

LOCKETT SYMPOSIUM

**LOCKETT V. OHIO AND THE RISE OF MITIGATION
SPECIALISTS**

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This article will discuss the impact of *Lockett*¹ in terms of the rise of mitigation specialists—the capital defense team members from a variety of multidisciplinary backgrounds whose dedicated function is to investigate the social history of the client in order to facilitate an outcome that avoids execution. This development could probably not be foreseen when the case was argued, but the result was almost immediate. The decision clarified the breadth of empathy-evoking mitigating evidence that capital defenders could offer in sentencing proceedings.² But it also brought to many lawyers the humbling recognition that they were ill-equipped to discover this powerful evidence. They needed help. This admission rested on two insights: the relevant skill sets for life-history investigation were rarely taught in law school, and the sheer amount of work required for effective capital defense representation demanded a team of professionals with complementary skills.

In Part I, the article discusses how *Lockett* ended the confusion that resulted from the Supreme Court’s prior death penalty decisions in the 1970s. In 1972, the Court found in *Furman v. Georgia* that all the death penalty statutes, as applied, were unconstitutional.³ Four years later, a still

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1. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“Eighth and Fourteenth Amendments require that sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of the defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”) (emphasis in original).

2. As then Justice Rehnquist observed, “We are now told, in effect, that in order to impose a death sentence the judge or jury must receive in evidence whatever the defense attorney wishes them to hear.” *Id.* at 629 (Rehnquist, J., dissenting).

3. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (finding death penalty statutes, as applied, violated the Eighth Amendment). A single paragraph provided the Court’s per curiam opinion. The five concurring justices each wrote separately explaining their individual rationales.

divided Court parsed the new post-*Furman* statutes, finding some constitutional while others continued to have constitutional infirmities.⁴ A brilliant team of litigators from the NAACP Legal Defense Fund, led by Anthony G. Amsterdam,⁵ could not persuade the Supreme Court of the United States that capital punishment was per se unconstitutional.⁶ However, their success in *Woodson v. North Carolina*⁷ and *Lockett* established the critical tension that would haunt capital punishment litigation throughout succeeding decades. As Professors Carol and Jordan Steiker have observed:

[T]he Court seemed to be protecting as a matter of constitutional law the very discretion *Furman* had identified as constitutionally problematic. But according to the Court, the discretion to *withhold* the death penalty based on mitigating factors is categorically different from the discretion to *impose* the death penalty based on amorphous perceptions of the aggravating aspects of the offense. So was born the central tension in American death penalty law: its simultaneous command that states cabin discretion of who shall die while facilitating discretion of who shall live.⁸

4. *Woodson v. North Carolina*, 428 U.S. 280, 286–87, 305 (1976) (finding mandatory death penalty unconstitutional); *Roberts v. Louisiana*, 428 U.S. 325, 328–30, 336 n.3 (1976) (same); *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976) (finding newly enacted guided discretion statute constitutional); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976) (same); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (same).

5. See JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* 440–60 (1994) (memoir by former Director-Counsel of NAACP Legal Defense Fund; ch. 32 describes death penalty litigation). Amsterdam had argued *Furman* in 1972, and he continued to direct the post-*Furman* litigation.

6. See EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* (2013) (discussing the Supreme Court litigation 1972–1976).

7. *Woodson*, 428 U.S. at 304 (“A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.”); *Id.* (citations omitted).

While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

8. CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 165 (2016) (footnote omitted). Justice White dissented in *Lockett* with a similar warning:

[I] greatly fear that the effect of the Court’s decision today will be to compel constitutionally a restoration of the state of affairs at the time *Furman* was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that “its imposition would then be the pointless and

In Part II, the article examines the emergence of mitigation investigation as a central obligation of capital defense in response to *Lockett*, and the diverse career paths that led nonlawyers (and a few lawyers) to the role of mitigation specialists. In the days before email, the collective wisdom of the capital defense community was shared through articles, manuals, and conferences, but the importance of mitigation specialists received early national recognition in the 1980s.

In Part III, the article concludes by examining the further recognition that mitigation specialists have received in the 21st century, from court decisions to the revision of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (in 2003)⁹ and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (in 2008).¹⁰ This development coincides with a wider appreciation of the need for individualized sentences in all cases, as we begin to return to the “enlightened policy” that the High Court respected at the time of *Woodson*¹¹ but temporarily abandoned in the era of mass incarceration. The Court has facilitated restoration of the enlightened policy with its decisions ending rigid federal sentencing guidelines¹² and mandatory life without parole sentences for crimes committed by children.¹³ Mitigation specialists, meanwhile, are here to stay.

I. ENDING THE CONFUSION

Furman had caused enough confusion. Five justices agreed that the existing statutes as applied violated the Eighth and Fourteenth Amendments, but they all had different reasons and they did not join one

needless extinction of life with only marginal contributions to any discernible social or public purposes.”

Lockett v. Ohio, 438 U.S. 586, 623 (1978) (citation to his own *Furman* concurrence omitted). (White, J., dissenting).

9. American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003).

10. *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008).

11. *Woodson*, 428 U.S. at 304.

12. *See United States v. Booker*, 543 U.S. 220, 264–65 (2005) (finding federal sentencing guidelines advisory rather than mandatory).

13. *See Graham v. Florida*, 560 U.S. 48, 82 (2010) (barring life without parole for non-homicide offenses committed prior to age eighteen); *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (barring mandatory life without parole sentences for homicide offenses committed prior to age eighteen); *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (holding that *Miller* applies retroactively).

another's individual opinions.¹⁴ The legislative backlash was immediate. Most of the states whose statutes had been found unconstitutional passed new laws attempting to avoid what the Court's *Furman* majority had found unacceptable.¹⁵ When five cases from the new statutes reached the Court in 1976, two justices were already of the view that the death penalty itself was unconstitutional. Justices Brennan and Marshall never wavered. Justice Douglas, who emphasized arbitrariness in his *Furman* opinion,¹⁶ was gone, and President Gerald Ford had appointed John Paul Stevens to replace him.¹⁷ President Kennedy's appointment, Justice White, had no problem with any of the new statutes.¹⁸ Three justices – Powell, Stevens, and Stewart – controlled the outcomes of the 1976 cases.¹⁹ The opinions finding the mandatory statutes unconstitutional in North Carolina²⁰ and Louisiana²¹ were written by Justices Stewart and Stevens, respectively. The opinions upholding the “guided discretion” statutes in Georgia,²² Florida,²³ and Texas²⁴ were written by Justices Stewart, Powell, and

14. See *Furman*, 408 U.S. 238 (1972), for the five separate concurrences; MANDERY, *supra* note 6, for a reconstruction of the internal negotiations that produced the 5-4 outcome.

15. See *Gregg v. Georgia*, 428 U.S. 153, 179–81 (1976) (thirty-five states enacted new capital punishment statutes); MANDERY, *supra* note 6, at 303–04 (discussing details of the legislative response).

16. *Furman v. Georgia*, 408 U.S. 238, 274, 286 (1972) (Douglas, J., concurring) (“[I]t is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment.”).

17. See MANDERY, *supra* note 6, at 333–34.

18. *Id.* at 401–02 (in White's view all the new statutes satisfied *Furman*'s mandate). In fact, in his dissent in *Lockett*, Justice White would also note the legislative trend away from individualized sentencing as mandatory minimums and federal sentencing guidelines loomed on the horizon:

The plurality's general endorsement of individualized sentencing as representing enlightened public policy even apart from the Eighth Amendment context . . . is not only questionable but also highly inappropriate in light of the fact that Congress, after detailed study of the matter, is currently giving serious consideration to legislation adopting the view that the goals of the criminal law are best achieved by a system of sentencing which narrowly limits the discretion of the sentencer.

See S. Journal, 95th Cong., 2d Sess. 1437 (1978) (approved by the Senate on Jan. 30, 1978).” *Lockett v. Ohio*, 438 U.S. 586, 622 n.5 (1978) (White, J., dissenting) (internal citation omitted).

19. See *Lockett*, 438 U.S. at 601.

Four Justices took the position that all five statutes complied with the Constitution; two Justices took the position that none of them complied. Hence, the disposition of each case varied according to the votes of three Justices who delivered a joint opinion in each of the five cases upholding the constitutionality of the statutes of Georgia, Florida, and Texas, and holding those of North Carolina and Louisiana unconstitutional.

20. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

21. *Roberts v. Louisiana*, 428 U.S. 325 (1976).

22. *Gregg v. Georgia*, 428 U.S. 153 (1976).

23. *Proffitt v. Florida*, 428 U.S. 242 (1976).

24. *Jurek v. Texas*, 428 U.S. 262 (1976). After his retirement from the High Court, Justice Stevens expressed his regret at joining the majority upholding the Texas statute in 1976. See Sara

Stevens, respectively. In all five cases, the three joined one another's opinions.

Since the 1960s, the NAACP Legal Defense Fund had spearheaded the litigation on behalf of the death-sentenced prisoners.²⁵ The lawyers on the briefs in the post-*Furman* cases included Anthony G. Amsterdam²⁶ and Peggy Davis²⁷ (both later law faculty at NYU), Jack Greenberg (later a professor at Columbia law school),²⁸ Adam Stein (a co-founder of the first integrated civil rights law firm in the Southeast),²⁹ and the late James Nabrit III (another veteran civil rights lawyer).³⁰ Amsterdam argued *Woodson*, *Jurek*, and *Roberts* on March 30-31, 1976.³¹ In all three epic courtroom dramas, he was opposed by the Solicitor General of the United States, Robert Bork, arguing as an amicus.³²

If the Court could not be persuaded to find the death penalty in itself unconstitutional, LDF's victory in *Woodson* and *Roberts* (barring

Olkon, *Event with Justice Stevens Recounts Remarkable Supreme Court Career*, UCHICAGO NEWS (Oct. 4, 2011), <https://news.uchicago.edu/story/event-justice-stevens-recounts-remarkable-supreme-court-career> [<https://perma.cc/B4FV-XEZX>].

25. See GREENBERG, *supra* note 5.

26. See NYU EMERITUS LAW FACULTY PROFILE, Anthony G. Amsterdam, <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=19743> [<https://perma.cc/98AP-6MD3>] (last visited July 4, 2018). Even before *Furman*, Amsterdam had been recognized as a brilliant young lawyer taking on work of national importance. After clerking for Justice Frankfurter, he joined the law faculty at the University of Pennsylvania and was named the Young Man of the Year by the Philadelphia Junior Chamber of Commerce in 1966 after he co-wrote an ACLU amicus brief in *Miranda v. Arizona* from which Chief Justice Warren lifted many passages "wholesale." See Nadya Labi, *A Man Against the Machine*, NYU LAW MAGAZINE (Autumn 2007), at 19, http://www.law.nyu.edu/sites/default/files/ECM_DLV_008765.pdf [<https://perma.cc/Z83A-6NGG>]. Even his undergraduate peers had recognized Amsterdam's extraordinary gifts, describing him in the yearbook not only as "far and above the best student in the class," but also "the one Senior in the class who can make an important contribution to the world." *The 1957 Record*, HAVERFORD COLLEGE (1957) at 103, https://ia800208.us.archive.org/1/items/recordofclass1957have/recordofclass1957have_bw.pdf [<https://perma.cc/842X-AQQD>] (last visited July 4, 2018).

27. See NYU LAW FACULTY PROFILE, Peggy Cooper Davis, <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=19866> [<https://perma.cc/2JQ2-5ULR>] (last visited July 4, 2018).

28. See GREENBERG, *supra* note 5. Author's biography on book jacket describes Greenberg's thirty-five years with the Legal Defense Fund (1949-1984) prior to joining the faculty at Columbia Law School.

29. See Marisa Bakker, *The Fight Goes on for Adam Stein*, THE DAILY TAR HEEL (Nov. 24, 2015, 12:09 AM) <http://www.dailytarheel.com/article/2015/11/the-fight-goes-on-for-adam-stein> [<https://perma.cc/GQ4C-DZS9>].

30. See William Yardley, *James M. Nabrit, a Fighter for Civil Rights, Dies at 80*, THE NEW YORK TIMES (Mar. 27, 2013), <https://www.nytimes.com/2013/03/28/us/james-m-nabrit-a-fighter-for-civil-rights-dies-at-80.html> [<https://perma.cc/2BWN-VXMH>].

31. See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976);

32. *Id.*

mandatory death sentences and mandating individualized sentencing as constitutionally required) foreshadowed what was to come in *Lockett* and locked the Court into the principle that no crime, however heinous, required imposition of the death penalty, and every person accused of a capital crime was entitled to an opportunity to persuade the sentencer that he was not the worst of the worst. Nonetheless, confusion reigned.

In California, for example, newly enacted Penal Code § 190.3 contained an apparent conflict, in that ¶ 1 provided for any evidence relevant to mitigation, while ¶ 5 enumerated only ten specific factors which the trier “shall take into account.” In the syllabus for one of the first capital case defense seminars in the state, one veteran public defender expressed his confusion and frustration:

Most of the doubt and uncertainty lies within the penalty phase. Although strong arguments can be made for allowing the defendant to produce evidence going to such matters as common mercy, defendant’s total value within the community, his character, history, and background, the more strict and severe interpretation is one that admits the production of evidence of only specifically enumerated factors. Large wars can be expected to be waged in that never-never land falling between paragraph one with its broad expansive admissions of proofs and paragraph five with its rather stringent limitations.³³

In *Lockett*, the High Court agreed to review the constitutionality of “a[n Ohio] statute that narrowly limits the sentencer’s discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors.”³⁴ In delivering the Court’s opinion, Chief Justice Burger (a dissenter in *Furman*) blamed the variety of opinions in *Furman* for the “confusion as to what was required in order to

33. James Jenner, *The California Death Penalty: Trial Tactical Considerations*, in CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN COOPERATION WITH CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, STRATEGY SEMINAR ON DEATH PENALTY TRIALS, Hastings College of the Law, San Francisco, Mar. 24-25, 1978.

34. *Lockett v. Ohio*, 438 U.S. 586, 589 (1978).

Once a verdict of aggravated murder with specifications had been returned, the Ohio death penalty statute required the trial judge to impose a death sentence unless, after “considering the nature and circumstances of the offense” and *Lockett*’s “history, character, and condition,” he found by a preponderance of the evidence that . . . the victim had induced or facilitated the offense, . . . [the defendant] “was under duress, coercion, or strong provocation,” or . . . the offense was “primarily the product of . . . psychosis or mental deficiency.”

Id. at 593–94 (code citation omitted). The pertinent provisions of the statute were appended to the opinion at 609–13.

impose the death penalty in accord with the Eighth Amendment.”³⁵ The limits on the sentencer’s discretion in Ohio seemed to the Chief Justice to be “a direct response to *Furman*.”³⁶ He wryly noted how the various opinions both in *Furman* and the five cases in 1976 had created further confusion as states continued to revise their statutes: “The signals from this Court have not, however, always been easy to decipher. The States now deserve the clearest guidance that the Court can provide; we have an obligation to reconcile previously differing views in order to provide that guidance.”³⁷

In a concurrence, Justice Marshall summarized most of the mitigating circumstances that the judge in Sandra Lockett’s case was not permitted to consider: her degree of involvement in the crime (getaway driver who did not actually commit or intend to commit the homicide), her age (twenty-one), or her prospects for rehabilitation.³⁸ As Chief Justice Burger noted, the trial court “judge said that he had ‘no alternative, whether [he] like[d] the law or not’ but to impose the death penalty” on Lockett.³⁹

The Chief Justice traced the long history of individualized sentencing in this country, and the concomitant principle “that the sentencing judge’s ‘possession of the fullest information possible concerning the defendant’s life and characteristics’ is ‘[highly] relevant—if not essential—[to the] selection of an appropriate sentence.’”⁴⁰ He quoted with approval his own dissent in *Furman*: “Most would agree that ‘the 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process.’”⁴¹ *Woodson*’s holding that individualized sentencing is constitutionally indispensable in the capital context virtually dictated the outcome in *Lockett*: the Court was not writing on a “clean slate.”⁴²

The Court’s conclusion dictated that mitigation evidence would be at the core of capital defense representation in the decades that followed:

35. *Id.* at 599, n.6 (noting the predictability of this outcome as he had foreseen in *Furman v. Georgia*, 408 U.S. 238, 403 (1972)).

36. *Lockett*, 438 U.S. at n.7.

37. *Id.* at 602.

38. *Id.* at 619–21 (Marshall, J., dissenting). Justice Marshall wrote, “The Ohio statute, with its blunderbuss, virtually mandatory approach to imposition of the death penalty for certain crimes, wholly fails to recognize the unique individuality of every criminal defendant who comes before its courts.” *Id.* at 620–21. Justice Marshall failed to mention “that Lockett had committed no major offenses” as a juvenile or as an adult prior to the capital case. *Id.* at 594.

39. *Id.* at 594 (alterations in original).

40. *Id.* at 603 (citation omitted; emphasis and alterations added by the Chief Justice).

41. *Id.*, citing *Furman v. Georgia*, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting).

42. *Lockett v. Ohio*, 438 U.S. 586, 604, 597 (1978).

[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.⁴³

After noting the “flexible techniques” and postconviction remedies that may be available to modify a wrongful sentence in a noncapital case, the Court added a comment about finality and reliability: “The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.”⁴⁴

II. THE RISE OF MITIGATION SPECIALISTS

Some visionary capital defenders of course had not waited for *Lockett's* clarification. Georgia lawyer Millard Farmer had assembled a group he called the Team Defense Project to meet the challenge of the new capital punishment statutes. As early as 1976, he and his colleague James Kinard were invited to the National Legal Aid and Defender Association Convention in Philadelphia to discuss their effective penalty phase presentation in a post-*Furman* case in Harris County, Texas.⁴⁵ Defendant Bernardino Sierra “had committed twelve robberies, two maimings, and three killings” in an eight-hour spree.⁴⁶ Experts were quoted as saying this was the “most likely case for capital punishment in the history of Harris County.”⁴⁷ Mr. Sierra's mother then testified about his childhood:

When he was a little boy, his stepfather would come home drunk at night and beat him with a wire whip, catching him while he was asleep. His stepfather would lock him out of the house at night sometimes, and he would crawl under it to make his miserable bed and try to sleep. Often he was hungry and had no food. He ate out of garbage cans. He brought

43. *Id.* at 604 (emphasis in original).

44. *Id.* at 605 (citation omitted).

45. See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 300-01 (1983) (describing unreported capital trial of Bernardino Sierra based on statements by Farmer and Kinard), citing Farmer & Kinard, *The Trial of the Penalty Phase* (remarks at the National Legal Aid and Defender Association Convention, Philadelphia, 1976), reprinted in California Office of the Public Defender, 2 California Death Penalty Defense Manual N-33.

46. *Id.* at 300.

47. *Id.*

the best food he found there home for his mother and little sister.⁴⁸

Mr. Sierra's son also testified. The jury spared Sierra's life.⁴⁹ Millard Farmer's "Team Defense" would soon become legendary in capital defense representation.⁵⁰

But Lockett put capital defense lawyers throughout the country on notice that they could offer expansive mitigation about the character and record of their clients, and the circumstances of their crimes. While it may have taken some time for Millard Farmer's reputation to spread at national training programs and in later law review articles, opinions from the Supreme Court of the United States reached practitioners more quickly, even in the pre-Internet era. Lawyers in multiple jurisdictions began looking in a variety of directions for professionals who could help uncover the life-saving narratives.

One California lawyer looked to the journalism school at Berkeley, where the late Lacey Fosburgh was teaching. A former *New York Times* reporter, Fosburgh, had written a best-selling book about a murder case she had covered for the newspaper.⁵¹ The lawyer wanted her to investigate the life and mind of his client, just as she had meticulously studied the killer who had been the subject of her articles and book. After her successful work in developing the capital client's mitigation evidence, Fosburgh wrote about the critical role she had played:

[A] significant legal blind spot existed between the roles played by the private investigator and the psychiatrist, the two standard information-getters in the trial process. Neither one was suited to the task at hand here—namely discovering and then communicating the complex human reality of the defendant's personality in a sympathetic way.

. . .

Significantly, the defendant's personal history and family life, his obsessions, aspirations, hopes, and flaws, are rarely a matter of physical evidence. Instead they are both discovered and portrayed through

48. *Id.* at 300-01.

49. *Id.* at 301.

50. *See, e.g.*, Team Defense Project, *Team Defense in Capital Cases*, FORUM, May–June 1978, at 24, 24; Michael G. Millman, *Interview: Millard Farmer*, FORUM, Nov.–Dec. 1984, at 31, 31-33. *See also* Jill E. Miller, *The Defense Team in Capital Cases*, 31 HOFSTRA L. REV. 1117, 1123, n.51 (2003) ("Millard Farmer, an attorney who assisted with the Team Defense Project in Georgia in 1976, was one of the first to articulate the team concept in capital defense work. The project employed an interdisciplinary approach and strategies that reached beyond the courtroom in representing its clients.")

51. LACEY FOSBURGH, *CLOSING TIME: THE TRUE STORY OF THE "GOODBAR" MURDER* (1977).

narrative, incident, scene, memory, language, style, and even a whole array of intangibles like eye contact, body movement, patterns of speech—things that to a jury convey as much information, if not more, as any set of facts. But all of this is hard to recognize or develop, understand or systematize without someone on the defense team having it as his specific function. *This person should have nothing else to do but work with the defendant, his family, friends, enemies, business associates and casual acquaintances, perhaps even duplicating some of what the private detective does, but going beyond that and looking for more. This takes a lot of time and patience.*⁵²

Lawyers in Los Angeles turned to a former probation officer, Casey Cohen, to help them prepare the mitigation case. Cohen became a regular faculty member at California's Capital Case Defense Seminar in the 1980s, and he was interviewed for a cover story in the defense bar magazine.⁵³ A key figure in the conceptual development of mitigation evidence was Professor Craig Haney, who had a law degree as well as a Ph.D. in social psychology from Stanford. He also became a regular faculty member at the California death penalty seminar, and he testified in many capital sentencing proceedings as the social historian who could interpret the significant influences in the client's development.⁵⁴

A social worker in New Jersey was also featured on the cover of the California defense bar magazine.⁵⁵ Cessie Alfonso had been "working at the second largest psychiatric emergency room in the country, Kings County Hospital in Brooklyn."⁵⁶ After working on a few capital cases together, Alfonso and her colleague, Katharine Baur, both left the hospital to work fulltime on mitigation.⁵⁷ In the decade following *Lockett*, by 1988, Alfonso and Baur had worked on over sixty-five cases.⁵⁸

52. Lacey Fosburgh, *The Nelson Case: A Model for a New Approach to Capital Trials*, in CALIFORNIA STATE PUBLIC DEFENDER, CALIFORNIA DEATH PENALTY MANUAL, 1982 supplement, N6-N10, N7 (July 1982) (emphasis added). This article also appeared in the magazine of the California defense bar, Lacey Fosburgh, *The Nelson Case: A Model for a New Approach to Capital Trials*, FORUM Sept.–Oct. 1982, at 31, 32.

53. The author attended the California Capital Case Defense Seminar annually throughout this period. See also Anne E. Fragasso, *Interview: Casey Cohen*, FORUM, Jan.–Feb. 1987, 22, 26.

54. Professor Haney's publications in the area of mitigation came a bit later. See, e.g., Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547 (1995); CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM* (2005); Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835 (2008);

55. Leslie H. Abramson, *Interview: Cessie Alfonso*, FORUM, Mar.–Apr. 1988, at 24–27.

56. *Id.* at 25.

57. *Id.*

58. *Id.* at 26. Alfonso and Baur also wrote about their work in the monthly publication of the National Association of Criminal Defense Lawyers, *Enhancing Capital Defense: The Role of the*

In states like Florida and Virginia where executions came quickly in the post-*Furman* era and there was no funding for lawyers to represent death-sentenced prisoners under warrant, two extraordinary anti-death penalty activists who were recruiting volunteer lawyers in the direst circumstances also began uncovering mitigating evidence for clemency presentations and post-conviction litigation. The late Marie Deans had come to Virginia to head the Virginia Coalition on Jails and Prisons (whose focus had been prison conditions), but her empathy for the death-sentenced prisoners whom she encountered led her to become a pioneer in mitigation investigation.⁵⁹ In Florida, the late Scharlette Holdman ran the Clearinghouse on Criminal Justice and turned her training in anthropology into a methodology for mitigation investigation.⁶⁰ Today, Holdman's multigenerational methodology is widely recognized as "creating a model for the life-history investigations that the American Bar Association now considers standard in death penalty defense work."⁶¹

One lawyer who played a key role in establishing the breadth of mitigation evidence and the techniques for discovering it was also a minister. Jeff Blum was the Executive Director of the Tennessee Association of Criminal Defense Lawyers; he and his wife shared in the ministry of a United Methodist congregation.⁶² In 1992, the Capital Case Resource Center of Tennessee published Blum's lengthy Mitigation Workbook providing extensive guidance in multiple areas of mitigation investigation, including neurological impairment, psychological impairment, dysfunctional family, substance abuse, social/cultural

Forensic Clinical Social Worker, THE CHAMPION, June 1986, at 26 (describing their work on death penalty cases in New Jersey, Connecticut, and Ohio, as well as a military capital case in Rhode Island). They astutely pointed out that mitigation evidence was not only valued for possible presentation in sentencing proceedings, but also to facilitate plea bargains. *Id.* at 28.

59. See TODD C. PEPPERS & MARGARET A. ANDERSON, *A COURAGEOUS FOOL: MARIE DEANS AND HER STRUGGLE AGAINST THE DEATH PENALTY* (2017).

60. See Peter Carlson, *Florida's Death Row Defender Stands Between 89 Condemned Men and the Electric Chair*, PEOPLE (July 11, 1983, 12:00 PM) <https://people.com/archive/floridas-death-row-defender-stands-between-89-condemned-men-and-the-electric-chair-vol-20-no-2/> [<https://perma.cc/7B7X-YUWF>]; Maurice Chammah, *We Saw Monsters. She Saw Humans. Scharlette Holdman, pioneering foe of the death penalty, dies at 70*, MARSHALL PROJECT, (July 13, 2017, 5:58 PM) <https://www.themarshallproject.org/2017/07/13/we-saw-monsters-she-saw-humans> [<https://perma.cc/73AA-U9GF>] (last visited July 6, 2018).

61. Emily Langer, *Scharlette Holdman, activist known as "Angel of Death Row," dies at 70*, THE WASHINGTON POST, (July 24, 2017), https://www.washingtonpost.com/local/obituaries/scharlette-holdman-activist-known-as-angel-of-death-row-dies-at-70/2017/07/24/6638b100-7079-11e7-8f39-eeb7d3a2d304_story.html?utm_term=.2ef641e502ee [<https://perma.cc/K5ZH-BTKM>] quoting Robert Dunham, executive director of the Death Penalty Information Center, concerning Holdman's role in developing this methodology.

62. Jeff Blum, *The Ten Commandment of Religious Testimony*, THE CHAMPION, Apr. 1987, at 23.

factors, “positive prisoner” evidence, offense-based factors, “good person” evidence, and victim-related factors.⁶³

In 1985, the National Legal Aid and Defender Association (which had hosted and publicized the work of Millard Farmer and Stuart Kinard back in 1976)⁶⁴ first published Standards for the Appointment of Defense Counsel in Death Penalty Cases.⁶⁵ Standard 11.4.1(d)(3), Investigation, noted the potential use of mitigation specialists.⁶⁶ And from the land of *Lockett*, three Ohio social workers wrote in 1987: “The mitigation specialist is a professional who, as attorneys across the nation are recognizing, should be included and will be primary to the defense team.”⁶⁷ In 1989, the American Bar Association published its first Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases,⁶⁸ incorporating the same reference to the potential use of mitigation specialists that had appeared four years earlier in the NLADA Standards.⁶⁹ A decade later, the *Atlantic* magazine’s Word Watch column, compiled by the editor of the American Heritage Dictionary, discovered “mitigation specialist” as a newly coined term!⁷⁰

III. MITIGATION SPECIALISTS IN THE 21ST CENTURY

As we entered the 21st century, the importance of mitigation specialists was well recognized. When the American Bar Association published its revised Death Penalty Guidelines in 2003, there was extensive discussion of mitigation specialists, both in the black letter text and in the Commentary.⁷¹ That same year, the Supreme Court acknowledged the nonlawyer who had gathered the post-conviction

63. JEFF BLUM, MITIGATION WORKBOOK (1992).

64. See Goodpaster, *supra* at note 45.

65. National Legal Aid & Defender Association, *Standards for the Appointment of Defense Counsel in Death Penalty Cases*, <http://www.nlada.org/defender-standards/death-penalty/black-letter> [<https://perma.cc/S7H6-52ZD>] (last visited July 6, 2018).

66. *Id.*

67. James Hudson et al., *Using the Mitigation Specialist and the Team Approach*, THE CHAMPION, June 1987, at 33, 36. Hudson and one of his co-authors had worked in the Mitigation Specialists Department of the Ohio State Public Defender’s Office. *Id.* at 33.

68. American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, www.ambar.org/1989guidelines [<https://perma.cc/K8L2-ZZVS>] (last visited July 6, 2018).

69. National Legal Aid & Defender Association, *supra* at note 65.

70. *Word Watch*, THE ATLANTIC, (Apr. 1999), <https://www.theatlantic.com/magazine/archive/1999/04/word-watch/377573/> [<https://perma.cc/WDK9-VSLT>].

71. Reprinted in American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003). See *id.* at 952 et seq., 999 et seq.

mitigation evidence that proved prejudice in the landmark case on ineffective assistance, *Wiggins v. Smith*.⁷² Five years later, the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases appeared.⁷³ In summarizing the development of these mitigation guidelines, Professor Sean D. O'Brien also discussed the multiple pathways that had led "skilled journalists, anthropologists, educators, social workers, and others" to the mitigation profession.⁷⁴

If the rise of this profession could not have been foreseen when *Lockett* was litigated, neither could we have appreciated the role that mitigation, and mitigation specialists, would ultimately play in noncapital cases. Multiple public defender offices now embrace holistic approaches to defense representation. Sentencing advocacy has become a critical part of the defense function in federal court since once-rigid, mandatory guidelines have become advisory.⁷⁵ The end of mandatory life without parole sentences for juveniles has created a two-fold need to show courts the mitigation that might have been presented when the child was originally tried, and who the individual has become in the intervening years as she seeks reentry into society.⁷⁶

Forty years after *Lockett*, one thing is certain: mitigation specialists are here to stay.⁷⁷

72. *Wiggins v. Smith*, 539 U.S. 510, 516–17 (2003). The Court did not use the term "mitigation specialist," but referred to the nonlawyer as a "licensed social worker."

73. *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008).

74. 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, 733 (2008).

75. See *supra* text accompanying note 12. See also Miriam Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41 (2013).

76. See *supra* text accompanying note 13. See also 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.

77. See also John Blume & Russell Stetler, *Mitigation Matters*, in TELL THE CLIENT'S STORY: MITIGATION IN CRIMINAL AND DEATH PENALTY CASES (Edward Monahan & James Clark, eds., 2017), ch. 1, 19 (describing breadth and effectiveness of mitigation today).