've had, on the grounds of the drug addiction that doubtlessly influenced what you did, on grounds of your extraordinary rehabilitation, on grounds of your community service, on grounds of the insight and contrition that I think you have, and on grounds of your family support. I'll tell you, your wife . . . alone herself is independently a ground for the remarkable support she's given you for a lesser sentence than I would otherwise impose.¹³²

Here, the court was able to go most, but not all, of the way to the students' recommended sentence of no additional prison time. Client

¹²⁹ Fiona Doherty has written extensively about the "almost farcical level of control over people's lives" that state and federal probation and supervised release systems exert. Doherty, *Obey All Laws*, *supra* note 42, at 294. For instance, "[b]ecause standard conditions reach beyond the criminal law, they necessarily also broaden the behavior that constitutes recidivism . . . that can result in a custodial sentence . . ." *Id.* at 295. See also Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 1017 (2013) (arguing that federal supervised release sentences constitute indeterminate (i.e., indefinite) sentences).

¹³⁰ Client F Sentencing Tr. at 49-52. The extra day on the prison sentence made our client eligible to earn good-time credits toward early release.

¹³¹ *Id.* at 52.

¹³² *Id.* at 51-52.

F's sentencing proceeding demonstrates the limits of mitigation—in some cases, it will not entirely neutralize the retributivist strain of punishment and does not always persuade judges that prison is unnecessary to hold even rehabilitated defendants accountable for their crimes.¹³³ However, proportionate sentencing is central to any just theory of retributive punishment, and in this case, the students' work provided the court with justification for a prison term well below the Guidelines.¹³⁴

b. Client C: Steady State, Trouble, Villains and Heroes, Coda

In an early clinic case, students represented a client facing 235-240 months under the Guidelines for two counts of possession of a stolen firearm.¹³⁵ The relevant conduct, however, included holding hostage and serially assaulting a young woman with whom he lived. The crux of the mitigation case was evidence that our client had suffered extreme parental neglect and abuse. His brother sexually abused him.¹³⁶ He was exposed to endemic community violence growing up in the Bronx in the 1970s. The details the students' investigation uncovered included the following: Our client started using drugs when he was eight and left school at ten. He lived out of a taxicab in his sister's neighborhood from the ages of 14-18.¹³⁷ He was functionally illiterate and in the "borderline" range of intellectual functioning.¹³⁸ Psychologists diagnosed him as suffering from the impacts of post-traumatic stress.¹³⁹

Despite these challenges, during early adulthood, our client was able to maintain sobriety, be married, and work consistently as a carpenter.¹⁴⁰ He had no history of violence against a person until this offense.¹⁴¹ The students' memorandum pointed to these years of stability as evidence that despite his difficult life history, our client was capable of living a peaceful, productive life.¹⁴² The students also explained that in the years leading up to the offense, which involved repeated physical and sexual abuse of the woman with whom he was living, Client C began to suffer from serious lung disease, which de-

¹³³ For examination of the historical role of retributivism or "just deserts" philosophies in federal sentencing, see STITH & CABRANES, *supra* note 34, at 34-35.

¹³⁴ See Bagaric et al., *supra* note 33, at 35 (citing sources).

¹³⁵ Client C Presentence Report at 3.

¹³⁶ *Id.* at 14.

¹³⁷ *Id.*

¹³⁸ Client C Sentencing Memo at 15, 43.

¹³⁹ *Id.* at 2.

¹⁴⁰ Client C Presentence Report at 15, 17-18.

¹⁴¹ *Id.* at 4-11 (criminal history, which did include burglary).

¹⁴² Client C Sentencing Memo at 50, 58.

prived his brain of oxygen.¹⁴³ His marriage fell apart when his wife began using alcohol again, and he was no longer able to work, which unmoored him.¹⁴⁴ In this context, our client met the victim, a much younger woman with her own history of mental illness.¹⁴⁵ After a series of conflicts, he began to physically abuse her and repeatedly sexually assaulted her over the course of three months, at times brandishing the gun that was the basis of his federal conviction.¹⁴⁶ The students argued that prior to his arrest for this crime, Client C had never been diagnosed with or received treatment for his mental health conditions.¹⁴⁷

The students' case theory was that our client's arrest was a turning point and opportunity for him to receive treatment according to a specific rehabilitation plan the students proposed, so that he could return to the stable, law-abiding life he had demonstrated he was capable of for many years.¹⁴⁸ The students also argued that Client C had begun to receive psychiatric treatment for the first time in his life while incarcerated in a state medical prison pending sentencing and was responding well.¹⁴⁹ In contrast, the Federal Bureau of Prisons (BOP) would not likely be able to provide the kind of therapeutic treatment Client C needed and that the psychologists who evaluated him recommended—to say nothing of the toll BOP incarceration would take on his fragile physical health.¹⁵⁰

The victim addressed the court and our client to describe the impact of his physical, sexual, and psychological abuse of her, and she said that she would never forgive him.¹⁵¹ The prosecution requested a 20-year sentence.¹⁵²

In clinic seminar, students learn that Anthony Amsterdam and Jerome Bruner describe the elements of plot as: (1) an initial steady state; (2) that gets disrupted by trouble attributable to human agency or susceptible to change by human intervention; (3) evoking efforts at redress or transformation, which succeed or fail; (4) so that the old steady state is restored or a new transformed steady state is formed; and (5) a coda or moral of the story that folds the then-and-there of

¹⁴³ Client C Presentence Report at 4-5, 15, 17.

¹⁴⁴ Client C Sentencing Memo at 21, 24-25.

¹⁴⁵ *Id.* at 25.

¹⁴⁶ Client C Presentence Report at 4-5.

¹⁴⁷ Client C Sentencing Memo at 42.

¹⁴⁸ *Id.* at 56.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 45-47. The client had been pending sentencing for three years and had been incarcerated in state prison the whole time, during which his physical health had declined substantially from the time he committed the offense. Client C Sentencing Tr. at 21.

¹⁵¹ Client C Sentencing Tr. at 36.

¹⁵² *Id.* at 39.

the tale into the here-and-now of the telling.¹⁵³ In Client C's case, the students' theory was that our client had been in a steady state until his physical illnesses exacerbated his mental health conditions and cognitive limitations. The illness and the demise of his marriage were the trouble that disrupted his steady state.

At issue was the identity of the villains. Clearly, our client's behavior had been egregious and had caused the victim tremendous suffering. The prosecution counted him as the villain. That view comports neatly with traditional crime narratives. The students' case theory offered an alternative villain: the unchecked poverty, violence, and addiction that our client survived. The implicit co-villains were the social actors that failed to ameliorate those conditions, to provide our client's family with support and basic resources and to keep his neighborhood safe. In fact, one might argue that ignoring those villains results in a tragically constrained definition of a "steady state." A transformative steady state would require social transformation. The transformative steady state would be one in which social institutions maintained safe and prosperous neighborhoods, adequately sheltered and fed families, and protected children from violence.¹⁵⁴

In the students' case theory, the court stood to be the change-agent or the hero. It faced the decision whether to impose the maximum punishment, which the prosecution had requested, notwithstanding our client's own history of suffering, evidence of rehabilitative potential, and his present illness. In the alternative, the court could, as the students argued, set a punishment that acknowledged the serious harm our client caused his victim, but which also accounted for our client's whole life and placed him in the setting in which he stood the best chance of healing. In setting Client C's sentence, the court had an opportunity to shed light on the consequences of social institutions' failure to protect: harm to the person the court was sentencing and his victim alike.

In setting punishment, the judge said the following about the context:

[C]'s conduct is awful. I don't disagree with you and I need to consider it, but, you know, as horrific as the poor victim you say she's not getting treatment . . . but why are we here [sic] likely because [C] was sexually assaulted as a child and didn't get treatment . . . [and] he doesn't have violence in his background.¹⁵⁵

This vignette demonstrates the court's acceptance of the students' argument that it should discount Client C's punishment on account of

¹⁵³ AMSTERDAM & BRUNER, *supra* note 61, at 113-14.

¹⁵⁴ SERED, *supra* note 47, at 179.

¹⁵⁵ Client C Sentencing Tr. at 40.

his own history of suffering. Implicitly, the court blamed someone else's failure to provide Client C with treatment for his own sexual abuse at least as much for the victim's suffering as the court blamed our client's actions. The court's recognition that Client C had no history of violence also shows the judge's adoption of the students' case theory that although Client C had many risk factors for committing serious crime before the instant offense, he had not. He was capable of living a stable life with the right supports. He was capable of rehabilitation and of returning to that steady state, before the "trouble" of his physical and cognitive decline.

Concerning rehabilitation, the judge said:

He's never had mental health treatment and he isn't going to get it in the Bureau of Prisons. . . . [H]e won't get the type of treatment he would get on supervised release in the community. He did do well. He kicked his substance abuse. That's amazing to me. It is not seen very often. Somebody start [sic] drinking at eight or taking drugs sometime around then. It doesn't excuse [the offense].¹⁵⁶

Here, the court exercised its power to be the change-agent or hero. Instead of adopting the conventional retributive punishment narrative, the court imposed a sentence which the judge believed would be a catalyst to our client's return to his steady state by facilitating access to the medical treatment he needed and which the court recognized the BOP was ill-equipped to provide.

After a short recess, the court returned, addressed our client, and imposed his sentence. The court began by describing the seriousness of the crime:

The sentence is meant to reflect the seriousness of what you did because if it doesn't, then the punishment isn't just. If that were the only thing I were considering today, your sentence would be as long as I could make it. What you did to the victim is indescribable.¹⁵⁷

The court acknowledged the serious suffering our client had inflicted on the victim and prepared him for a sentence that would hold him accountable for that. Then the court went on to discuss our client's background:

What makes this sentencing so difficult, as I said, is that if that's all I was considering, I would say then maximum is the right sentence. But that's not all that I'm told to consider. And I need to consider your history and characteristics.¹⁵⁸

The court considered significant evidence that the students presented that our client's previous arrests had all been when he was

¹⁵⁶ *Id.* at 45.

¹⁵⁷ *Id.* at 46.

¹⁵⁸ *Id.* at 48.

younger and were all drug-related. They had never involved violence. The students also persuaded the court that our client's mental health condition, which the court surmised caused our client to commit the crimes, had never been treated.

I'm not going to go into great detail about your childhood. I referenced it. You obviously suffered trauma and abuse and neglect. You have a long criminal history but as I said, no violence. You started using drugs at eight. For all of that and for no mental health treatment, [there was] a period of time when you finally got out from under the scourge of drug addiction. As you mentioned yourself, you started your own business, your life was good, you were connecting back with some of your family I think at that time.¹⁵⁹

The court then referred to letters of support the students had gathered and put into the record, corroborating the period of stability in our client's life and offering a counterbalance to the terrible violence to which he subjected the victim.

[The letters] talk about you in a way that's totally out of character to what your offense is here in terms of being someone who cares for people and has helped people, is a good worker. It is a real — it is really a conflict with your offense conduct here which is brutal and serious.¹⁶⁰

Finally, accounting for our client's physical condition, the court imposed an eight-year sentence, with two years' credit for time served, which in the court's view, adequately balanced the seriousness of the offense with our client's history and present condition.¹⁶¹ The six years that our terminally ill client was sentenced to serve in prison may very well have amounted to a life sentence for him (in the end, he was released early due to the severity of his medical condition), but it was nevertheless a far cry from the twenty-year maximum the prosecution called for.

The court's reasoning for imposing this mitigated sentence provided the coda, Amsterdam and Bruner's final plot element: when a person does all he can to overcome his own history of abuse and addiction and has made positive contributions to his community, the court possesses the authority to order treatment he should have received from the outset. The court also possesses the discretion to discount punishment to account for the defendant's own victimization and society's failure to protect or heal him before he harmed another. The students' evidence and case theory provided the court with the basis for displacing the conventional retributive punishment narrative.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 49-50.

That narrative would have prevailed had our client's serious offenses dominated the record, without the counterbalance of context and evidence of rehabilitation.

IV. NEW INSIGHTS AND QUESTIONS REMAINING FOR RESEARCH

Operationalizing *Grace Notes*' theory of noncapital mitigation advocacy has solidified some of my earlier claims, challenged others, and led to new insights. The previous sections of this article describe CMIC's operationalization of *Grace Notes*. This section identifies new insights from CMIC's practice as well as questions ripe for additional research that this early stage of the clinic leaves open.

A. New Insights

A number of insights have emerged from putting *Grace Notes*' blueprint into practice. I discuss three here. The first is innovations to client-centered, holistic lawyering paradigms. The second is development of a new model for noncapital defense lawyers' engagement with experts. The third is the potential of defense-based victim outreach (DVO).

1. Innovations to Client-Centered, Holistic Representation

In *Grace Notes*, I envisioned holistic, client-centered representation as the backbone of enhanced noncapital sentencing advocacy.¹⁶² CMIC students have innovated this model of representation by deploying interdisciplinary teamwork and social science both as a means of navigating the attorney-client relationship and as a means of contextualizing clients' "whole-life" histories in legal examination of their sentencing deserts.¹⁶³ The marriage of science and law is the core of our approach. The clinic students' practice draws from but also differs from traditional client-centered, interdisciplinary, holistic lawyering.¹⁶⁴

Consistent with client-centered and holistic representation mod-

¹⁶² Gohara, *supra* note 2, at 48.

¹⁶³ Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 963-64 (2013) (defining the pillars of holistic defense as interdisciplinary team collaboration and community engagement).

¹⁶⁴ Katherine Kruse has summarized client-centered lawyering, of which holistic lawyering is one strain, as follows, "(1) it draws attention to the critical importance of nonlegal aspects of a client's situation; (2) it cabins the lawyer's role in the representation within limitations set by a sharply circumscribed view of the lawyer's professional expertise; (3) it insists on the primacy of client decision-making; and (4) it places a high value on lawyers' understanding their clients' perspectives, emotions and values." Katherine R. Kruse, *Forress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLIN. L. REV. 369, 377 (2006); *see also id.* at 375-78, 420.

els, CMIC students learn that as clients' representatives, they must privilege clients' interests, voices, and dignity, and they must pay close attention to nonlegal aspects of clients' lives.¹⁶⁵ Indeed, we teach students to "put the client as a whole person at the center of the representation."¹⁶⁶ In addition, our case theory emphasizes factors that contribute to crime to persuade courts to order sentences that achieve a transformative steady state. Convincing courts to apply sentences that improve a client's health, rehabilitation, and safety, is especially consistent with holistic representation, which seeks to reach beyond a client's legal case to expand his options in the world.¹⁶⁷ The same goes for students' facilitating clients' work with addiction counselors, psychologists, or problem-solving courts to expand their options for rehabilitation.¹⁶⁸

However, CMIC students' advocacy differs from traditional client-centered, holistic defense models by externalizing the fruits of interdisciplinary teamwork. As noted previously, our interviewing techniques and data-gathering draw heavily on psychiatric, psychological, and social work paradigms. This aligns closely with client-centered, holistic lawyering.¹⁶⁹ Students take this model a step further. They harness the information they learn by investigating clients' extra-legal circumstances. They then apply medical, psychological, neuro-, and other scientific disciplines to provide courts and other justice stakeholders with a more complete sentencing framework than the Federal Sentencing Guidelines' actuarial calculation of factors. In addition, although holistic defenders may screen for mitigating factors in a client's background and present those at sentencing, our model depends on a particularly granular look at the incidents and impact of adversity in clients' lives.¹⁷⁰ The specificity and texture of the record builds credibility with judges, probation officers, and prosecutors. CMIC students learn that details win cases. Tropes lose them.¹⁷¹

In other words, CMIC students' representation begins with a searching investigation of specific data and corroborating anecdotes. They build on that with interdisciplinary research. Students are then equipped to craft factual and legal arguments that use social science to

¹⁶⁵ See Steinberg, *supra* note 163, at 976-77 (citing JONATHAN RAPPING, THE SOUTHERN PUBLIC DEFENDER TRAINING CENTER PHILOSOPHY 2-3).

¹⁶⁶ Kruse, *supra* note 164, at 378, 420.

¹⁶⁷ *Id.* at 421-22.

¹⁶⁸ *Id.* at 421.

¹⁶⁹ *Id.* at 383, 393.

¹⁷⁰ See James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 839 (2019).

¹⁷¹ Dennis N. Balske, *The Penalty Phase Trial: A Practical Guide*, CHAMPION, Mar. 1984, at 42.

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explain that clients' responses to wretched social conditions are adaptive, expected, and foreseeable. By presenting justice stakeholders with social and medical science in the context of individual cases, our students' advocacy has offered judges, probation and parole officials, and prosecutors the opportunity to reset punishment norms, even where statutory frameworks remain anchored to lengthy sentences.¹⁷² By putting science into the record in individual cases, students have also provided judges, prosecutors, and probation officers with a lasting paradigm with which to understand responses to trauma, addiction, and other mitigating factors. That paradigm applies across cases. This scaling up of interdisciplinary representation is also an enhancement of the traditional holistic model.

The sheer pervasiveness of overwhelming adverse experiences in our clients' lives has been another insight that has emerged from CMIC's work. We put trauma-informed representation and advocacy at the center of holistic lawyering.¹⁷³ Social service providers and lawyers in fields such as domestic violence and child welfare have been engaging trauma-informed practices for some time.¹⁷⁴ However, criminal defense lawyers have been later to recognize how necessary it is to competent, compassionate representation. Teaching law students trauma-informed criminal defense representation is therefore another innovation of traditional client-centered lawyering.¹⁷⁵

Given the prevalence of trauma in our clients' backgrounds, students learn to recognize that the impacts of trauma may affect every aspect of the lawyer-client relationship.¹⁷⁶ Such recognition is necessary to competent mitigation lawyering.¹⁷⁷ Preceding sections of this article have described the trauma-informed interview techniques that students learn. Students also learn the ways in which trauma affects many aspects of some clients' behaviors and experiences, including how they recall memories, their ability to control certain impulses, their responses to threat, the impacts of emotional numbing or dissociation, and their perception of their own advocates and others in the legal system.¹⁷⁸

In the clinic seminar, structured case-rounds exercises, and supervision sessions, we apply lessons, including Susan Bryant's parallel

¹⁷² Tonry, *supra* note 36, at 17.

¹⁷³ Cf. Gohara, *supra* note 4, at 33.

¹⁷⁴ Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLIN. L. REV. 359, 370-71 (2016).

¹⁷⁵ See Gold, *supra* note 70, at 217-25 (describing trauma's impact on lawyer-client trust and communication).

¹⁷⁶ *Id.*

¹⁷⁷ Katz & Haldar, *supra* note 174, at 379; Wayland, *supra* note 70, at 949, 959-61.

¹⁷⁸ Gold, *supra* note 70, at 216.

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universe thinking, to train students to brainstorm possible reasons for traumatized clients' approaches to the lawyer-client relationship.¹⁷⁹ Doing so provides students an opportunity to make connections between concrete, case-specific challenges and the social science they learn about the behavioral impacts of trauma. These lessons in turn provide students occasion to reflect on the difficulties clients live with that might have contributed to their decisions to participate in crime. Students able to develop empathic responses to challenging interactions with clients will become all the more adept at explaining the basis for that empathy to prosecutors and judges.¹⁸⁰

Finally, and critically, our students learn that vigilance about signs of vicarious traumatization is their ethical imperative. The intensive, trauma-informed representation that we teach students naturally requires attention to the impacts of vicarious traumatization on advocates themselves.¹⁸¹ Otherwise, vicarious traumatization that remains unaddressed will impede their advocacy.¹⁸² For this reason, Jean Koh Peters describes advocates' meeting their own needs as an ethical imperative, so that those needs do not interfere with their competent representation of clients on clients' terms.¹⁸³ We teach students the signs and symptoms of vicarious traumatization and to brainstorm ways to guard against it before, and when, it inevitably seeps in. Our students learn that in order to remain open, compassionate, and excellent advocates, they must take care of themselves. This is another enhancement of holistic, client-centered representation, which, at least in the criminal defense context, has not traditionally included mindfulness of the advocate's own need for restoration.

2. *Enhanced Approaches to Working with Experts*

A crucial area in which CMIC students have incorporated best capital defense practices into noncapital sentencing advocacy is their work with non-legal experts. Many criminal defense lawyers are by now accustomed to working with and engaging experts at various stages of representation, and in *Grace Notes*, I recommended incorporating experts into noncapital mitigation practice.¹⁸⁴ In practice, our students have found that preparing mitigation experts is a major component of their casework and that the methods for doing so require much more engagement than has been the norm for noncapital miti-

¹⁷⁹ Bryant, *supra* note 73, at 65; Susan Bryant & Eliot Millstein, *Rounds: A "Signature Pedagogy" for Clinical Education*, 14 CLIN. L. REV. 195, 223-24 (2007).

¹⁸⁰ Gold, *supra* note 70, at 207-08.

¹⁸¹ Katz & Haldar, *supra* note 174, at 361.

¹⁸² See PETERS, *supra* note 77, ch. 9.

¹⁸³ *Id.* at 449.

¹⁸⁴ Gohara, *supra* note 2, at 62, 72, 75.

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gation practice.¹⁸⁵ Several aspects of our approach to engaging with mitigation experts differs from routine noncapital defense practice.

First, our definition of “expert” is broad.¹⁸⁶ Experts may be people with a rich and longstanding familiarity with community dynamics. They may be sociologists, traumatologists, historians, or addiction specialists with particular expertise in gambling, alcohol, or other drugs. At one sentencing hearing, one of the most powerful witnesses students recruited was a high school teacher, a lay historian who had borne witness to the violence and depleted schools in New Haven.¹⁸⁷ This teacher had attended funerals of former students who had been shot to death.¹⁸⁸ The CMIC students enlisted her to speak before the court. The teacher’s sentencing statement began by providing a glimpse of our client as a teenager, before he was ever involved in crime. She described him as “even then, a genuine soul, a great heart, and an amazing person.”¹⁸⁹

A central aspect of successful mitigation is showing a sentencing judge that the person standing before her is worth saving, and contrary to conventional crime narratives, he is not endemically evil or pathological. The teacher was an essential surrogate for the upstanding public, whom the prosecution and the court consider it their duty to protect. Her statement went on:

[H]aving taught in New Haven for several years, and going from an outsider to being embraced by the students, their families and the community, I was able to witness a world that was very different from my own upbringing and environment. Through the perspective of this new environment and culture, I was able to view growing up as an adolescent through a different lens. [Many of my students] ha[ve] not been afforded the luxury of growing up in a safe environment. [They were] not afforded the luxury of attending a school with adequate supplies, motivated teachers, or in a system that valued educating its students on their history, their culture and their identity. Instead, . . . [they] sat in classrooms where teachers called students “savages” and “animals.” [They] sat in classrooms where teachers had been checked out for years. [They] sat in classrooms where teachers regularly came in hung over. [They] rarely sat in classrooms where the material was made relevant to [them] and [their] lives, and [they] almost never sat in a classroom where [their] teachers looked like [them] or had an understanding or respect of where [they] came from. Representation does matter. The imprinting of learned behavior, morals and values is especially crucial dur-

¹⁸⁵ See O’Brien & Wayland, *supra* note 57, at 756.

¹⁸⁶ O’Brien, *supra* note 65, at 730.

¹⁸⁷ Client H Sentencing Tr. at 27-28.

¹⁸⁸ *Id.* at 28.

¹⁸⁹ *Id.* at 26.

ing adolescence. [They were] not surrounded by positive role models; [were], instead, surrounded by violence, robbery, drugs and neighborhoods known less for their positive cultural contributions but their gang affiliations. [Their] school bordered two gang neighborhoods. And because it was a magnet school, was comprised of student demographic from multiple gang neighborhoods strife [sic] with tension. The low socioeconomics provided little rescue from their surroundings. I have had students involved in drug use and abuse, the sale of drugs and trafficking, robbery, and who have been physically and sexually abused and raped. I've also had students shot and killed.¹⁹⁰

The teacher's statement contrasted what every adult, including the judge and prosecutor, knows a child needs to thrive with what our client and his schoolmates received. In place of well-resourced schools staffed with caring educators and trusted adults were classes lacking basic supplies and teachers who dehumanized their students. This white teacher's description of her peers' racist labels of our client and his classmates reflected one view of the community in which our client had grown up and which the court and law enforcement were charged to protect. It also reflected a view, rooted in bias, of our client and others who had stood in his place before him and would stand in his place after him. The question hanging over the court and the prosecutor was whether to align with those who labeled black students in poor schools "savages" and "animals," or with the teacher who condemned that distancing and replaced it with an understanding of the relentless disadvantage her students were forced to live with, some of whom it killed.

The teacher's statement underscored that our client and her other students were trapped. They lacked outlets from streets teeming with addiction, trafficking, and abuse. There was no rescue. Violence escalated until it culminated in murder. The teacher's recounting supported the students' sentencing theory that our client was endangered long before he posed a danger to others. The teacher's words captured "whole life" and "societal standing to punish" mitigation. Our client had suffered enough: threats and violence in the very places where children are supposed to be safe; adults who abdicated their responsibility to create a safe environment where the children in their custody could learn and thrive; neighborhoods and schools impoverished and divested of basic resources and the protection that civilized society owes the vulnerable.

The teacher's window into our client's formative context, along with her attestation to his character in his youth, left the court and the

¹⁹⁰ *Id.* at 26-28.

prosecutor to consider who deserved the blame. This narrative of a traumatized, unprotected adolescent displaced the prosecution's depiction of a heedless young man who sold the very weapons that terrorized his community.

Later in the hearing, another lay witness the CMIC students located served as a ballast for the high school teacher's appeal. The director of the tractor-trailer school where our client had post-arrest earned his commercial drivers' license (CDL) spoke to our client's sincere remorse, will to succeed, and motivation to build a successful, law-abiding career.¹⁹¹ This witness was a current teacher of our client who immediately noticed and nurtured his potential. The CDL director described the moment after he introduced himself and his program to our client's class. Our client, with tears in his eyes, told him how moved he was by seeing the CDL director's own pathway from a background similar to his to the director's present-day success.¹⁹² The director attested that from that day forward, our client sought him out as a mentor, rose to the top of his class, assisted other students with their coursework, and showed exceptional ability in the field.¹⁹³

The CMIC students' witness preparation and plans for the hearing carried the day. The contrast between the CDL director and the former teacher's description of the checked-out, hungover, and derisive educators our client had encountered as a teenager, provided the court and the prosecutor with the answer to the question of what our client was capable of when he was provided with access to genuine opportunity and personal support. This, not prison, was what he needed to rehabilitate and to support himself and his family. In ten months, he had demonstrated that with the right resources, he could kick his addiction, obtain a legal, gainful job, and pose no further risk to the public.

At that point in the sentencing hearing, the prosecutor requested a brief recess to speak with our client and to consider his options. The prosecutor then addressed the court, noted our client's exceptional courtroom showing of family and community support, and said that in his estimation our client had demonstrated extraordinary rehabilitation, positive future prospects and a very low risk of recidivism.¹⁹⁴ The judge, in turn, citing the ACEs study as "very important" announced a sentence that she had not planned on imposing: nine days' time-served.¹⁹⁵

¹⁹¹ *Id.* at 32-35.

¹⁹² *Id.* at 33.

¹⁹³ *Id.* at 34-35.

¹⁹⁴ *Id.* at 36, 39-40.

¹⁹⁵ *Id.* at 52.

The vignette about the high school and CDL teachers demonstrates the power of lay historians. Experts may also be medical doctors, psychologists, or social workers trained to evaluate clients' mental health. With that category of experts especially, our approach is capitably-informed. Rather than hiring an expert to conduct an evaluation of a client at the outset of representation, students begin the social history investigation, which throughout the representation, informs the scope of defense experts' engagement. Experts trained in forensic evaluations may be important for particular legal questions such as competence or sanity. More often than not, however, therapeutic clinicians are better suited to conduct mitigation-oriented assessments.¹⁹⁶

Second, CMIC's mitigation model emphasizes clients' experiences and the behavioral and emotional impacts (symptoms) of those experiences. Unless there is a clear strategic reason to do so, as in the case example offered below, students do not ask experts to render an opinion as to whether clients suffer from specific diagnoses.¹⁹⁷ Diagnoses can be distracting and misleading in the context of sentencing mitigation. Instead, students ask experts to focus on the impact of life events on clients' experiences, emotions, opportunities, bodies, minds, and behavior. To that end, the students' social history investigation informs the mental health expert's biopsychosocial evaluation of a client. That evaluation, in turn, explains to judges, probation officers, and prosecutors why the adverse life experiences the client survived *matter* to considerations of his blameworthiness and prospects for rehabilitation. Such evaluations also inform the type of sentence that is most likely to be effective in healing our clients and deterring them from future criminal justice involvement. This requires the students to craft careful referral questions and to engage experts in a mutually consultative relationship, wherein the students conducting the mitigation investigation and leading the sentencing advocacy discuss with the experts social history avenues to pursue.¹⁹⁸ Clinic students work carefully on referral questions to tailor them strategically, while keeping them broad enough to account for the clients' symptoms and behavioral manifestations of trauma, other situational stressors, or organic mental health conditions.

One example of our mode of working with mental health experts already provided is that of Client C's case in which a psychiatrist and a

¹⁹⁶ Dudley & Blume Leonard, *supra* note 51, at 974-76; VAN DER KOLK, *supra* note 18, at 140-41.

¹⁹⁷ Dudley & Blume Leonard, *supra* note 51, at 983-85; VAN DER KOLK, *supra* note 18, at 144-45.

¹⁹⁸ Dudley & Blume Leonard, *supra* note 51, at 974.

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psychologist the clinic team retained wrote a report explaining that the client's pulmonary disease, background of extreme poverty, abuse and neglect, and several downturns in his life's fortunes converged with a medical condition that caused cognitive decline. It would have been impossible for this expert to have reached her conclusion without the social history the clinic students assembled and explained. In the absence of this context, at best, experts conclude that clients exhibit particular behaviors and symptoms. Yet, without context and explanation, sentencing judges might view those (often adaptive) outward expressions of defendants' internal responses to their life experiences as aggravating rather than mitigating.

Examples of referral questions students have presented to experts opining on the impact of medical conditions on clients' mental health and behavior include:

- 1) How does the client's condition impact their cognitive age and functioning?
- 2) What impact does the client's condition have with regards to the alleged crime?
- 3) What is the client's prognosis for rehabilitation?
- 4) Given the client's cognitive impairment, will the client be able to respond to treatment, and if so, what treatment would be most effective?

The clinic has provided experts with school records, prison records, law enforcement reports, prior psychological assessments by other practitioners, and lay witness accounts to describe clients' social histories. Experts may then conduct their own evaluation and assessment of clients.

In one case in which students' work with a medical doctor was central to their mitigation advocacy, our client was facing a sentence of ten years, with a Guidelines range of 210-262 months. The prosecutor recommended imprisonment at the top of the Guidelines. The judge imposed a sentence of 146 months, including time-served, which made our client eligible for release shortly after the mandatory minimum ten years. A decade in prison is without question a lengthy and severe penalty. Without adequate explanation of our client's medical condition and its impact on his daily functioning and understanding of his behavior leading up to and during the offense, he might have been serving upwards of twenty years instead.

The method we teach students for working with experts differs substantially from a conventional model, prevalent among some non-capital defense teams. In the conventional model, an attorney calls an expert with forensic expertise and asks them to conduct an evaluation of the client and conclude with a diagnosis, without offering referral

questions or the fruits of social history investigation.¹⁹⁹ In some attorneys' practices, the expert's client interview doubles as the social history investigation. The expert then proffers an opinion, which may include a diagnosis, and then the attorney decides whether the evaluation is likely to be helpful or harmful to the defense. If the attorney decides that the evaluation is unhelpful, then that concludes the engagement of the expert. In such cases, the defense makes no trained professional available to the court to explain the impact and significance of particular life events on clients' opportunities and behaviors. This cursory approach to working with experts thereby deprives clients of a pillar of competent mitigation representation.²⁰⁰ Best capital practices have shown in case after case that mental illness and impairments are only mitigating when presented, with the aid of suitable experts, in the context of a client's entire life trajectory.²⁰¹ The same is true in noncapital cases.

3. *Defense-Based Victim Outreach*

New insights have also arisen from CMIC's application to some cases of defense-based victim outreach, known in capital advocacy as DVO.²⁰² DVO is a practice rooted in restorative justice principles which require the person who caused harm to take active steps to restore that harm to the victim.²⁰³ Such restoration will never undo the harm, and in cases of homicide, rape, and other violent crimes, can never fully restore. However, an expression of true remorse, plus whatever concrete steps are possible to offer restitution or repair, can aid a victim's healing.²⁰⁴ In addition, defense teams have access to information that can provide answers to victims' questions, which may help them move past initial stages of fear and shock toward a place of understanding aspects of the crime.²⁰⁵

Mitigation investigations also provide explanation for a defendant's behavior, which may demystify the traumatic events surrounding the offense. In this sense, presenting mitigating information to

¹⁹⁹ O'Brien & Wayland, *supra* note 57, at 756.

²⁰⁰ *Id.* at 772.

²⁰¹ *Id.* at 759, 779.

²⁰² Mickell Branham & Richard Burr, *Understanding Defense-Initiated Victim Outreach and Why It Is Essential in Defending a Capital Client*, 36 HOFSTRA L. REV. 1019 (2008).

²⁰³ Richard Burr, *Expanding the Horizons of Capital Defense: Why Defense Teams Should Be Concerned About Victims and Survivors*, CHAMPION, Dec. 2016, at 44-48 (citing HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 28-29 (2002)).

²⁰⁴ *Id.*

²⁰⁵ Tammy Krause, *Reaching out to the Other Side: Defense-Based Victim Outreach in Capital Cases*, in WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY 389 (Acker & Karp eds., 2006) (citing SANDRA L. BLOOM, CREATING SANCTUARY: TOWARD THE EVOLUTION OF SANE SOCIETIES 225 (1997)).

victims may play the same humanizing role that presenting it to judges plays: it takes the defendant's actions out of the terrifying, unexplained realm of the two-dimensional, inherently evil actor, into the world of a flawed human being who committed a grievous harm, but whose motivations and behavior may be explicable by his own history of victimization, impairment, or deprivation. None of this mitigation, of course, excuses our clients' actions. It may, however, prove enlightening to victims who are interested in learning more about the people who harmed them.

As Stephanie Frogge has written concerning the kinds of questions that DVO might answer about the defendant and the import of those answers to victims:

Who *is* this person? What does he do for a living? Is he married or does he have a family? What does the family think of this? How was he raised? What was his childhood like? In the absence of information, the perpetrator becomes "larger than life" in the minds of victim survivors and takes on characteristics and traits that often are not congruent with reality. Other questions concern the crime and the defendant's reaction to it. Why did he do it? Was I selected on purpose? Was alcohol or other drugs involved somehow? Did something trigger this? Did I trigger this somehow? Is the defendant sorry? Is he even capable of remorse? What does that mean to him?²⁰⁶

These are reasons why, in cases where victims are amenable, CMIC teams reach out directly to people our clients have harmed and offer them answers, an opportunity to express their feelings about our client or his crime, and, should the victims agree, provide our clients a chance to express their remorse directly to the people their actions hurt.²⁰⁷ When our clients have an opportunity to express remorse directly to their victims, it facilitates their own healing.²⁰⁸ DVO helps our clients face and come to terms with the damage they have caused and to understand how and why they committed their crimes and who they hurt as a result.²⁰⁹ It has also helped our clients commit to educating themselves, finding paths to productive lives, and doing service to others to help them avoid the paths that led our clients into the criminal justice system.²¹⁰ In this sense, DVO presents an opportunity

²⁰⁶ Stephanie Frogge, *Victim Outreach: An Ethical and Strategic Tool for the Defense*, CHAMPION, Apr. 2014, at 35.

²⁰⁷ SERED, *supra* note 47, at 111-18 (describing accountability practice of "'doing sorry"—taking actions to repair harm to the degree possible, and guided when feasible by the people harmed").

²⁰⁸ Burr, *supra* note 203, at 46-47.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 47.

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to identify defense-based sources of restoration that the adversarial criminal justice system, whose focus is on punishing “offenders” and not restoring victims, fails to do.²¹¹

DVO also provides the defense team a chance to offer victims information about what to expect from legal proceedings. In our DVO casework, students have kept victims abreast of the timeline and trajectory of sentencing proceedings and answered questions concerning the range of punishment our clients are facing. This ameliorates victims’ stress related to the uncertainty surrounding timing and possible outcomes of criminal cases. In addition, DVO has provided students with a window into the extent to which the victims’ wishes and the prosecution’s recommended sentences align or diverge from one another.²¹²

CMIC’s DVO philosophy is consistent with that of organizations such as Common Justice and Crime Survivors for Safety and Justice, which premise their work on the recognition that victims of trauma are at greater risk of causing harm in the community.²¹³ Our DVO work is tied inextricably to the recognition that our clients have, in all the clinic’s cases to date, survived serious crime themselves well before they harmed anyone else.²¹⁴ Communities most impacted by crime are full of people who have been on both sides of the often blurry “offender-victim” line. Students’ mitigation advocacy, which focuses attention on the social conditions contributing to crime, works toward solutions that rehabilitate our clients and redirect resources to the depleted communities from which they all too often hail. Our advocacy is aimed at promoting solutions like those that Common Justice and Crime Survivors for Safety and Justice offer: alternatives to incarceration for victims of violence who later commit crimes; redistribution of funds away from prisons and into mental health programs, drug treatment, and victims’ services; and building trauma-treatment centers in high-crime neighborhoods.²¹⁵

Finally, our DVO work arises from an understanding that while prisons certainly incapacitate and punish, they do little to hold imprisoned people actively accountable for their crimes. Incarcerated people

²¹¹ See Richard Burr, *Litigating with Victim Impact Testimony: The Serendipity that Has Come from Payne v. Tennessee*, 88 CORNELL L. REV. 517, 517 (2003); SERED, *supra* note 47, at 28, 30.

²¹² See Frogge, *supra* note 206, at 35.

²¹³ See SERED, *supra* note 47, at 74; Sarah Stillman, *Black Wounds Matter*, NEW YORKER (Oct. 15, 2015), <https://www.newyorker.com/news/daily-comment/black-wounds-matter> (describing the organizations and their work).

²¹⁴ SERED, *supra* note 47, at 4.

²¹⁵ Gohara, *supra* note 4, at 50 (citing sources).

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passively “do time.”²¹⁶ DVO requires our clients to face and engage with victims, express genuine remorse, and repair (to the extent possible) the harm they caused.²¹⁷ This may benefit clients at sentencing, but more fundamentally, it benefits them by counteracting the avoidance and shame that so often has led them to commit crime in the past.²¹⁸

B. Questions for Future Research

In this article, I have presented one example of how to operationalize noncapital mitigation principles through a law school clinic. Yale Law School’s Challenging Mass Incarceration Clinic is young, however, and plenty of questions for future scholarship, research, and practice remain. This section touches on a few.

1. Questions About the Potential for Fundamental Sentencing Reform

Grace Notes’ prescription for shortening prison terms, even for serious offenses, is the premise of CMIC and of this article. Questions about whether that prescription is the most effective one are fair and worth examining.

One such category of questions is whether focusing on defense practice norms is as important as focusing on prosecutorial and judicial discretion, or on statutory frameworks that still include mandatory minimum or inflated guidelines schemes. *Grace Notes*’ blueprint and our practice in CMIC are designed to start with defense lawyers because they have the immediate power to use their advocacy to influence prosecutorial and judicial decisions.²¹⁹ As all justice stakeholders begin to reconsider the roots of crime and the deserts of people who break the law, they can use their power to shift public policy. CMIC’s practice has shown that comprehensive social history mitigation can, in fact, shift judicial and prosecutorial perceptions and sentencing decisions and recommendations. As happened with capital practice, our noncapital sentencing practice in individual cases has harnessed insights into the social science behind a great deal of crime.²²⁰ Clinic case outcomes and analysis of clinic case sentencing transcripts show that such insights have already begun to impact judges’ and prosecutors’ assumptions about criminal sentencing.

²¹⁶ SERED, *supra* note 47, at 93, 96-98.

²¹⁷ *Id.*

²¹⁸ *Id.* at 67-68 (citing JAMES GILLIGAN, VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES (1996)).

²¹⁹ Gohara, *supra* note 2, at 49.

²²⁰ *Id.* at 46-48, 85.

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A question remains whether and how that will translate into public policy changes. Study of legislative testimony, for example, by justice stakeholders in jurisdictions where defense counsel are practicing capital-style noncapital sentencing advocacy might shed light on whether the in-court practice will translate into widespread policy change. That project will require implementation of the capital-style practice norms and follow-up study of sentencing decisions and any related public policy advocacy.

2. Questions About Fairness

Another set of questions relate to whether CMIC's practice will result in fairer and more just sentencing.²²¹

One particular concern is whether judicial discretion will result in more unwarranted sentencing disparities than existed under the mandatory guidelines regime. After all, the move from completely individualized sentencing to the mandatory guidelines system came about as a result of bipartisan concerns about sentencing disparities.²²² For example, it is certainly true that while CMIC clients in three fire-arms cases have received no additional prison time or substantially below-Guidelines prison terms, 40.5% in the District of Connecticut received prison terms within the Guidelines.²²³ Depending on a host of other case factors, that statistic may indeed signal a disparity, which may be, in part, the result of differences in the quality of defense sentencing advocacy. (A related area worth additional study is the extent to which simply putting more mitigation resources—more lawyers and mitigation specialists on teams, additional funding for experts, enhanced mitigation training for public defenders, for example—into all cases, regardless of whether they apply the clinic's methods, would result in reduced sentences akin to those that CMIC has achieved.)

In CMIC's practice, students learn that their duty is to represent their clients zealously in each case, regardless of concerns about systemic disparity. However, to answer the empirical question whether adoption by some defenders of intensive mitigation practice would result in widespread disparity requires study. If it turns out that there is

²²¹ A related question is whether and to what extent the inherent idiosyncrasies of judicial discretion will always lead to sentencing disparities and what to do about judicially-created disparities. See, e.g., FRANKEL, *supra* note 34, at 12-25, 69-85; cf. STITH & CABRANES, *supra* note 34, at 104-42.

²²² STITH & CABRANES, *supra* note 34, at 80-81. For an overview of the bipartisan Congressional concerns about disparities in individualized sentencing that led to adoption of the federal sentencing guidelines, see *id.* at 38-48.

²²³ 2019 D. CONN. STAT., *supra* note 96, at 16 tbl.10; 2018 D. CONN. STAT., *supra* note 96, at 16 tbl.10; 2017 D. CONN. STAT., *supra* note 96, at 18-19 tbl.10; 2016 D. CONN. STAT., *supra* note 96, at 18-19 tbl.10.

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a disparity and, with all other factors being equal, it is a result of variations in the quality of defense advocacy, then additional questions arise. Which paradigm, individuation informed by a defendant's "whole life," or uniformity based on offense conduct and actuarial "offender characteristics," fosters just and proportionate punishment? Does actuarial sentencing really eliminate disparity?²²⁴ Is maintaining the quality of noncapital defense sentencing advocacy to a baseline in pursuit of uniformity feasible, efficacious, or just? If so, whose practice should set that baseline? Those questions, as well, deserve close examination once data is available. With that said, CMIC teaches students excellent sentencing practice. The clinic aims to raise the level of noncapital sentencing advocacy nationally as our students practice in other jurisdictions and as sentencing judges come to expect their standards of practice. This is how national capital defense standards evolved. CMIC students are poised to lead the same evolution in non-capital sentencing representation.²²⁵

Another question is whether the clinic's emphasis on rehabilitation will really serve clients in the long-term or simply subject them to judicial control in the community. The clinic's rehabilitation plans have worked by offering problem-solving courts and additional supervision in exchange for reduced or no prison time. The matrix of rehabilitative services that students have presented in clinic clients' cases has proved persuasive. Clients' completion of Support Court, probation-supervised drug treatment, community service and vocational programs, plus terms of federal supervised release has demonstrated to judges that clients are amenable to and responding well to community-based treatment programs, working, and willing to submit to close monitoring in lieu of prison. However, as Fiona Doherty has written, supervisory sentences also ensnare and risk detention if probationers relapse or deviate from strict supervision requirements.²²⁶ Problem-solving courts also implicate complicated questions of procedural justice and what rights defendants bargain away in exchange for participation.²²⁷ Research into whether bargaining for reduced or no prison time results in lengthier terms of supervised release is worth

²²⁴ See STITH & CABRANES, *supra* note 34, at 126 ("Applying the same objective, mechanical system uniformly to all cases is simply an objective, mechanical way of dispensing the arbitrariness that is inherent in the system. An *ex ante* set of sentencing instructions can spread only a relatively coarse grid over the infinitely complex field of human behavior.").

²²⁵ Gohara, *supra* note 2, at 55.

²²⁶ Doherty, *Obey All Laws*, *supra* note 42, at 295; Doherty, *Testing Periods*, *supra* note 42, at 1704; Doherty, *supra* note 129, at 1017.

²²⁷ See, e.g., Jane M. Spinak, *Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts*, 40 AM. CRIM. L. REV. 1617 (2004).

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pursuing. The efficacy of problem-solving courts in reducing prison sentences and recidivism in federal criminal cases, and at what cost to defendants, raises another important set of questions for a future project.

3. *Questions About Risks*

A third set of concerns is the extent to which increased focus on defendants' life histories may risk changes to sentencing that will undermine mitigation.

One question is whether enhanced mitigation will provoke increased attention to victims' plights, which may backfire against defendants. In federal court, and in nearly all the states, victims are entitled to certain procedural protections during litigation of criminal proceedings arising from crimes that impacted them, including the right to deliver victim impact statements at sentencing hearings.²²⁸ Moreover, law enforcement and prosecution case records already provide courts with documentation of all the harms defendants cause victims, though certainly without the emotional force of live in-court statements.

In all the clinic cases where our clients have harmed other people directly (as opposed to harming the community broadly), victims have opted to speak. Whether those decisions were in response to the clinic's enhanced mitigation work remains unknown. As noted, our DVO practice has been to engage with victims whenever they are amenable to defense outreach. Regardless, students prepare for victims' participation in the sentencing process in all cases. Providing clinic clients with the opportunity to express remorse, and when they are permitted to, make amends directly to victims, has been foundational to our clients' ability to heal and move past the shame and trauma that have contributed to their offenses. It has also demonstrated our clients' remorse and responsibility for their crimes.

If it turns out that presenting a record of our clients' own histories of victimization inspires more victim impact testimony, then that presents all the more opportunity for clinic students, supervisors, and our clients to engage with victims' perspectives and viewpoints as part of our advocacy. Moreover, mitigation-rich sentencing records have, even in cases with strong victim impact statements, resulted in reduced prison time for clinic clients. Therefore, eschewing the opportu-

²²⁸ Crime Victims' Rights Act, 18 U.S.C. § 3771 (2018); Victims of Crime Act, 34 U.S.C.A. ch. 201 (West 2020); see also *Victims' Pretrial Release Rights and Protections*, NAT'L CONF. ST. LEGISLATURES (May 12, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-victims-rights-and-protections.aspx> (searchable database of crime victims' rights laws).

nity to present courts with mitigation evidence that has proven effective in reducing sentences is not a worthy trade-off on the speculative chance that mitigation may provoke more robust victim participation. The impact on the victim will always be a part of sentencing in one form or another. The clinic's philosophy is that facing that, accounting for it, and advocating zealously and compassionately in response is the best practice.

Further, challenging the traditional bright line between victims and defendants reflects the truth of our clients' own victimization and foregrounds the experiences that the people who live in communities most impacted by crime all too often share. As judges have recognized in our sentencing hearings, conditions in those clients' homes and neighborhoods and their own untreated trauma have contributed to the harms they have inflicted on their communities. Finally, and as importantly, DVO has provided victims with a point of contact with the defense team and an invitation to demystify the person who harmed them. Courageous lawyering requires diving headlong into the most difficult, frightening, and righteous positions counter to one's own. We teach defense-clinic students to approach victims with the same empathy and compassion with which we approach our own clients. The combination of DVO and whole-life mitigation thereby exposes the oversimplicity of the traditional and oppositional victim-defendant divide and replaces it with one that more accurately reflects the complicated reality of commonality and shared experience.

Another risk is that the clinic's medico-legal paradigm will appear to pathologize clients. In one sentencing hearing, the court wondered whether our client's addiction and trauma-related symptoms were a pathologic adaptation from his having witnessed violence as a child in his neighborhood. The court's characterization of the mitigation as pathological represented a departure from the clinic's aims.²²⁹ Our mitigation method seeks, rather, to explain through medical and social science how and why symptoms such as addiction are often adaptive and expected responses to the types and levels of traumatic exposure our clients experience. This does not mean that our clients are whole and well. But neither does it mean that they are sick or pathological. It means that they are injured and need healing. This is a subtle distinction that requires careful thought and calibration of the clinic's evidentiary submissions, expert reports, and narrative tacks. This is crucial work our students and supervisors will undertake as we continue to evolve and refine clinic practice.

²²⁹ Client H Sentencing Tr. at 50-51.

4. *Questions About Data*

A third category of research arises from our sentencing outcomes and concerns rigorous analysis of how those outcomes compare to those in similar cases. The nine CMIC federal sentencing cases considered here present a small sample size. A brief description of CMIC's case selection criteria may shed light here. The Federal Defender's Office and I select CMIC cases based primarily on whether their expected case dockets will align suitably with the academic calendar. Severity or nature of charges or convictions only figures into our consideration to the extent that we believe that a particularly complicated case, or a client who is facing an especially lengthy or likely prison term, might benefit from the clinic's enhanced resources. Clinic case outcomes demonstrate that CMIC's methods have reduced punishment even in those high-stakes cases and on behalf of clients in particular jeopardy. It stands to reason that the clinic's methods would also mitigate punishment in less complicated or aggravated cases, though we do not know at what level of severity, if any, the benefits of our approach would begin to wane.

The statistics presented in Section III.B.1 show that CMIC's clients are sentenced generally below guidelines at a rate that is higher than average for the District of Connecticut and as compared to cases within the same categories of conviction nationally. However, a thorough cross-case comparison isolating the impact of comprehensive social history mitigation requires a larger sample size, plus regression analysis isolating variables associated with each type of case, just a few of which would include: whether the defendant cooperated in the prosecution of others; what categories of mitigation the defense attorney argued; how many charges were in the defendant's initial indictment compared to how many they actually pled to or were convicted of; what types of behavior counted as relevant offense conduct; whether the defendant was detained or out on bond presentencing; whether the defendant engaged in rehabilitation programs while awaiting sentencing; the prosecutor's recommended sentence; and many more. An analysis of this sort might begin in the District of Connecticut and then look to another district for comparison. This is another area ripe for future research.

Another set of data questions relates to the reasons that decisionmakers actually rely on when mitigating punishment. As of now, CMIC's information is anecdotal and relies primarily on the type of sentencing transcript analysis in Section III of this article as well as on reports from the FDO about sentencing outcomes in other cases in which attorneys have employed CMIC's methods. To plumb a more methodical exploration of how CMIC's methods have impacted judi-

cial decisionmaking systemically, one might conduct qualitative interviews; sentencing judges could then shed specific light on which factors they found most persuasive or which particular aspects of mitigation they considered most compelling. Another method of approaching the question of what theoretical basis for mitigating punishment people rely on most, is to conduct an empirical study which provides a series of hypothetical case vignettes and facts such as child abuse in a defendant's background, plus a range of sentences according to hypothetical guidelines.²³⁰ This experiment will permit analysis of first, whether, and if so, why, certain types of adverse experiences impact lay people's estimation of appropriate punishment. If the experiment suggests that adverse experiences have a mitigating impact, then a future similar survey of judges could compare their responses and reasoning to that of lay people. This project also has the potential to tease out strains of reasoning behind outcomes like that of Client F, where the court accepted his extraordinary rehabilitation and the traumatic roots of his addiction but nevertheless believed that prison time was warranted because a nonprison sentence would fail to promote respect for the law.²³¹ More specific understanding of why people believe that prison time is necessary, even when they accept mitigating arguments, will help the clinic refine its advocacy.

5. *Questions About Scalability*

Finally, a perennial question for public defense clinics is whether they teach a model of practice that is replicable in "the real world," particularly in a busy, high-volume public defender office, where clinic students may pursue careers. The answer to that question varies, depending on the model of the clinic in question and the resources and approach of the public defender office to which it is being compared. Many public defender organizations already engage in holistic, client-centered representation that meets a range of clients' legal and social work needs.²³² For those offices with resources dedicated to thorough investigation, mitigation work, and services designed to support clients' rehabilitation, the CMIC model is less of a stretch than for offices without social workers, investigators, or mitigation specialists. The work product templates, or master documents, would provide a

²³⁰ I am collaborating with Gideon Yaffe, a colleague at Yale Law School, and Dries Bostyn, of Ghent University in Belgium, on such a study. See Heather K. Gerken, *Resisting the Theory/Practice Divide: Why the "Theory School" Is Ambitious About Practice*, 132 HARV. L. REV. F. 134, 142 n.43 (2019).

²³¹ Client F Sentencing Tr. at 35-37, 45, 50-51.

²³² Anderson et al., *supra* note 170, at 819, 825-26 (describing the results of a RAND study of case outcomes comparing the Bronx Defenders, a holistic public defender's office, and the Legal Aid Society's Bronx Office, a traditional public defender's office).

framework for organizing and accessing work that the defense team in holistic offices is already collecting in many instances. The emphasis on social science and broad historical and socio-legal context is one that public defenders can begin to incorporate into their sentencing memoranda and hearing presentations. CMIC's partnership with the Federal Defender's Office in the District of Connecticut has proven as much.

The challenge with replicating the model is more pronounced when the comparison is with solo contract attorneys and with public defender offices lacking resources for investigators, social workers, and mitigation specialists. High caseloads, which diminish the time a defender has to devote to any one client's case, will remain a major constraint for some practitioners in these situations. However, our students learn a defense framework that is applicable to all cases, and they will have the perspective to decide when in higher volume practices to triage and apply it with varying degrees of thoroughness and completion to cases on their dockets.

The lens for social context and rehabilitation-focused mitigation will remain with a CMIC-trained student, as will the methods for assembling the building blocks of the mitigation case. Our alums will know how to conceive of a thorough social history investigation, to conduct that investigation, and to organize its fruits. They will know to connect their clients as early as possible to rehabilitative treatment programs. They will know to build and develop a store of social science, medical, and historical resources that chronicle the social conditions common to many poor people prosecuted for crimes. They will know that if they obtain an expert's teaching declaration describing the neurological, developmental, and behavioral impacts of trauma, they can use it in multiple clients' cases to conserve resources. They will also know that engaging with victims has transformative potential for clients and the people they have harmed.

CONCLUSION

In this article, I have examined Yale Law School's Challenging Mass Incarceration Clinic's blueprint, theories, methods, and outcomes. The students' work has demonstrated in a small sample of cases that when defense teams provide courts with a mitigation presentation that both explains clients' involvement in crime in the context of their whole lives and demonstrates rehabilitation, judges are willing to reduce prison sentences or jettison incarceration altogether. By sentencing people to participation in community-based drug treatment or mental health programs instead of prison, courts point to the

need for more resources for rehabilitation services.²³³ These are the transformative results I aspired to in *Grace Notes* when I recommended capital-style mitigation advocacy in noncapital cases. The early lessons also point to plenty of room for refining and innovating the model and fruitful avenues of future research as CMIC and other clinics put these theories into practice.

²³³ The RAND study published in the Harvard Law Review comparing the Bronx Defender's and Legal Aid Society's case outcomes found that while there was little difference in the criminal adjudication results the two offices achieved, the Bronx Defender's holistic model reduced the likelihood of a custodial sentence by 16% and reduced the expected sentence length by 24%. See Anderson et al., *supra* note 170, at 823.



5-1-2023

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Vartkessian, Elizabeth S.; Posel, Thea; Ginez, Anthony; and Hubbard, Lela (2023) "When Justice Depends on It: The Need for Professional Standards for Mitigation Development in All Criminal Cases," *University of Baltimore Law Review*. Vol. 52: Iss. 3, Article 4.

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

**Elizabeth S. Vartkessian,
Thea Posel,
Anthony Ginez &
Lela Hubbard***

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I. INTRODUCTION

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

* The authors would like to thank the University of Baltimore School of Law, the Center for Criminal Justice Reform, and Advancing Real Change, Inc. for hosting a panel discussion centered around many of the ideas in this article. We are also deeply grateful to Sean O'Brien and Sarah Gannett for providing invaluable feedback on an earlier draft and to Alexandra Becnel for assisting with editing.

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

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

Early concepts of what evidence could mitigate a potential sentence of death often focused on the historical trauma, damage, or dysfunction experienced by a person charged with a death-eligible crime.⁴ Over the last several decades, however, this blinkered conception has blossomed into a holistic approach that requires defense teams to investigate and develop the full spectrum of personhood and present decision-makers with a multidimensional biography⁵ of the accused.⁶ This includes one's generational history, the impacts of social structures on outcomes,⁷ how culture and race influence development, perspectives and beliefs that in turn inform behaviors,⁸ and the capacity for growth.⁹ At its core, mitigation evidence is the story of a human life—past, present, and future—and all the facets that shape human potential.¹⁰ It is through the presentation of such evidence that authentic understanding between decision-makers and the accused develops; this is because the presentation of mitigation evidence dispels false narratives about crime and who commits acts that are deemed unlawful.¹¹ The result is a more compassionate process and individualized justice.¹²

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

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

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

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

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

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

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

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

Systems of indigent defense are often plagued with insufficient resources needed to provide zealous representation to clients²⁵ facing the loss of freedom and the collateral consequences that come from being system-involved.²⁶ The passage of guidelines would reflect the recognition that the resources to provide properly trained mitigation specialists in all criminal cases will not simply appear; as in capital and JLWOP cases, professional standards applicable to every criminal case will provide defense counsel with authority under which to request resources for the requisite services.²⁷ Jurisdictions must invest in justice—in a system that not only appoints an attorney to an accused person who does not possess the means to pay for a defense but provides a defense that takes into account their life and circumstances.²⁸ Potential costs at the front end of the process pale in comparison to the costs lost to the individual and the community in wasted human potential.²⁹

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

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

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

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

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

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

33. See *infra* Parts II–III.

34. See *infra* Section IV.A.

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

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

37. See *infra* Section IV.B.

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

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

II. A BRIEF HISTORY OF MITIGATION

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

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

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

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

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

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

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

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

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

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

In the wake of *Furman*, states that wanted capital punishment moved quickly to enact statutes that could satisfy the concerns of the Supreme Court.⁴⁸ In 1976, several of these newly crafted statutes reached the Court for review.⁴⁹ The statutes considered by the Court fell into one of two general categories: schemes that attempted to provide guidance for determining the appropriate sentence⁵⁰ or those that made a sentence of death mandatory upon conviction of a death-eligible crime.⁵¹

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

44. See, e.g., *Ring v. Arizona*, 536 U.S. 584, 588–89 (2002) (holding that a person facing capital punishment has the right to have a jury—rather than a judge—find an aggravating factor that makes the defendant eligible for the death penalty); see also *Constitutionality of the Death Penalty in America*, *supra* note 43. But cf. *Spaziano v. Florida*, 468 U.S. 447 (1984) (upholding then-existing Florida sentencing scheme in which the jury’s sentencing recommendation was merely advisory and judicial override was permitted), *overruled by* *Hurst v. Florida*, 577 U.S. 92 (2016).

45. See Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 669 (2016); see also Jill M. Cochran, *Courting Death: 30 Years Since Furman, Is the Death Penalty Any Less Discriminatory? Looking at the Problem of Jury Discretion in Capital Sentencing*, 38 VAL. U. L. REV. 1399, 1400–31 (2004).

46. See *Furman v. Georgia*, 408 U.S. 238, 256–57 (1972) (Douglas, J., concurring).

47. Kim Bellware, *Death Penalty’s 50-Year Rise and Fall Since Supreme Court Struck It Down*, WASH. POST (Jul. 6, 2022, 7:00 AM), <https://www.washingtonpost.com/history/2022/07/06/furman-georgia-supreme-court-death/> [https://perma.cc/3K7L-BMHX].

48. See Stetler and Tabuteau, *supra* note 9, at 733.

49. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

50. See *Gregg*, 428 U.S. at 197–98; *Jurek*, 428 U.S. at 267–69; *Proffitt*, 428 U.S. at 246–52 (three companion guided discretion cases).

51. See *Roberts*, 428 U.S. at 331; *Woodson*, 428 U.S. at 285 (two mandatory schemes).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

65. *Id.* at 74–75.

66. *Id.* at 75.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Recent Legislative Advancements Have Expanded the Application of Mitigation

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

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

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

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

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

Finally, mitigation investigation and the presentation of such evidence have long been central to requests for executive clemency—pardons, commutations, or reprieves—including those in military courts.⁸² While executive clemency exists outside the judiciary, it has often been referred to as the “fail safe” of our criminal justice system.⁸³ By its very nature, clemency is “an act of grace,”⁸⁴ and requests for clemency often put forth the personal history of a convicted person in an effort to persuade the decision-maker that the individual is deserving of mercy. These requests often included information related to the mental health and intellectual functioning of a convicted person⁸⁵ as well as their capacity for redemption and personal growth since the commission of the crime for which they have been convicted.

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

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

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

A. *The Evolving Scope of Mitigation Practice*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

104. See *id.*

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

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

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

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

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

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

B. *The Evolving Tools of Mitigation Practitioners*

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

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

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

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

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

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

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

115. *Id.* at Guideline 5.1.B–E.

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

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

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

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

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

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

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

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

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

120. See *id.* at 52.

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

122. See *id.* at 19.

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

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

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

124. See *id.* at 158–59.

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

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

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

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

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

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

1. The Passage of Professional Standards for Capital Defense¹³²

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

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

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

130. Katrina Daniel, *Practice Points: Telling a Story in a Mitigation Video*, THE CHAMPION, Sept.–Oct. 2022, at 59, 59.

131. See, e.g., Stephanie Clifford, *A Flattering Biographical Video as the Last Exhibit for the Defense*, N.Y. TIMES (May 24, 2015) (discussing the power of visual narrative).

132. Sean O’Brien, Russell Stetler, and others have written about the process and history behind the development of the ABA Guidelines. See sources cited *supra* notes 18, 32.

133. Compare GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (AM. BAR ASS’N 1989), with 2003 ABA Guidelines, *supra* note 3 (showing the substantial updates from the 1989 to 2003 ABA Guidelines).

134. See 2003 ABA Guidelines, *supra* note 3.

135. *Id.* at Guideline 1.1.

136. Eric M. Freedman, *Introduction*, 31 HOFSTRA L. REV. 903, 903 (2003).

137. See ABA House of Delegates, AM. BAR. ASSOC., https://www.americanbar.org/groups/leadership/house_of_delegates/ [https://perma.cc/G5JX-HUWW] (last visited Apr. 12, 2023).

138. Freedman, *supra* note 136, at 912 (“I close with one observation to set in context the pages that follow. The revised Guidelines came to the floor of the House of Delegates with the co-sponsorship of a broad spectrum of ABA entities and passed without a single dissenting vote. This was symbolic of the philosophy that has animated the project since its inception in the 1980s, and that I as the current Reporter hope will

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

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

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

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

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

139. *Id.*

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

141. *Id.*

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

143. *See id.* at 9.

144. *Id.* at 12, 15–16.

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

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

The broad mandate of mitigation in capital cases has evolved into a multidisciplinary deep dive into an accused person's individual trajectory¹⁴⁶ and become integral to defense strategy in other types of cases.¹⁴⁷ Information gathered through mitigation investigation has proven the relevance of one's humanity in criminal defense writ large, enabling defense teams to incorporate individualized facts and circumstances into presentations that challenge or mitigate the culpability of a person facing criminal charges.¹⁴⁸ Mitigation is a necessity in every case, but absent guidelines, it is not always treated as such.¹⁴⁹ With a clearly defined standard of care in mitigation practices across the criminal legal system, however, the full potential of mitigation for all those facing carceral sentences can be realized.

A. *Qualifications and Role of the Mitigation Specialist*

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

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

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

147. *See infra* Section IV.B.

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

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

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

151. *See supra* Part III.

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

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

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

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

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

154. See sources cited *supra* note 153.

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

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

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

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

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

158. *Id.* at 343–44.

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Cultural Competency

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

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

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

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

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

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

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

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

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

culturally competent investigation is more than an admirable and desirable skill. It is a standard of performance.”¹⁷⁷ Cultural competency is most commonly seen through a lens of race, but culture is inclusive of much more, including gender, sexual identity, age, nationality, and language.¹⁷⁸ Culture “is an ever-developing dialogue” between individual and environment; it encompasses the patterns by which individuals “make sense of the events through which they live,”¹⁷⁹ patterns “by which we parent, build families, perform work, define education, seek community, find hope, and overcome or fall prey to adversity.”¹⁸⁰ Cultural competency is an ongoing process¹⁸¹ and requires dedication to developing awareness and humility, “recognizing clients as experts of their own culture, [and] committing to lifelong learning.”¹⁸²

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

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

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

178. *Id.* at 885–86.

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

180. *Id.* at 886.

181. *Id.* at 906–07.

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

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

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

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

2. Client and Witness Interviews

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

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

186. See *id.* at 905.

187. *Id.* at 887.

188. *Id.* at 885.

189. *Id.* at 887.

190. See *id.* at 906–07.

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

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

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

medical profession, the most important tool 'is the face-to-face interview' because other methods of acquiring information 'are inherently limited.'"¹⁹⁴

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

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

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

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

196. *See id.*

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

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

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

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

201. *See id.* at 346-47.

202. *See id.* at 347-48.

203. *See id.* at 347.

204. *See id.* at 342.

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

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

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

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

207. *Id.* at 349.

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

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

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

211. See *id.*

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

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

3. Document/Record Collection

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

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

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

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

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

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

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

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

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

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

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

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

4. Document Analysis and Working with Defense-Retained Experts

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

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

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

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

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

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

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

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

227. See *id.* at 683.

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

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

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

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

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

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

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

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

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

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

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

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

B. How Mitigation Improves Client Outcomes

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

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

237. *See id.*

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

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

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

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

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

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

psychotic symptoms or a mental decline in the lead-up to the offense, providing both a potential legal defense and sentencing mitigation.²⁴⁴ Mitigation investigation can also begin to document genetic predisposition to such events or environmental factors and stressors presenting conditions of risk.²⁴⁵ A comprehensive mitigation investigation can bolster a legal defense of insanity or reduced culpability due to mental state²⁴⁶ and suggest treatment or support systems that would enable a client to function effectively and safely in their community.²⁴⁷

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

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

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

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

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

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

247. See *id.* at 988.

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

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

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

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

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

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

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

V. CONCLUSION

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

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

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

255. *Id.* at 18–19.

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

257. See *supra* Part I.

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

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

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

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

259. See *supra* Part IV.

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

261. See *supra* Section IV.B.

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

263. See *id.* at 879–80.

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

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

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

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

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

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

267. *See supra* Part II.

268. *See supra* Part II.

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

Trauma-Informed Judicial Practice from the judges' perspective

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Research sends a clear message: The effects of trauma cannot be ignored within our court system. Up to 90 percent of adolescents and 75 percent of adults involved in the U.S. criminal legal system report at least one traumatic event during childhood,¹ and decades of research demonstrate the link between early experiences of trauma and later negative outcomes, including criminal legal system involvement. What can judges do to help address this endemic problem? In this article, we describe an in-depth investigation of judges' perspectives on how to make judicial practice more "trauma-informed." But first, we offer an overview of trauma and its relevance to the criminal legal context.

One of the first large-scale explorations of trauma was the Adverse Childhood Experiences (ACEs) study, a massive undertaking that surveyed 17,000 people between 1995 and 1997.² In this study, Kaiser Permanente asked participants a series of questions about their experiences as a child to investigate whether exposure to traumatic events in childhood was linked to physical and mental health issues in adulthood. The questions covered events a person may have experienced themselves or may have witnessed happening to someone with whom they lived, and they focused on three broad categories — abuse, neglect, and family dysfunction. Had the child experienced physical, sexual, or emotional abuse, or physical or emotional neglect? Did the child have a family member who was depressed or diagnosed with other mental illness, or who was addicted to alcohol or another substance, or who was in prison? Had the child witnessed a mother being abused? Had the child lost a parent to separation, divorce, or some other reason?³

The findings of the study shocked researchers: Nearly two-thirds of adults had at least one ACE.⁴ And the more adversity a person had experienced as a child, the more likely they were to suffer from both negative mental and physical outcomes as an adult, including chronic disease, suicidality, cancer, and other health concerns.⁵ An ACE score of 4, for example, is associated with a 400 percent increase in the risk of emphysema and a 1,200 per-

cent increase in the risk of suicide.⁶ The study suggested that trauma and its effects were more prevalent than ever imagined and flipped the script: Whereas trauma used to be seen as a problem predominantly within poorer communities of color, the study also revealed noticeable ACE scores among white participants and those with college degrees.⁷

Today, many judges, lawyers, and other system actors realize that not only can trauma not be ignored in their work, but that adopting a trauma-informed approach is part of doing their jobs well.

What began as a study about health quickly evolved into something much more. Further research revealed that the effects of early and/or severe adversity — including the original ACE categories, as well as others like bullying, systemic oppression, and community-based violence — are relevant to a wide range of contexts.⁸ Indeed, experiencing traumatic events can impact a person's brain and body development, and thus their behavior, in profound ways. Trauma can affect the actual physical structure of the brain — leading, at times, to more impulsive behavior, emotional regu-

lation challenges, trouble identifying threats, and other behaviors that may contribute to a person's involvement in the criminal legal system.⁹ These behaviors also contribute to outcomes that often occur in tandem with criminal legal system involvement, such as substance use, housing instability, relationship problems, and employment challenges.¹⁰ A vast program of research, some conducted even before the ACEs study, illustrates these links between trauma and system involvement,¹¹ showing that experiencing trauma during childhood increases the odds of engaging in violent behavior by more than 200 percent.¹² Importantly, research also shows that some people demonstrate growth and resilience, and can heal through psychotherapy,¹³ social support,¹⁴ and other interventions following traumatic events.¹⁵

This body of research, including a special issue in the *Juvenile and Family Court Journal* devoted to trauma in 2006, brought the concept of "trauma-informed care" to the forefront of the criminal legal context. Nearly a decade later, the government agency Substance Abuse and Mental Health Services Administration (SAMHSA) developed a framework for taking a trauma-informed approach that could be adopted across a range of service systems, including the criminal legal system. This framework articulates the "4 Rs" of a trauma-informed approach: *realizing* the prevalence of ►

Judges expressed confidence in their knowledge of trauma but uncertainty about what to do with that knowledge.

trauma and potential pathways for recovery; *recognizing* signs and symptoms of trauma in the people who come through the courtroom; *responding* by integrating knowledge of trauma into practice; and actively *resisting re-traumatization*.¹⁶ Studies examining the impacts of trauma-informed interventions directed at people who are justice-involved* have shown reduced recidivism and perpetration of violent behavior among youth in juvenile detention centers,¹⁷ and decreased presence of post-traumatic stress disorder symptoms among women who are incarcerated.¹⁸ Today, many judges, lawyers, and other system actors realize that not only can trauma not be ignored in their work, but that adopting a trauma-informed approach is part of doing their jobs well.

Despite widespread recognition of the importance of trauma-informed care throughout the U.S. criminal legal system broadly and the court system specifically, many system actors still have questions surrounding this concept: What exactly does it mean to be “trauma-informed” within a courtroom? How much does trauma *really* influence a person’s involvement in the system? How should court professionals, including judges, be trained on this concept?

There is some guidance on these questions. The National Child Traumatic Stress Network published a resource

guide on the Essential Elements of a Trauma-Informed Juvenile Justice System,¹⁹ and a recent study investigated perceptions of judicial educators about what does and does not work when engaging in trauma education for the judiciary.²⁰ However, the perceptions of judges themselves have not been extensively explored. And these perceptions matter, as studies show that the success of any practice depends in part upon whether the practitioner actually believes the practice is appropriate and relevant.²¹ Indeed, judicial educators recognize the importance of understanding judges’ perceptions and recommend that anyone creating trainings should “engage judicial voice in assessing how trauma education is designed and delivered.”²² The investigation described here aimed to do just that by asking judges themselves about their experiences with receiving training on trauma-informed courtrooms and engaging in trauma-informed practices.

OUR INVESTIGATION

Over the past year, a team of investigators set out to explore judges’ perceptions of trauma training and trauma-informed courtrooms. The process began in August 2021 with a pilot trauma education course for a small group of North Carolina district court judges. The course was developed and administered by the Bolch Judicial Institute at Duke Law School, which serves as the academic leader of the North Carolina Chief Justice’s Task Force on ACEs-Informed Courts, created by Chief Justice Paul Newby in May 2021 (the Institute also publishes *Judicature*). The course concluded with a feedback session in which research-

ers asked participating judges for their thoughts on the effectiveness of the course and how to improve future trainings.

The curriculum covered three topics: 1) the science of trauma; 2) efforts to grow a trauma-informed system of care in North Carolina; and 3) pragmatic ways to implement trauma-informed practices in the courtroom. The training lasted two and a half hours, took place over Zoom due to COVID-19 precautions, had one session for each topic, and included an introduction by a North Carolina chief district court judge who opened the program by discussing the goals and purpose of the course. The course that followed included a session on the brain science of trauma led by a professor of psychiatry; a session on the trauma movement within the state led by a clinical psychologist; and a session on practical application of trauma-informed court in the courtroom led by two experienced judges.²³

Eleven district court judges, five of whom were chiefs of their respective district courts, attended the pilot training. The participating judges came from both urban and rural jurisdictions across North Carolina, and their years of experience on the bench ranged from one year to 21 years, with the majority having served over ten years. Knowledge of trauma varied among the judges, though all had at least some baseline familiarity.

Directly following the pilot training, the judges engaged in a feedback session on the training. The feedback session was structured using the group-level assessment model, a research method in which stakeholders — in this case, participating judges — join the

* Throughout our article, we use the terms *justice-involved* or *court-involved* to refer to people who are involved with the court or justice system at any stage (e.g., pretrial, sentencing, post-conviction, probation). Using a term that allows for person-first language (i.e., person who is justice-involved), rather than a label (e.g., defendant, perpetrator), is aligned with the key principles of trauma-informed practices laid out by SAMHSA: specifically, the principle of collaboration and mutuality.

evaluation process as co-researchers.²⁴ This model allows those with the greatest courtroom knowledge and expertise to play a central role in the generation, analysis, and interpretation of data.²⁵

We also conducted in-depth interviews with nine of the judges three to four months after the training to learn about their experiences implementing the content of the training and their opinions of trauma-informed courtrooms broadly. Here, we share our findings on judges' perceptions of various topics and issues surrounding trauma-informed judicial practice focusing on three overarching topics:

1. Trauma Education — What do judges believe makes an effective trauma education program for court professionals?
2. Trauma-informed Courts — What do judges believe makes a courtroom trauma-informed?
3. Barriers and Solutions — What do judges consider to be the greatest barriers to implementing trauma-informed judicial practice and how do they believe these barriers should be addressed?

In the sections that follow, we dig into each of the above-listed questions, first providing brief overviews of the general topic and then reporting our findings.

WHAT MAKES AN EFFECTIVE TRAUMA EDUCATION PROGRAM FOR COURT PROFESSIONALS?

A recent survey of 343 court professionals (probation/parole officers, lawyers, judges, and law students) found that nearly one in two respondents had previously participated in a training or educational program focused on the impact of trauma.²⁶ Trauma-related education takes many forms. It might

be, for example, a broader educational curriculum on child development or a viewing of the movie *Resilience: The Biology of Stress and the Science of Hope*. Whatever the form, these educational efforts generally have the same overarching goals — defining trauma and traumatic events, explaining how trauma affects the brain and behavior, describing the relevance of trauma to the criminal legal context, and illustrating how to adjust court practices and procedures to account for the influence of trauma on court-involved people.

Findings

We gleaned 11 essential recommendations for future trauma education from the feedback we received from our judge participants. These recommendations cover two broad categories: the content of training and the structure of training.

Content Recommendation #1: Focus on the practical

“Many trainings are conceptually strong, but weak on practicality.”

In both the feedback session and interviews, judges expressed confidence in their knowledge of trauma but uncertainty about what to do with that knowledge. Future trainings should dedicate substantial time to concrete changes judges and other legal actors can make and specific skills they can develop to foster a trauma-informed courtroom. As one judge described, seemingly simple skills, such as communicating with courtroom participants in a trauma-informed manner, can be challenging. “You have to ask questions but try to not be too personal with people either — you don’t want people to have to talk about all of their problems within a courtroom with 100

people sitting there, but being positive and supportive and praising people for the steps that they’re taking is important. Sometimes, I get so rushed that I forget to do that.”

Content Recommendation #2: Incorporate research, data, and statistics into training

“The brain studies on the actual biological impact of trauma, neuroplasticity, etc., [are] amazing for someone who went to law school.”

Judges appreciated the inclusion of research speaking to the neuropsychological impacts of trauma, statistics on the prevalence of trauma in North Carolina, and research on the impacts of trauma-informed interventions in other criminal legal contexts (e.g., juvenile detention centers). They also expressed a desire for more research on topics they thought would help foster a trauma-informed approach and increase buy-in among other court professionals, such as research showing the impacts of courtroom-based trauma-informed practices on future legal system involvement and life outcomes. In other words, several judges asked: Do these practices “work”?

Content Recommendation #3: Include broad messaging and discussion about what it means to be a judge

“[My main takeaway of the pilot training was] the concept of making court procedures and processes more about everybody else and not just about the judges and lawyers.”

Most judges shared the perspective that becoming trauma-informed necessarily involves re-examining the role of the judge. Several referred to this as a ►

Most judges shared the perspective that becoming trauma-informed necessarily involves re-examining the role of the judge. Several referred to this as a “mindset” or “culture” shift. Trainings should directly address this shift by emphasizing the ways in which taking a trauma-informed approach to one’s judicial role often means defying the traditional perceptions of what it means to hold that role.

“mindset” or “culture” shift. Trainings should directly address this shift by emphasizing the ways in which taking a trauma-informed approach to one’s judicial role often means defying the traditional perceptions of what it means to hold that role, which tend to include instilling fear in others or having authority over others. To demonstrate, one judge described a trauma-informed communication approach in contrast to the approach many judges were trained in: “You know, not being so challenging of ‘Why did you do this?’ . . . and [instead] trying to speak to them in a way that you’re trying to understand what happened in their lives that led them to where they’re standing in front of you . . . that’s always tricky for judges, though, because you do want accountability and personal responsibility, but how you get someone to be personally responsible . . . there are definitely different ways to do that — and not just fear. Fear is the old one that most judges have been trained to use. . . . That works for a certain number of people, but it doesn’t work for the majority of people. Unfortunately, that’s usually the mindset judges come from.”

Content Recommendation #4: Supplement training with educational resources

“I think bench cards, checklists, videos — all those things are extremely helpful.”

Judges expressed that a wide range of resources can be helpful at differ-

ent times, but that bench cards and checklists were the easiest to implement. Additionally, some judges said that sharing a list of trauma-informed practices that other court professionals frequently use would encourage such practices among other judges.

Content Recommendation #5: Don’t forget about adults

“My perspective is that it’s all been about children.”

Several judges noted how current trauma trainings are heavily centered around children. While early adversity has the greatest impact on young developing minds, trauma can occur at any age and often presents differently depending on a person’s age.²⁷ As such, trauma trainings should address the ways in which trauma manifests in adults and how to take a trauma-informed approach when working with adults in the system.

Content Recommendation #6: Include information and resources on vicarious trauma

“I think one training issue that needs to be dealt with is [that] being a juvenile court judge is traumatic. We see traumatic stuff; it affects us.”

As noted by several of the interviewed judges, the frequent exposure to and contact with trauma in other people’s lives can itself be traumatic. Research

shows that legal professionals are susceptible to vicarious, or secondary, trauma. One study of work-related symptoms associated with vicarious trauma found that the majority of judges (63 percent) reported experiencing either long- or short-term symptoms.²⁸ Another study that surveyed attorneys, mental health professionals, and social workers found that attorneys were the most likely to experience burnout from becoming “over-extended” with their clients.²⁹ Trainings should incorporate information on vicarious trauma and ways to address it, and should also avoid content that could re-traumatize training participants (e.g., video or audio clips presenting physical abuse).

Content Recommendation #7: Consider differences in the availability of resources faced by training participants

“I wish I could show you this room that I’m holding court in. I mean we [in rural courts] live in a very different world and we don’t have all those options. . . . We can’t paint the walls blue because it’s a soothing color. I can’t get paint on the walls in the hallway of my offices with holes punched in it with no paint at all on it for 10 years. . . . [Y]ou are talking about two completely different worlds when you talk about rural versus the urban metropolitan areas and all that.”

Some judges from low-resourced jurisdictions expressed frustration over trauma-informed courtroom

suggestions that rely on money, such as making structural changes to the courthouse. Trainers should recognize the potential resource limitations some districts face when making recommendations for changes to courtrooms and focus on affordable trauma-informed practices. Many potential practices cost little or nothing to implement, like improving communication and scheduling dockets to avoid exposing court-participants to unnecessary wait times and traumatic testimony, and even some physical changes are low cost, like adding children's books to waiting areas. Trainers should make it clear that costly courtroom changes are only some options among many and should consider proposing costly options only if courts strongly buy into making changes and have the means to implement them. Further, trainers should include information about free resources available for courts interested in implementing a trauma-informed courtroom, such as those available on the SAMHSA website.

Structure Recommendation #1: Form training teams with diverse voices and perspectives

"I would like to see a multiple-disciplinary team type of approach . . . have a judge make a presentation, somebody from the juvenile justice system, somebody from the district attorney's office."

Judges valued the diversity of presenters in the pilot training — researchers, clinical professionals, and judicial actors. They shared that hearing directly from a judge about trauma and their approach to trauma-informed practice was particularly impactful for increasing buy-in. Hearing from, and being able to ask specific questions of, trauma experts during the train-

ing was also helpful. That said, several judges expressed that some voices were missing, particularly voices of trauma survivors who had been system-involved. Trainings, whether in person or virtual, should include people with a wide range of perspectives and expertise.

Structure Recommendation #2: Provide training opportunities for all court professionals

"Out of 100 people, [court participants] might only interact with the judge 2 percent of the time. Ninety-eight percent of the time they are interacting with everyone else in the system, and so a lot of judges will go, 'Well, how much impact can I really have?'"

Most of the judges highlighted the fact that an individual will encounter many different court professionals (e.g., law enforcement officers, lawyers, clerks, magistrates, judge, etc.) while moving through the system. These multiple points of contact signal the need to educate all court professionals on trauma and trauma-informed judicial practice. Indeed, trauma-informed care describes a system-level approach to providing services to people, which requires all actors within that system to be on the "same page."

Structure Recommendation #3: Provide independent and collaborative training sessions across professions and jurisdictions

"If you have these meetings in silos, an agency may understand what their role is, but they don't understand how it connects to the other agency."

In recognizing that different actors have different frames of reference,

many judges suggested a training structure in which groups of actors are first trained independently (e.g., all judges together, all clerks together, etc.) to discuss group-specific issues and then brought together to discuss how to collectively create a trauma-informed experience for people who are system-involved. As one judge put it, "the left hand has to know what the right hand is doing." Several judges emphasized that these collaborative sessions would be most effective if they grouped actors by district so that they could discuss inventive ways to provide trauma-informed care while working around system- and resource-limitations in their districts.

Structure Recommendation #4: Ensure trainings are in person and interactive

"More expansive, in person, and ideally on site if that's an option."

Nearly all judges recommended in-person trainings that include sufficient time for discussion. In-person and, if possible, on-site trainings would allow more opportunity for the collaborative brainstorming and dialogue needed to turn trauma knowledge into trauma-informed practice. Though judges acknowledged that it can be challenging to gather a group of court professionals in one room for any significant amount of time, they suggested that trauma training may be one situation in which the effort is worthwhile.

WHAT MAKES A COURTROOM TRAUMA-INFORMED?

Many available resources (e.g., trainings, academic articles, published bench cards, and online guides) provide suggestions for creating a more trauma-informed justice system, yet ►

it can be difficult for judges to determine exactly how to implement these suggestions. For instance, a systematic review of 10 publications on trauma-informed care in the juvenile justice system found moderate consistency across publications on the abstract core domains of a trauma-informed juvenile justice system, such as the importance of promoting a safe environment, but much less consistency around the concrete trauma-informed practices, interventions, and policies to employ, such as the use of positive behavior-management strategies.³⁰

We sought to better understand what judges believe to be the core components of a trauma-informed courtroom. Understanding judges' perceptions of what a trauma-informed courtroom *does* look like allows for specific recommendations that address those perceptions and elucidates gaps in knowledge about what trauma-informed courtrooms *could* look like.

Findings

During interviews, judges' comments tended to center on five core components of a trauma-informed courtroom.

Component #1:

Consider the judge's demeanor and behavior

"It goes deeper than [respect] when you're talking about trauma . . . we don't know what circumstances have brought the individual into the courtroom and why they're standing before me, so I have to try to be mindful in the way I talk to people, the language I use, the tone I use, because I have a furrowed brow and I can look mean and tough just naturally without intending to."

Judges focused heavily on judge demeanor and behavior when describ-

"If there is a traumatic condition that's causing this criminal behavior, if we don't treat that or get to the bottom of that, this person is going to continually be involved in the criminal justice system."

ing trauma-informed courtrooms. They recognized that their treatment of courtroom participants can have a significant impact on those participants' experience in court. Many emphasized the need for judges to shift their communication style to focus more on having a conversation rather than an interrogation or lecture. According to the judges, asking questions aimed at understanding as opposed to blaming (e.g., "What have you been through?" instead of "What is wrong with you?"), listening, and then asking more questions is at the crux of taking a trauma-informed approach as a judge.

Component #2:

Prioritize treatment

"[It's] almost like I preside over a treatment court . . . the person obviously still needs to be held accountable, but maybe we're not so punitive, maybe we're more treatment-oriented and realizing that if there is a traumatic condition that's causing this criminal behavior, if we don't treat that or get to the bottom of that, this person is going to continually be involved in the criminal justice system."

All judges recognized prioritization of treatment as an essential element of trauma-informed judicial practice. They acknowledged that a trauma-informed courtroom should help individuals who have experienced trauma receive proper treatment to reduce the odds that they return to that courtroom in the future. That said, many judges also described a degree of tension or incompatibil-

ity between their desire to prioritize treatment and their responsibility to hold people accountable. As one judge explained, "On the one hand, you have the accountability; on the other hand, you have treatment." Future trainings should directly address how trauma-informed goals do not necessarily conflict with accountability goals.

Component #3: Slow down

"Too often, the prosecutors, everybody in the courtroom wants to hurry up. They want to get it done. They want to move on. They don't want to spend the time with this person or this child, so I'm trying to slow things down."

Across all interviews, judges noted the need to slow down despite their huge caseloads and the fast-paced environment of court. They believed that if they had more time with courtroom participants, they would be able to address participants' trauma more effectively and make decisions with everyone's best interest in mind. One judge described the way they intentionally manage their schedule to ensure they are able to slow down to the extent needed for some cases:

"It takes a little forethought, you know . . . like today, I knew that I was going to have a kid testifying. I had one other remote matter, but besides that I scheduled nothing else. . . . Every other day I might have 10 cases on the calendar, but because I knew a kid was going to be testifying, I blocked out the entire morning and, as luck would have it, it lasted all morning long."

Component #4: Reimagine the court environment

“I think the courtroom environment could be a little bit softer . . . I guess we have to maintain a certain amount of decorum and it’d still be a courtroom, but I think there’s ways of making it a little less formal, less daunting.”

Judges described the need to “soften” the courtroom environment, structurally and procedurally. Regarding structure, several judges expressed support for the use of round conference tables in the well of the courtroom to discuss disposition decisions. They described situations in which it would be beneficial to come off the bench, perhaps without a robe on, and join courtroom participants at their same level to discuss next steps and solutions together. As for procedural changes, several judges noted the need to re-think who is in the courtroom and when. As one judge questioned: “I don’t know what effect it might have if we have a murder case and the next case behind it is a kid who got in a fight in school . . . and they’re seeing the murder defendant walking out in chains. Does that affect them?” Taking intentional steps toward creating an environment that is calming, supportive, and not re-traumatizing is an essential component of a trauma-informed courtroom.

Component #5: Involve everyone

“The way that the bailiffs and other courtroom actors interact with people — I try to monitor that because, in my experience, [it] has been triggering to some people.”

Although judges recognized the weight their own behaviors hold within the

courtroom, they also noted that a true trauma-informed approach would require an integrated effort from all actors, both inside and outside of the courtroom. They stressed the importance of the ways in which bailiffs, sheriff deputies, juvenile court counselors, public defenders, guardians ad litem, and district attorneys behave and interact with courtroom participants, including court-involved youth and victims. Several noted the role that the district attorney’s office, and specifically district attorney legal assistants, can play in making the process more trauma-responsive for victims, not only by advocating for accountability throughout the court proceedings but also by ensuring victims are connected to the services and support they need going forward.

WHAT ARE THE BARRIERS TO TRAUMA-INFORMED JUDICIAL PRACTICE, AND HOW SHOULD WE ADDRESS THEM?

As with any practice, intervention, or training, understanding barriers to implementation and how to address those barriers is essential to success. Barriers to trauma-informed judicial practice, however, have not been thoroughly examined. That may explain why trauma-informed courtrooms are still not the norm in the United States, despite decades of research supporting the need for them. The limited research that does exist suggests that misconceptions regarding trauma (e.g., trauma is an excuse for bad behavior) may be one barrier to the successful translation of trauma education into trauma-informed practices in the courtroom.³¹

To build on this knowledge, we explored judges’ perspectives on these barriers and their ideas for addressing them.

Findings

Judges’ comments tended to center on three types of barriers that most often impede the successful implementation of trauma-informed judicial practice. Many also offered potential solutions for addressing these barriers.

Barrier Type #1: Lack of Buy-in

“You’re going to have a target population of people who do not believe in therapists, who think it’s junk science, who have not really taken the opportunity to take a look at it, or they think that they know better, and my personal favorite, ‘we’ve never done it that way.’”

All judges agreed that lack of buy-in to the concept of trauma-informed care from court professionals across roles (e.g., judges, lawyers, district attorneys) presents a major hurdle to a trauma-informed system. The reasons for such pushback range broadly. Judges noted that some actors do not fully believe in the science behind trauma and ACEs; that some would rather not switch up “the way things have always been”; and that others, particularly judges, may resist a trauma-informed approach out of fear that it requires them to relinquish some of their authority. As one judge shared: “I think some judges’ egos are going to have a hard time with this.”

Judges also spoke extensively about how concerns surrounding accountability may decrease buy-in. As previously noted, some judges we spoke to described a perceived dichotomy between treatment and accountability, believing that a trauma-informed approach that prioritizes treatment could diminish the extent to which they are able to achieve accountability. One judge illustrated the perceived tension between these two concepts: ►

Punishment is not synonymous with accountability. Sometimes trauma-informed practices can achieve goals traditionally associated with punishment (e.g., reducing recidivism).

“We certainly want the treatment aspect of the situation to work, because if a child receives effective treatment, we probably won’t see him again But at the same time, the victim is sitting there wondering what you are going to do to this kid; what are you going to do to make him accountable for disrupting the classroom or punching the teacher in the face or kicking some kid down the stairs or more serious things.” This perceived dichotomy between treatment and accountability may deter some judges from taking the more trauma-informed approach, particularly judges who see their primary responsibility to be enforcing rules and upholding the law.

Judges proposed several ways to increase buy-in to trauma-informed judicial practice:

- *Focus on getting judges, particularly chief judges, on board first.* Their opinions often carry the most weight in regard to changing courtroom policies and procedures, as well as other actors’ perspectives. As one judge stated: “If you have a judge saying ‘everyone, hey, let’s do this,’ there’s a lot more power and influence in that.”
- *Broaden the conversation of trauma-informed care to include discussion of what it means to be a judge, more broadly.* The traditional perception of a judge as primarily someone who is meant to have authority over others inhibits progress toward trauma-informed practice. Conversations about reconceptualizing a judge’s role would likely be most effective if they occur from one judge to another.
- *Clarify that punishment is not synonymous with accountability, and that sometimes trauma-informed practices can achieve goals tradi-*

tionally associated with punishment (e.g., reducing recidivism). One judge explained “If you want to talk about accountability, one of our goals here is [reducing] recidivism [You often hear complaints] about how we see the same people here over and over again. . . . Well, if you want to change that . . . [trauma-informed care] is one way to do it. If you get to them early enough, you can actually stop that cycle and reduce these folks from coming back again and again. . . . If we punish every time and a person has a lengthy record, just punishing them is not stopping them from coming back to court.”

Barrier Type # 2: Practical barriers

“We are limited by the number of courtrooms we have. We are limited by the number of clerks we have available for those courtrooms. We are limited by the number of sheriff personnel who are bailiffs in the courtroom.”

Even judges who were exceedingly knowledgeable about trauma and fully bought-in to the concept of trauma-informed care indicated they experienced difficulty in implementing trauma-informed judicial practice due to various practical barriers. All judges spoke repeatedly about the sheer number of cases they deal with on a daily basis. According to several judges, these high numbers result in court professionals too often treating people “like case numbers and not real people.” They expressed that, due to the high volume of cases, they simply could not “slow

down,” despite believing this to be one of the most essential components of a trauma-informed approach.

Other judges spoke about the lack of resources in their counties, and specifically, about the uneven distribution of resources across the state. As one judge shared: “If I live in [X county], I’m going to get program after program thrown at me or available to me. . . . In the smaller counties, we don’t have a lot of this programming, and that’s very frustrating that we live in a state that has a statewide system, but the system is so radically different depending on where you are.” Lack of money was most frequently mentioned as an obstacle to making physical changes to the courthouse that are trauma-informed, such as painting the walls a soothing color, installing multilingual signage, or reorganizing waiting areas.

The judges suggested the following actions to help address some of these practical barriers:

- *Partner with the community.* Several judges spoke about the resources and support that other folks and organizations in their communities — such as advocacy groups, schools, local mental health services, and faith-based groups — can offer. One judge said: “I think it’s a matter of getting our community organized, talking, and working together.”
- *Engage in deliberate scheduling and meticulous time management.* Judges who have learned to “slow down” shared how deliberate this change of pace has to be. It takes intention in the moment and forethought

Best practices for trauma-informed virtual hearings

When physical distancing measures required courts to quickly adapt operations, the National Center for State Courts (NCSC) saw an opportunity to examine the experience of families and child welfare court professionals in virtual hearings. Most families who come to the attention of the child welfare system have experienced trauma, and, for many, the court experience exacerbates trauma. Many jurisdictions have moved in recent years to implement trauma-informed practices for in-person hearings, including environmental changes and judicial engagement strategies. But early in the pandemic, how those practices would translate to the virtual environment was unclear.

With support from Annie E. Casey Foundation Inc. and Casey Family Programs, NCSC began a study that aimed to describe how families and court professionals experienced online court proceedings through the lenses of procedural fairness, access, and judicial engagement. Sixteen jurisdictions in five states welcomed NCSC into their virtual courtrooms to observe more than 400 child welfare hearings in early 2021. NCSC supplemented hearing observations with interviews and surveys of judges, parents, older youth, attorneys, and case workers.

A key takeaway from the study is that no two sites conducted virtual hearings in the same way — even courtrooms within the same state or courthouse. When courts began facilitating virtual hearings, there was little guidance available and immense pressure to become operational quickly. Most courts simply took in-person practices and transitioned them online with limited time to consider how the virtual courtroom impacted effective

One way to be trauma-responsive and support feelings of safety for hearing participants is to ask them where they are physically and whether they feel safe and able to meaningfully participate from that location.

communication, access to justice, and meaningful engagement.

For example, camera use in videoconferencing sessions varied widely across hearing participants. Very few courts in the study articulated clear expectations on this issue. Individuals joining hearings by video have the benefit of seeing all participants and observing nonverbal cues, while those joining by phone only are often unaware of who is present and may not know how and when to contribute. These limitations make an already difficult situation even more stressful, can contribute to feelings of mistrust, and impede an individual's ability to meaningfully engage in a hearing — all experiences that can trigger a trauma response.

While the pandemic forced courts to quickly adopt technological solutions, it also created an opportunity for courts to expand access to justice for families and a responsibility to learn how to do so in an effective, fair, and trauma-responsive way. NCSC's study of virtual child welfare hearings identified several practices to improve the quality

of virtual hearings, and many of these practices align with the key principles of the Substance Abuse and Mental Health Services Administration's trauma-informed approach (<https://bit.ly/3aUvdms>). Some crucial practices of trauma-informed virtual hearings are described here; see the NCSC's full report at <https://bit.ly/3ttEuby> for more practices and details.

Safety. Virtual (video) hearings present different challenges for ensuring physical and emotional safety for hearing participants. The virtual courtroom may be less intimidating for some; however, it creates the possibility that participants may join from a public location or a place that may otherwise inhibit meaningful engagement. One way to be trauma-responsive and support feelings of safety for hearing participants is to ask them where they are physically and whether they feel safe and able to meaningfully participate from that location. In the study of virtual child welfare hearings, it was extremely rare for judges to ask individuals where they were, though this simple act can help determine whether a parent or child is able to meaningfully engage in the virtual hearing.

Transparency and Trustworthiness. Trauma-responsive virtual hearings require courts to communicate expectations and processes clearly, starting with the hearing notice. Courts can demonstrate transparency and build trust by providing instructions on how to access the hearing, how to use the platform, and how clients can privately interact with their attorney, as

well in advance, too (such as by reorganizing dockets and start times for cases). As one judge noted, scheduling changes is something judges ultimately do “have more control over.”

- **Commit to trauma-informed judicial practice.** As several judges acknowledged, the number of cases will continue to be high until judges commit to engaging in practices that get to the root of why persons end up in the system in the first place.

Barrier Type #3: Systemic Barriers

“You’ve got this dynamic where the courthouse is owned by the county commissioners, the clerk of superior court is responsible for the physicality, and it’s the judge’s courtroom. Okay, so walk through that for just a second . . . I can’t change the colors on the walls of my courtroom because I don’t own the building, the county does. The clerk of superior court technically runs the courthouse as far as its physicality, but the county commissioners pass the budget.”

Judges described a wide range of barriers to trauma-informed judicial practice related to, or perpetuated by, the way the criminal legal system is “set

up.” Several judges recognized how the hierarchical, and at times bureaucratic, nature of the system restricts some judges from implementing changes that could move their courtrooms toward being trauma-informed. Judges’ opinions also varied widely on the extent of their own authority to take the initiative to make certain changes. For instance, a few judges, but not all, expressed that they would need to receive direct permission from leadership or to see adjustments made to the juvenile court rules to implement some trauma-informed change recommendations, such as bringing a conference table into the well of the courtroom. As illustrated in the quote above, others spoke about the bureaucratic obstacles that effectively discourage court professionals from putting effort into making physical changes to their courtroom.

Several judges also emphasized that many parts of the current system are simply not, and likely will never be, set up to address trauma. For instance, one judge explained how we cannot rely on jails to provide mental health services to individuals who are system-involved: “Jail is not the place to send someone who has mental health issues, who’s getting [into] criminal problems, because nothing is going to

happen at the jail except they are going to just sit there alone.”

Judges identified other system-level obstacles that impede implementation of trauma-informed judicial practice:

- **Election politics:** One judge explained how pressure to get reelected can influence the way judges behave: “In North Carolina, you have to get reelected. You’re not going to get too many ‘activist judges’ in their first four years or if they have to run for election if they [originally] got appointed. If you’ve been around 25 to 30 years, you feel a lot more comfortable saying whatever you want to, what’s on your heart, and what’s on your sleeve.”
- **Underpaid attorneys:** “We’re dealing with a system that quite candidly doesn’t pay attorneys enough money to do this kind of work. We have fewer and fewer people that are willing to take these kinds of cases.”
- **Assignment of young and inexperienced district attorneys to juvenile court:** “Historically, across [North Carolina], when you’re a new assistant DA, just out of law school, with no experience, they put you in juvenile court . . . and then the idea is you work your way up to your goal

well as the court’s expectations around camera use, before the hearing. Most parents surveyed said they received a link for the hearing from their attorney, and youth often received the link from their caseworker. Courts can develop and disseminate clear instructions for accessing hearings for court professionals like these to share with clients so that everyone receives the same information.

Empowerment, Voice, and Choice. As requirements for physical distanc-

ing wane, many states are deciding to keep virtual hearings in child welfare cases, and several have given careful thought to which hearing types and situations are best for virtual hearings. Ideally, courts will offer families a choice as to how they access a hearing. Giving families a choice embodies the trauma-responsive principle of empowerment, voice, and choice.

With intentional preparation, it is possible for virtual hearings to be responsive to trauma. While virtual hearings may not be ideal for all

families or all hearings, they do have benefits. Through careful consideration of technology, open and clear communication, and realistic expectations, child welfare courts can facilitate virtual hearings that not only respond to impacts of past traumas experienced by families involved in the child welfare system, but also avoid creating new traumatic experiences.

— **TERI DEAL** is a principal court management consultant at the National Center for State Courts.

... most of their goals is to become a superior court DA and try murder cases Unfortunately, that leads to [juvenile court] just being a steppingstone.”

Judges provided several ideas for higher-level changes that could help address some of these barriers:

- *Leadership should encourage trauma-informed practices specifically and directly.* This encouragement could be the tipping point for some judges who question whether they have the authority or the permission to implement common trauma-informed change recommendations.
- *Consider enacting laws to explicitly recommend certain trauma-informed practices.* As one judge shared: “I’d like to have a juvenile rule that says, ‘Here’s how we’re going to do disposition’ and specifically state ‘We will have this conversation in this manner, these are the issues that need to be addressed during that disposition in a more thoughtful manner’ — rather than, ‘Here’s the juvenile court counselor’s recommendation, you look at them, follow the recommendations, you have a minute or two conversation with the juvenile and the parents, and send them on their way.’”
- *Ensure all district attorneys, particularly the ones who begin their career in juvenile court, are trained on trauma and trauma-informed practice.* Several judges noted the unique position district attorneys are in to support courtroom participants, prepare them for the courtroom experience, and help connect them to community resources.

CONCLUSION

In this article, we share results from an investigation into judges’ perspec-

Several judges also emphasized that many parts of the current system are simply not, and likely will never be, set up to address trauma. For instance, one judge explained how we cannot rely on jails to provide mental health services to individuals who are system-involved.

tives on trauma education programs and on trauma-informed courtrooms more broadly. Judges shared important recommendations for the structure and content of trainings and insights into the barriers to implementing trauma-informed practices in their courtrooms. We conclude by highlighting a few recommendations that came out of this research and that we believe are important considerations as the work of creating a trauma-informed criminal legal system continues. The first is a takeaway for developers and facilitators of trauma education, the second is a takeaway for researchers of effective trauma-informed practices, and the third is a takeaway for all parties working to create trauma-informed environments.

First, future trainings should include the voices of people who have experienced trauma and have been justice-involved. While many trauma education programs increasingly involve various system actors and academic experts, the inclusion of people who have been justice-involved themselves is not common practice, nor is it commonly recommended in the literature.³² Yet judges recognized the unique insight this population could bring to the movement toward trauma-informed courts and expressed that inclusion of such voices would have enhanced the training.

Second, future research should focus on understanding perceptions of accountability in the context of trau-

ma-informed court practices. The concept of accountability is complex, and the judges acknowledged this complexity by grappling with the question of how to achieve accountability and implement trauma-informed practices simultaneously. Tension between these concepts was salient when judges described consideration of victims’ wishes. Some judges expressed concern that an increased focus on treatment may reduce their ability to hold a person accountable, suggesting there may be conflation between the concepts of punishment and accountability. Yet research suggests that, for some victims at least, accountability and punishment are not synonymous,³³ highlighting a misalignment between victims’ views of accountability and judges’ perceptions of those views. Future research must explore perceptions of the relationship between accountability, punishment, and trauma-informed practices for all parties to help alleviate accountability concerns as a barrier to adoption of these practices.

Third, greater attention must be paid to diversity, equity, and inclusion (DEI) — a critical aspect of trauma-informed courts. As Shawn Marsh, former chief program officer for Juvenile Law at the National Council of Juvenile and Family Court Judges and expert on trauma-responsive justice, said, “Diversity, equity, and inclusion is a priority [for the future of trauma-responsive justice]. . . . It comes down to DEI being a trauma-informed prac- ►

tice.”³⁴ The topic of DEI did not come up in the interviews with judges, highlighting a potential gap in awareness of the connections between DEI and trauma-informed practice and a weakness of the pilot training for not emphasizing this topic. Among other actions, helping make courts navigable by offering multilingual signage and ensuring courthouse leadership reflects the gen-

der and racial diversity of the people who come through the courthouse are central to promoting a sense of safety for people who are court-involved.³⁵ Such practices must be promoted in future training and integrated into efforts to create trauma-informed courts — without them, the efforts will fall short.

- ¹ Carly B. Dierkhising et al., *Trauma Histories Among Justice-involved Youth: Findings from the National Child Traumatic Stress Network*, 4 EUR. J. OF PSYCHOTRAUMATOLOGY 1, 1–11 (2013); Flora Matheson, *Implications of Trauma Among Male and Female Offenders*, 9 INT. J. OF ENV'T. RSCH. AND PUB. HEALTH 97, 97–99 (2012).
- ² Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. OF PREVENTIVE MED. 245, 245–258. (1998); *About the CDC-Kaiser ACE Study*, CTNS. FOR DISEASE CONTROL & PREVENTION (June 14, 2016), [hereinafter *About CDC-Kaiser*], <http://www.cdc.gov/violenceprevention/acestudy/about.html> [https://perma.cc/LJ2E-EBWC].
- ³ See Felitti et al., *supra* note 2, at 248 (abbreviating list of ACE questions in Table 1).
- ⁴ See *About CDC-Kaiser*, *supra* note 2 (highlighting major ACE findings).
- ⁵ See Felitti et al., *supra* note 2, at 249 (“We found a strong dose response relationship between the breadth of exposure to abuse or household dysfunction during childhood and . . . ischemic heart disease, cancer, chronic lung disease, skeletal fractures, and liver disease.”)
- ⁶ See *id.* at 250 (highlighting emphysema and suicide associations in Tables 4 and 7).
- ⁷ *Id.* at 251 (Tabl. 3); see also *PACES Science 101*, ACES TOO HIGH, <https://acestoohigh.com/aces-101/> [https://perma.cc/M9CJ-L3PL] (“What’s particularly startling is that the 17,000 ACE Study participants were mostly white, middle- and upper-middle class, college, educated, and all had jobs and great health care . . .”).
- ⁸ *The Original ACE Study*, NAT’L HUMAN TRAFFICKING TRAINING AND TECHNICAL ASSISTANCE CTR., https://nhtta.acf.hhs.gov/soar/eguide/stop/adverse_childhood_experiences [https://perma.cc/2YLD-H76C].
- ⁹ Bryanna H. Fox et al., *Trauma Changes Everything: Examining the Relationship Between Adverse Childhood Experiences and Serious, Violent, and Chronic Juvenile Offenders*, 46 CHILD ABUSE AND NEGLECT 163, 164–165 (2015).
- ¹⁰ Matheson, *Implications of Trauma Among Male and Female Offenders*, *supra* note 1, at 97.
- ¹¹ See, e.g., Michael G. Maxfield and Cathy S. Widom, *The Cycle of Violence: Revisited Six Years Later*, 150 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 390, 390 (1996) (“Childhood abuse and neglect have a significant impact on the likelihood of arrest for delinquency, adult criminality, and violence.”).
- ¹² Fox, *supra* note 9, at 164.
- ¹³ See generally LOUIS J. COZOLINO, *THE NEUROSCIENCE OF PSYCHOTHERAPY: BUILDING AND REBUILDING THE HUMAN BRAIN* 14 (3rd ed. 2017) (“Psychotherapy can be thought of as a specific type of enriched environment that promotes social and emotional development . . . the way the brain changes during therapy will depend upon the neural networks involved in the symptoms and focus of the treatment.”)
- ¹⁴ See Kristen Clements-Nolle & Rachel Waddington, *Adverse Childhood Experiences and Distress in Juvenile Offenders: The Protective Influence of Resilience and Youth Assets*, 64 JOURNAL OF ADOLESCENT HEALTH, 49, 52–55 (2019) (finding that “protective factors,” such as family communication, school connectedness, peer role models, and nonparent role models are “associated with a reduction in psychological distress . . .”).
- ¹⁵ See Sukhdeep K. Purewal Boparai et al., *Ameliorating the Biological Impacts of Childhood Adversity: A Review of Intervention Programs*, 81 CHILD ABUSE AND NEGLECT, 82, 84–102 (2018) (demonstrating through an extensive literature review that “interventions can indeed improve or normalize outcomes in children exposed to adversity across institutional foster care, and community settings”).
- ¹⁶ SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., *Concept of Trauma and Guidance for a Trauma-Informed Approach*, 9–10 (2014), https://ncsacw.acf.hhs.gov/userfiles/files/SAMHSA_Trauma.pdf [https://perma.cc/J9HS-8GXK].
- ¹⁷ See, e.g., Carly L. Baetz et al., *Impact of a Trauma-Informed Intervention for Youth and Staff on Rates of Violence in Juvenile Detention Settings*, 36 J. OF INTERPERSONAL VIOLENCE NP9463, NP9464 (2019) (“The analyses revealed the intervention was significantly related to a reduction of violent incidents . . .”); Haley Zettler, *Much to Do About Trauma: A Systematic Review of Existing Trauma-Informed Treatments on Youth Violence and Recidivism*, 19 YOUTH VIOLENCE AND JUV. JUST. 113, 117 (2021) (“Systematic reviews . . . report that these interventions are effective at reducing recidivism in both adolescent samples . . .”).
- ¹⁸ See, e.g., Erin A. King, *Outcomes of Trauma-Informed Interventions for Incarcerated Women: A Review*, 67 INT. J. OF OFFENDER THERAPY AND COMP. CRIMINOLOGY 667, 684–685 (2017) (“Overall, the identified trauma-informed interventions appear to have a positive impact on PTSD symptomatology.”).
- ¹⁹ *Essential Elements: Trauma-Informed Juvenile Justice System*, NATIONAL CHILD TRAUMATIC STRESS



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- 20 Shawn C. Marsh, *Judicial Educators' Perspectives on Trauma Education for the Judiciary*, 70 JUV. AND FAM. CT. J. 55, 55–67 (2019).
- 21 See, e.g., Enola Proctor et al., *Outcomes for Implementation Research: Conceptual Distinctions, Measurement Challenges, and Research Agenda*, 38 ADMIN. AND POLICY IN MENTAL HEALTH SERV. AND MENTAL HEALTH SERV. RSCH. 65, 69–73 (2011) (defining “appropriateness” as including “relevance” and demonstrating the relationship between perceived appropriateness and the “adoption, penetration, and sustainability” of an intervention).
- 22 Marsh, *supra* note 17, at 63.
- 23 Drawing on his own experiences, a judge introduced the program with introductory remarks on why trauma education ought to matter to the judiciary. The first session, “The Science of Trauma & Resilience,” was led by a professor and practitioner of medicine who focused on defining trauma and resilience, trauma’s effect on the brain and body, and the prevalence of trauma in N.C. and nationally. The second session, “The Trauma-Awareness Movement in N.C.,” was led by the director of a trauma-focused nonprofit organization who presented information on trauma awareness and resilience across systems, the evolution of the trauma movement in N.C., and trauma approaches in different sectors of the community. The final session, “Trauma-Informed Practice on the Bench,” was led by two judges, the N.C. chief district court judge who had led the introduction and a retired circuit court judge from Florida, both of whom are heavily involved in trauma education and practice in their districts. This session included concrete ways to implement trauma awareness skills from the bench. The judges covered courtroom practices, relationship-building techniques, the cost savings potential of trauma-sensitive policies, and skills for handling vicarious trauma and building resilience for judges.
- 24 Lisa Vaughn & Maryann Lohmueller, *Calling All Stakeholders: Group-Level Assessment (GLA)—A Qualitative and Participatory Method for Large Groups*, 38 EVALUATION REV. 336, 336–355 (2014).
- 25 This collaborative process involved four steps. First, the participating judges responded to 20 feedback prompts on a digital, interactive whiteboard platform called Jamboard. All responses were completely anonymous. Second, the judges reviewed and responded to each other’s responses. Third, in Zoom breakout rooms of three to four people, the judges discussed themes they saw within the digital responses. Fourth and lastly, the judges and other conference attendees engaged in a full group discussion to expand on their observations of and feedback on the training, identify overarching themes within the data, and talk about how to use this information moving forward.
- 26 McKinsey, E. & Desmarais, S. L. *Impact of growth mindset-enhanced trauma education on criminal legal professionals’ attitudes and perceptions* (2022) (draft manuscript on file with author).
- 27 Jonathon DePierro et al., *Beyond PTSD: Client presentations of developmental trauma disorder from a national survey of clinicians*, PSYCH. TRAUMA: THEORY, RSCH., PRAC., AND POL’Y. (2019) (on file with the National Library of Medicine).
- 28 Peter G. Jaffre et al., *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice*, 54 JUV. AND FAM. CT. J. 1, 14 (2009).
- 29 Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 251 (2003).
- 30 Christopher E. Branson et al., *Trauma-informed Juvenile Justice Systems: A Systematic Review of Definitions and Core Components*, 9 PSYCH. TRAUMA: THEORY, RSCH., AND POLICY 635, 635–646 (2017).
- 31 Marsh, *supra* note 17, at 63.
- 32 But see Kathryn A. Becker-Blease, *As the World Becomes Trauma Informed, Work to Do*, 18 J. OF TRAUMA AND DISSOCIATION 2, 131–138 (describing the input of trauma victims/survivors as a forgotten yet essential component of the trauma-informed care movement).
- 33 See Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcome of Restorative Justice*, 2003 UTAH L. REV. 167, 178 (“Table 1 and Figure 1 . . . [show] that both victims and offenders in restorative justice were significantly and substantively more likely . . . to believe that the criminal justice system was fair than were victims or offenders in court”).
- 34 See New York Youth Justice Institute, *Reflections on the Status and Future of Trauma-Responsive Justice in Communities of Healing*, YOUTUBE, at 24:14 (Oct. 14, 2021), <https://www.youtube.com/watch?v=vljtZSL366U> [https://perma.cc/UD97-DFHR].
- 35 See Alicia DeVault et al., *Environmental Considerations for Trauma-Responsive Juvenile and Family Courts: A Review of the Literature with Recommendations for Practice*, 69 JUV. AND FAM. CT. J. 5, 5–20 (2018) (“Public trust in the courts and feelings of safety within the courthouse, which are important conditions for healing, are undermined by a lack of diversity.”).

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