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Symposium Introduction

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SYMPOSIUM INTRODUCTION

*Eric M. Freedman**

As the death penalty declines,¹ the importance of effective capital defense representation increases.² We are close to the point where the mere fact of an execution strongly suggests that the defendant received deficient representation at some stage,³ whether due to the inadequacies of an individual lawyer or of the jurisdiction's system for the provision of capital defense services.⁴

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1. See generally David McCord & Talia Roitberg Harmon, *Lethal Rejection: An Empirical Analysis of the Astonishing Plunge in Death Sentences in the United States From Their Post-Furman Peak*, 81 ALBANY L. REV. 1 (2017).

2. See generally Ankur Desai & Brandon L. Garrett, *The State of the Death Penalty Decline*, 94 NOTRE DAME L. REV. (forthcoming 2018) (empirical study of death penalty decline “finds that state provision of capital trial representation is far more strongly and robustly correlated with reduced death sentencing than . . . other factors.” (manuscript at 2)).

3. The *ABA Guidelines* “apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings and any connected litigation.” *ABA Guidelines, supra* star note, at 919 (Guideline 1.1.B). Some of the practical implications are discussed in Eric M. Freedman, *The Revised ABA Guidelines and the Duties of Lawyers and Judges in Capital Post-Conviction Proceedings*, 5 J. APP. PRAC. & PROCESS 325 (2003); see also *infra* text accompanying notes 26-33 (discussing clemency duties of capital defense counsel).

4. The *ABA Guidelines* recognize that “Attorney error is often the result of systemic problems, not individual deficiency The Guidelines . . . , therefore, not only detail the elements of quality representation, but mandate the systemic provision of resources to ensure that such representation is achieved in fact.” *ABA Guidelines, supra* star note, at 937-38 (Commentary to ABA Guideline 1.1: “Objective and Scope of Guidelines”). “Even a skilled lawyer making best efforts to defend her client competently is probably engaged in a foredoomed project if she is not part of a system that provides her with the back-up necessary to perform effectively,” Eric M. Freedman, *Add Resources and Apply Them Systemically: Governments’ Responsibilities Under the Revised ABA Capital Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1102 (2003).

For discussions of this aspect of the *ABA Guidelines*, see generally Robin M. Maher,

That is the background against which the *Hofstra Law Review* presents its Symposium marking the fifteenth anniversary of the release of the *ABA Guidelines*. As the distinguished authors whose works appear on the following pages demonstrate, the shrinking sphere of the death penalty is still large enough to contain many individual injustices. And while one can look back upon (and forward to) improvements in the quality of capital defense representation in light of the lessons taught by ongoing experience and study, the political and legal environment is far too unstable to allow for complacency.

One salient example of these phenomena is the uneven application of the decision of the Supreme Court in *Atkins v. Virginia*,⁵ holding that people suffering from intellectual disability are categorically exempt from the death penalty.⁶ The Court has been commendably firm and clear in ruling that clinical standards rather than lay perceptions or misperceptions provide the governing criteria for determining which defendants fall within the exclusion.⁷ But implementing the Court's decisions requires sustained—and so far incomplete—efforts to educate dispersed groups that frequently do not speak to each other and often misunderstand each other when they do.⁸ These include legislators, prosecutors, judges, and clinicians.⁹

Improving State Capital Counsel Systems Through the Use of the ABA Guidelines, 42 HOFSTRA L. REV. 419 (2013); Meredith Martin Rountree & Robert C. Owen, *Overlooked Guidelines: Using the Guidelines to Address the Defense Need for Time and Money*, 41 HOFSTRA L. REV. 623 (2013); Eric M. Freedman, *Introduction*, 31 HOFSTRA L. REV. 903, 905 (2003) (*ABA Guidelines* require death penalty jurisdictions to “create institutions whose structure results in the effective delivery of capital defense services on the ground. For this reason, many of the Guidelines are addressed not to defense counsel but to the government officials whose responsibility it is to provide those services.”).

5. 536 U.S. 304 (2002).

6. *Atkins*, 536 U.S. at 320-21. For comprehensive empirical studies of how *Atkins* has fared, see John H. Blume et al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393 (2014); John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689 (2009); John H. Blume et al., *An Empirical Look at Atkins v. Virginia and its Application in Capital Cases*, 76 TENN. L. REV. 625 (2009).

7. See *Moore v. Texas*, 137 S. Ct. 1039, 1050 (2017); *Brumfield v. Cain*, 135 S. Ct. 2269, 2276-80 (2015); *Hall v. Florida*, 134 S. Ct. 1986, 1993-94 (2014).

8. See JOHN H. BLUME & MARC J. TASSE, *INTELLECTUAL DISABILITY AND THE DEATH PENALTY: CURRENT ISSUES AND CONTROVERSIES* (2018).

9. This issue of the *Law Review* contains a magisterial Article providing authoritative and objective guidance to the latter two groups regarding the current clinical criteria for intellectual disability diagnoses in the capital context. See James W. Ellis, Caroline Everington, & Ann M. Delpha, *Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases*, 46 HOFSTRA L. REV. 1309 (2018).

In *Protecting People with Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*,¹⁰ Sheri Lynn Johnson, John Blume, Emily Paavola, and Lindsey Vann undertake the education of the capital defense community. In an Article informed by extensive practical experience and empirical research, the authors present a lucid and detailed roadmap through the pitfall-strewn landscape of the effective investigation and presentation of an *Atkins* claim.

Using dozens of concrete examples, the piece teaches defense teams to remove the blinders of their own stereotypes, penetrate smokescreens of seemingly negative facts, and eventually present a picture of their client that is not just clinically accurate but so compellingly true-to-life that it dispels the fog of misimpressions (if not outright hostility) through which the decision maker is likely to be viewing the claim that, although accused of a horrible crime, the client is intellectually disabled and must be spared the death penalty.

The problems presented by intellectual disability cases reflect more general challenges. Overcoming one-dimensional stereotypes of capital defendants and authentically narrating the life of the specific individual before the court is an essential task of all death penalty defense teams. The prosecution's account will isolate the defendant's crime, presented as "entirely the product of his free and autonomous choice-making" and constituting both "the full measure of [the defendant's] life and the primary justification for ending it."¹¹ An effective capital defense team needs to conduct an investigation of the client's life aimed at "the construction of a psychologically oriented social history [in which] key developmental stages and relevant family and social experiences are analyzed together."¹² From this data the team must fashion a mitigating counter-narrative: a persuasive fully-realized account of all the circumstances that have brought "a human being with hopes, dreams, beliefs, and values" to his present peril.¹³

This indispensable defense function is the subject of *The Past, Present, and Future of the Mitigation Profession: Fulfilling the*

10. Sheri Lynn Johnson et al., *Protecting People with Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*, 46 HOFSTRA L. REV. 1107 (2018).

11. Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 843 (2008).

12. *Id.* at 844.

13. See Sean D. O'Brien & Kathleen Wayland, *Implicit Bias and Capital Decision-Making: Using Narrative to Counter Prejudicial Psychiatric Labels*, 43 HOFSTRA L. REV. 751, 769-82 (2015) (explaining the importance of placing the client's story rather than the psychiatric diagnosis proffered by his experts at "center stage," and describing numerous cases in which the approach was used successfully).

Constitutional Requirement of Individualized Sentencing in Capital Cases by Russell Stetler.¹⁴ Mr. Stetler is the National Mitigation Coordinator for the Federal Death Penalty Projects as well as a Coordinator of the project which produced the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*.¹⁵

His deeply-researched Article demonstrates that—even when the crimes were very serious—during the last forty years the death sentence has only been sought in a strikingly small percentage of the cases in which it was available and actually imposed in only a small fraction of those.¹⁶ As the state of the art of capital mitigation has improved in light of experience, research, increased funding, and the creative contributions of an increasingly diverse community of practitioners—notably the people now known as “mitigation specialists”¹⁷—that fraction has diminished further. The increasing effectiveness of defense teams is central to the “sharp reduction in both death sentences and executions in the new millennium”¹⁸ that has brought us to the current twilight of capital punishment.

Some implications are visible among the shadows. In addition to the life-long warehousing of aging defendants, the legal system will need to confront the truth that almost none of the relatively few prisoners being executed today would receive death sentences if tried today.¹⁹ And if non-death sentences are the new normal, perhaps every death sentence is inherently constitutionally suspect—not only because the government will have a difficult time meeting its Eighth Amendment burden under *Furman v. Georgia*²⁰ of differentiating the case on culpability grounds

14. 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 (2018).

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

16. In an eye-opening set of Appendices to his Article, Mr. Stetler presents extensive lists of cases in which juries have declined to impose the death penalty notwithstanding the heinous nature of the crime. See Stetler, *supra* note 14, at 1229, 1239, 1247 (Appendix 2 listing seventy-nine cases between 1979 and 2017 involving child victims; Appendix 3 listing forty-seven cases between 1982 and 2018 involving law enforcement victims; Appendix 4 listing eighty-one cases between 1982 and 2018 involving multiple victims).

17. For descriptions of the role of these team members see *ABA Guidelines*, *supra* star note, at 959-60 (Commentary to ABA Guideline 41.1). See also Pamela Blume Leonard, *A New Profession for an Old Need: Why a Mitigation Specialist Must be Included on the Capital Defense Team*, 31 HOFSTRA L. REV. 1152 (2003); Jill Miller, *The Defense Team in Capital Cases*, 31 HOFSTRA L. REV. 1117, 1120, 1127-31 (2003).

18. Stetler, *supra* note 14, at 1163.

19. See *id.* at 1207.

20. 408 U.S. 238 (1972).

from the numerous others that did not result in a death sentence but also because the sentence on its face warns that the defendant's Sixth Amendment right to effective counsel has most likely been violated.²¹

At the same time, the new normal is partly the result of a substantial increase in the number of salaried mitigation specialists employed in public defender offices of all types. Reliance on that model, which depends on continued government funding of the positions, "is risky pragmatically."²² Were the funding to dry up there might not be enough private capital mitigation specialists available to fill the need.²³ The result could easily be an up-tick in death sentences and a down-tick in their reliability.

Executive clemency should be a safeguard against that risk. But, as Laura Schaefer, a staff attorney with the ABA's Death Penalty Representation Project, documents in *The Ethical Argument for Funding in Clemency: The "Mercy" Function and the ABA Guidelines*,²⁴ there are serious flaws in how the institution is functioning. At a time when executions are so few that each one may signal a system breakdown of some sort, this is a cause for grave concern.²⁵

The *ABA Guidelines* impose on capital defense teams extensive duties to investigate all available bases for clemency and to present them forcefully to decision makers.²⁶ But governments are exiguous at best in paying counsel for the work that the *Guidelines* require them to perform. Some states, like Florida, impose fee caps that "explicitly conflict[] with

21. A number of law review authors have already described how judicial perceptions of effective capital representation are distorted because they are based on the dataset of decided cases, in which the effort to defeat the death penalty has always failed, rather than the dataset of all potentially capital cases, in which the effort to defeat the death penalty has overwhelmingly succeeded. See Russell Stetler & Aurelie Tabuteau, *The ABA Guidelines: A Historical Perspective*, 43 HOFSTRA L. REV. 731, 747 n. 136 (2015) (collecting sources); *ABA Guidelines*, *supra* star note, at 928 (Commentary to ABA Guideline 1.1; recording comments of Justice Ginsburg that none of the stay applications coming before her involve defendants who were well represented at trial because "people who are well represented at trial do not get the death penalty"). One of the reasons empirical research like that presented in Mr. Stetler's Article is so valuable is that it can assist in clarifying judicial perceptions of both prevailing professional norms and the effect on outcomes when those norms are violated.

22. Stetler, *supra* note 14, at 1163.

23. See *id.* at 1164, 1209-10. Of course, this would have no effect on the duties of counsel and the States under the *ABA Guidelines* and the Constitution to insure the effective collection and presentation of mitigation evidence. See *id.* ("Public defender organizations may come and go as governmental policies change, but the constitutional obligation of jurisdictions seeking to impose the death penalty will not change.").

24. Laura Schaefer, *The Ethical Argument for Funding in Clemency: The "Mercy" Function and the ABA Guidelines*, 46 HOFSTRA L. REV. 1257 (2018).

25. As Ms. Schaefer notes, the years 2017 and 2018 have seen more vigorous use by governors of their clemency powers. See *id.* at 1258 n.7.

26. See *id.* at 1270-71 (explicating ABA Guideline 10.15.2: "Duties of Clemency Counsel").

the Guidelines”²⁷ and might plausibly be the subject of legal challenge.²⁸ Federal funding, which provides the compensation for “a large portion of all attorneys performing capital clemency representation,”²⁹ is at best “haphazard”³⁰ and at worst dispensed on conditions that appear to be at odds with the governing statute.³¹

All courts should instead administer their funding systems on the premise that capital clemency counsel will diligently perform their duties under the *ABA Guidelines*.³² Not only will this course of action relieve ethical pressures on counsel and result in the provision of legal services to people entitled to them, but the courts will then be in a much better position to insure that counsel in fact meet their obligations.³³

In the meantime, the failure to provide competent counsel to Death Row prisoners seeking clemency is damaging not only to them but to the justice of the death penalty system as a whole.³⁴

27. *Id.* at 1273. As Ms. Schaefer describes, *id.* at 1266-68, 1273-74, the *ABA Guidelines* strongly disapprove of such systems because they adversely impact effective representation by putting economic pressure on counsel “to limit the amount of time invested in the representation in order to maximize the return on the fixed fee. . . . For better or worse, a system for the provision of defense services in capital cases will get what it pays for.” *ABA Guidelines, supra* star note, at 987-88 (Commentary to ABA Guideline 9.1).

28. *See* Schaefer, *supra* note 23, at 1274 & n.53 (observing that under ABA Guideline 10.15.2(D) “clemency counsel’s duties . . . include a responsibility to challenge procedurally or substantively unjust procedures”); *see also id.* at 1268 n.40 (describing Florida litigation challenge that became moot).

This responsibility flows from the special role of executive clemency in capital punishment systems. As the Commentary to ABA Guideline 1.1, *ABA Guidelines, supra* star note, at 936-37, describes, “[e]xecutive clemency plays a particularly important role in death penalty cases” because it has historically been granted in those cases not only to prevent miscarriages of justice but “for a broad range of humanitarian reasons.” The client is entitled to the benefits of this receptivity. That is why, “in addition to assembling the most persuasive possible record for the decision maker, counsel must carefully examine the possibility of pressing legal claims asserting the right to a fuller and fairer process.”

29. Schaefer, *supra* note 24, at 1265.

30. *Id.* at 1274.

31. *See id.* at 1267 n.39 (reporting “troubling” policy of Florida federal courts to deny funding to clemency counsel on the basis that they are being compensated through the flawed Florida scheme described in the previous sentence of text).

32. *See id.* at 1276.

33. *See id.* at 1261-62 n.18 (observing that failures by counsel to meet their obligations “are regrettably common”); *ABA Guidelines, supra* star note, at 970, 973 (Guideline 7.1(C) and Commentary; describing circumstances under which appointed counsel who has failed to represent their client consistently with the *Guidelines* should, in accord with publicized standards and procedures, be denied future appointments).

34. While many organizations take the position that capital punishment should be abolished because “a just death penalty system” is an oxymoron, the ABA is not one of them. It does not object to governments making the public policy choice to have a death penalty, as long as they comply with a series of policies designed to insure that the choice is implemented fairly. *See Death Penalty Policies*, AM. BAR ASS’N, https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/resources/policy.html (last visited Aug. 23, 2018).

Every discussion of the *ABA Guidelines* should bear firmly in mind that they

are premised on the belief that the ultimate beneficiary of the effective performance of capital defense counsel is the justice system itself. . . . [T]he more is known about the defendant's life the more everyone involved—including prosecutors, judges, and family members—can have confidence in the soundness with which they have discharged the heavy burdens they all bear.³⁵

That is why the *ABA Guidelines* received the unanimous approval of the House of Delegates, whose members represent many diverse constituencies, including state and federal prosecutors, judges, and government officials of all sorts.³⁶

This system-wide perspective and the ABA's commitment to institution-building underlie *Reclaiming Van Hook: Using the ABA's Guidelines and Resources to Establish Prevailing Professional Norms* by Emily Olson-Gault, Director and Chief Counsel of the ABA's Death Penalty Representation Project.³⁷

The *ABA Guidelines* emerged from an inclusive two-year long drafting process³⁸ whose purpose was to produce a document that would “embody the current consensus about what is required to provide effective representation in capital cases.”³⁹ The *Guidelines* synthesized “the collective experience and expertise of [those] . . . who had

35. William M. Bowen, Jr., *A Former Alabama Appellate Judge's Perspective on the Mitigation Function in Capital Cases*, 36 HOFSTRA L. REV. 805, 818 (2008); see Eric M. Freedman, *Fewer Risks, More Benefits: What Governments Gain by Acknowledging the Right to Competent Counsel on State Post-Conviction Review in Capital Cases*, 4 OHIO ST. J. CR. L. 183, 193 (2006) (“The interest in insuring that the decision of the government to execute a person in the name of its citizens is based upon the most complete possible factual and legal picture belongs not just to each individual actor in the legal system—including judges and victims as well as defendants and prosecuting and defense attorneys—but to society as a whole.”); Freedman, *Introduction*, *supra* note 4, at 912 (describing this viewpoint as having animated the *Guidelines* project since its inception in the 1980s).

36. See Emily Olson-Gault, *Reclaiming Van Hook: Using the ABA's Guidelines and Resources to Establish Prevailing Professional Norms*, 46 HOFSTRA L. REV. 1279, 1292-93 & n.81 (2018).

37. *Id.* The ABA Death Penalty Representation Project was the entity that supervised the creation of the *Guidelines*, which, as further discussed in the next paragraph of text, were formulated by dozens of expert organizations and individuals, see *ABA Guidelines*, *supra* star note, at 914-15 (listing these), and then subjected to extended review within the organization. See Stetler & Tabuteau, *supra* note 21, at 731 n.2.

38. See *ABA Guidelines*, *supra* star note, at 916 (detailing process). A description by the then-Director of the ABA Death Penalty Representation Project appears in Maher, *supra* note 4, at 421 n.8.

39. *ABA Guidelines*, *supra* star note, at 920 (ABA Guideline 1.1: “History”); see Olson-Gault, *supra* note 35, at 1292 n.69, 1294-95 & n.80.

effectively litigated capital cases,⁴⁰ the teachings of research studies conducted by academics, government agencies and private consulting organizations,⁴¹ the practice standards of professional legal organizations,⁴² and extensive case law addressing the effective assistance of counsel.⁴³ Much material in these categories was cited in the 357 footnotes that accompanied the published document,⁴⁴ and more was to be found in the training materials used by the defense bar, in state-level studies and resulting officially-adopted performance standards, and elsewhere.⁴⁵

Because a great deal of Supreme Court case law supports reliance on such materials for the purpose of establishing professional norms when the performance of counsel is challenged as unconstitutionally ineffective, it is unsurprising that the authoritative and accessible codification represented by the *ABA Guidelines* has been repeatedly utilized by that Court and hundreds of others when addressing such challenges in capital cases.⁴⁶

Indeed, there would be little to discuss were not for the unfortunate per curiam opinion in *Bobby v. Van Hook*.⁴⁷ There, Justice Alito wrote a solo concurrence suggesting that the *ABA Guidelines* had “no special relevance in determining whether an attorney’s performance meets the standard required by the Sixth Amendment.”⁴⁸ The majority opinion reiterated the uncontroversial proposition that an assessment of ineffectiveness should be based on “the professional norms prevailing when the representation took place.”⁴⁹ But it slipped into imprecise terminology that might suggest that a professional norm embodied in the *Guidelines* only sprang into existence on the date that the ABA formally adopted the codification.⁵⁰

The result, Ms. Olson-Gault writes, has been confusion in the lower courts and an unwarranted reluctance on the part of practitioners to rely upon the *ABA Guidelines* to establish prevailing norms.⁵¹

40. Stetler & Tabuteau, *supra* note 20, at 748.

41. *See id.* at 746.

42. *See id.* at 741-42.

43. *See id.* at 747.

44. *See id.* at 745-47 & nn. 84-134 (exhaustively arranging the footnotes to the *ABA Guidelines* by what sorts of authority they rely upon).

45. *See* Olson-Gault, *supra* note 36, at 1296.

46. *See id.* at 1279, 1288-95.

47. 558 U.S. 4 (2009).

48. *Id.* at 13-14 (Alito, J. concurring).

49. *See id.* at 7.

50. *See* Olson-Gault, *supra* note 36, at 1291-93.

51. *See id.* at 1280.

The confusion may be dispelled fairly easily. As described above,⁵² the *Guidelines* did not enact standards; they codified norms that “were already well-established as the standard of care,” and had been for years if not decades.⁵³ The courts should treat the *Guidelines* accordingly. To assist them, “[r]ather than saying that the Guidelines were ‘in effect’ on a certain date, counsel should phrase their arguments in terms of the prevailing norms at a certain time, which were later codified in an edition of the Guidelines.”⁵⁴

But counsel will still need to support those arguments with evidence. For that purpose, they can now turn to an extensive and user-friendly collection of databases that the ABA has created and that Ms. Olson-Gault’s Article describes.⁵⁵ Tellingly, although Mr. Van Hook was executed in July of 2018,⁵⁶ a search of these resources shows that the professional norms at issue in his case had been established more than two decades before publication of the *Guidelines* “and were unquestionably ‘in effect’ at the time of Mr. Hook’s trial.”⁵⁷

When the first of these symposia was published fifteen years ago, I wrote that creative thinking and inventiveness are the indispensable requisites for successful capital representation.⁵⁸ Whatever may become of the death penalty in the years ahead, there is every reason to believe that the productive multi-disciplinary brainstorming and dedication to justice which has long defined the field and which the Articles in this Symposium exemplify will continue “as long as the ultimate criminal sanction—execution—remains available in any jurisdiction.”⁵⁹

52. See text accompanying notes 38-45.

53. Olson-Gault, *supra* note 36, at 1293.

54. *Id.*

55. See *id.* at 1293-304.

56. See *id.* at 1282 n.23; Marty Schladen, *Ohio Executes Convicted Killer Robert Van Hook*, THE REPOSITORY (July 18, 2018, 11:17 AM), <http://www.cantonrep.com/news/20180718/ohio-executes-convicted-killer-robert-van-hook>.

57. *Id.* at 1304.

58. See Freedman, *Introduction*, *supra* note 4, at 905-06.

59. Stetler & Tabuteau, *supra* note 21, at 749.
