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The Case of Intellectual Disability vs. the Death Penalty: A Foucauldian Analysis of Georgia's Beyond a Reasonable Doubt Standard of Proof

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Abstract

Georgia was the first state in the United States to ban the execution of persons with intellectual disability, and did so 14 years prior to the federal mandate in *Atkins v. Virginia* (2002). In doing so, it became and remains the only state to invoke the highest of standards, beyond a reasonable doubt. When states use a standard higher than the lowest of three, defendants raising the claim of intellectual disability are placed at an increased risk for rights violations that may include lack of due process, the imposition of cruel and unusual punishment, and finally, in the extinction of life.

The purpose of this case study is to analyze the 2013 legislative informational hearing hosted by the Georgia House of Representatives Non-Civil Judiciary committee on the state's standard of proof using Foucault's medico-judicial perspective. Based on this analysis, the second purpose of the study is to propose a position of advocacy and respective strategy for changing Georgia's standard of proof of intellectual disability. Lastly, this article recommends a strategy of leveraging the medical model of intellectual disability in the criminal justice context as an instrument for diminishing the risk for unlawful execution and enhancing the securement of accommodations while in state penal custody, as per federal law.

Keywords
Intellectual disability; death penalty; medico-judicial discourse; standard of proof; beyond a reasonable doubt; impressionist narrative

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According to Michel Foucault (2003), the historical intertwining of medical/clinical diagnosis and criminal justice gave rise to a modern, hybrid discourse that found doctors laying claim to judicial power and judges laying claim to medical power. Foucault designated this professional hybrid the medico-judicial discourse, a theoretical construct constituted by a combination of everyday discourses of truth that kill and provoke laughter (2003). The medico-judicial discourse deserves our attention, Foucault warned, because “these everyday discourses of truth that kill and provoke laughter are at the very heart of our judicial system” (Foucault, 2003, p. 6). Since 2002, one such discourse involves the raised claim of the clinical construct, intellectual disability and the legal determination of death eligibility.

The U.S. Supreme Court’s *Atkins v. Virginia* (2002) decision barred the execution of persons with intellectual disability. At the same time, the decision provided minimal specification regarding adjudication. The Court did, however, recommend that states should generally conform to accepted clinical practice and norms when considering their legal definitions of intellectual disability and related legal procedures. The suggestion of clinical conformity has been further upheld in the U.S. Supreme Court’s *Hall v. Florida* (2014) and *Moore v. Texas* (2016) decisions. This arguably positions clinicians, professional associations, and legal advocates to take an important role in interrelated legal issues, such as what is the clinically appropriate standard of proof of intellectual disability. With regard to clinicians, this article proposes a controversial method, at least for the purposes of discussion, for challenging unequal U.S. criminal jurisprudence and advancing justice related to *Atkins* cases. Namely, this article addresses how the medical model can be first used to challenge restrictive state legal definitions of

intellectual disability that result in execution; and second, this article addresses how the challenge to state legal definitions can result in the challenge to the death penalty itself. Because abolition would ultimately preclude the medicalization of intellectual disability—at least in the death penalty context—this irony may warrant further attention from an advocacy standpoint. The author wishes here to recognize the controversies and ironies of leveraging the medical model as an instrument for challenging U.S. criminal jurisprudence and advancing justice.

Persons with intellectual disability who stand accused of a death eligible crime are placed at an increased risk for unlawful execution when states use a standard of proof higher than the lowest (Blume, Johnson, Marcus, & Paavola, 2014; Saviello, 2015). There are three standards of proof of intellectual disability and only Georgia uses the highest, beyond a reasonable doubt. In discussions regarding the appropriate standard of proof, legal advocates point to procedural challenges defendants with intellectual disability face in the criminal justice system to justify selection of the lowest and most widely adopted standard, preponderance of the evidence (Blume, 2015; Cheung, 2013; Feluren, 2013; Informational hearing, 2013; Saviello, 2015). The identified procedural challenges are rooted in *deficits* or *impairments* ingredient to the clinical definition (American Association on Intellectual and Developmental Disabilities, 2010; American Psychiatric Association, 2013; Atkins v. Virginia, 2002). Examples of procedural challenges cited in the *Atkins* (2002) decision include impaired ability to assist legal counsel, unwarranted impression of lack of remorse for the crime committed, false confession, framing, and naïve-offending (Blume et al., 2014; Greenspan, Harris, & Woods, 2015).

There is an additional issue at stake with high standards of proof of intellectual disability. If a person is unable to meet the standard, say for instance due to lack of evidence during onset or owing to legal decision-makers' fundamental misunderstanding of adaptive functioning, that same person will not by definition be eligible to receive Title II supports and services to which they should otherwise be legally entitled under the Americans with Disabilities Act (1990). This legislative act was grounds for lawsuit in *U.S. v. Georgia* (2006), a case in which the court ruled that Title II of the Americans with Disabilities Act (1990) validly abrogates state sovereign immunity insofar as it creates a private cause of action for damages against the states for conduct that violates the 14th Amendment (Rosado). In this way, the issue of standard of proof doubles as a civil rights matter—and rightly so, given the history of eugenic segregation and incarceration, and discriminatory killing (Ben-Moshe, 2013; Greenspan, 2016; Ladd-Taylor, 2004; Lutzker, Guastaferro, & Benka-Corka, 2016).

Background

Georgia's 1988 statute was the first in the nation to bar the execution of persons with intellectual disability, owing to the negative publicity that followed Georgia's execution of Jerome Bowden in 1986. Mr. Bowden was a young African American man in his early-20s with an IQ test score that fell 10-points below the clinically accepted score range thus indicating an intellectual impairment according to the medical model (Bowden v. Kemp, 1986). The execution drew heavy national criticism and ultimately resulted in the crafting of the first statutory bar in the nation (Informational Hearing, 2013). In 2013, the House of Representatives Non-Civil Judiciary Committee convened to gather information regarding Georgia's beyond a reasonable doubt standard of proof

and to discuss the implications of lowering the standard (Informational Hearing, 2013). According to the Georgia House of Representatives' webpage, one duty of the Judiciary Non-Civil committee is "jurisdiction over Georgia's criminal code and procedure, …. sentencing, parole and pardons, …. Any legislation that carries a possibility for criminal penalties can be referred to the Judiciary Non-Civil Committee" (Georgia House of Representatives, House Non-Civil Judiciary, n.d.). The purpose of the hearing is to gather information in order to then make a decision with regard to moderating Georgia's standard of proof (Informational Hearing, 2013). Attorney Jack Martin with the Georgia Association of Criminal Defense Lawyers co-authored the statute in 1988. During the hearing, Jack Martin explained the origin of the standard, beginning with the execution of Jerome Bowden:

> There was the execution of Jerome Bowden, who everybody knew was mentally retarded [sic], parole board did not stop that execution […] So what happened was, there was a consensus among the legislature, including the Attorney General Mike Bowers […] came together and decided, we got to do something about this in Georgia. And at the same time […] There was a case called Ford versus Wainwright that the Supreme Court had passed. And Ford versus Wainwright provided that you couldn't execute someone who did not understand *why* they were being executed because of mental illness. And the Supreme Court said the states have to come up with their own procedures. So at the same time we were coming up with a procedure in Georgia to implement Ford versus Wainwright, the idea about executing someone who was mentally retarded [sic] came up […] The lobbyist for the Prosecutors from the Fulton County Attorneys

> Office, and I, on behalf of Georgia Association of Criminal Defense Lawyers, sat down in this room […] and said, well, what's the *easiest* way to do this? And we said, what we'll do is we'll attach to the 'guilty, but mentally ill' statute […] we put at the *very end* of that statute, that you couldn't execute someone who was found to be retarded [sic]. And that's what the law *is*, to this day, for more than 25-years. […] The mentally retarded [sic]—the 'guilty, but mentally retarded [sic] and guilty, but mentally ill' statute—was meant to be this: after a lot of controversy about the insanity defense […] the idea was to *tighten* insanity. And the idea was to say, yeah okay, *you're guilty*, but you're mentally ill. And all that means is you'll be punished, just like any other defendant, but that they will get *services* from the, whoever—the Department of Human Resources, or whoever it might be at *that* time—so that these people would get some *help*, mentally ill people and mentally retarded [sic] people, but they would not avoid being convicted. And they would not get the insanity plea […] It was *sloppy* draftsmanship, pure and simple. I don't think anybody *intended* that to happen, but if you look at the *statute*, that's the way it reads and that became the law of Georgia (Informational Hearing, 2013).

By the co-drafter's own admission, the beyond a reasonable doubt standard of proof was meant only to apply to the issue of guilt, for which there is rich legal precedence, and not to the issue of intellectual disability, for which there is none. It was a drafting error.

The purpose of the present study is to analyze the 2013 legislative informational hearing hosted by the Georgia House of Representatives Non-Civil Judiciary committee

on the state's standard of proof of intellectual disability using Foucault's medico-judicial perspective. I received access to the recorded 2013 informational hearing in the form of a thumb drive from a highly regarded legal and academic expert in Georgia. Public weblinks to the video were broken. The medico-judicial framework drives the design, conceptual analysis, discussion, and recommendations. Based on this analysis, the second purpose of the study is to propose an alternative position of advocacy and a respective strategy for changing Georgia's beyond a reasonable doubt standard of proof of intellectual disability, which in addition to saving persons' lives, will also necessarily impact persons' securement of disability accommodations while in state penal custody, in accordance with federal law.

Method

In this geopolitically-bounded and theoretically-driven case study of the 2013 legislative hearing on Georgia's beyond a reasonable doubt standard of proof of intellectual disability, standard of proof is taken as a manifestation of the medico-judicial negotiation of intellectual disability and the death penalty, and all that this discourse represents. My subject of analysis is a video recording of the 2013 legislative hearing on Georgia's standard of proof. I reviewed the video on multiple occasions and transcribed its contents verbatim. It is available upon request. I use Van Maanen's (2011) impressionist narrative tale technique. Impressionist tales are written to convey the drama of what occurred, selectively holding back on interpretations in order to reflect suspense (Van Maanen, 2011). Impressionist tales allow both the researcher's thought processes and the participants' actions to come forward (Van Maanen, 2011). The

goals of such tales are to have the audience understand or feel the case through the invocation of imagery and very specific, detailed accounts (Van Maanen, 2011).

I structure the three impressionist tales from the 2013 legislative hearing in accord with Foucault's medico-judicial discourse. Each tale corresponds with one of the three powers: the power to kill (i.e., life and death), the power to tell truth (i.e., truth), and the power to invoke laughter (i.e., humor). A conceptual analysis follows.

Life and Death

According to Foucault, the medico-judicial discourse has the power to impose determinations of justice that ultimately concern a person's freedom, and at its most critical point of power, life and death (Foucault, 2003). An impressionist tale of life and death as expressed in the 2013 legislative hearing follows. As the video of the hearing opens, the cordial sounding voice of Chairman Rich Golick wafts in as though from on high, catching him mid-sentence. The scroll dissolves into fluorescent light and gives way to a wave-shaped, gray-capped table with cherry sides and protruding microphones like bendy-black antennae. Chairman Golick is at the helm of it all, seated center and facing the camera, enjoying optimum visibility. It is October 24th of 2013 at 9:30 am, and spanning either side of the table are the key players. They are gathered to hash out what has been erroneously labeled an informational hearing on Georgia's *burden* of proof. Although the meeting only lasts from approximately 9:30 am – 11:30 am at the State Capitol building in Atlanta, according to Chairman Golick, there are three-hours reserved for the committee to, "get educated."

Chairman Golick opens the hearing with an explanation that morphs into three admissions and an admonishment. The admissions are: (1) the goal of the hearing is to

gather information and to “get educated”; (2) it is possible and perhaps even normal and reasonable to, “take all of that information, get educated, and consider all view points,” and then to, “not act accordingly”; and, (3) the Chairman supports the death penalty as being “well-established law […] that’s not going to change anytime soon.” The admonishment is subtle and comes before his final admission: the death penalty is off the table for discussion and anyone who thinks otherwise is, in essence, foolish or inept: “So I hope that’s clear, if there’s *any*…*misunderstanding* on the part of any entity or individuals that we are somehow looking at the death penalty in general, that would be a *wrong* assumption.” The Chairman will later reveal that his veiled admonishment is intended for a specific target. The use of admonishment both at the opening of the hearing and at its conclusion betrays the admonishment as an important, if not central, concern of the hearing on the State’s standard of proof of intellectual disability.

Attorney Jack Martin and his wife, Sandy Michaels, with the Georgia Association of Criminal Defense Lawyers are called first to testify. Jack Martin co-drafted the 1988 statute with Joe Drolet, who is not in attendance. In an effort to demonstrate that the statute can be changed without in some way impacting the state’s death penalty status, Jack Martin references the federal statute: “One proposal we’ve been throwing around is not to *tinker* with the guilty, but mentally retarded [sic] statute […] but to provide a provision at the end—this is what federal law did.” Invocation of the federal government is met with mixed reaction. In further trying to make the case that changing the standard of proof will not impact Georgia’s power to impose a sentence of death, Jack Martin appeals to the legal definition of intellectual disability in the Georgia Code. He states, “Mental retardation [sic] is a *pretty* structured definition and you’ve got to meet those

three standards pretty clearly—it's not very flexible." However, and contrary to Jack Martin's testimony, Georgia's legal definition is considerably flexible: it does not specify adaptive functioning criteria beyond the three domains and it specifies only that onset be established during the developmental period.

Chairman Golick reiterates his underlying concern for state sovereignty in the imposition of death sentences, without ever directly referring to the death penalty itself: "Is there a sense that there may be an opportunity for the court to go ahead and use it as a vehicle for a more *expansive* decision on the greater, overhanging issue?" It is as though the Chairman does not dare utter the words, "death penalty." The explicit reference is instead made to the issue of scope; and ironically, what he describes as an expansion is really the expansion of federal powers and the restriction of Georgia's power to construct and implement a discourse with the power to kill. The Chairman's next line of questioning addresses the concern for false positive inundation:

> As it relates to the standard of, excuse me, the *burden* [sic] of proof to prove mental retardation [sic] under the Code, it goes to *any* crime, not just to the death penalty. If hypothetically the burden were to be changed, wouldn't we see as a practical matter, a floodgate of litigation coming from individuals who had been convicted under the previous approach who would be seeking relief under the new approach as a practical and administrative matter for our courts?

The Chairman's floodgate argument with regard to litigation has at least four implications: (1) the argument effectively adds a temporal dimension to the original concern for scope (i.e., the floodgate represents the notion of too much, too soon); (2) in invoking such a floodgate argument, the Chairman commits a slippery slope logical

fallacy; (3) symbolically, a floodgate implies a rigid us/them social order that must be preserved at the risk of its own peril and may betray what are perhaps the Chairman's own protectionist beliefs regarding state sovereign power; and, (4) scope now entails a related concern for the economy and efficiency of the bureaucratic apparatus (i.e., the "practical and administrative matters for our courts").

Jack Martin rebuffs Chairman Golick's floodgate argument: "I think the floodgate argument has two problems: one, it's not *true* and two, it's the right thing to do, to give those people another shot." Stepping out from the clutches of the Chairman's logical fallacy, Jack Martin makes an appeal to empirical evidence: "Those would be the handful of people who could even make an *arguable* claim […] there may be a few, not a *flood* […] maybe four or five that would be likely making that claim." Jack Martin also makes an appeal to the spirit of the U.S. Constitution, which will later be dubbed an appeal to emotion by Danny Porter with the District Attorneys' Association of Georgia. Jack Martin asserts himself further:

> If there are a few people, a few, relatively few people, that deserve a second bite at this because of the onerous standard, beyond a reasonable doubt, then so be it. That ought to be what we do. If they didn't get a fair hearing at their trial, then we ***shouldn't be worried*** that those people can get back into court, and we can correct that error. We shouldn't *worry* about people who were *un*constitutionally convicted having a second *shot.*

Following the testimony of Jack Martin, Rita Young with All About Developmental Disabilities begins speaking at approximately 50-minutes into the two-hour hearing and

is asked by the Chairman to limit her "initial comments to about 10-minutes or so." After acknowledging their shared goal of brevity, she states:

> We're here today to bring you the *science* of developmental, excuse me, *intellectual* disability. What you all know as mental retardation [sic], we know it as intellectual disability […] the law it says mental retardation [sic], but as professionals, the professionally *relevant* term is intellectual disability […] We're not here to *change* the definition of intellectual disability—to somehow *broaden* its scope.

Danny Porter and Chuck Spahos, respectively with the District Attorneys' Association of Georgia and the Prosecuting Attorneys' Council of Georgia, offer the final testimony, and the only testimony in favor of retaining the State's beyond a reasonable doubt standard of proof of intellectual disability. Danny Porter, referencing the earlier testimony of Jack Martin and others advocating for a lowered standard, relegates the opposing argument regarding the spirit of the constitution and the beyond a reasonable doubt standard to a baseless appeal to emotion:

> We're concerned with the system as a whole if we begin to just *surrender* to the emotional appeal. The second thing is that we believe that as a matter of law, this cannot be limited to death penalty cases. I don't believe that a statute can be *crafted*—I don't believe that a statute can be written—that would survive an equal protections claim that would limit this only to death penalty cases. And so therefore the statement that there are only 10 people on death row that this would apply to is, we think, incorrect […] And frankly what we know is—and I've learned this from some of our previous speakers—is that mental retardation [sic]

> is defined *very specifically* in our *code* with a three-prong test that determines if a person is mentally *retarded* [sic]. But if you move to the definition of *intellectual disability*, then you *broaden* it *by nature*—you broaden the understanding of what that means to include Autism.

Although Jack Martin previously suggested that only four or five persons on death row would have a legitimate claim to appeal should the standard of proof be lowered, Danny Porter inflates Jack Martin's figures to 10 or more and then rejects the new figures as being too low. Danny Porter also expands the previous concerns for scope/floodgates to include not just the difference between persons on death row and any person who authored a criminal offense, but as well, to the difference between persons with intellectual disability and persons with developmental disability. In this way, Danny Porter erroneously creates: (1) a false distinction between the terms, *mental retardation* [sic] and *intellectual disability*, and (2) a false non-distinction between the terms, *intellectual disability* and *developmental disability*.

The correct information had been previously introduced in the testimony of Jack Martin and Rita Young. However, because Danny Porter and Chuck Spahos are the last to testify, their position goes unchallenged. (So too does the reference to Georgia's Code as being narrow in its definition of intellectual disability.) Chairman Golick frames the confusion as the following:

> We need to get our arms around a little bit tighter on the ability to section off death penalty as opposed to every other crime. It seems to me on the surface that we would not be able to do that constitutionally, but I reserve the right to be wrong.

This position makes little sense, however, as persons with psychiatric disabilities are not death eligible, owing to considerations related to cruel and unusual punishment and relatedly, the preclusion of the so-called penological aims of the death penalty (i.e., deterrence and retribution); nonetheless, such identified persons are still incarcerated for the commission of an illegal act (Ford v. Wainwright,1986). Ironically, it was the *Ford v. Wainwright (*1986) decision, in combination with the shameful execution of Jerome Bowden, that led to Martin and Drolet's hurried drafting of Georgia's statute and standard of proof.

Truth

According to Foucault, the medico-judicial discourse has the power to make truth claims. Furthermore, the power of truth functions to legitimize the power to kill (Foucault, 2003). An impressionist tale of scientific truth as expressed in the 2013 legislative hearing follows. After Jack Martin's opening testimony, Chairman Golick calls upon others who advocate for a lowered standard of proof to testify: Rita Young from All About Developmental Disabilities, and Stacy Ramirez and Drs. Dan Crimmens and Roy Sanders from the Center for Leadership in Disability. All About Developmental Disabilities, which has offered direct services for people with developmental disabilities for more than 60 years, is now known as the Bobby Dodd Institute. The Institute provides outreach services, family support, and benefits consulting in Georgia (Bobby Dodd Institute, 2018). Regarding the Center for Leadership in Disability, the mission is: "to translate research into sustainable community practices that contribute to independent, self-determined, inclusive, and productive lives for people with disabilities and their families" and is housed within the Institute of Public Health at Georgia State

University (Center for Leadership in Disability, 2019). Rita Young with then-organization, All About Developmental Disabilities, is the first person to speak the word *science* into consciousness. It is a term that will be used seven times more in this 25-minute section of the hearing on the science of intellectual disability and clinical diagnosis.

Following the testimony of Rita Young and Stacey Ramirez, psychiatrist Roy Sanders is called to answer questions related to the science of diagnosis. Representative BJ Pak who, according to his website, serves on the Magistrate Judge Merit Selection Panel of the U.S. District Court for the Northern District of Georgia, is the second person to use the term, *science*. He asks earnestly, but rhetorically:

> And this may be an unfair question […] is the *science* developed enough to say that beyond a reasonable doubt this person suffers from mental retardation [sic]/intellectual disability? […] In your field, is there a consensus that we could say that to a *reasonable* certainty, *or* beyond a *reasonable* doubt, that when you could diagnose someone and go through some tests and say this person, can you say beyond a reasonable doubt, *suffers* [sic] from mental retardation [sic] as defined in the law?

Psychiatrist Roy Sanders explains, “At issue is that you can’t—*in medicine*, we don’t have anything beyond a reasonable doubt. That’s the general consensus.” Representative Pak persists: “What is the *strongest* kind of conclusion you can reach?” Psychiatrist Roy Sanders responds succinctly, “Preponderance of the scientific evidence, and that would be based on the objective evidence, and based on exam and evaluation over time.”

Representative Coomer joins the discussion: “I’ve sometimes heard of experts refer to something being to a reasonable degree of medical certainty […] Can you explain the difference between *that* and what you just described as a medical preponderance?” What may have started as a genuine effort to reframe the discussion in more recognizable terms, or perhaps in an effort to garner a more palatable response, has effectively resulted in what will become a quagmire of jargon. The descriptor *awkward* is used four times and the term *odd* is used three-times throughout the hearing to describe Georgia’s capital trial procedure and discrepancies in professional terminology. In what might be interpreted as a medico-judicial norm, psychiatrist Roy Sanders acquiesces to Representative Coomer: “It’s probably more semantics than anything else.” But according to the National Commission on Forensic Science testimony, the term *reasonable medical certainty* is not routinely used in scientific disciplines (i.e., clinical diagnosis) outside the courtroom setting and has “no scientific meaning” (U.S. Department of Justice, 2015). Instead, “the standard for admissibility only requires that the expert’s opinion be a reasonable one, deduced from the evidence” (U.S. Department of Justice, 2015).

What follows is a panicked muddling of terminology that ultimately leads Chairman Golick to intervene, withdrawing from the entire line of inquiry. Within a timespan of less than three minutes, psychiatrist Roy Sanders uses a total of eight terms to designate the legal translation of *reasonable medical certainty*, which he had already correctly equivocated as preponderance of the evidence: *reasonable certainty, beyond a reasonable doubt, preponderance of the scientific evidence, degree of medical certainty, preponderance of science, scientific certainty, reasonable scientific*

certainty, medical certainty, and, *reasonable medical certainty*. Chairman Golick sounds mentally bedraggled as he solemnly concludes it is in everyone's best interest to just defer to the legal terminology. The Chairman concludes:

> I mean, to speak for myself, we would do better to have a consistency in our terminology as long as we've got a very clear idea as to what it means, but it sounds to me like we've got more certainty in some language that currently exists and may not be the most modern, professionally accepted language, but for purposes of *the statute* and for purposes of *the burden*, which is the narrow issue we're discussing, we have some level of predictability with that whereas, if I'm understanding this correctly, we may have actually *less* certainty if we were to go with some scientific terminology that doesn't have the precedent that the current terminology in the Code *does have.*

Chairman Golick successfully subjugates the medical terminology to the legal terminology out of an expressed concern for the understanding of the legislative hearing community; he does not, however, address the translational gap between accepted clinical practice and norms with regard to scientific certainty and Georgia's high legal evidentiary standard, beyond a reasonable doubt. Challenges in translation are not relegated only to discrepancies between medicine and law, but they also arise within the jurisdiction of law itself. The intra-law discrepancy is between the standard and the burden of proof. The hearing has been erroneously titled an informational hearing on Georgia's *burden* of proof. This error arguably betrays a lack of preparation and a lack of concern. As Tim Saviello, Supervising Branch Manager at Federal Defenders for the Middle District of Georgia, explains in his testimony:

> I think we should *all back up* for a moment and establish some terms so we're clear. The *legal* evidentiary standard of beyond a reasonable doubt, or to a preponderance, or clear and convincing evidence, is the standard that the trier *of fact* has to reach in order to decide that a fact has been proven sufficiently. In this *context*, the *burden* of proving mental retardation under the statute, and in virtually every state that deals with *this issue*, everybody places the *burden* on the defendant to prove mental retardation [sic]. The *standard* is what is at issue here.

Despite Mr. Saviello's caution, Representative Pak, trial lawyer and litigator, and former federal prosecutor, continues to use the terminology, *burden of proof*. Representative Pak also effectively positions psychiatrist Roy Sanders in a false dilemma: Roy Sanders must either come to the rescue of his profession by claiming that, yes, the science is "developed enough," which in addition to being inconsistent with expert opinion, is antithetical to his previous testimony, and therefore undermines his credibility; or he must say that, no, the science is not "developed enough" and again undermine his credibility by virtue of discrediting the scientific rigor and status of his profession.

Humor

According to Foucault (2003), the medico-judicial discourse expresses humor that results in the power to invoke laughter. It is a humor that, like satire, aims toward a deeper irony and entails the momentary recognition of an underlying reality (Foucault, 2003). An impressionist tale of humor in Georgia's 2013 medico-judicial discourse on standard of proof follows. At approximately 11:00am, 90-minutes into the hearing, Chairman Golick calls the final speakers, Danny Porter and Chuck Spahos, who

advocate for imposing no changes upon the standard of proof of intellectual disability. They are with the District Attorneys' Association and the Prosecuting Attorneys' Council of Georgia, respectively. Danny Porter speaks first, his voice an intriguing combination of low and grumbly, soft and amiable:

> Mr. Chairman, first of all, I'd like to also express my reluctance to use the term, mental retardation [sic] because a member of my family suffers [sic] from intellectual disability and we have a rule that if anyone were to use those words in a *pejorative* sense, we're under directions to take *direct* action to remedy that [laughter erupts], so I find that term as offensive as anyone else […] But the law *does* describe it as such and I'm here on behalf of the District Attorneys Association of Georgia.

Danny Porter has constructed his position as a District Attorney who is both sympathetic toward and personally connected to disability rights and who, on the other hand, did not transgress the legal norm by using the relevant clinical terminology, despite the legal terminology being pejorative. In his opening assertion, Danny Porter underscores the legal norm of retribution is one of capital punishment's penological aims: "take *direct* action." His slow and methodical pronunciation of the word *take* is contrasted by his sharp inflection of the word *direct,* and a modest eruption of laughter punctuates his sentence. The laughter seems to acknowledge an underlying paradox in his statement. The first paradox is chivalrous violence. The very people he aims to protect in his personal life are the same people who will be placed at a disparate risk for unlawful execution and rights violations if the standard of proof and legal language is retained.

The final moments of the hearing serve to bookend Chairman Golick's subtle admonishment that came at the opening of the hearing. Despite their common ground on the issue of standard of proof, Representative Christian Coomer initiates a confrontation with the state judiciary representatives:

> I want to ask you about an earlier comment I read in a memorandum by GACDL [Georgia Association of Criminal Defense Lawyers]. Paragraph 11, it says that *some* Georgia District Attorneys have voluntarily moved to a preponderance of the evidence standard because of their concern about future court decisions. Can you give us some light on that?

Gwinnett District Attorney Danny Porter offers up the Ocmulgee District Attorney before explaining plaintively to the committee as the Chairman reads a newspaper, "And this is the only instance we're aware of, because we discussed it pretty thoroughly at our last meeting." Representative Coomer becomes more forceful:

> I was just going to say, as a legisla*tor* and an attorney who's been a prosecutor *and* a defense attorney, it frankly sends off sirens and bright lights and whistles and everything else when I see DAs ignoring the law and creating their own standards for their cases.

Chuck Spahos states that he will "defend that" before explaining that discretion in creating standards is acceptable so long as it is a procedural standard and involves the consent of both parties. Representative Coomer counters:

> I understand that, and yesterday I got a little bit of a thrashing by the Chairman [Rich Golick] because I was talking about separation of powers issues. Just as

> adamant as I am that we ought not invade the judiciary, I don't think the judiciary ought to make a statute as it goes.

To this, Chairman Golick responds, "That wasn't even close to a thrashing," and laughter ensues. It is another veiled threat of violence met with laughter. "Thank you, Mr. Chairman," replies Representative Coomer to further laughter. He looks down; his face is now flushed. The tension of the previous moment breaks, seemingly setting up Chairman Golick to initiate the ultimate and final confrontation:

> And while we're talking about the DAs, let me offer an observation, Mr. Spahos. And I wouldn't bring this up were it not such a glaring example of maybe how not to engage in a public discourse. I read an article where the leadership of the DAs Association—I'm going to go ahead and direct this to *you*, not to Mr. Porter, or Mr. Poston—but directly to you as one of their representatives, although as I understand, you did *not* make this comment…the quote is: 'the District Attorneys don't believe that you change a law for no reason and in this case, the law appears to be working. Where has a jury done a disservice? Why are we putting *all* of our eggs in the defendant's basket and forgetting there's a victim?' My sense is that the leader of the DAs Association who made that comment, current leader of the DAs Association, maybe didn't understand that this is an *informational* hearing and that that rather *breathless, uninformed,* and frankly, misleading comment didn't do anything but go ahead and undermine the credibility of the organization. I would ask you to remind that individual—not Mr. Porter because Mr. Porter has been around the block a few hundred times and understands the work we've done on this committee, including the Victim

> Restitutions Act of 2005 and the Crime Victims Bill of Rights in 2009 I think it was. So, you know, we're not putting *any* eggs in *any* basket. We're gathering information. That's our charge. That's what we're supposed to do, and then act accordingly or not. So, my sense is that if the question had been posed to Mr. Porter, it would have been a much more measured, productive response rather than the one we have here.

"That's not always a guarantee," Danny Porter responds self-deprecatingly, almost irreverently, invoking laughter. And then, in what might be the most ironic, the most telling moment of the hearing, Chairman Golick interprets Danny Porter's statement as an apology, responding in kind, "There are no guarantees, but I'll go ahead and say it's *more likely than not*, how about that?" This is met with further laughter. What Chairman Golick has just effectively said to Danny Porter is that he is willing to hold Danny Porter, who the Chairman values for being "measured and productive" to a standard of preponderance (i.e., "more likely than not") rather than to beyond a reasonable doubt (i.e., "guarantees"). For meeting Chairman Golick's normative assumptions, Danny Porter is rewarded with confirmation of his in-group status demonstrated by the Chairman's gesture of offering the lowest standard of proof for membership. And thus concludes the impressionist tale of humor in Georgia's medico-judicial discourse on standard of proof.

Discussion

According to Foucault (1977), power is based on knowledge and makes use of knowledge; however, the knowledge of importance here has no relationship with science. Instead, the relevant concern of knowledge is the technique of discipline.

Chairman Golick and his committee know something that no testifying participant knows: the purpose of the meeting is not to “get educated” about the “science” of intellectual disability. Rather, the underlying purpose of the hearing is for the legislative body to make its power both visible and verifiable to participants through the use of the following disciplinary techniques: (1) subjugating professional clinical terminology (i.e., “intellectual disability”) to the legal terminology (i.e., “mental retardation” [sic]) with full awareness of, but only surface level regard for, the pejorative connotations of the latter; (2) three-times publicly admonishing representatives of the judiciary; (3) positioning the committee, and specifically the Chairman, as the trier of facts; (4) using only two- of the three-hours allotted for the hearing despite not meeting the ostensible goal, “to get educated”; and, (5) evoking two instances of legislation that the Committee had previously supported that furthered the agenda of the Prosecuting Attorneys’ Council and District Attorneys’ Association of Georgia. Together, they express what Foucault regards as the three primary techniques of control in disciplinary power: (1) hierarchical observation (e.g., the legislative committee positions itself to be the trier of fact over the representatives of the judiciary); (2) normalizing judgment (e.g., it is desirable that representatives of the judiciary behave in a “measured and productive” manner); and, (3) the examination (e.g., the informational hearing itself, with the legislative committee navigating its position relative the other branches, professions, and constituents as demonstrated in the subjugation of the medical language to the legal language).

Recommendations for Affecting Social Inclusion

If formal processes are instituted as mechanism of change, but can be argued to function in a way that betrays their very existence (i.e., hidden discourses on social

hierarchy masquerading as democratic discourses on science and justice), advocates should consider exploring similar methods for affecting change. If advocates who do not support Georgia's high standard of proof were to employ a strategy parallel to the 2013 informational hearing, we might turn our focus to leveraging the powers expressed by the *medico-* portion of the medico-judicial discourse. That is, we might leverage clinical professions' power as expressed through the act of, and claim to, clinical diagnosis. The clinical professional umbrella encompasses psychology, psychiatry, and to a lesser extent, clinical social work. The U.S. Supreme Court constructed an important role of clinicians in the *Atkins* (2002) decision. Further, two subsequent U.S. Supreme Court decisions have served to bolster the *Atkins* mandate to adhere to clinical standards: *Hall v. Florida* (2014) and *Moore v. Texas* (2016).

Employing this new strategy, the issue of unlawful execution of persons with intellectual disability should be reframed as a civil rights, not a criminal justice, issue: quite literally, if a person cannot meet the standard of proof, the person will also be denied Title II supports and services to which they should otherwise be entitled, as per the Americans with Disabilities Act (1990). If there is reason to suspect that persons with intellectual disability are at-risk for unlawful execution and constitutional rights violations, then there is equal reason to suspect the same for the denial of Title II supports and services and civil rights—both being predicated on a legal determination of intellectual disability. A clinical finding of intellectual disability of someone on death row, for example, would sufficiently challenge their death row status in the first place, and could result in change through the court system in addition to, or rather than, the

legislature. In an organized and ethical fashion, clinical evaluation should be explored as an option for effectuating a lower standard or a moratorium on the death penalty.

The inherent paradox of such a strategy is worthy of our consideration. On one hand, the medical model reifies and pathologizes disability, objectivizing and stigmatizing people—reducing the person to diagnostic label/s, perpetuating stigma and negative stereotypes that can play out lethally in the context of jury deliberations. On the other, if diagnosis can be used to challenge restrictive state legal definitions that place people with intellectual disability at-risk for unlawful execution and rights violations (e.g., denial of accommodations, lack of due process, subjection to cruel and unusual punishment), maybe it is worthy of further consideration as a strategy. I should be clear here that clinical diagnosis is not the endpoint, but rather a beginning point and critical juncture—a position from which to raise a legitimate concern over the protection of rights, civil and constitutional, and access to accommodation.

A clinical finding of intellectual disability where there is no legal finding will challenge state policy and procedure; however, because *Atkins* (2002) is a federal ruling, it should be argued that the only way to reliably ensure that death penalty states are effectuating the intent of the decision and not executing persons with intellectual disability is to implement a national moratorium or abolition. A moratorium (and truly, abolition) is additionally preferable to a moderated standard because it altogether avoids the stigma-laden assumptions and pity-based argument of the *Atkins v. Virginia* (2002) decision, relieving the advocate from an impossible ethical choice: to save a person’s life or to challenge negative stereotypes and stigma that continue to pervade society and place a person’s life and access to justice at greater risk in the first place.

Justice requires us to organize and step beyond the circuity of this manufactured dilemma. We can effectively achieve this through the abolition of the death penalty itself, a necessary step toward the realization of social justice and inclusion in the United States.

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