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HOW IQ TESTS ARE PERVERTED TO JUSTIFY THE DEATH PENALTY

Research has identified embedded racism in IQ tests. Now, prosecutors in at least eight states are using that research—to legalize more executions.

DAVID M. PERRY · JAN 25, 2018

As a concept, IQ is terrible. The idea that we can reduce intelligence to a simple number, quantifiable in a test, exacerbates inequality in numerous racist, classist, sexist, and ableist ways. Not only do people have worth beyond their measurable cognitive ability, but IQ also routinely awards higher numbers to abled middle- and upper-class white males, reinforcing pre-existing ideologies in the name of "science." Over the last many decades, scholars and activists have pushed back against the regime of IQ testing in all contexts, often successfully.

Now, prosecutors in at least eight states have been hiring experts to testify about the racist nature of IQ, in order to kill more black and brown men.

The Supreme Court has slowly been carving out exemptions to the death penalty for people with intellectual disabilities. In 2002, the Supreme Court ruled in *Atkins v.*

Virginia that people with intellectual disabilities could not be executed, but left it up to the states to determine who is or is

not eligible for that protection. In 2014, in *Hall v. Florida*, the court ruled that a state can't use a simple IQ cut-off. Then, in last year's *Moore v. Texas*, the court ruled that states

X must consider the best psychiatric and medical information about disability when **CLOSE** determining disabled status. Still, IQ testing continues to play a major role, with a threshold of around 70 serving as the cutoff score, below which a person cannot legally be executed.

HOW MANY DEATH ROW PRISONERS ARE DISABLED? BY SOME METRICS, ALL OF THEM.

Here's where "ethnic adjustments" come in. The practice, as documented by attorney Robert Sanger in a 2015 article in the *American University Law Review*, adjusts IQ scores upward for people of color convicted of capital crimes. According to Sanger, prosecutors in Florida, Texas, Alabama, Tennessee, Missouri, California, Pennsylvania, and Ohio have all used ethnic adjustments to successfully impose the death penalty on people who otherwise might have been deemed exempt. In his article, Sanger works methodically through case after case, noting in particular the role played by expert witnesses for the prosecution, who testify to the racial biases of IQ testing. In most cases, these experts have never met the person convicted of the capital crime or assessed that person for disability, even as their testimony clears the way for execution.

At the end of his article, Sanger writes, "The idea of racially classifying a person and then using 'ethnic adjustments' to increase his or her IQ score, thereby qualifying that person for execution, is logically, clinically, and constitutionally unsound. In fact, when looked at more closely, it is a wonder how the practice has gone largely unchallenged over the last few years." When I spoke to him over the phone, Sanger confirmed to me that no clear constitutional challenge to the practice has emerged to his knowledge, and certainly not at the United States Supreme Court, or in California, where he practices law.

As I wrote last year, most people on death row are disabled. In reporting the story, I found that this fact presents a challenge to people trying to save lives: Do they fight for total abolition of the death penalty, or do they try to carve out ever-increasing exemptions? Everyone who ends up on death row has experienced a complex panoply of mitigating factors—intersecting disabilities, traumas, and inequities—that led them to be convicted of a capital crime. So anti-death-penalty lawyers look for narrow legal strategies to protect their specific clients, which of course is just what they should do, while slowly pushing new exemptions up through the court process to seek new exculpatory precedents. *Atkins*, *Hall*, and *Moore*—the big three Supreme Court decisions protecting people from intellectual disabilities—are the result of these Herculean efforts.

It's not enough. As Sanger writes, "A more profound conclusion of this article may be that the project of attempting to determine who should live and die is an endeavor lost from the beginning. Perhaps there is no way to devise a just means to implement an unjust result. If the state's executing prisoners is wrong, there can be no right way to do it." He's correct. Racism, ableism, and classism are too deeply held for incremental efforts to effect true change. Even the anti-racist work against the tyranny of the IQ test is being used to perpetuate the state's killing of people of color. Abolition is the only answer.

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