

RESPONSE

“YOUR CORRUPT WAYS HAD FINALLY MADE YOU BLIND”: PROSECUTORIAL MISCONDUCT AND THE USE OF “ETHNIC ADJUSTMENTS” IN DEATH PENALTY CASES OF DEFENDANTS WITH INTELLECTUAL DISABILITIES

MICHAEL L. PERLIN, ESQ.*

In a recent masterful article, Professor Robert Sanger revealed that, since the Supreme Court’s decision in Atkins v. Virginia, some prosecution experts have begun using so-called “ethnic adjustments” to artificially raise minority defendants’ IQ scores, making such defendants—who would otherwise have been protected by Atkins and, later, by Hall v. Florida—eligible for the death penalty. Sanger accurately concluded that ethnic adjustments are not logically or clinically appropriate when computing a person’s IQ score for Atkins purposes. He relied further on epigenetics to demonstrate that environmental factors—such as childhood abuse, poverty, stress, and trauma—can cause decreases in actual IQ scores, and that “ethnic adjustments” make it more likely that such individuals, who are authentically “intellectually disabled,” will be sentenced and put to death.

I agree with Professor Sanger, but I wish to shift the focus to the role of prosecutors in perpetuating this state of affairs by endorsing and sanctioning the use of “corrupt science” in the cases in question. I consider whether there is any meaningful distinction between what was done by the state in the cases

* Professor Emeritus of Law, *New York Law School*; Founding Director, International Mental Disability Law Reform Project; Co-founder, Mental Disability Law and Policy Associates. My thanks to Dr. Robert McIntyre for his helpful assistance, and to Krystina Drasher for her, as always, excellent legal research.

discussed by Sanger, and what was done in the cases involving fingerprints, autopsies and laboratory reports, discussed some years ago by Professor Giannelli, and whether the use of such testimony is yet another example of “corrupt science.” Here, I conclude that legal and moral corruption similarly permeates what some prosecutors do in the “ethnic adjustment” cases.

Through the filter of therapeutic jurisprudence, I argue that the introduction of “ethnic adjustment” testimony is as corrupt as putting on the witness stand a fact witness who the DA knows is lying, and that a DA who, in fact, does introduce such testimony should be, at the least, sanctioned by the relevant bar associations, and perhaps, prosecuted criminally. Finally, I offer some modest conclusions, focusing on the need for defense counsel to familiarize themselves with these issues so that they can vigorously challenge the credentials of experts on voir dire.

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INTRODUCTION

In recent years, the United States has finally recognized that an appalling number of wrongful convictions—most pointedly, in death penalty cases—have been the result of “scientific fraud.”¹ According to Professor Paul Giannelli, “forged fingerprints, faked autopsies, fals[ified] laboratory reports, and perjured testimony, including the falsification of credentials, have all been documented” in criminal trials.² Such scientific fraud may result in the conviction and death sentence of an innocent person, or, at the least, may cover up such a mistake.³ Until recently, however, none of the ample literature on

1. Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 163 (2007); *see also id.* at 166 (noting that a study of 200 DNA exonerations revealed that fifty-five percent of those cases involved forensic evidence).

2. *Id.* at 168–69 (citations omitted).

3. *See* Robert Weisberg, *Introduction*, 15 STAN. L. & POL’Y REV. 323, 326 (2004).

this forensic fraud has focused on fraudulent testimony in death penalty cases involving the IQ scores of defendants with intellectual disabilities.⁴ This gap in the scholarship has now changed.

In his recent masterful article, Professor Robert Sanger⁵ revealed that, since the Supreme Court's decision in *Atkins v. Virginia*,⁶ some prosecution experts have endorsed the use of what have been characterized as "ethnic adjustments" in death penalty cases—artificially adding points to the IQ scores of minority death penalty defendants—so as to make such defendants, who would otherwise have been protected by *Atkins* and, later, by *Hall v. Florida*,⁷ eligible for the death penalty.⁸ Sanger accurately concluded that "ethnic adjustments" are not appropriate, clinically or logically, when calculating a defendant's IQ score for *Atkins* purposes."⁹ Further, he relied on epigenetics¹⁰ to demonstrate that environmental factors—such as childhood abuse, poverty, stress, and trauma—can result in lower IQ scores, and that "ethnic adjustments" make it *more* likely that such individuals—authentically "intellectually disabled"—will be sentenced and put to death.¹¹

4. For relevant exposés in judicial opinions on forensic fraud, see, for example, *In re Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 438 S.E.2d 501, 503 (W. Va. 1993) (examining the effect of false testimony from a serology officer). See also *Mitchell v. Gibson*, 262 F.3d 1036, 1064 (10th Cir. 2001) (discussing a forensic chemist who offered DNA testimony "which she knew was rendered false and misleading"); *Ramirez v. State*, 810 So. 2d 836, 853 (Fla. 2001) (reversing a conviction based on a "knife mark identification procedure" that "cannot be said to carry the imprimatur of science"); *McCarty v. State*, 765 P.2d 1215, 1218 (Okla. Crim. App. 1988) (questioning a forensic expert's opinion that was based on scientific techniques that did not exist).

5. Robert M. Sanger, *IQ, Intelligence Tests, "Ethnic Adjustments" and Atkins*, 65 AM. U. L. REV. 87 (2015). Professor Sanger is a veteran death penalty lawyer and an Adjunct Professor of Law at *Santa Barbara College of Law*. He is the past President of the California Attorneys for Criminal Justice.

6. 536 U.S. 304 (2002) (holding that the execution of persons with intellectual disabilities violates the Eighth Amendment's prohibition against cruel and unusual punishment).

7. 134 S. Ct. 1986 (2014) (ruling that inquiries into a defendant's intellectual disability for purposes of determining whether he may be subject to the death penalty cannot be limited to a bare numerical "reading" of an IQ score).

8. Sanger, *supra* note 5, at 89–90.

9. *Id.* at 146.

10. Epigenetics refers to "the causal interactions between genes and their products, which bring the phenotype into being." See Conrad H. Waddington, *The Basic Ideas of Biology*, in *THE ORIGIN OF LIFE* 1, 9–10 (Conrad H. Waddington ed., 1968).

11. Sanger, *supra* note 5, at 145–46; see also John Matthew Fabian, William W. Thompson & Jeffrey B. Lazarus, *Life, Death, and IQ: It's Much More than Just a Score: Understanding and Utilizing Forensic Psychological and Neuropsychological Evaluations in*

I agree with Professor Sanger, but I wish to shift the focus to the role of prosecutors who perpetuate the meretricious use of “ethnic adjustments” by endorsing and sanctioning the use of this “corrupt science.”¹² In recent work, I analyzed prosecutorial misconduct in death penalty cases where defendants had psychosocial (“mental health”) disabilities, and I concluded that “prosecutors . . . violate the law and the codes of ethics with impunity, and are often rewarded for it.”¹³ This Article shifts focus to the “ethnic adjustments” cases that Professor Sanger addressed, and I conclude that legal and moral corruption similarly permeates the behavior of some prosecutors in these cases.¹⁴

Part I reviews the disturbing frequency of prosecutorial misconduct in death penalty cases, specifically focusing on those involving defendants with mental disabilities. To do this, it looks carefully at the scandalous story of Dr. James Grigson—known morbidly as “Dr. Death”—who regularly testified fraudulently on behalf of the state at the penalty phase of death penalty cases, *even after he lost his license to practice psychiatry*, using, in virtually every case, “junk science” as the basis of his opinions.¹⁵ The subsequent part analyzes cases involving defendants with intellectual disabilities in which state experts testify in support of “ethnic adjustments” to IQ scores, issues that go beyond

Atkins *Intellectual Disability/Mental Retardation Cases*, 59 CLEV. ST. L. REV. 399, 414 (2011) (noting that the steady increase of the general population’s IQ scores over time could be attributed to cultural changes, improved nutrition, testing experience, changes in schooling and child-rearing practices, and improved technology).

12. It appears that the first use of the phrase “corrupt science” in a related context appeared in E.M. Coles & H.O.F. Veiel, *Expert Testimony and Pseudoscience: How Mental Health Professionals Are Taking Over the Courtroom*, 24 INT’L J.L. & PSYCHIATRY 607, 607–08 (2001) (purporting to “draw attention to some attitudes and practices that corrupt science and pervert the original purpose of expert testimony”). The phrase is also used in the context of fraudulent convictions in Kevin C. McMunigal, *Prosecutors and Corrupt Science*, 36 HOFSTRA L. REV. 437 (2007).

13. Michael L. Perlin, “*Merchants and Thieves, Hungry for Power*”: *Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 WASH. & LEE L. REV. (forthcoming 2016) (manuscript at 54) [hereinafter Perlin, *Merchants and Thieves*], <http://ssrn.com/abstract=2782118>; see also Michael L. Perlin, Editorial, “*Power and Greed and the Corruptible Seed*”: *Mental Disability, Prosecutorial Misconduct, and the Death Penalty*, 43 J. AM. ACAD. PSYCHIATRY & L. 266 (2015) [hereinafter Perlin, *Power and Greed*] (suggesting solutions to a death penalty process “contaminated” by prosecutorial misconduct).

14. See Jamie Fellner, *Beyond Reason: Executing Persons with Mental Retardation*, 28 HUM. RTS. 9, 13 (2002) (noting that prosecutors frequently and “vigorously challenge the existence of mental retardation, minimize its significance, and suggest that although a capital defendant may ‘technically’ be considered retarded, he nonetheless has ‘street smarts’—and hence should receive the highest penalty”).

15. See *infra* notes 50–53 and accompanying text.

the scope of the *Atkins* and *Hall* decisions. Here, it considers three collateral questions that must be answered in the context of prosecutorial misconduct: (1) to what extent is it typical for prosecutors to reject the validity of expert testimony as to intellectual disability in se, as the district attorney (DA) did in *State v. McCollum*;¹⁶ (2) to what extent have prosecutors familiarized themselves with the standard manual on interpreting IQ scores that specifically *rejects* the use of ethnic adjustments in individual cases;¹⁷ and (3) have prosecutors been put on adequate notice that testimony is, simply, fraudulent, given the reality that professionals have uniformly rejected such adjustments?¹⁸

Part II focuses on the cases that Sanger discusses in his article—as well as other similar cases—and considers whether there is any

16. 433 S.E.2d 144, 155 (N.C. 1993); *see also* Perlin, *Merchants and Thieves*, *supra* note 13 (manuscript at 16–17); Richard A. Oppel, Jr., *As Two Men Go Free, a Dogged Ex-Prosecutor Digs In*, N.Y. TIMES (Sept. 7, 2014), <http://nyti.ms/1nEU9tw> (reporting that the prosecutor still thought the defendants were guilty after exculpatory DNA evidence was introduced).

17. *See* WAIS-IV, WMS-IV, AND ACS: ADVANCED CLINICAL INTERPRETATION 193 (James A. Holdnack et al. eds., 2013) [hereinafter ACS MANUAL] (providing that demographically-adjusted norms should not be used to diagnose intellectual or learning disability because such disorders “are diagnosed relative to the general population”); *see also* Scott Barry Kaufman, *The Flynn Effect and IQ Disparities Among Races, Ethnicities, and Nations: Are There Common Links*, IQ’S CORNER (Aug. 23, 2010) (citing David F. Marks, *IQ Variations Across Time, Race, and Nationality: An Artifact of Differences in Literacy Skills*, 106 PSYCHOL. REP. 643 (2010)), <http://www.iqscorner.com/2010/08/flynn-effect-and-iq-disparities-among.html> (discussing a study that linked literacy rates and IQ scores but cautioning that the results only speak to populations, not individuals). On why adjustments in scores to accommodate the “Flynn effect” in individual cases do not comport with prevailing standards of psychological practice, *see* Leigh D. Hagan, Eric Y. Drogin & Thomas J. Guilmette, *Adjusting IQ Scores for the Flynn Effect: Consistent With the Standard of Practice?*, 39 PROF. PSYCHOL.: RES. & PRAC. 619 (2008). For a remarkably prescient observation in the context of the debate over the applicability of the “Flynn effect” on the question raised by Professor Sanger, *see* Mark D. Cunningham & Marc J. Tassé, *Looking to Science Rather Than Convention in Adjusting IQ Scores When Death Is at Issue*, 41 PROF. PSYCHOL.: RES. & PRAC. 413, 418 (2010) (citing R.B. Moore, *Letter to the Editor: Modification of Individual’s IQ Scores Is Not Accepted Professional Practice*, 32 PSYCHOL. MENTAL RETARDATION & DEV. DISABILITIES 11 (2006)) (noting that the “considerations of race in the application of the death penalty are particularly troubling”).

18. *But see* *Hall v. Florida*, 134 S. Ct. 1866, 2005 (2014) (Alito, J., dissenting) (dismissing the universal position of experts, that Florida’s use of a “gold standard” of an IQ score of seventy for executability created an “unacceptable risk” that persons with intellectual disabilities would be executed, as not reflecting the position of the American people, but “at best, represent the views of a small professional elite”). I criticize Alito’s dissent as “whiny” in Perlin, *Merchants and Thieves*, *supra* note 13 (manuscript at 32).

meaningful distinction between what was done by the state in the cases on which Sanger focuses,¹⁹ and what was done in the cases involving fingerprints, autopsies, and laboratory reports, discussed some years ago by Professor Giannelli.²⁰ Part II also investigates whether the use of such testimony is yet another example of the sort of “corrupt science” discussed by Professor McMunigal.²¹ Further, I consider all of this through the filter of therapeutic jurisprudence.²² Here, I argue that introducing “ethnic adjustment” testimony is as corrupt as soliciting testimony from a witness whom the DA knows to be lying. I believe that a DA who does introduce “ethnic adjustment” testimony should be, at the least, sanctioned by relevant bar associations and, perhaps, criminally prosecuted. Finally, the Article modestly concludes by focusing on the need for defense counsel to familiarize themselves with these issues so they can vigorously challenge the credentials of these experts on voir dire.

Seeking to capture the great injustice that results from such abuse, my Article’s title draws on Bob Dylan’s magisterial song *Idiot Wind*, a “monumental” song that “rage[d] against failure,”²³ displayed a “vision of societal dislocation,”²⁴ and supplied an “anthem to pain.”²⁵ It is contained in this remarkable verse:

I noticed at the ceremony, *your corrupt ways had finally made you blind*
I can’t remember your face anymore, your mouth has changed,
your eyes
don’t look into mine
The priest wore black on the seventh day and sat stone-faced while
the
building burned
I waited for you on the running boards, near the cypress trees,
while the
springtime turned
Slowly into Autumn.²⁶

I have drawn on this song many times in the past,²⁷ as I have found that the “searing metaphors and savage language”²⁸ of the song are

19. See, e.g., *infra* note 69.

20. See *infra* Part I.B.

21. *Id.*

22. See *infra* Part II.

23. HOWARD SOUNES, *DOWN THE HIGHWAY: THE LIFE OF BOB DYLAN* 282 (2001).

24. OLIVER TRAGER, *KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA* 278 (2004).

25. *Id.* at 279.

26. Bob Dylan, *Idiot Wind* (Columbia Records 1975) (emphasis added).

perfect descriptors for so much of what is wrong with mental disability law, especially in the context of questions of criminal procedure. Indeed, the “corrupt ways” of prosecutors—using “corrupt science”—have significantly “blind[ed]” the justice system to what happens in the cohort of death penalty cases about which Professor Sanger has so carefully and thoughtfully written.²⁹

I. ON PROSECUTORIAL MISCONDUCT

In death penalty cases, “prosecutors and other public officials exploit the victims of crime and the death penalty for political gain by stirring up and pandering to fears of crime.”³⁰ As part of their strategy urging death sentences, prosecutors portray mentally ill defendants’ demeanor as “flat” or “unremorseful,” tapping into popular fear and ignorance of mental illness.³¹ Further, they are free to commit this conduct with “impunity.”³² Not coincidentally, prosecutors have regularly and systematically opposed legislation that would exclude persons with serious mental disabilities from being

27. See, e.g., Michael L. Perlin, “Big Ideas, Images and Distorted Facts”: *The Insanity Defense, Genetics, and the Political World*, in GENETICS AND CRIMINALITY: THE POTENTIAL MISUSE OF SCIENTIFIC INFORMATION IN COURT 37 (Jeffrey Botkin et al. eds., 1999); Heather Ellis Cucolo & Michael L. Perlin, “They’re Planting Stories In the Press”: *The Impact of Media Distortions on Sex Offender Law and Policy*, 3 U. DENV. CRIM. L. REV. 185, 190 (2013) [hereinafter Cucolo & Perlin, *Media Distortions*]; Michael L. Perlin, “Everything’s a Little Upside Down, As a Matter of Fact the Wheels Have Stopped”: *The Fraudulence of the Incompetency Evaluation Process*, 4 HOUS. J. HEALTH L. & POL’Y 239, 243 (2004); Michel L. Perlin, “What’s Good Is Bad, What’s Bad Is Good, You’ll Find Out When You Reach the Top, You’re on the Bottom”: *Are the Americans with Disabilities Act (and Olmstead v. L.C.) Anything More than “Idiot Wind?”*, 35 U. MICH. J.L. REFORM 235 (2001–02) [hereinafter Perlin, *What’s Good Is Bad*]; Michael L. Perlin, “The Borderline Which Separated You From Me”: *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1379 (1997).

28. Perlin, *What’s Good Is Bad*, *supra* note 27, at 241.

29. See *infra* notes 67–75 and accompanying text.

30. Stephen B. Bright, *The Death Penalty as the Answer to Crime: Costly, Counterproductive and Corrupting*, 36 SANTA CLARA L. REV. 1069, 1076 (1996).

31. USA: *New Report on Execution of Mentally Ill Prisoners*, AMNESTY INT’L UK (Jan. 31, 2006), <https://www.amnesty.org.uk/press-releases/usa-new-report-execution-mentally-ill-prisoners>.

32. Harry Mitchell Caldwell, *Everybody Talks About Prosecutorial Conduct but Nobody Does Anything About It: A 25-Year Survey of Prosecutorial Misconduct and a Viable Solution*, 2016 U. ILL. L. REV. (forthcoming 2016) (manuscript at 2), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2761252 (stating that prosecutors who commit misconduct do not face serious sanctions like license suspension or civil liability and any resulting convictions are rarely overturned).

eligible for the death penalty.³³ And, as noted above, as part of these gambits, they regularly and “vigorously challenge the *existence* of mental retardation [and] minimize its significance.”³⁴

The significance of a prosecutor’s refusal to recognize a defendant’s diminished mental capacity grows in importance in the context of the observation that, “whether authorized to or not, prosecutors” have created “enforcement agendas,” which they impose on the dockets they manage.³⁵ An extensive study of prosecutorial misconduct in California makes clear: “Prosecutorial misconduct fundamentally perverts the course of justice and costs taxpayers millions of dollars in protracted litigation. It undermines our trust in the reliability of the justice system and subverts the notion that we are a fair society.”³⁶ In a civil society, such an abuse of power undermines trust in the judicial system.³⁷

This sort of prosecutorial misconduct should not be a surprise to anyone with even the vaguest familiarity with the criminal justice system. Cases of misconduct are now publicized regularly,³⁸ and the otherworldly work of the Innocence Project has demonstrated—with numbing frequency—the aftereffects of this misconduct.³⁹

33. See, e.g., Evan J. Mandery, *Executing the Insane, Retribution, and Temporal Justice*, 43 CRIM. L. BULL. 981, 981–82 n.7 (2007) (citing Andrea Weigl, *Limit to Death Penalty Sought; Bill Would Protect the Mentally Ill*, NEWS & OBSERVER, May 13, 2007, at B1) (remarking that prosecutors opposed a North Carolina bill that would exclude the mentally ill from the coverage of the state’s death penalty statute); Mike Smith, *Bill Would Ban Executions of Mentally Ill*, ASSOCIATED PRESS (Jan. 23, 2001) (explaining that the Indiana Prosecuting Attorneys’ Council opposed an Indiana bill to exclude the mentally ill on grounds that jurors “should be able to hear evidence and decide the issue of mental illness during the sentencing phases of capital cases” and calling into concern the “ever expanding list of what constitutes mental illness”).

34. Fellner, *supra* note 14, at 13 (emphasis added).

35. Daniel Richman, *Accounting for Prosecutors* 7 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Working Paper No. 14-506, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757811.

36. KATHLEEN M. RIDOLFI & MAURICE POSSLEY, NORTHERN CALIFORNIA INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 4 (2010).

37. See H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 54 (2013).

38. See generally Perlin, *Merchants and Thieves*, *supra* note 13 (citing multiple online news accounts of misconduct).

39. See, e.g., Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROCEEDINGS OF THE NAT’L ACAD. OF SCI. 7230, 7230 (2014) (estimating that at least 4.1 percent of those sentenced to death would be exonerated if remaining on death row indefinitely); *Executed But Possibly Innocent*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executed-possibly->

Unfortunately, this misconduct is especially egregious in death penalty cases and even *more* egregious in the cohort of cases that Sanger writes about: persons with intellectual disabilities facing the death penalty.⁴⁰

The potential for injustice is heightened in death penalty cases involving defendants with intellectual disabilities for several reasons. First, the outcome of a death penalty case in which capital punishment has been carried out, of course, cannot be reversed, even if the misconduct is discovered years after the fact.⁴¹ Second, we still adhere to the proposition that “death is different,”⁴² and that, at the least, prosecutorial misconduct should be lessened when so much is at stake.⁴³ Third, although some Supreme Court decisions have receded from the position articulated by other courts and scholars

innocent (last visited Aug. 19, 2016) (compiling cases of posthumous pardons and other potentially wrongful convictions); *Innocence*, NAT'L COAL. TO ABOLISH THE DEATH PENALTY, <http://www.ncadp.org/pages/innocence> (last visited Aug. 19, 2016) (listing some of the 156 people who have been exonerated while on death row since 1973).

40. Interestingly, in his initial list of the sorts of cases in which prosecutorial misconduct surfaces, Professor Caldwell lists “introduction of improper evidence,” but the cases to which he refers appear to be limited to ones involving *lay* evidence. Caldwell, *supra* note 32, at 67–68. In his subsequent list, he adds a section on “future dangerousness”—a topic of frequent egregious misconduct. See Perlin, *Merchants and Thieves*, *supra* note 13 (manuscript at 33) (“Some prosecutors consciously seek out expert witnesses who will testify—with total certainty—to a defendant’s alleged future dangerousness, knowing that such testimony is baseless.”). Caldwell’s discussion of future dangerousness, however, is not in the context of the sort of “ethnic adjustment” testimony discussed by Sanger and that I address here. Caldwell, *supra* note 32 (manuscript at 28–29).

41. See, e.g., *Executed but Possibly Innocent*, *supra* note 39. This is one of the reasons I do not believe that Professor Caldwell’s excellent recommendation for a prosecutor review panel goes far enough. Caldwell, *supra* note 32 (manuscript at 34–40). Dean Jennifer Bard’s equally-excellent recommendation to empower state licensing boards to intervene to stop forensic witnesses from testifying beyond their professional limitations also does not go far enough. Jennifer S. Bard, *Diagnosis Dangerous: Why State Licensing Boards Should Step in to Prevent Mental Health Practitioners from Speculating Beyond the Scope of Professional Standards*, 2015 UTAH L. REV. 929 (2015).

42. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion). In contrast, Justice Scalia argued in his derisive *Atkins v. Virginia* dissent that the Court, in limiting imposition of the death penalty, has invented a “death-is-different jurisprudence.” 536 U.S. 304, 337 (2002) (Scalia, J., dissenting).

43. See, e.g., Jeffrey L. Kirchmeier et al., *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327, 1332 (2009) (citing *State v. Lorraine*, 613 N.E.2d 212, 224 (Ohio 1993) (Wright, J., concurring)) (describing one state supreme court justice’s puzzlement concerning the cause of prosecutor misconduct in capital cases and explaining that “it is the duty of all ethical lawyers in the bar to work to do everything they can to limit instances of egregious misconduct”).

that death penalty cases demand “super due process,”⁴⁴ the structure of death penalty cases—separating out the question of guilt from the question of punishment, endorsing a system where virtually *any* evidence is allowed to be brought to the fact-finder’s attention during the mitigation phase—tells us that society does insist, to some extent, on *more* due process in these cases.⁴⁵ Fourth, defendants with mental disabilities are especially susceptible to the fallout from prosecutorial misconduct and this should heighten prosecutorial accountability in such cases; on the contrary, as it stands, it diminishes it.

The story of prosecutorial misconduct in death penalty cases has been told on many occasions.⁴⁶ I have focused on it in two separate articles—specifically in the context of cases involving defendants with mental disabilities. In one, I concluded that “mandatory training, certifications, sanctions, and written policies are important and necessary predicates to any potentially ameliorative change in this area.”⁴⁷ In the other article, I concluded that prosecutors have nearly complete authority to mislead jurors, to exploit their most irrational and sanist fears, and to utilize questionable expert witnesses. Virtually no one opposes, and courts usually permit, these practices.⁴⁸

In the latter article, I categorized prosecutorial misconduct in three ways: (1) consciously misusing evidence of mental disability “to play on the fears of, to scare, and to exploit the ignorance of jurors”; (2) deliberately searching for expert witnesses who will testify with “total certainty[]” to a “defendant’s alleged future dangerousness, knowing that such testimony is baseless”; and (3) suppressing

44. Compare *In re Harris*, 763 P.2d 823, 833 (Wash. 1988) (en banc) (“If today’s death penalty statutes escape constitutional invalidation, it is because they adhere to the ‘super due process’ required by the United States Supreme Court cases . . .”), with *Branch v. State*, 882 So. 2d 36, 65 (Miss. 2004) (en banc) (“Neither this Court, the Fifth Circuit, nor the Supreme Court have ever recognized the ‘super due process’ test advanced by Branch.”). The phrase “super due process” comes from the scholarship of Professor Margaret Radin. See generally Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1143 (1980).

45. See MICHAEL L. PERLIN, *MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES* 29–43 (2013) [hereinafter PERLIN, *MENTAL DISABILITY*].

46. See, e.g., Perlin, *Merchants and Thieves*, *supra* note 13 (manuscript at 21) (discussing studies of prosecutorial misconduct in capital cases); Perlin, *Power and Greed*, *supra* note 13, at 268 (referencing several instances of prosecutorial misconduct involving the death penalty). I now believe that this publicity is not sufficient. See *supra* note 41.

47. Perlin, *Power and Greed*, *supra* note 13, at 270.

48. Perlin, *Merchants and Thieves*, *supra* note 13 (manuscript at 47).

exculpatory psychiatric evidence.⁴⁹ But none of these criticisms focuses directly on how prosecutorial use of “ethnic adjustment” expert testimony is misconduct per se.

A. *The Case of Dr. Grigson*

Robust literature about forensic error in cases of defendants with mental illness exists.⁵⁰ Much of this literature focuses on the work of Dr. James Grigson and his followers,⁵¹ but little of this work considers this issue through the lens of prosecutorial misconduct. Such conduct involves the (eager) willingness of *some* prosecutors to present unscrupulous testimony, knowing it to be baseless and discredited by every professional association that has considered it.⁵²

In a recent article, I noted that, “[t]o the best of my knowledge, there have been no sanctions brought against any of the prosecutors who retained Dr. Grigson to testify in this cohort of cases.”⁵³ This, however, was a topic that was well known to lawyers representing defendants in death penalty cases; the publicity given to Dr. Grigson as “Dr. Death”⁵⁴—an appellation referred to both in case law and

49. *Id.* at 31–35.

50. *See, e.g.*, Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 370–73 (1998) (mentioning that expert witnesses are extremely poor at predicting the future dangerousness of a defendant facing the death penalty).

51. *See, e.g.*, James W. Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 L. & SOC'Y REV. 449, 457 (1989) (explaining that Dr. Grigson was a psychiatrist who frequently testified in death row cases).

52. *See generally* PERLIN, MENTAL DISABILITY, *supra* note 45, at 19–28 (asserting that mental health experts cannot accurately predict future dangerousness, defense counsel cannot effectively cross-examine these mental health experts, and jurors cannot competently assess this mental health testimony).

53. Perlin, *Merchants and Thieves*, *supra* note 13 (manuscript at 34); *see also* Marc Sageman, *Challenging the Admissibility of Mental Expert Testimony*, 13 PRAC. LITIGATOR 7, 15 (2002) (characterizing Grigson as “notorious”). *But see* Fuller v. Johnson, 114 F.3d 491, 497 (5th Cir. 1997) (noting that the American Psychiatric Association had reprimanded Dr. Grigson more than once but nonetheless concluding that admission of his testimony—that “there is absolutely no question, no doubt whatsoever” that defendant would be dangerous in the future—did not violate due process). For a survey of other cases in which Dr. Grigson’s testimony was similar, *see* Marquart et al., *supra* note 51, at 457–58. Dr. Grigson testified in fifty-seven reported cases *after* he was decertified by the American Psychiatric Association and the Texas Psychiatric Association. *See* Perlin, *Merchants and Thieves*, *supra* note 13 (manuscript at 33–34).

54. *See, e.g.*, RON ROSENBAUM, TRAVELS WITH DR. DEATH AND OTHER UNUSUAL INVESTIGATIONS 206 (1991) (profiling Dr. Grigson and referring to him as “the legendary forensic psychiatrist known as ‘Dr. Death’”).

academic literature⁵⁵—was certainly public knowledge.⁵⁶ Nonetheless, commentators have failed to focus on the testimony that Professor Sanger has brought to our attention in cases involving defendants with intellectual disabilities.⁵⁷

B. On Defendants with Intellectual Disabilities

We have known for years that defendants with mental disabilities disproportionately receive the death penalty,⁵⁸ and that prosecutors regularly minimize and deny the existence of intellectual disabilities in such cases.⁵⁹

One of the most startling stories involves a subsequently-exonerated defendant who had been on death row for years. In 2014, two African-American, mentally disabled, death row inmates—

55. See, e.g., *Flores v. Johnson*, 210 F.3d 456, 467 n.16 (5th Cir. 2000) (per curiam) (“Dr. Grigson’s notoriety earned him the title ‘Dr. Death’”); Kirchmeier, *supra* note 50, at 372 (“Dr. James Grigson . . . has been strongly criticized for his testimony . . . that he is ‘one-hundred percent’ accurate in predicting future dangerousness even when he has not examined the individuals in question.”); Marquart et al., *supra* note 51, at 457 (reproducing some of Dr. Grigson’s testimony in death penalty cases).

56. Matt C. Zaitchik, *Burying Dr. Death*, BOS. PHOENIX, Dec. 21, 1990, § 1, at 3 (reporting on the Colorado death penalty case of Frank Orona, in which Drs. Paul Appelbaum and Henry Steadman testified on behalf of the defendant and concluded that Grigson’s testimony was “unethical” and that there was “no empirical evidence” to support his conclusions). The penalty phase aspect of the trial resulted in a hung jury. *Id.*

57. Dr. Grigson was no stranger to cases involving defendants about whom the question of mental retardation was raised. See, e.g., *Walker v. State*, No. 05-98-01161-CR, 1999 WL 669589, at *4–5 (Tex. Ct. App. Aug. 30, 1999) (reporting Dr. Grigson’s findings that the defendant was mentally competent to stand trial); *Carter v. State*, 851 S.W.2d 390, 395 (Tex. Ct. App. 1993) (containing Dr. Grigson’s determinations as to whether a defendant was mentally deficient).

58. Perlin, *Power and Greed*, *supra* note 13, at 266–67. Professor Timothy Hall characterizes the number as “staggering.” Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant after Penry v. Johnson*, 35 AKRON L. REV. 327, 327 (2002); see, e.g., Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association’s Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 40 (1996) (calculating that between twelve and twenty percent of persons on death row are intellectually disabled). This issue has been studied extensively in the context of juveniles. See generally S. Starling Marshall, Comment, “Predictive Justice”?: *Simmons v. Roper and the Possible End of the Juvenile Death Penalty*, 72 FORDHAM L. REV. 2889 (2004).

59. See, e.g., Fellner, *supra* note 14, at 11–13 (noting that “when evidence of retardation is presented, prosecutors . . . discount its significance”).

one's IQ was in the sixties, the other's was as low as forty-nine⁶⁰—were exonerated by DNA evidence about twenty years after the Supreme Court denied certiorari on their cases⁶¹ when it was determined that their confessions were coerced and that they were factually innocent.⁶² District Attorney Joe Freeman Britt, the prosecutor in that case, was profiled later on “60 Minutes” as the nation’s “Deadliest DA” because he sought the death penalty so often.⁶³ Notwithstanding the exculpatory DNA evidence, he told the press that he still believed the two men were guilty,⁶⁴ indicating that he could not comprehend why the justice system put so much faith in DNA evidence.⁶⁵ Revealingly, in

60. Joseph Neff, *DNA Evidence Could Free 2 Men in 1983 Case*, CHARLOTTE OBSERVER (Sept. 2, 2014), <http://www.charlotteobserver.com/news/local/crime/article9159632.html#.VA2VdlcR-uI>.

61. *McCullum v. North Carolina*, 512 U.S. 1254, 1256 (1994). Justice Blackmun offered a stinging dissent. *Id.* at 1256 (Blackmun, J., dissenting) (positing that Buddy McCullum’s death sentence—given his age, reduced mental capacity, and other factors—“only confirms my conclusion that the death penalty experiment has failed”).

62. The authorities overlooked evidence that implicated another person living a block from where the victim’s body had been found, who had admitted to committing a similar rape and murder at about the same time. Jonathan M. Katz & Erik Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, N.Y. TIMES (Sept. 2, 2014), http://www.nytimes.com/2014/09/03/us/2-convicted-in-1983-north-carolina-murder-freed-after-dna-tests.html?_r=0.

63. Oppel, *supra* note 16. As this Article went to press, Britt was featured in a study of the “five deadliest prosecutors in America.” See FAIR PUNISHMENT PROJECT, AMERICA’S TOP FIVE DEADLIEST PROSECUTORS: HOW OVERZEALOUS PERSONALITIES DRIVE THE DEATH PENALTY 3 (2016), http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf. It should be noted that thirty-six percent of Britt’s convictions were subsequently reversed. See *America’s Deadliest Prosecutors Spreadsheet: Donnie Myers, Joe Freeman Britt, and Bob Macy*, FAIR PUNISHMENT PROJECT, <http://fairpunishment.org/wp-content/uploads/2016/06/Americas-Deadliest-Prosecutors-Donnie-Myers-Joe-Freeman-Britt-and-Bob-Macy.xlsx> (last visited Aug. 19, 2016). Britt has been characterized as “a living symbol of the gross, almost medieval nature of the justice system in small Southern counties.” See Hamilton Nolan, *Prosecutor Who Sent Innocent Man to Death Row Proud He’s No “Pussy”*, GAWKER (Sept. 8, 2014), <http://gawker.com/prosecutor-who-sent-innocent-man-to-death-row-proud-hes-1631877118>.

64. Katz & Eckholm, *supra* note 62.

65. Oppel, *supra* note 16. *McCullum* is not the only case in which exoneration is responded to in this manner. See, e.g., Ryan Sit et al., *Donald Trump Slams NYC for \$40M Central Park Five Settlement*, N.Y. DAILY NEWS (June 21, 2014), <http://www.nydailynews.com/new-york/nyc-crime/central-park-dad-40m-settlement-article-1.1837710> (reporting on Donald Trump criticizing the settlement for five men wrongfully convicted of attacking a jogger). The “Central Park Five” case is discussed in *In re McCray, Richardson, Santana, Wise, and Salaam Litigation*. 928 F. Supp. 2d 748, 751–52 (S.D.N.Y. 2013); see also N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1315–21 (2004).

discussing the issue of the false confession, Britt said, “When we tried those cases, every time they would bring in shrinks to talk about how retarded they were. It went on and on, blah-blah-blah.”⁶⁶

The issue Professor Sanger raises, however, broaches additional important questions that have not yet been comprehensively addressed by courts or other scholars. Professor Sanger’s article—which demonstrates how a cadre of “experts” have manipulated principles of clinical psychology to artificially raise the IQ scores of certain African-American and Latino defendants via “ethnic adjustments,” so as to take them out of the category of those not subject to execution per *Atkins* and *Hall*⁶⁷—makes us carefully consider the extent to which the prosecutors who call these witnesses to the stand knowingly engage in prosecutorial misconduct with a total “lack of negative consequences.”⁶⁸ The cases that Professor

66. Oppel, *supra* note 16. For a comprehensive recounting of the *McCollum* case, see Dahlia Lithwick, *A Horrifying Miscarriage of Justice in North Carolina*, SLATE.COM (Sept. 3, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/henry_lee_mccollum_cleared_by_dna_evidence_in_north_carolina_after_s_pending.2.html.

67. It is still too early to assess the impact of *Hall*—rejecting the use of a “bright line” IQ score of seventy as a cut-off point for intellectual disability for the purposes of determining whether one is eligible to be executed—on these cases. 134 S. Ct. 1986, 2001 (2014). Notwithstanding *Hall*, Texas, by way of example, continues to adhere to its decision of *Ex parte Briseno*, which created a standard for determining whether a particular defendant possesses significant adaptive deficits. 135 S.W.3d 1 (Tex. Crim. App. 2004). That is notwithstanding the fact that the *Ex parte Briseno* standard “has been repeatedly criticized as unscientific.” *Ex parte Lizcano*, No. WR-68,348-03, 2015 WL 2085190, at *2 (Tex. Ct. Crim. App. Apr. 15, 2015) (Alcala, J., dissenting). *Briseno* is condemned sharply—and to my mind, accurately—in *Ex parte Cathey*. 451 S.W.3d 1, 28 (Tex. Ct. Crim. App. 2014) (Price, J., concurring) (“Particularly after the recent opinion of the United States Supreme Court in *Hall v. Florida*, I should think that the writing is on the wall for the future viability of *Ex parte Briseno*.”); see also Hensleigh Crowell, Note, *The Writing Is on the Wall: How the Briseno Factors Create an Unacceptable Risk of Executing Persons with Intellectual Disability*, 94 TEX. L. REV. 743, 744 (2016) (arguing that the *Briseno* factors create an unconstitutional risk of executing mentally deficient persons under *Hall*).

68. Kevin C. McMunigal, *Prosecutorial Disclosure Violations: Punishment vs. Treatment*, 64 MERCER L. REV. 711, 713 (2013). But see Cynthia E. Jones, *A Reason To Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 442 (2010) (“The goal advanced by imposing meaningful sanctions for *Brady* violations is not merely to punish the individual prosecutor but to ensure that the government does not feel empowered to violate constitutional mandates with impunity.”). Professor Jones refers here to *Brady v. Maryland* in which the Supreme Court held that a prosecutor violates due process, regardless of his good or bad faith, when he suppresses evidence favorable to an accused and material to either guilt or punishment. 373 U.S. 83, 87 (1963). On *Brady* violations in the

Sanger tells us about—cases that have been litigated in the Fifth Circuit and state courts, such as Florida, Texas, Alabama, Tennessee, Missouri, California, Pennsylvania, and Ohio⁶⁹—force us to reconsider them in the context of prosecutorial misconduct. Unfortunately, evidence exists that prosecutors knew or should have known that their expert witnesses offered falsified information. For instance, at least one of the expert witnesses offering such testimony has been reprimanded.⁷⁰ But apparently, the Harris County District Attorney's office in Houston, Texas, continued to use Dr. Denkowski as an expert witness even *after* he was judicially rebuked.⁷¹ Beyond

context of prosecutorial misconduct in cases of defendants with mental disabilities, see Perlin, *Merchants and Thieves*, *supra* note 13 (manuscript at 35–36).

69. Sanger, *supra* note 5, at 108–13; see also, e.g., *Ex parte Rodriguez*, 164 S.W.3d 400, 404 (Tex. Crim. App. 2005) (per curiam) (elucidating testimony that “the fact that a person has a subaverage IQ score does not necessarily mean that he is mentally retarded”). Note that, in at least one of the cases that Professor Sanger discusses, *Hernandez v. Stephens*, 537 Fed. App'x 531, 536 (5th Cir. 2013) (per curiam), *cert. denied*, 134 S. Ct. 1760 (2014), the testifying expert did not test the defendant personally. Sanger, *supra* note 5, at 115. This eerily tracks the testimony of Dr. Grigson in *Barefoot v. Estelle*, 463 U.S. 880 (1983), one of his most criticized cases. See PERLIN, MENTAL DISABILITY, *supra* note 45, at 22–23 (outlining various responses criticizing *Barefoot*). In *Barefoot*, Dr. Grigson testified solely in response to hypotheticals and never evaluated the defendant personally. See generally Ana M. Otero, *The Death of Fairness: Texas's Future Dangerousness Revisited*, 4 U. DENV. CRIM. L. REV. 1, 30 (2014) (detailing the circumstances in *Barefoot*); Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, Psychiatric Testimony in Death Penalty Cases, and the Power of Symbolism: Dulling the Ake in Barefoot's Achilles Heel*, 3 N.Y. L. SCH. HUM. RTS. ANN. 91, 101–03 (1985) (same).

70. The court in *Matamoros v. Stephens* gave no weight to Dr. George Denkowski's opinions or testimony concerning the evaluation of a subject's mental status. 783 F.3d 212, 226 n.10 (5th Cir. 2015). Specifically, the court noted that Dr. Denkowski had “entered into a settlement agreement with the Texas State Board of Examiners of Psychologists, in which he agreed to not accept any engagement to perform forensic psychological services in the evaluation of subjects for mental retardation or intellectual disability in criminal proceedings.” *Id.* at 214; see also *Pierce v. Thaler*, 355 Fed. App'x 784, 794 (5th Cir. 2009) (per curiam) (commenting that Dr. Denkowski was subject to disciplinary proceedings for “improperly . . . overstat[ing] the impact of sociocultural factors on these [adaptive] deficits”); *Ex parte Gallo*, No. WR-77940-01, 2013 WL 105277, at *1 (Tex. Crim. App. Jan. 9, 2013) (per curiam) (noting that Dr. Denkowski's license was “reprimanded”). The disciplinary proceedings in Dr. Denkowski's case took place in April 2011. “*Dr. Death Agrees to Stop Evaluating Mentally Disabled Texas Death Row Prisoners*, DEMOCRACY NOW! (Apr. 21, 2011), http://www.democracynow.org/2011/4/21/dr_death_agrees_to_stop_evaluating.

71. See Brandi Grissom, *County Used Doctor After Methods Challenged*, TEX. TRIB. (Apr. 26, 2011), <https://www.texastribune.org/2011/04/26/county-used-doctor-after-methods-challenged/> (reporting that Harris County continued to pay

this, the testimony on which Professor Sanger focuses—testimony that attributes a defendant’s low IQ score to being a member of a “cultural group” that commonly uses drugs,⁷² being a member of “the criminal socio-culture,”⁷³ or not being a member of a “mainstream” group⁷⁴—has been regularly accepted “without challenge”⁷⁵ and is regularly offered with “no discussion of scientific research.”⁷⁶

In short, some prosecutors use baseless *non-individualized* testimony—not supported *anywhere in valid and reliable research*—*knowing* it is baseless and use it with no regard to the consequences.⁷⁷ This is indistinguishable from the “[f]orged fingerprints, faked autopsies, fals[ified] laboratory reports, and perjured testimony, including the falsification of credentials” that have been characterized as “scientific fraud,”⁷⁸ the use of which exemplifies “culpability on the part of the prosecutor.”⁷⁹ The state of the knowledge is clear: as I indicated earlier, “demographically adjusted norms” fail to suitably diagnose intellectual or learning disabilities because those “are diagnosed relative to the general population.”⁸⁰ Yet, to the best of my knowledge, no disciplinary actions have ever been taken against prosecutors who have put on such baseless evidence under the patina of “science.”⁸¹

Denkowski to examine defendants for intellectual disabilities “even after a judge harshly rebuked his work”).

72. Sanger, *supra* note 5, at 110 (citing Brief for United Mexican States as Amicus Curiae Supporting Petitioner at 13–14, *Hernandez v. Stephens*, 134 S. Ct. 1760 (2014) (No. 13-8004), 2014 WL 316661, at *14).

73. *See id.* (citing *Commonwealth v. DeJesus*, 58 A.3d 62, 72–73 (Pa. 2012)).

74. *See id.* at 114 (citing 12 Reference Hearing Transcripts at 2009, *In re Lewis*, No. S117235 (Cal. June 24, 2011)).

75. *Id.* at 111. On the inadequacy of counsel in death penalty cases of defendants with mental disabilities, see generally PERLIN, *MENTAL DISABILITY*, *supra* note 45, at 123–38.

76. Sanger, *supra* note 5, at 111.

77. Of course, through “confirmation bias,” people are inclined to favor “information that confirms their theory over disconfirming information.” Cucolo & Perlin, *Media Distortions*, *supra* note 27, at 214 (quoting Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1594 (2006)). On illusory correlations in general, see Robyn M. Dawes, *Experience and Validity of Clinical Judgment: The Illusory Correlation*, 7 BEHAV. SCI. & L. 457, 459–60, 464–66 (1989).

78. Giannelli, *supra* note 1, at 163, 168–69.

79. McMunigal, *supra* note 12, at 441.

80. ACS MANUAL, *supra* note 17, at 193.

81. *Compare United States v. Hines*, 55 F. Supp. 2d 62, 64 (D. Mass. 1999) (contending that, unlike other witnesses, “a certain patina attaches to an expert’s testimony,” so “the jury may . . . give more credence to the testimony than it may

C. Questions to Consider

Return to the earlier questions I posed: (1) to what extent is it typical for prosecutors to reject the validity of expert testimony as to intellectual disability in se, as the district attorney did in *State v. McCollum*;⁸² (2) to what extent have prosecutors familiarized themselves with the standard manual on interpreting IQ scores that specifically *rejects* the use of ethnic adjustments in individual cases; and (3) have prosecutors been put on adequate notice that testimony is, simply, fraudulent, given the reality that professionals have uniformly rejected such adjustments?

Despite these important questions, there has never been any “pushback” against the argument that prosecutors regularly minimize the existence of intellectual disability.⁸³ Tellingly, a survey of state attorneys general revealed that the identification of persons with intellectual disability in the criminal justice system “is neither systematic nor probable.”⁸⁴ Indeed, the track record of prosecutors in the cases that Professor Sanger shares with us is stark evidence of this.⁸⁵

deserve”), *with Barefoot v. Estelle*, 463 U.S. 880, 926 (1983) (Blackmun, J., dissenting) (cautioning that the “major danger of scientific evidence is its potential to mislead the jury” and that “an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny”) (quoting Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1237 (1980)).

82. 433 S.E.2d 144, 155 (N.C. 1993); *see also* Perlin, *Merchants and Thieves*, *supra* note 13 (manuscript at 16–17); Richard A. Opper, Jr., *As Two Men Go Free, a Dogged Ex-Prosecutor Digs In*, N.Y. TIMES (Sept. 7, 2014), <http://nyti.ms/1nEU9tw> (reporting that the prosecutor still thought the defendants were guilty after exculpatory DNA evidence was introduced).

83. *See, e.g.*, Appellant Richard Sanchez’s Petition for Review, *People v. Sanchez*, No. S210377, 2013 WL 2454329 (Cal. May 9, 2013), at *15 (“[T]he prosecutor repeatedly raised the issue before the jury to minimize the significance of appellant’s cognitive problems.”); *see also* William J. Edwards, *How to Demystify the Prosecution’s Efforts of Minimizing the Severity of Your Client’s Mental Retardation*, CONTINUING LEGAL EDUC. SOC’Y OF N.S. (Nov. 1997), <http://www.nsbs.org/archives/CLESNS/891.pdf> (providing tips for counteracting a prosecutor’s attempts to diminish the severity of a defendant’s mental disability).

84. James K. McAfee & Michele Gural, *Individuals with Mental Retardation and the Criminal Justice System: The View from States’ Attorneys General*, 26 MENTAL RETARDATION 5, 5 (1988).

85. *See* John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL’Y 689, 722–23 (2009) (recounting similar behavior and concluding that “[t]he implication that crime evidence can override the other evidence regarding mental retardation because it is the ‘best evidence’ of adaptive functioning must be rejected”).

It is impossible to know whether prosecutors have, in fact, familiarized themselves with the standard manual for interpreting IQ scores.⁸⁶ However, the lack of citations to their work in any reported case suggests that it has never been the centerpiece of contested appellate litigation. Nothing suggests that the expert witnesses whom Professor Sanger names ever considered this literature in reaching the conclusions that are reflected in their testimony. It is equally likely that defense counsel—other than Professor Sanger—have not familiarized themselves with this scholarship.⁸⁷

Nonetheless, the fact that there is *no* valid or reliable evidence that supports the positions taken in these cases by the states' witnesses certainly *should* put prosecutors on notice that the testimony they have elicited is little more than, in the words of Professor McMunigal, "corrupt science"⁸⁸ or, again in the words of Professor Giannelli, "scientific fraud."⁸⁹ Their "culpability" is clear.⁹⁰ Prosecutors can introduce testimony that does not have an iota of support in valid and reliable professional literature with "impunity"⁹¹ and without any challenge by defense counsel⁹² nor push back by the judiciary.

86. See ACS MANUAL, *supra* note 17, at 193 (denouncing the inability of demographically adjusted norms to diagnose intellectual or learning disabilities).

87. See Cucolo & Perlin, *supra* note 27, at 214; Burke, *supra* note 77, at 1594 (explaining that confirmation bias often leads people to believe information that supports their beliefs, even if those beliefs are inaccurate).

88. McMunigal, *supra* note 12, at 441.

89. Giannelli, *supra* note 1, at 163.

90. McMunigal, *supra* note 12, at 441.

91. Caldwell, *supra* note 32 (manuscript at 2).

92. In a future article, I plan on addressing this issue in the context of how defense counsel violate the effectiveness-of-counsel standard of *Strickland v. Washington*, 466 U.S. 688 (1984), by failing to object to the sort of testimony discussed in this Article. The standard has led to widespread inadequate counsel in death penalty cases involving defendants with mental disabilities. Other literature already addresses how courts have construed counsel's failures to object in other aspects of death penalty practice. See, e.g., John H. Blume & Pamela A. Wilkins, *Death by Default: State Procedural Default Doctrine in Capital Cases*, 50 S.C. L. REV. 1 (1998); Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805 (2000). I believe that the best potential solution to the issue raised by Professor Sanger is to invigorate defense counsel so they can robustly challenge the admissibility of the testimony in question.

II. THERAPEUTIC JURISPRUDENCE⁹³

Therapeutic jurisprudence (“TJ”) assesses the impact of case law and legislation, recognizing that, as a therapeutic agent, the law can have therapeutic or anti-therapeutic consequences.⁹⁴ TJ asks whether legal rules, procedures, and lawyers’ roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.⁹⁵ In doing so, the law’s use of “mental health information to improve therapeutic functioning [cannot] impinge[] upon justice concerns.”⁹⁶

TJ also considers how the law actually impacts peoples’ lives and assesses the law’s influence on emotional life and psychological well-being.⁹⁷ It counsels that “law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and[,] when consistent with other values served by

93. This section is generally adapted from two other pieces I have written or co-written. See Michael L. Perlin & Alison J. Lynch, “*All His Sexless Patients*”: *Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 259 (2014); Michael L. Perlin, “*Yonder Stands Your Orphan with His Gun*”: *The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes*, 46 TEX. TECH. L. REV. 301 (2013).

94. See Michael L. Perlin, “*His Brain Has Been Mismanaged with Great Skill*”: *How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885, 912 (2009).

95. Michael L. Perlin, “*Everybody Is Making Love/Or Else Expecting Rain*”: *Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 WASH. L. REV. 481, 510 n.129 (2008); Michael L. Perlin, “*And My Best Friend, My Doctor/Won’t Even Say What It Is I’ve Got*”: *The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 751 (2005). See generally Michael L. Perlin, “*Baby, Look Inside Your Mirror*”: *The Legal Profession’s Willful and Sanist Blindness to Lawyers with Mental Disabilities*, 69 U. PITT. L. REV. 589, 591 (2008) (discussing how TJ “might be a redemptive tool in efforts to combat sanism, as a means of ‘strip[ping] bare the law’s sanist façade”); Michael L. Perlin, “*Infinity Goes up on Trial*”: *Sanism, Pretextuality, and the Representation of Defendants with Mental Disabilities*, http://papers.ssrn.com/sol3/paper.cfm?abstract_id=2734762 (exploring why criminal defense lawyers must understand therapeutic jurisprudence as a means of rebutting the effects of sanism in criminal trials).

96. David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993); see also Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000) (“[A]n inquiry into therapeutic outcomes does not mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”).

97. David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45, 45 (Dennis P. Stolle et al. eds., 2000); Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

law, should attempt to bring about healing and wellness.”⁹⁸ TJ allows us to achieve “a new and distinctive perspective utilizing socio-psychological insights into the law and its applications,”⁹⁹ creating a change in ethical thinking about the role of law.¹⁰⁰

One of the central principles of therapeutic jurisprudence is a commitment to dignity.¹⁰¹ Professor Amy Ronner describes “the three Vs,” voice, validation, and voluntariness,¹⁰² arguing:

What “the three Vs” commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant’s story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronouncement that affects their own lives can initiate healing and bring about improved behavior in the

98. Bruce J. Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, in *INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVES ON CIVIL COMMITMENT* 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003).

99. Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 *T. JEFFERSON L. REV.* 575, 576 (2008). It is also part of a growing comprehensive movement in the law towards establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully. See, e.g., Susan Daicoff, *Afterword: The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in *PRACTICING THERAPEUTIC JURISPRUDENCE*, *supra* note 97, at 465.

100. Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 *J.L. & MED.* 328, 329–30 (2001); see also Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, in *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION* 341, 342 (Marjorie A. Silver ed., 2007); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 *CLINICAL L. REV.* 605, 605–06 (2006) (noting that TJ has “begun to penetrate legal education”).

101. See MICHAEL L. PERLIN, *A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW* 214–15 (2013) (exploring the role of dignity in the sentencing process); Winick, *supra* note 98, at 161 (illustrating how hospitalization of individuals with mental health issues deprives them of certain basic rights and freedoms).

102. Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 *TOURO L. REV.* 601, 627 (2008).

future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.¹⁰³

This leads to a critical question: does testimony of the sort exposed by Professor Sanger serve to fulfill Professor Ronner's vision? Can we remotely speak of voice, validation, or voluntariness in the context of cases in which persons with intellectual disability inappropriately face the death penalty based on fraudulent testimony premised on spurious "ethnic adjustments"? Elsewhere, I have written about the death penalty in the context of therapeutic jurisprudence, and one of my final recommendations called for a "serious reevaluation of the roles of expert witnesses in testifying to 'future dangerousness' in death penalty cases," noting that Dr. Grigson's death "has not ended the problem."¹⁰⁴ I believe that the issues on which I focus on in this Article must be read alongside that recommendation.

CONCLUSION

What remedies need to be in place to sanction prosecutorial misconduct? In earlier articles, I have discussed recommendations by several professors and experienced defense counsel¹⁰⁵ that would partially remediate the underlying problems.¹⁰⁶ In addition, the suggestion of a "Prosecutor Review Panel"¹⁰⁷ or the proposal that state licensing boards be given the power to stop prosecutors from providing "unsubstantiated testimony about future dangerousness" would also

103. Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002) (citations omitted). See generally AMY D. RONNER, LAW, LITERATURE AND THERAPEUTIC JURISPRUDENCE (2010).

104. PERLIN, MENTAL DISABILITY, *supra* note 45, at 153.

105. See, e.g., Kirchmeier et al., *supra* note 43, at 1370 (suggesting that bar and ethics organizations, courts, and prosecutor offices should be responsible for addressing prosecutor misconduct); Natasha Minsker, *Prosecutorial Misconduct in Death Penalty Cases*, 45 CAL. W. L. REV. 373, 374 (2009) (concluding that the current Rules of Professional Responsibility are too vague and the penalties for misconduct are not enough); Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 FORDHAM L. REV. 1413, 1451 (2007); Christopher Slobogin, *Scientizing Culpability: The Implications of Hall v. Florida and the Possibility of a "Scientific Stare Decisis"*, 23 WM. & MARY BILL RTS. J. 415, 417 (2014) (proposing that "groups that are scientifically alike should be treated similarly for culpability purposes").

106. See Perlin, *Merchants and Thieves*, *supra* note 13 (manuscript at 45–46) (listing recommendations).

107. See Caldwell, *supra* note 32 (manuscript at 34–40) (setting out a proposal for a statewide review committee to independently evaluate prosecutorial misconduct).

partially remedy the problem.¹⁰⁸ I agree and endorse each of these, but, at the most, they will be a palliative, not a cure. We know how common it is for egregious prosecutorial misconduct to be disregarded by appellate courts as “harmless error.”¹⁰⁹ Even more, appellate courts rarely reverse district courts that adopt this notion.¹¹⁰ What is worse, such reversals may come too late to save the life of a condemned defendant,” and the enforcement of sanctions against prosecutors is nearly non-existent.¹¹¹ As Professor Cynthia Jones has written, in the context of *Brady* violations, the government cannot “feel empowered to violate [these] constitutional mandates with impunity.”¹¹²

This problem, of course, is exacerbated by the abysmal lack of adequate defense counsel in so many death penalty cases,¹¹³ a topic generally beyond the scope of this paper. But it is to defense counsel that we must look.¹¹⁴ I believe it is *mandatory* that counsel representing defendants with intellectual disabilities in death penalty cases familiarize themselves with the testimony referred to here and discussed in depth in Professor Sanger’s article. They must, on voir dire, vigorously challenge the credentials of the prosecutors’ experts in such cases where they rely on this “corrupt science” in their testimony. Additionally, they must call their own witnesses—in the same manner that the Colorado defense lawyers did in the challenge to Dr. Grigson’s testimony—to expose the testimony’s fraudulence to

108. Bard, *supra* note 41, at 947.

109. Caldwell, *supra* note 32 (manuscript at 10–33); Perlin, *Power and Greed*, *supra* note 13, at 268.

110. See, e.g., *People v. Quartermain*, 941 P.2d 788, 797–98 (Cal. 1997); see also *People v. Purvis*, 384 P.2d 424, 443–44 (Cal. 1963) (en banc); *People v. Love*, 366 P.2d 33, 40 (Cal. 1961).

111. See, e.g., Perlin, *Power and Greed*, *supra* note 13, at 269 (noting there were no known sanctions for any of the prosecutors who retained Dr. Grigson after he was decertified).

112. Jones, *supra* note 68, at 442.

113. See Perlin, MENTAL DISABILITY, *supra* note 45, at 123–38; Michael L. Perlin & Heather Ellis Cucolo, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 17-3.6 (3d ed. 2016); Michael L. Perlin, “The Executioner’s Face Is Always Well-Hidden”: *The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y. L. SCH. L. REV. 201, 202–07 (1996).

114. See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 537–38 (2003) (finding representation to be constitutionally ineffective in a case that emphasized a lawyer’s duty to investigate possible mitigation before making any strategic decision about how to proceed); AMERICAN BAR ASSOCIATION, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 941 (2003) (asserting that each jurisdiction should create standards and processes to ensure high-quality representation in death penalty cases).

the court and its jurors.¹¹⁵ Only then can we hope for precedential law that is in accord with Professor Sanger's scholarship. This, I believe, in the "real world," is the best viable option.

In *Idiot Wind*, Dylan sings, "The priest wore black on the seventh day and sat stone-faced while the building burned."¹¹⁶ In the context of prosecutorial misconduct, rather than "the priest," "the judge" sits "stone-faced" while the "building"—the courthouse, as the temple of justice¹¹⁷—burns. The "ceremony"¹¹⁸ of the criminal trial is often a charade. We have "been made blind" by the corruption of the fraudulent testimony that is admitted without challenge. It is time this ends.

115. See Zaitchik, *supra* note 56. Of course, the vast majority of death penalty defendants are indigent, and in many death-penalty jurisdictions, there is no provision for the appointment of counsel in collateral proceedings. Such defendants rarely, if ever, are afforded adequate funds to retain expert witnesses. The problem is magnified by the Supreme Court's decision in *Murray v. Giarratano*, where it held that there was no constitutional right to an attorney at the post-conviction appeal stage. 492 U.S. 1, 10 (1989) (plurality opinion); see also Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393, 1393 (1999) (observing that the U.S. Supreme Court has not found a right to post-conviction counsel in the Due Process Clause, the Equal Protection Clause, or the Eighth Amendment); Ronald J. Tabak, *The Private Bar's Efforts to Secure Proper Representation for Those Facing Execution*, 29 JUST. SYS. J. 356, 356 (2008) (arguing that a defendant without counsel "has little chance of securing redress for constitutional violations that may have tainted a conviction or death sentence"). For those states that provide regularized post-conviction representation, see *Death Penalty Representation*, DEATH PENALTY INFO. CTR. (2016), <http://www.deathpenaltyinfo.org/death-penalty-representation>.

In *Ake v. Oklahoma*, the Supreme Court ruled that a defendant has a right to an independent expert in a capital trial when mental capacity at the time of the offense will be a significant issue. 470 U.S. 68, 83 (1985). I have argued in the past that the rule of *Ake* needs to be expanded to provide indigent defendants access to funds for neuroimaging tests and expert witnesses qualified to testify in cases involving such testimony. See, e.g., Michael L. Perlin, "And I See Through Your Brain": *Access to Experts, Competency to Consent, and the Impact of Antipsychotic Medications in Neuroimaging Cases in the Criminal Trial Process*, 2009 STAN. TECH. L. REV. 4, ¶¶ 21–23 (2009). I believe, similarly, that the rule of *Ake* needs to be expanded so as to provide funds for expert testimony to rebut the sort of testimony that Professor Sanger describes, the sort of testimony provided in the *Orona* case against Dr. Grigson. See Zaitchik, *supra* note 56.

116. Dylan, *supra* note 26.

117. This is a metaphor often used in the case law. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991); *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 1005 (5th Cir. 1995) (quoting *Chambers*, 501 U.S. at 46).

118. Dylan, *supra* note 26 ("I noticed at the ceremony.").