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# THE EUGENIC ORIGINS OF IQ TESTING: IMPLICATIONS FOR POST-ATKINS LITIGATION

Ajitha Reddy\*

## INTRODUCTION

During the early to mid-twentieth century, the pseudoscience of eugenics gained popularity among elites throughout western Europe and the United States.<sup>1</sup> Fascists and progressives alike found comfort in the promise of regulated human breeding amid the demographic chaos of Western industrialization and urbanization.<sup>2</sup> In the United States especially, a massive flood of new immigrants<sup>3</sup> prompted calls for “race-purifying” policies—such as marriage restrictions and forced sterilization—to protect the “well-born” from genetic degradation.<sup>4</sup>

Those considered well-born were almost exclusively upper class and of Nordic descent.<sup>5</sup> Eugenic validation of existing race and class hierarchies functioned tautologically: privileged ethnic groups were considered innately talented and biologically advanced. In this vein, renowned University of Chicago scholar and education expert John Franklin Bobbitt remarked of the northern European elite, “[o]ne must admit the high purity of their blood, their high average sanity, soundness and strength.”<sup>6</sup> Such assertions of genetic supremacy, propagated under the scholarly rubric of hereditary intelligence and

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1. The term “eugenics” was coined by English scientist Francis Galton in 1883 and is derived from Greek (*eu-* “good” + *genos* “birth”).

2. Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900–1930*, 16 *LAW & HIST. REV.* 63, 63–64 (1998).

3. Howard Markel, *Di Goldine Medina (The Golden Land): Historical Perspectives of Eugenics and the East European (Ashkenazi) Jewish-American Community, 1880–1925*, 7 *HEALTH MATRIX* 49, 56–57 (1997).

4. Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 *J. CONTEMP. HEALTH L. & POL’Y* 1, 5 (1996).

5. See EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE* 7 (2003).

6. *Id.* at 29.

character,<sup>7</sup> jangled through academic echo chambers on both sides of the Atlantic<sup>8</sup> with surprisingly little resistance.<sup>9</sup>

Throughout the early 1900s, eugenicists labored to devise objective methods of measuring and quantifying valued traits, including intelligence, in order to substantiate their hypothesis of Nordic genetic advantage.<sup>10</sup> Some of their more preposterous experiments involved measuring the crania of school children,<sup>11</sup> analyzing the facial asymmetry of criminals, and sketching the toes of prostitutes. Eugenicists struggled for years to produce compelling results, until the advent of Alfred Binet's intelligence scale in 1909 gave rise to standardized intelligence testing, colloquially known as IQ testing.<sup>12</sup>

Armed with this so-called objective methodology,<sup>13</sup> American eugenicists advanced a straw-man rationale for large-scale testing.<sup>14</sup> They reasoned that society needed to identify, segregate, and sterilize the "feeble-minded,"<sup>15</sup> initially defined as those with mental disabilities<sup>16</sup> but later extended to include any "unfit" person of low intelligence, character, or ethnicity.<sup>17</sup> In both Germany and the United States, persecution of the "feble-minded"<sup>18</sup> hastened a broader eugenic campaign against immigration, miscegenation, and other professed threats to Nordic ascendancy.<sup>19</sup>

In 1927, eugenic rhetoric condemning the "feble-minded" found its way into the nation's highest court.<sup>20</sup> In *Buck v. Bell*, the U.S. Supreme Court upheld the involuntary sterilization of Carrie Buck, a so-called "imbecile."<sup>21</sup> The Court noted that she was not only "feble-minded," but also "the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded

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7. STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 29 (W.W. Norton & Co. 1996) (1981).

8. PAUL A. LOMBARDO, "The American Breed": Nazi Eugenics and the Origins of the Pioneer Fund, 65 ALB. L. REV. 743, 754-55 (2002).

9. BLACK, *supra* note 5, at 75; HARRY BRUNIUS, *BETTER FOR ALL THE WORLD: THE SECRET HISTORY OF FORCED STERILIZATION AND AMERICA'S QUEST FOR RACIAL PURITY* 357 (2006).

10. GOULD, *supra* note 7, at 105-75.

11. *Id.* at 139 (discussing measurements of schoolchildren by Maria Montessori, founder of the Montessori pedagogy); *id.* at 156-59.

12. *Id.* at *passim*.

13. *Id.* at 189-90.

14. *Id.* at 204-07.

15. *Id.* at 188.

16. GOULD, *supra* note 7, at 196.

17. BLACK, *supra* note 5, at 63-73; BRUNIUS, *supra* note 9, at 358-59.

18. BLACK, *supra* note 5, at 77-78.

19. BLACK, *supra* note 5, at xvi-xviii; see also ELOF AXEL CARLSON, *THE UNFIT: A HISTORY OF A BAD IDEA* 397-404 (2001).

20. *Buck v. Bell*, 274 U.S. 200 (1927).

21. *Id.* at 205.

child.”<sup>22</sup> Chief Justice Oliver Wendell Holmes, writing for the majority, famously declared, “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.”<sup>23</sup>

The Court took a radically different approach seventy-five years later in *Atkins v. Virginia*, when it barred execution of persons with mental retardation, noting that they “have diminished capacities to understand and process information, communicate, abstract from mistakes and learn from experience, engage in logical reasoning, control impulses, and understand others’ reactions” and that these deficiencies “diminish their personal culpability.”<sup>24</sup> The difference in language between these two seminal cases is stark. In *Buck*, the Court’s concern is “all the world” rather than Carrie Buck; she is of a different “kind”—degenerate and inhuman. In *Atkins*, the Court puts itself in the defendant’s shoes and enumerates the cognitive impediments to death-eligible culpability.

This Article considers the gradual humanization of persons with mental retardation in the context of states’ continued reliance upon IQ tests to determine death penalty eligibility. Part II traces the eugenic origins of the IQ test.<sup>25</sup> As suggested above, the IQ test played a central role in the eugenics movement as a shibboleth designed to reaffirm Nordic supremacy and stratify the populace along ethnic, racial, and class lines. Part III examines eugenic persecution of individuals with mental retardation in Nazi Germany and the United States as a pretext for expanded state surveillance and control over all “undesirables.”<sup>26</sup> Finally, Part IV challenges the *Atkins* Court’s vestigial reliance on IQ tests and the now-debunked assumption that intelligence is static, unilinear, innate, and precisely measurable.<sup>27</sup> It also explores whether the Court’s problematization of personal culpability for those deemed mentally retarded invites logical extension to similarly situated disabled groups.

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22. *Id.*

23. *Id.* at 207.

24. *Id.*

25. See *infra* notes 28–65 and accompanying text.

26. See *infra* notes 66–81 and accompanying text.

27. See *infra* note 82–84 and accompanying text.

## II. THE EUGENIC ORIGINS OF INTELLIGENCE TESTING: A "SCIENCE" OF SORTING

Alfred Binet's intelligence scale, a prototype for the Stanford-Binet IQ test,<sup>28</sup> was developed with the sole purpose of identifying French children with developmental disabilities so that they could receive extra help in school.<sup>29</sup> Binet's scale assigned children a mental age based on a comparison of their skills with those of "normally functioning" children.<sup>30</sup> Binet explicitly warned against dangerous and unsupported extrapolation of his work, such as using his tests to peg normal children and adults on a single, linear scale of immutable intelligence.<sup>31</sup> Notable American eugenicist, Henry H. Goddard, eager to catalog Americans along just such a scale, promptly ignored Binet's warnings, translated the tests into English, and pushed for their widespread use.<sup>32</sup>

Known as the father of intelligence testing in the United States, Goddard used a perversion of Binet's intelligence scale to rank those he considered feebleminded into varying degrees of mental incompetence: idiots (pre-verbal), imbeciles (illiterate), and morons (high-functioning).<sup>33</sup> For Goddard, morons, or those with mental ages of eight through twelve,<sup>34</sup> posed the gravest eugenic threat because of the ease with which they could pass for normal and reproduce. Goddard found morons wherever he looked: criminals, alcoholics, prostitutes, and anyone "incapable of adapting themselves to their environment and living up to the conventions of society or acting sensibly."<sup>35</sup> Most immigrants also fit this classification.<sup>36</sup> Goddard tested immigrants arriving at Ellis Island and found that "[t]he intelligence

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28. GOULD, *supra* note 7, at 196.

29. *Id.* at 182.

30. *Id.* at 179-80.

31. *Id.* at 182-84, 388. Specifically, Binet noted that "[s]ome recent thinkers seem to have given their moral support to these deplorable verdicts by affirming that an individual's intelligence is a fixed quantity, a quantity that cannot be increased. We must protest and react against this brutal pessimism; we must try to demonstrate that it is founded on nothing." *Id.* at 388 (citing ALFRED BINET, *LES IDÉES MODERNES SUR LES ENFANTS* 101 (1909)).

32. *Id.* at 188-90.

33. *Id.* at 188. Binet originally labeled the highest functioning group of developmentally disabled children "débile" (French for "weak"), but Goddard changed the label to "moron," a term he coined (derived from *moros*, Greek for "stupid and foolish"). BLACK, *supra* note 5, at 78.

34. GOULD, *supra* note 7, at 188.

35. *Id.* at 191. In addition, when New York City allowed Goddard to test thousands of children attending public schools, Goddard identified over 15,000 "feeble-minded" schoolchildren for whom he recommended forced segregation and sterilization. BRUNIUS, *supra* note 9, at 204 (citing *Findings 15,000 Pupils Are Feeble Minded: Dr. H.H. Goddard Classes the Public School Defectives as High as 2 Per Cent*, N.Y. TIMES, Feb. 8, 1913, at 10).

36. BLACK, *supra* note 5, at 78-79.

of the average third-class immigrant is low, perhaps of moron grade.”<sup>37</sup> Goddard concluded that “immigration of recent years is of a decidedly different character from the early immigration. . . . We are getting the poorest of each race.”<sup>38</sup>

Contemporary critics noted the obvious flaws of eugenicists’ methods and gross misrepresentations of genetic knowledge.<sup>39</sup> For example, prominent journalist Walter Lippman said this of the eugenicists’ self-congratulatory findings: “Obviously, this is not a conclusion obtained by research. It is a conclusion planted by the will to believe.”<sup>40</sup> Clarence Darrow further cautioned, “[a]mongst the schemes for remolding society [eugenics] is the most senseless and impudent that has ever been put forward by irresponsible fanatics to plague a long-suffering race.”<sup>41</sup>

Despite such scathing rebuke, eugenicists’ efforts to quantify the innate superiority of the ruling classes continued to enjoy widespread support.<sup>42</sup> The moneyed and powerful were fond of Social Darwinist narratives legitimizing the existing social order.<sup>43</sup> Goddard, playing up this conceit, told a group of Princeton undergraduates in 1919 that “workmen may have a 10 year intelligence while you have a 20. To demand for him such a home as you enjoy is [ ] absurd . . . . How can there be a thing such as social equality with this wide range of mental capacity?”<sup>44</sup>

Eugenicists dominated the academic discourse of their day and soon began to wield significant governmental power. In 1917, immediately following the United States’s entry into World War I, Harvard professor and President of the American Psychological Association (APA) Robert Yerkes rounded up the country’s leading eugenicist scholars to work on a project with the U.S. Army.<sup>45</sup> The group, known collectively as the APA’s Committee on Psychological Examination of Recruits, set out to develop an intelligence test that would distinguish between recruits of low intelligence (meant for cannon fodder) and

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37. GOULD, *supra* note 7, at 194–97.

38. *Id.* at 197.

39. BLACK, *supra* note 5, at 84. At the 1915 annual meeting of the American Psychiatric Association in Chicago, a skeptic pointed out that the mayor of Chicago himself had tested as a moron on one of Binet’s scales. GOULD, *supra* note 7, at 223.

40. GOULD, *supra* note 7, at 204.

41. Willrich, *supra* note 2, at 104 (quoting Clarence Darrow, *The Eugenics Cult*, AM. MERCURY, June 1926, at 137).

42. BLACK, *supra* note 5, at 29–32.

43. *Id.*

44. See GOULD, *supra* note 7, at 191.

45. *Id.* at 224.

recruits who could serve in supervisory officer positions.<sup>46</sup> Eventually, 1.75 million recruits took the Army's written Alpha Test or the pictorial Beta Test (for illiterates and non-English speakers).<sup>47</sup> Both tests relied heavily upon knowledge of elite and urban pop culture, as well as test-taking proficiency.<sup>48</sup> As one might expect, the results of testing reinscribed Nordic supremacy: eighty-nine percent of all African Americans and forty-seven percent of whites, mostly from southern and eastern European countries, were deemed morons—that is, mental functioning below that of normal thirteen year olds.<sup>49</sup> However, just 0.2% of recruits of German origin tested below a mental age of thirteen.<sup>50</sup>

Although the U.S. Army had little use for findings indicating that a majority of its recruits were intellectually unfit for service, Yerkes's team used the testing data to advance their theories of hereditary intelligence and corresponding political agendas, such as the enactment of immigration and sterilization laws to prevent the "feebleminded" from reproducing.<sup>51</sup> Moreover, the U.S. Army's use of the test during World War I sanctioned intelligence testing in other areas,<sup>52</sup> spawning a battery of standardized tests still used today, including the Scholastic Aptitude Test and related aptitude tests.<sup>53</sup> These tests were used to justify the denial of admission of non-elites into institutions, mainly of higher education, despite these institutions' purported commitment to

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46. BLACK, *supra* note 5, at 80–82; GOULD, *supra* note 7, at 224–25.

47. See GOULD, *supra* note 7, at 224–25.

48. See BLACK, *supra* note 5, at 81, 83; GOULD, *supra* note 7, at 224–25.

49. BLACK, *supra* note 5, at 81.

50. *Id.* at 82.

51. RUTH CLIFFORD ENGS, *THE EUGENICS MOVEMENT: AN ENCYCLOPEDIA* 120 (2005); GOULD, *supra* note 7, at 254.

52. See BLACK, *supra* note 5, at 83. Princeton psychologist Carl Brigham advanced Yerkes's findings in his 1922 book, *A Study of American Intelligence*. Soon after the book's publication, he adapted the U.S. Army's Alpha Test for use as a college entrance exam at Princeton. Later, the college board asked Brigham to create a qualifying exam that soon became known as the SAT. *Id.* at 82–83.

53. *Id.* Brigham later renounced the eugenic premise:

[The test movement] accompanied one of the most glorious fallacies in the history of science, namely, that the tests measured *native intelligence* purely and simply without regard to training or schooling. I hope nobody believes that now. The test scores very definitely are a composite including schooling, family background, familiarity with English . . . . The "*native intelligence*" hypothesis is dead.

NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 34 (2000) (emphasis in original).

economic mobility.<sup>54</sup> By the 1950s, intelligence testing became a routine facet of work and school life nationwide.<sup>55</sup>

The standardized tests used today are not that different from the Alpha and Beta Tests administered during World War I,<sup>56</sup> although the scoring has been adjusted to ensure that very few people are on the extreme ends of high and low intelligence.<sup>57</sup> Both the Alpha and Beta Tests and the currently administered tests measure cultural conditioning and learned scholastic aptitude (as opposed to innate intelligence) with some accuracy in predicting success in school.<sup>58</sup> Now as then, the poor and those otherwise socially disadvantaged score lower,<sup>59</sup> and data, aggregated by race and class, are used to promote the interests of the ruling elite.<sup>60</sup>

Moreover, Yerkes's team of eugenicists laid the groundwork for certain assumptions that are made today about intelligence and intelligence tests: (1) intelligence is static; (2) it can be precisely measured; (3) it is possible to design a testing instrument capable of peeling back layers of political and socioeconomic shrouding to reveal a true essence of intelligence; (4) this essential intelligence can be expressed with a single number or with several numbers; and (5) the purpose of unmasking this essential intelligence is to allow society to identify and promote the best and brightest among us.<sup>61</sup>

The truth is that no such test exists. Intelligence is fluid, multi-faceted,<sup>62</sup> and irreducible to a numeric standard.<sup>63</sup> Moreover, the United States is not a meritocracy. Privilege is reproduced generation after

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54. The tests offered a seemingly sound rationale for sorting by innate merit as opposed to relative privilege. In fact, as Lemann indicates, for the first few decades, the tests were mainly used by the nation's top schools to identify worthy scholarship candidates. Later, as standardized testing became more widespread, it served to reinscribe the notion that the privileged classes were "participating (and succeeding) in a great, broad, fair, open national competition." LEMANN, *supra* note 53, at 41, 343.

55. *See id.* at 344.

56. BLACK, *supra* note 5, at 83.

57. *See* GOULD, *supra* note 7, at 243–46.

58. *See* LEMANN, *supra* note 53, at 346–51.

59. *See* GOULD, *supra* note 7, at 368–90.

60. *See, e.g.*, RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994) (arguing that there are innate cognitive differences among whites, African Americans, and Asian Americans). Because ethnic differences in intelligence reflect complex patterns, no overall generalization about them is appropriate. Ulric Neisser et al., *Intelligence: Knowns and Unknowns*, 51 *AM. PSYCHOLOGIST* 77, 97 (1996).

61. *See* GOULD, *supra* note 7, at 367–90.

62. *See* Neisser et al., *supra* note 60, at 77, 97:

It is widely agreed that standardized tests do not sample all forms of intelligence. Obvious examples include creativity, wisdom, practical sense, and social sensitivity; there are surely others. Despite the importance of these abilities we know very little about them:

generation. In an actual meritocracy, implementing fair testing, poor children from the inner city would score as highly as rich, suburban kids. But, in our fake meritocracy, intelligence tests serve only as predictive measures of achievement (aptitude for success within the status quo) or as measures of oppression and social disadvantage.<sup>64</sup>

By exploiting persons with mental retardation, American eugenicists effectively turned a simple test designed to help French school children into a macabre sorting experiment meant to wipe out whole classes of human beings. Their fellow eugenicists in Germany devoured every morsel of bogus data gathered from the Army's intelligence testing and took the eugenics movement to its terrifying, if logical, next step.<sup>65</sup>

### III. EUGENIC PERSECUTION OF "THE MENTALLY RETARDED"

The Nazi campaign of medicalized killing, also called "euthanasia," began with the murder of a single boy.<sup>66</sup> Baby Knauer—born blind, mentally retarded, and missing both an arm and a leg—was killed by lethal injection or gradual starvation after a team of University of Leipzig doctors agreed with the Knauer family and Hitler's own physician that the baby's life was not worth living.<sup>67</sup>

German eugenicists preached that persons with mental retardation were "useless eaters,"<sup>68</sup> undeserving consumers of precious, finite resources, and polluters of the Aryan gene pool.<sup>69</sup> Somewhat more secretly (at least at first), and in collusion with a cadre of German doctors, midwives, and bureaucrats, the Nazis built an efficient state apparatus to oversee the killing of boys and girls with mental retardation and other physical or developmental disabilities in euthanasia centers such as Hadamar.<sup>70</sup> They started with infants, moved on to

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how they develop, what factors influence that development, how they are related to more traditional measures.

*Id.* at 97.

63. GOULD, *supra* note 7, at 56–57.

64. *See id.*; LEMANN, *supra* note 53, at 64–65.

65. *See* BLACK, *supra* note 5, at 261–77.

66. Robert Jay Lifton, *German Doctors and the Final Solution*, N.Y. TIMES, Sept. 21, 1986, at 64.

67. *Id.* Upon receiving a letter from Baby Knauer's father or grandmother asking permission to put the boy to death, Hitler dispatched his personal physician and close advisor Karl Brandt to investigate the matter and reassure doctors that they would not be punished. *Id.*

68. BLACK, *supra* note 5, at 317.

69. *Id.*

70. Ben Stein, *Everybody's Business: When Scarcity Leads to Madness*, N.Y. TIMES, Sept. 17, 2006.

toddlers, then teenagers and adults.<sup>71</sup> Next, they targeted the chronically infirm, including those with senility, epilepsy, or therapy-resistant paralysis.<sup>72</sup> Soon, noncitizens, Jews, and “Gypsies,” were euthanized.<sup>73</sup> Between 1939 and 1941, when a public outcry finally forced closure of the centers, more than one hundred thousand people had been slaughtered in Nazi euthanasia centers. These were hideous precursors to Auschwitz, Treblinka, and other concentration camps, in which several hundred thousand more “degenerates” were sterilized throughout the 1930s.<sup>74</sup>

In the United States, eugenic persecution of persons with mental retardation took a different course. Ideologically, many American eugenicists were progressive reformers who called for better housing for the poor, child welfare laws, better schools, and family planning in addition to eugenic sterilization, segregation, and marriage-restriction laws for the mentally ill and disabled.<sup>75</sup> All of these goals were consistent. Progressive eugenicists believed that state surveillance and control of undesirables (usually the poor and downtrodden) were necessary for the greater good.<sup>76</sup> To that end, they sent out armies of social workers to comb the slums and countryside, looking for persons with mental illness or other mental disabilities to sterilize and confine.<sup>77</sup> Tens of thousands of poor whites, immigrants, African Americans, and Native Americans were sterilized against their will and often without their knowledge.<sup>78</sup> Many more were locked away in institutions to preclude the further spread of their “deficient” genes.<sup>79</sup>

Eugenicists believed in a genetic link between crime, poverty, and low intelligence, tending to lump the three into one blanket category of degeneracy. Margaret Sanger, an avowed eugenicist, notable feminist, and founder of Planned Parenthood stated the following in a tirade against charity:

The most serious charge that can be brought against modern ‘benevolence’ is that it encourages the perpetuation of defectives, delinquents and dependents. These are the most dangerous elements in the world community, the most devastating curse on human progress and expression. Philanthropy is a gesture characteristic of

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71. See Lifton, *supra* note 66.

72. *Id.*

73. *Id.*

74. *Id.*

75. BLACK, *supra* note 5, at 125.

76. *Id.*

77. *Id.*

78. *Id.*

79. *A Justice Refuses to Block Sterilization of a Woman*, N.Y. TIMES, Nov. 13, 1994, at 16. “As recently as the 1970’s, sterilization of retarded people was a widespread practice in Virginia.” *Id.*

modern business lavishing upon the unfit the profits extorted from the community at large.<sup>80</sup>

In contrast, Sanger preferred the strategies of containment and segregation.<sup>81</sup>

#### IV. *ATKINS*, OUTDATED NOTIONS OF INTELLIGENCE, AND “DESERVING” DISABILITY

The remnants of the eugenics movement in America’s attitude toward the developmentally disabled are easy to see. Although we have moved, ostensibly, from a model of deficiency to one of difference, from segregation to integration, and from persecution to protection, we still use mental retardation pretextually. We use it now as a straw-man, bright-line test of “deserving” disability, as distinct from other similarly situated but “undeserving” disabilities. If, as the *Atkins* Court indicated, diminished personal culpability arises when there is (1) an impairment in reasoning, judgment, and impulse control that (2) can jeopardize the reliability and fairness of capital proceedings,<sup>82</sup> then paranoid schizophrenics should also be deemed to have diminished culpability, as should severe depressives and those whose mental disabilities arose *after* the age of eighteen because of exposure to cerebral malaria or head injuries. Persons in these groups are surely categorically less culpable than the “normal” murderer. Why is social disability, brought on by poverty, lack of opportunity, and racism, any less deserving of mercy than physical or genetic disability?

The Court’s decision to protect only persons with mental retardation reflects outdated notions of intelligence initially propagated by the eugenics movement, including that intelligence is measurable on a linear scale—when academics now know that it is not linear, that there are multiple forms of intelligence not measured by IQ tests, and that IQ tests do not measure impairment with respect to these other forms of intelligence.<sup>83</sup> Another outmoded notion underlying the *Atkins* opinion is that intelligence is innate, essential, and immutable. The *Atkins* Court’s requirement of onset prior to age eighteen, ostensibly to preclude defendants from malingering, serves to limit protection to those with a “developmental” disability that can be considered more or less “innate” and “lifelong,”<sup>84</sup> as opposed to other, arguably equally deserving, adult-onset disabilities.

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80. BLACK, *supra* note 5, at 130.

81. *Id.* at 131.

82. *Atkins v. Virginia*, 536 U.S. 304 (2002).

83. GOULD, *supra* note 7, at 56–57.

84. *See Atkins*, 536 U.S. at 304, 309 nn.3, 5.

Finally, eugenicists' construction of innate and fixed intelligence was useful to them in that it kept the debate trained on individual culpability as opposed to societal culpability. Even today, many ask whether a defendant's bad "essence" or his traumatic upbringing caused him to be bad. Instead, the question should be whether the community could have done something to help him become a productive member of society. Indeed, the *Atkins* Court's notion of "diminished personal culpability" leads one to wonder, who is responsible for heinous murders? Who is responsible for the nongenetic conditions that lead to mental retardation? Who is responsible for lead-based paint, bad prenatal healthcare, and poverty itself? Who is responsible for abuse, neglect, and a broken-down foster care system? Who is responsible for environmental toxins?

#### V. CONCLUSION

The *Atkins* Court may have unwittingly trod upon a linchpin to the social order, namely, the notion that everyone gets what they deserve—whether a score on an IQ test or capital punishment. Our twenty-first century empathy for the developmentally disabled who score below 70 on an IQ test<sup>85</sup> can and will be used to legitimize our brutality toward the otherwise disabled, the scorned and discarded, and those who score above 70 on an IQ test. We will continue to meaninglessly sort between those who will live and those who will die.

If history can offer a lesson here, it is the danger of baseless taxonomy. Post-*Atkins* challenges may involve capital defendants trying to cram themselves into a box labeled "mentally retarded." Any fair attempt to distinguish between deserving and undeserving disabilities, however, requires a much more finely tuned analysis than an IQ test can provide.

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85. Under *Atkins*, each state decides the threshold score for a finding of mental retardation. Most states require a score between 70 and 75. See Carol S. Steiker & Jordan M. Steiker, *Atkins v. Virginia: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721 (2008).

