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TESTING THE DEATH PENALTY

By Paul Charlton, Quintin Cushner, and William Knight*

Prosecutors possess the singular authority to seek the death penalty. Although recent history demonstrates such power can be abused, no universally recognized standard has been implemented to ensure prosecutors in death penalty cases are qualified to undertake this tremendous responsibility. The highly controversial nature of capital punishment, potential for legal error in such cases, and principles of judicial fairness and efficiency all favor a more rigorous means of vetting prosecutors before they are empowered to seek to take another person's life. This Article proposes that one way to address this issue would be to require prosecutors to become members of a "Capital Bar"—through successful completion of rigorous written and oral examinations, continuing education requirements, and meeting certain character and fitness standards—all to reduce the risk of misapplication of the ultimate sanction.

Introduction

The Great Seal of the United States is a powerful and omnipresent symbol whose use and likeness are protected by federal law.[1] Depicted on the Great Seal is the bald eagle, holding in its right talons the olive branch of peace, and in its left talons the arrows of war.[2] Notably, the head of the eagle faces the olive branch of peace.

An exception to this depiction can be viewed in the Washington D.C. headquarters of the United States Department of Justice, the Robert F. Kennedy Department of Justice Building. The unremarkable exterior of the Justice Building belies the beautiful interior, which is done in an art deco style and decorated throughout by murals painted as part of the New

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[1] *See* 18 U.S.C. § 713.

[2] For the official history of the great seal of the United States, *see* http://www.state.gov/documents/organization/27807.pdf.

Deal-era Federal Art Project.[3] Above the entryway to the office of the United States Attorney General, the most powerful prosecutor in the United States, the mural depicts the Great Seal with the same bald eagle clasping the same arrows of war and olive branch of peace, but with a crucial difference: The eagle is facing the arrows of war.[4]

It is perhaps fitting that an artist working in the 1930s painted the eagle in this manner. During this earlier era, the dominant objective of criminal prosecutors was to convict the defendant.

However, a paradigm shift in this manner of thinking occurred in the late 1930s and early 1940s. That was when the leadership of the Department of Justice, very likely influenced by the United States Supreme Court, began to develop the ethic, now familiar, that prosecutors are in fact ministers of justice. As the Supreme Court stated in *United States v. Berger*:

> The United States Attorney is the representative not of an ordinary party to a controversy but, of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.[5]

Life for prosecutors today is as complicated as ever. Not only must prosecutors play the dual roles articulated in *Berger*, but they must work to continually improve both their practice and the justice system in which they operate. And perhaps no substantive prosecutorial practice area is more in need of improvement than the prosecution of death penalty cases.

An author of this Article, who served as United States Attorney for the District of Arizona from 2001 through 2007, has first-hand experience as a prosecutor charged with the difficult tasks of deciding what criminal acts warrant the ultimate punishment, and which prosecutors should seek that punishment in court. During his time as United States Attorney, the author was responsible for assigning death penalty prosecutors in the case of Lezmond Mitchell.[6] Mitchell was charged in the United States District

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[3] *See* Rafael Alberto Madan, *The Sign and Seal of Justice*, 7 AVE MARIA L. REV. 123, 173 n.141; Antonio Vasaio, Justice Mgmt. Div., U.S. Dep't of Justice, *The Fiftieth Anniversary of the United States Department of Justice Building: 1934-1984* at 98-99 (1984).

[4] *See id.*

[5] 295 U.S. 78, 88 (1935).

[6] For more information regarding the Mitchell case, see *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007).

Court for the District of Arizona with double homicide, *inter alia*.[7] The evidence showed that Mitchell fatally stabbed Alyce Slim, 63, and then slashed the throat of Ms. Slim's nine-year-old granddaughter, before crushing the young girl's head with several large rocks.[8] The bodies were then dismembered and buried.[9]

After a long lapse in the use of the death penalty in federal cases, the Federal Death Penalty Act of 1994 had authorized its use.[10] The Attorney General and the U.S. Attorney's Office for the District of Arizona agreed that seeking the death penalty against Mitchell was appropriate. The next step was to choose prosecutors with the requisite experience and judgment to carry out the serious task of prosecuting this death penalty case.

No one in the U.S. Attorney's Office at that time had gone to trial on a federal capital matter, as this was the first such case in the District of Arizona in well over a decade. Further, no formal vetting or evaluation process was in place to assist in assigning this case. Therefore, an author of this Article, in consultation with others, relied upon what prosecutors have relied upon for generations in assigning such cases: the reputation and experience of the persons to be selected. Two Assistant U.S. Attorneys had prosecuted death penalty cases in Arizona state court, and based upon those credentials—and their strong reputations as ethical and capable attorneys—they were chosen to prosecute the case. Mitchell was convicted of first-degree murder and the jury imposed the death penalty. Mitchell remains on death row.[11]

In a second murder case, an author of this article was confronted with facts in which a methamphetamine dealer had allegedly killed his supplier in a case based primarily upon solid circumstantial evidence.[12] However, no forensic evidence in that case directly linked the defendant to the victim. Further, the victim's body was not recovered. Based upon these factors, the author recommended that the federal government not seek the death penalty.[13]

However, the Attorney General's Capital Case Review Committee recommended the death penalty, and subsequently Attorney General Alberto Gonzales instructed the U.S. Attorney's Office to seek death.[14]

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[7] *Id.* at 945.

[8] *Id.* at 942-43.

[9] *Id.* at 943.

[10] *See* 18 U.S.C. §§ 3591-98.

[11] *See Mitchell*, 502 F.3d 931.

[12] Officer of the Inspector General, U.S. Dep't of Justice, *An Investigation into the Removal of Nine U.S. Attorneys in 2006* at 227-28 (September 2008), *available at* http://www.justice.gov/oig/special/s0809a/final.pdf.

[13] *See id.* at 228-34.

[14] *See id.*

An author of this Article objected, and was later removed from his position as U.S. Attorney for the District of Arizona with this disagreement cited as the reason.[15] Attorney General Gonzales' successor, Michael Mukasey, subsequently concluded the death penalty was not appropriate in this case. The Defendant then pleaded guilty to murder, drug, and weapon violations and agreed to a life sentence.[16]

Thus, in the personal experience of one of this Article's authors, the manner in which prosecutors are currently chosen for death penalty cases is based not upon a rigorous vetting methodology, but rather on an anecdotal and word-of-mouth process. Critically, the individuals who comprise the Attorney General's Capital Case Review Committee are not required to be, and are often not "death penalty" prosecutors.[17] They too are selected through anecdotal evidence.

This system, in which a supervisor assigns a prosecutor who has proven his or herself capable on other cases to a death case, is perhaps an intuitive and efficient way to make this decision. However, given the grave responsibility prosecutors who seek the death penalty possess, a more rigorous system is needed to help ensure that only the best qualified people are selected for this extremely difficult job.

For this reason, the Article proposes a move away from the use of anecdotal evidence in favor of a more rigorous vetting process we call: a "Capital Bar Exam." This exam would provide a metric, an objective standard, which would give the public, the judiciary, and the defense bar an opportunity to see that the individuals who walk into court are capable and ethical enough, and have met a required standard before they were authorized to seek to impose the ultimate penalty.

The authors wish to make clear that the suggestion of a Capital Bar Exam is not intended to either promote or deter the death penalty. But the death penalty is a reality in the United States. It is imposed in the federal system and it is imposed in many states, including the State of Arizona. If it is going to be a reality, it is our obligation to ensure that it is imposed in the most just fashion—there can be no room for error. It is our belief that

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[15] *See id.*

[16] *See id.* at 234 n.151. Under the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976, federal defendants sentenced after November 1, 1987 serve determinate terms without the possibility of early parole. Accordingly, a life sentence issued by a federal court means that the defendant will actually spend the rest of his or her natural life imprisoned. *See generally* U.S. DEPARTMENT OF JUSTICE, HISTORY OF THE FEDERAL PAROLE SYSTEM (2003), *available at* http://www.justice.gov/uspc/history.pdf.

[17] *See* U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW, at Part I.B (June 6, 2001), *available at* http://www.justice.gov/dag/pubdoc/deathpenaltystudy.htm.

the imposition of a Capital Bar Exam requirement will improve the justice system.

A Capital Bar Exam will benefit the system in numerous ways. It would deter the risk of prosecutorial misconduct by testing and reinforcing the obligations prosecutors have to the Court, to opposing counsel, and, significantly, to the defendant. Further, a Capital Bar Exam would serve to give the public greater confidence that the people who are representing them in court and who are empowered to seek the ultimate penalty are qualified to do so. It would also give the bench greater confidence that the people before them representing the government possess qualifications and knowledge of the death penalty. Most importantly, the imposition of the Capital Bar would work to reduce wrongful convictions.

An exhaustive description of the exact nature of a Capital Bar Exam is beyond the scope of this Article. However, we believe that the U.S. Department of Justice should be empowered with the responsibility of setting the bar. That agency has the resources and reach to impose such standards. As a basic component, we recommend that the Capital Bar Exam contain a character and fitness requirement. Further, the exam should cover criminal procedure subjects spanning from issues that arise from the day a homicide takes place to the last post-conviction issues. Additionally, the Capital Bar Exam should thoroughly test the rules of ethics that apply to prosecutors.[18] And the Capital Bar Exam should test developments in the capital punishment arena so that only the most capable and knowledgeable prosecutors are able to seek to take another person's life.

Prosecutors and Problems with the Death Penalty

The authors of this article accept as true that the vast majority of prosecutors are well-intentioned people who seek to convict the guilty while ensuring that no one who is innocent is ever wrongfully prosecuted, much less convicted. Despite this, the system for capital punishment is deeply flawed and, tragically results in convictions of innocent people, often because of the actions of prosecutors.[19]

A three-year study conducted by the Department of Justice identified ten factors common to wrongful convictions—at least eight of which are

[18] Such issues include conduct before grand juries, obligations to turn over evidence to defense counsel, complications pertaining to witnesses, handling a confidential informant, and the role of surviving family members.

[19] Ineffective assistance of defense counsel is a common topic of death penalty appeals, and an important topic to consider when discussing problems with the capital punishment system. However, it is beyond the scope of this Article, which discusses ways to improve the prosecution of death penalty cases.

within the direct or indirect control of the prosecutor.[20] These included *Brady* violations, overly suggestive witness coaching, improper closing arguments, tunnel vision in which errors were disregarded and exculpatory evidence not considered, and perjured informant testimony.[21] Further, an often cited study led by Columbia Law School Professor James Liebman found a 68 percent error rate in death penalty cases, meaning "serious reversible error [was found] in nearly 7 of every 10 of the thousands of capital sentences that were fully reviewed" between 1973 and 1995.[22]

"In research on erroneous convictions, the most commonly established transgression is the prosecution's failure to turn over exculpatory evidence."[23] In a substantial number of cases, reversal of death penalty convictions occurred after an appellate court found "prosecutorial suppression of evidence of innocence."[24] Such *Brady* violations "can be caused by inexperienced prosecutors who may not recognize what information should be shared with the defense or by malicious misconduct."[25] This reported prosecutorial misconduct, whether or not it is a product of poor training or deficiencies in character and fitness manifested in bad intent, erodes trust in the justice system, and in law enforcement. This is true even when a death penalty conviction is not overturned.[26]

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[20] *See* JOHN B. GOULD, ET AL., PREDICTING ERRONEOUS CONVICTIONS: A SOCIAL SCIENCE APPROACH TO MISCARRIAGES OF JUSTICE (2013), *available at* http://www.american.edu/spa/djls/prevent/upload/Predicting-Erroneous-Convictions.pdf; David Stout, *The Wrongfully Accused: Who Among the Innocent are Cleared, and Who are Not?*, MAIN JUSTICE: POLITICS, POLICY AND THE LAW (March 14, 2013), *available at* http://www.mainjustice.com/2013/03/14/the-wrongfully-accused-who-among-the-innocent-are-cleared-and-who-are-not/; D.S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125-83.

[21] *See* GOULD, *supra* note 20.

[22] James S. Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, COLUM. L. SCH., PUBLIC LAW RESEARCH PAPER, at 5 (2000), http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf.

[23] *See* GOULD, *supra* note 20, at 19.

[24] Jason Liebman, et al., *A Broken System, Part II: Why There Is So Much Error in Capital Case, and What Can Be Done About It*, at 41 (2002), *available at* http://www2.law.columbia.edu/brokensystem2/report.pdf.

[25] *See* GOULD, *supra* note 20, at xiii.

[26] *See* Liebman, *supra* note 22, at 23; Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, at N1 ("Between 1993 and 1997, there were 167 published opinions in which the Illinois Appellate Court or Illinois Supreme Court found that prosecutors committed some form of misconduct that could be considered harmless. In 122 of the cases—or nearly three out of four times—the reviewing court affirmed the conviction, holding that the misconduct was 'harmless'"); Spencer Hunt, *Clouded Cases. Prosecutors' Conduct Risks Reversals*, CINCINNATI ENQUIRER, Sept. 10, 2000, at A1 (reporting the Ohio Supreme Court "repeatedly has criticized prosecutors for making improper courtroom statements to win 14 death penalty

In addition to prosecutorial misconduct during the discovery and trial stages of litigation, aggressive charging by prosecutors was a cause of the startlingly high reported error rate.[27] Additionally, the decision to pursue the death penalty must often be made amid incomplete information and tremendous public outcry.[28] Liebman states that "over-charging of this sort in turn puts strong pressure on officials to cut corners and overstep bounds to avoid defeat, and to secure a capital conviction and sentence notwithstanding the weak evidence and aggravation or the strong mitigation."[29] The Department of Justice study also recommended "rigorous screening of cases by seasoned prosecutors" to ensure that the death penalty was judiciously utilized.[30] Even if the correlation between seeking death in marginally aggravated cases and mistakes at trial holds up, it is logical that seeking death in cases without a strong articulable reason for doing so diminishes the legitimacy of the death penalty.

Problems with the death penalty are certainly not foreign to Arizona. In Liebman's study, Arizona was one of ten States with an error rate of over 75%, and one of three States that was at the time pushing to increase the speed and number of executions.[31] Further, the doubling of death penalty recommendations that occurred in Maricopa County might make it more likely that expensive reversals, and the accompanying diminishment in public trust in the judgment of prosecutors, are on the horizon.[32]

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cases over the past 12 years," and "has written at least four lengthy opinions since 1988 telling prosecutors to stop the misconduct" even in cases where reversals did not occur); *Prosecutorial Restraint: Death Penalty Allows No Margin for Error*, COLUMBUS DISPATCH, July 15, 2000, at 6A (reporting Ohio Supreme Court "express[ed] frustration" and "'mounting alarm'" over prosecutorial misconduct in cases where death penalty nonetheless affirmed).

[27] Liebman, *supra* note 24, at 45.

[28] *See id.* ("[W]e report evidence that reversible error is related to pressures to impose death verdicts in marginal cases where the evidence of guilt or facts calling for a death sentence are weak. This tendency may be especially strong when prosecutors make snap charging decisions absent full investigation in response to outrage at a serious crime or doubts about the ability of existing law enforcement strategies to solve the crime and prevent its recurrence").

[29] *Id.*, at 409.

[30] *See* GOULD, *supra* note 20, at 86.

[31] *See* Liebman, *supra* note 22, at 8.

[32] Jennifer Steinhauer, *Policy Shift on Death Penalty Overwhelms Arizona Court*, N.Y. TIMES, March 5, 2007, *available at* http://www.nytimes.com/2007/03/05/us/05death.html; Terry Carter, *Pending Death Penalty Cases Weigh Against Maricopa County*, A.B.A. J., Apr. 1, 2010, *available at* http://www.abajournal.com/magazine/article/pending_death_penalty_cases_weigh_against_maricopa_county/.

Our Proposition: The Capital Bar Exam

The purpose of our proposition is to create a metric—an objective standard—that will give the public and the judiciary an opportunity to see that the individuals who walk into court are sufficiently capable and have arrived at an ethical standard that we can all agree ought to be required before someone may seek to impose the ultimate sanction. Although an exhaustive exposition of the contours that our proposed Capital Bar Exam might take is beyond the scope of this Article, a cursory overview of its basic elements will help demonstrate how implementing such an exam might improve our justice system. To that end, here follows a specific list of suggested exam criteria and an explanation of how these components might improve capital prosecution.

A. Individual Components of the Capital Bar Exam

As mentioned above, only the Department of Justice has the resources and influence to implement the first Capital Bar Exam.[33] But what, exactly, should the Department of Justice's capital bar examiners look for?

First and foremost, the Capital Bar Exam must contain a stringent character and fitness component. Most, if not all, state bar organizations already require their members to be of good moral character.[34] Although this character and fitness application and subsequent investigation is typically quite rigorous,[35] the moral fitness of admitted members, including prosecutors, is typically not revisited unless an admitted member has done something to warrant disciplinary attention. Most prosecutorial agencies also engage in independent background investigations—albeit of varying degrees of stringency—before hiring attorneys, but these, too, are typically done only once.[36]

Yet under both the anecdotal system currently in place and the proposed Capital Bar Exam, it is unlikely that a prosecutor will ever handle a death penalty case until many years have passed since his or her moral fitness was last examined. If death penalty prosecutors are entrusted with the great and singular authority to intentionally seek to take a life, then it is right and it is appropriate that somebody have another look

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[33] See Introduction, *supra*.

[34] *See*, *e.g.*, Rule 34(b)(1)(B), Ariz. R. S. Ct. (2013).

[35] *See, e.g.*, "Procedure before the Committee on Character and Fitness," Rule 36, Ariz. R. S. Ct. (2013),

[36] *See* Craig S. Denney, *How do You Become an Assistant U.S. Attorney?*, A.B.A. PUBL'NS, http://www.americanbar.org/publications/young_lawyer_home/young_lawyer_archive/how_do_you_become_an_assistant_us_attorney.html.

at their character and fitness. In fact, given the highly political and divisive nature of the death penalty,[37] this component of the Capital Bar Exam ought to be much more stringent than the standard moral fitness requirements of general bar membership. Further, the review should be ongoing. Capital Bar members should also be required to engage in continuing legal education above and beyond the mandated minimum to ensure members possess the most current legal knowledge. In this way, the examiners can demonstrate to the public that the people entrusted with discretion over life and death exhibit the very highest moral fortitude.

This leads to our second recommendation: In order to ensure objectivity and fairness in Capital Bar membership, the examiners themselves should be highly qualified and of diverse adversarial postures. Examination by a panel of distinguished prosecutors, members of the defense bar, and even members of the bench will further ensure that death penalty prosecutors are of exceptional character and fitness.[38] Attorneys who are not able to remove their personal ambitions, feelings, and beliefs about crime and punishment from the highly complex decision-making process in death penalty cases should be screened from admission.[39]

Third, bearing in mind certain inescapable realities of capital trial practice that often give rise to mistakes and appealable issues, we suggest applicants meet a minimum experiential requirement and that the exam contain an oral component. Death penalty prosecutors, like most criminal practitioners, are regularly required to think on their feet while in court and under fire. Unlike most criminal practitioners, however, the split-second decisions death penalty prosecutors make in court are regularly reviewed *ad infinitum* and from the pages of an ice-cold record.[40]

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[37] *See* Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283 (2008); James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255 (2011).

[38] The authors discussed the possibility of including lay community members on the panel of examiners, like some police agencies do with "oral boards" when vetting police officers to use lethal force. Unfortunately, the vicissitudes of criminal law practice are too vast and technical for non-lawyers to analyze with the thoroughness required of a specialized bar examiner.

[39] *See* Peter Margulies, *True Believers at Law: National Security Agendas, The Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1 (2008) (discussing the phenomenon and impact of ideological "true believers" in criminal law practices); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 949 (1999) (discussing ramifications of "true believers" working as prosecutors in the Southern District of New York).

[40] *See, e.g.*, *Ryan v. Gonzales*, 568 U.S. __ (2013) (slip opinion) (U.S. Supreme Court's unanimous reversal of 9th Circuit's unanimous vacating of Arizona death penalty case on habeas procedural competency grounds), *available at*

Accordingly, we suggest that the Capital Bar Exam mirror, to a degree, the "oral board" exams police officers undergo to qualify to carry a weapon and use lethal force.[41] An additional oral board component would mimic the high-stress environment of a death penalty trial, requiring exam takers to remain calm while drawing on their legal knowledge to answer technical questions.

Fourth, some minimum experiential requirement, such as four years of dedicated criminal trial practice, would guarantee that death penalty prosecutors are capable of avoiding common pitfalls while appearing on the record. It is our belief that these requirements might obviate certain appellate reversals, particularly those based on so-called "cumulative prosecutorial misconduct."[42]

Finally, the written exam itself should thoroughly test the applicants' knowledge of prosecutorial ethics and the substantive law of capital punishment. Prosecutorial misconduct, intentional or otherwise, underlies all of the most common reasons for appellate reversals.[43] Accordingly, the Capital Bar Exam should analyze exhaustively the particular and unique professional standards to which prosecutors must adhere.[44] For example, the exam should cover such areas as the rules of ethics (with an emphasis on Rule 3.8, addressing "Special Responsibilities of a Prosecutor"),[45] a prosecutor's disclosure obligations under *Brady*[46] and its progeny,[47] who—if anyone—the prosecutor's client is,[48] what factors influence a prosecutor's discretion,[49] how to deal with confidential informants,[50]

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http://www.supremecourt.gov/opinions/12pdf/10-930_7k47.pdf.

[41] *See* Amaury Murgado, *Oral Board Preparation*, POLICE MAG. (July 10, 2012), *available at* http://www.policemag.com/channel/careers-training/articles/2012/07/oral-board-preparation.aspx.

[42] *See State v. Roque*, 213 ARIZ. 193, 228, 141 P.3d 368, 403 (2006).

[43] Liebman, *supra* note 22; Liebman *supra* note 24..

[44] For an in depth analysis of prosecutorial ethics, see R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS (2005).

[45] *Compare* Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427 (2009), *with* Frank O. Bowman, III, *A Bludgeon by Any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, 670 (1996).

[46] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

[47] *See generally* George E. West II, *A Prosecutor's Duty to Disclose: Beyond* Brady, 73 TEX. B.J. 546 (2010); Theresa A. Newman and James E. Coleman, Jr., *The Prosecutor's Duty of Disclosure Under ABA Model Rule 3.8(D)*, 34-MAR CHAMPION 20 (Mar. 2010); CASSIDY, *supra*, note 44, at ch. 5.

[48] *See* CASSIDY, *supra*, note 44, at ch. 1.

[49] *See id.* at chs. 3–4, 7–8; U.S. Attorney's Manual § 9-2.000, *et seq.*; NAT'L DIST. ATTORNEYS ASS'N., NATIONAL PROSECUTION STANDARDS (3d ed.), *available at* http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf.

conducting witness interviews,[51] preserving evidence both for trial and the inevitably lengthy appeal,[52] what—if any—role the surviving family should play in the prosecutor's internal process,[53] and more. In addition to prosecutorial ethics, the exam should test the applicants' knowledge of criminal procedure from the time a case is charged through carrying out the sentence. Among other things, applicants should demonstrate a thorough understanding of the history and current state of the death penalty, including areas that are in flux[54] and common defense strategies.[55]

B. Improving the Justice System

Together, these five generalized features of our proposed Capital Bar Exam will improve our system of justice. Stringent and ongoing character and fitness requirements will improve confidence in capital prosecutors, while simultaneously weeding out people without solid moral convictions. A diverse panel of bar examiners will keep ideologically divisive temperaments away from the Capital Bar. Experiential standards and oral boards will ensure that admitted members are sufficiently learned and capable in the courtroom. And a thorough examination of ethical and substantive legal knowledge will guarantee that only the best and brightest prosecutors handle these most difficult of all cases.

Conclusion

In a death penalty case, a prosecutor is allowed to methodically and intentionally seek to take another person's life. Therefore, it is right to

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[50] *See* R. Michael Cassidy, *"Soft Words of Hope:"* Giglio*, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129 (2004); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645 (2004).

[51] *See* CASSIDY, *supra*, note 44, at ch. 4.

[52] *State v. Grell*, __ Ariz. __ (2013) (*Grell III*) (vacating death penalty after finding defendant mentally retarded based upon sparse and decades-old childhood school records, under "independent review" of the trial record nearly fifteen years later still), *available at* http://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2013/CR-09-0199-AP.pdf.

[53] *See* Jonathan DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URB. L.J. 767, 785–86 (1999).

[54] One example is the relatively recent *Atkins* doctrine that prevailed in *Grell*, *supra*, note 52. *See generally* John H. Blume et. al., *An Empirical Look at* Atkins v. Virginia *and Its Application in Capital Cases*, 76 TENN. L. REV. 625 (2009).

[55] Ineffective assistance of counsel claims are inevitable in capital prosecution, and responding to them can be particularly difficult when defense attorneys concede inefficacy. *See, e.g.*, 82 AM. JUR. TRIALS 1, *Defending Against Claim of Ineffective Assistance of Counsel* (Originally published in 2002).

rigorously evaluate death penalty prosecutors through stringent and ongoing character and fitness requirements; experiential standards; and thorough oral and written examination of ethical and substantive legal knowledge by diverse examiners. It is our belief that by doing so, it will reduce the risk of wrongful convictions. For a minister of justice, there is no worthier goal.