A MULTI-METHODS ANALYSIS FOR UNDERSTANDING THE INTERSECTION OF INTELLECTUAL DISABILITY, CAPITAL PUNISHMENT, AND SOCIAL INCLUSION: IMPLICATIONS FOR POLICY, PRACTICE, AND RESEARCH IN SOCIAL WORK

By

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(Under the Direction of Kristina Jaskyte)

ABSTRACT

The U.S. Supreme Court's *Atkins v. Virginia* (2002) decision exempted capital defendants with intellectual disability (ID) from execution. In its decision, the U.S. Supreme Court asked states to generally conform to clinical standards. However, states vary greatly on legal definitions of ID and capital procedures, such as standard of proof. When states use a standard of proof of ID that is higher than the lowest, capital defendants with ID are placed at an increased risk for unlawful execution. The overarching purpose of this dissertation is to understand the policy, practice, and research implications of high standards of proof of ID for the social inclusion of persons with ID. Chapter 2 was a secondary data analysis that used publicly available records. The purpose of Chapter 2 was to explore the differences between states' death penalty statuses and standards of proof of ID across social inclusion factors. The overall findings were that states do not differ on social inclusion factors by death penalty status alone, and that states using a standard of proof higher than the lowest were less socially inclusive than states using the lower standard or no standard. Chapter 3 was a theoretically driven, single-case study that explained why Georgia remains the only state to implement the highest standard of proof. To

answer this question, I conducted interviews with key informants in the public sector. I also obtained and transcribed a two-hour long legislative hearing that occurred in 2013 on Georgia's standard of proof. I used the impressionist narrative tale and constant comparative methods to develop themes and dimensions. Themes and dimensions were used to inform nine recommendations that address the lack of information or misinformation presented in the 2013 legislative hearing. Chapter 4 was a policy analysis that used a value-critical approach to examine the standard of proof of ID within Georgia's 1988 statute. I presented findings across the social history context, the judicial context, and the economic context. I then provided a justification for the recommendation to clinically evaluate death row inmates in Georgia for ID.

INDEX WORDS: Intellectual disability, Death penalty, Social inclusion, Standard of proof

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DEDICATION

For Elle, always and forever.

And for all the people who have been wrongfully executed:

may your memories live on with honor.

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Cheers!

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CHAPTER 1

INTRODUCTION AND REVIEW OF THE LITERATURE

"In its function, the power to punish is not essentially different from that of curing or educating" – Michel Foucault

According to Liat Ben-Moshe (2013), a disability scholar who writes from the social inclusion perspective, the history of disability is the history of incarceration. I argue that if disability and the prison system, irrespective of one another, represent exclusion societies, with prisons representing "extreme" forms of exclusion, then the intersection of intellectual disability (ID) and capital punishment is arguably the most extreme "exclusion society" yet. The intersection of ID and capital punishment is rendered only more egregious when one comes to understand the gross and historic maltreatment that persons with ID in the U.S. have been made to endure. Historically, persons with ID have not been protected under the sphere of legal rights; have been subjected to maltreatment such as forced sterilization and undue confinement; and have largely been segregated and excluded from full and equitable participation in society.

The insurance of access to needed services and resources, equality of opportunity, and meaningful participation in decision-making are issues of social justice, and therefore fall within the purview of the social work profession. I submit that, as a profession, social work is well positioned to address the extreme brand of social exclusion that occurs at the ID-capital punishment intersection. I make this argument based on the idea that such an intersection is counter to the National Association of Social Workers' (NASW) core value, social justice. Social justice is based on the ethical principle that social workers should challenge instances of social injustice:

> Social workers pursue social change, particularly with and on behalf of vulnerable and oppressed individuals and groups of people. Social workers' social change efforts are focused primarily on issues of poverty, unemployment, discrimination, and other forms of social injustice. These activities seek to promote sensitivity to and knowledge about oppression and cultural and ethnic diversity. Social workers strive to ensure access to needed information, services, and resources; equality of opportunity; and meaningful participation in decision making for all people (NASW, 2016, Ethical Principles).

In this vein, the social work profession regularly takes up the concern for the ways in which politically dominant groups in society treat others in a non- or less dominant position, and the resultant stigmatization and diminished participation. To further support the social work profession's ethical role in the ID-capital punishment intersection, I point to two policy statements issued by the National Association of Social Workers (NASW) on capital punishment and disability advocacy, respectively. In 2002, the Association stated that it opposes capital punishment and that the "NASW maintains that the integrity of human life and well-being are among the highest values to which a society aspires. The death penalty is a violation of human rights that belong to every human being, even those who have committed crimes" (NASW, 2002, Social Workers Oppose Death Penalty and Capital Punishment). Regarding disability advocacy, in 2008, the NASW officially endorsed: "Advocacy in collaboration with people with disabilities and their families to reduce discrimination, stigma, and restriction of rights based on inaccurate perceptions of individuals with disabilities in their communities and in society" (NASW, 2008, People with Disabilities).

However, despite such professional mandates, and despite legislated measures attempting to further social inclusion efforts (e.g., the Americans with Disabilities Act of 1990), persons

with ID continue to endure maltreatment and diminished participation in the public domain. In order to address this extreme form of exclusion society effectively, it is incumbent upon social work professionals to understand the ID-capital punishment intersection across three broad perspectives: (1) the legal perspective (i.e., the *Atkins v. Virginia* [2002] decision); (2) the clinical perspective (i.e., the historical and present day clinical conceptualizations of ID as promulgated by the two leading authorities in the ID community); and (3) the social perspective (i.e., the relationship between stigma, rights, and social inclusion). After providing an overview of the legal, clinical, and social perspectives in this literature review, I conclude by stating the aims of Chapters 2, 3, and 4.

The Legal Perspective: Intellectual Disability and the *Atkins* (2002) Rationale

In the 2002 *Atkins v. Virginia* decision, after taking a national consensus on the matter, the U.S. Supreme Court ruled that the execution of persons with ID is unconstitutional on the grounds that it violates the Eighth Amendment's protection against cruel and unusual punishments (Cheung, 2013). The Atkins court determined that the national consensus precluded states from exacting the sentence of death upon capital defendants with ID, citing these reasons: (1) the aims of retribution and deterrence may not apply to defendants with ID due to issues of moral culpability and, (2) defendants with ID face an increased risk of wrongful execution because they, "are less able to give meaningful assistance to their counsel, typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes" (Cheung, 2013, p. 319; Ellis, 2003; Feluren, 2013). Subsequently, the U.S. Supreme Court took the case, *Hall v. Florida* (2014), and ruled that the determination of ID should be informed by the medical community's diagnostic framework (Howe, 2016). The rightful position of the clinical profession (i.e., state legal adherence to accepted clinical practice and norms)

within criminal jurisprudence is again being challenged in the *Moore v. Texas* (2016) case heard by the U.S. Supreme Court on November 29, 2016 (Howe, 2016). Because Georgia is the only state to invoke the highest evidentiary standard of ID, beyond a reasonable doubt, and because Georgia has erroneously interpreted this standard as being the legal equivalent of 'a reasonable degree of scientific or medical certainty,' it is likely that should the U.S. Supreme Court take a case from Georgia on the issue of standard of proof, the Court will examine it from the perspective of clinical conformity (Informational hearing, 2013).

The Clinical Perspective: Classification and Diagnosis of Intellectual Disability

The definition of ID has undergone many reconstructions over time, originally referring only to deficits in intellectual functioning (Papazoglou, Jacobson, McCabe, Kaufmann, & Zabel, 2014). Traditionally, disability has been viewed from the perspective of the medical model, which presents disability as an individual pathology with a physical or organic etiology (Ali, Strydom, & King, 2012). Beginning in the latter half of the 1900s, the disability movement embraced the social constructionist approach, which focuses on person-in-social environment interactions that establish the underpinning structures of a shared social reality (Ali et al., 2012). From this perspective, language has been integral to the disability rights movement, with many terms having been adopted and then discarded for reflecting negative, albeit publicly endorsed, stereotypes about persons with ID. Although the U.S. today sanctions person-first language, it was not roughly until within the past decade that the term ID began to replace the term, 'mental retardation' [sic]. Prior to the clinical use of the term 'mental retardation' [sic], language such as idiot [sic], imbecile [sic], feeble-minded [sic], and moron [sic] prevailed in the 19th and early 20th centuries (Haydt, Greenspan, & Agharker, 2014; Meany, 2004), reflecting the roots of the present day classification systems (e.g., the mild, moderate, severe, and profound categories in

the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders). Due to variances within the ID population, diagnosis is a nuanced process that requires professional judgment and experience. In general, diagnosis is confounded by a variety of factors: (1) frequent overlap of symptoms across diagnostic categories; (2) diagnoses are frequently co-morbid; and, (3) information about etiology is frequently missing (Greenspan, Harris, & Woods, 2015). In addition to determining eligibility for supports and services, and having real-life impact on capital defendants' eligibility for death penalty sentencing, diagnosis is linked to the recognition and protection of legal rights.

Role of Professional Organizations

The American Psychiatric Association (APA) and the American Association of Intellectual and Developmental Disability (AAIDD) promulgate two widely used definitions of ID (Cheung, 2013; DeMatteo, Marczyk & Pich, 2007). In *Atkins v. Virginia* (2002), the U.S. Supreme Court left to the states the task of developing appropriate ways to enforce the constitutional restriction against the execution of capital defendants with ID (Cheung, 2013). The Court further suggested states generally conform to clinical practice and norms, providing guidelines in the form of definitions promulgated by the APA in its fourth text revised edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) and the AAIDD's 1992 manual (Blume, Johnson, Marcus, & Paavola, 2014; Cheung, 2013; Ellis, 2003; Fabian, Thompson, & Lazarus, 2011; Feluren, 2013; Haydt et al., 2014). The U.S. Supreme Court further upheld its previous suggestion in the *Hall v. Florida* (2014) decision. The APA and AAIDD definitions utilized in *Atkins* (2002) were similar, but not identical and this difference has contributed to confusion between states concerning which definition to follow, with some states

choosing to adopt the AAIDD definition and others the APA definition (Cheung, 2013; Ellis, 2003; Feluren, 2013).

AAIDD. Founded in 1876, the American Association of Intellectual and Developmental Disability (AAIDD) is an interdisciplinary organization of professionals (DeMatteo et al., 2007) and has been the primary organization involved in defining intellectual disability (Obi et al., 2011). Since 1961, the AAIDD has revised the definition of ID several times (DeMatteo et al., 2007; Ellis, 2003). Definition changes have varied on the point of the adaptive functioning prong (i.e., real-life impact on the individual's life) (Ellis, 2003). As an authority of disabilities research, the AAIDD was one of the primary resources for the U.S. Supreme Court in *Atkins* (2002) and remains a contemporary guide for many state courts and legislatures (Cheung, 2013). The *Atkins* Court specifically referred to the AAIDD's 1992 definition of ID (Cheung, 2013), which the Association revised 10 years later in 2002. Although the *Atkins* Court adopted the AAIDD's 1992 clinical definition of ID, James Ellis (2003) argues that the 2002 edition of the manual seems to be "somewhat better suited for forensic evaluations in death penalty cases" (p. 8) because the move from service-related skill areas of the 1992 definition to the broader domains of conceptual, social, and practical skills is better aligned with the concerns of the criminal justice system. Subsequent to this edition, the AAIDD published its 11th and most recent edition in 2010, retaining the broader conceptual domains, but replacing the term, 'mental retardation' [sic], with intellectual disability (ID), explaining that ID is intended to cover "the same population of individuals who were diagnosed previously with mental retardation in number, kind, level, type and duration" (Cheung, 2013, p. 322; Fabian et al., 2011).

APA. The American Psychiatric Association (APA) was established in 1844 and is the world's largest psychiatric organization and publishes the Diagnostic and Statistical Manual of

Mental Disorders (DSM) (Cheung, 2013; Feluren, 2013). Publications of the DSM have closely followed the lead of the most recent AAIDD manual, with differences typically attributed to the fact that the DSM manuals have undergone revision less frequently than those published by the AAIDD (Haydt et al., 2014). The *Atkins* Court referred to the DSM-IV-TR (2000) due to its wide use among mental health experts (Cheung, 2013; Feluren, 2013). This edition utilized a multi-axial diagnostic approach (Feluren, 2013). The multi-axial assessment was intended to help clinicians to develop a more comprehensive evaluation of a person by incorporating levels of diagnosis across five axes (Feluren, 2013), which would then establish a primary diagnosis as differentiated from other, non-primary (i.e., less impairing) diagnoses. This, in conjunction with the use of narrower, adaptive skill areas (i.e., communication, self-care, home living, social/interpersonal skills, self-direction, functional academic skills, work, leisure, health, and safety) (Cheung, 2013), would in turn serve as a more sensitive guide for matching the specific needs of individuals with appropriate psychosocial supports and services. The DSM also serves as a tool for the development of treatment plans, and is used by the insurance industry to determine appropriate reimbursements for psychological treatment (Feluren, 2013). Not designed for legal use, the DSM-5 cautions that "dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis," but that with measured awareness of risks and limitations of the assessment tool, the DSM should assist legal decision-makers in reaching determinations of justice (Feluren, 2013).

Prong 1: Intellectual Functioning

Intellectual functioning is the first of three prongs of ID and is typically measured by the administration of a standardized intelligence test. According to the APA (2013), intellectual functioning includes abstract thinking, practical understanding, planning, and problem solving.

The statistical norm in the U.S. is a score range of between 80 and 120 points (Borromeo, 2001), with approximately 97 percent of the general population falling within two standard deviations (i.e., 30-points) of the average (Blume, Johnson, & Seeds, 2009). Therefore, it is estimated that less than 3 percent of the population has ID (Blume et al., 2009). The majority of individuals (85 percent) diagnosed as having ID fall within the mild spectrum of the DSM (i.e., a score range of between 50-55 and approximately 70-75 points) (Blume et al., 2009; Borromeo, 2001). Capital defendants with mild ID represent the majority of *Atkins* claims (Cheung, 2013; Feluren, 2013).

While the APA establishes categories of ID in its diagnostic manual (i.e., mild, moderate, severe, and profound), the AAIDD does not. Both organizations recognize 70-points with a 5-point standard error of measure (i.e., 75-points) as being indicative of ID. However, alone, IQ scores are not a reliable measure of the upper boundary of ID, and so require clinical judgment by experienced diagnosticians (Ellis, 2003). The *Atkins* Court took note that IQ scores are at best approximations of an individual's current level of intellectual functioning and should be interpreted with appropriate skepticism (Feluren, 2013). A skilled evaluator will be aware that not all IQ tests are the same, as well as that scores are not fixed, but instead represent an approximated range of intellectual functioning (Harvard Law Review, 2014). The literature consistently identifies other issues that can diminish score validity, such as practice effect, the Flynn effect, and inherent cultural biases of the test (Blume et al., 2014; Cheung, 2013; Feluren, 2013; Haydt et al., 2014). Moreover, if ID is a dynamic, malleable, and flexible biopsychosocial phenomenon, individuals will likely have IQ test scores and functions that fluctuate in and out of the designated score range across time (Fabian et al., 2011).

Prong 2: Adaptive Functioning

Adaptive functioning is the second prong of ID and is assessed using both clinical evaluations and individualized psychometric measures (Feluren, 2013). The AAIDD first incorporated adaptive functioning into the definition of ID in 1961 (Foster, Leland, Nihira, & Shallhass, 1967). However, at that time there were no available precise measures of adaptive functioning, so the construct had to be developed by a special program of research (Foster et al., 1967). The adaptive functioning construct is a supplemental measure of IQ, as it has long been understood in the clinical community that the relationship between the, "same maladaptive behavior without that IQ number might have placed [the individual] in another service" (Foster et al., 1967, p. 138). This phenomenon is referred to as social invisibility and occurs when an "individual who is not known as mentally retarded [sic] because he [sic] has achieved a sufficiently high level of adaptive behavior" (Foster et al., 1967, p. 142).

The current AAIDD and APA manuals define adaptive functioning using three domains of skills: (1) conceptual, (2) social, and (3) practical (Cheung, 2013; Ellis, 2003). Conceptual skills consist of language and literacy; money, time, and number concepts; and, self-direction (Cheung, 2013). Social skills are comprised of interpersonal skills, social responsibility, self-esteem, gullibility, naiveté, social problem solving, and ability to follow rules/obey laws and to avoid being victimized (Cheung, 2013). Practical skills are conceptualized as activities of daily living: occupational skills, healthcare, travel/transportation, schedules/routines, safety, use of money, and use of telephone (Cheung, 2013). Although some scholars see the broad domains as being better aligned with criminal justice concerns (Ellis, 2013), there is other contemporary concern that the diagnostic change to adaptive domain deficits could make the diagnosis more restrictive due to instrumentation and measurement errors (Papazoglou et al., 2014). A related

and salient concern is how mental health professionals are to accurately evaluate the adaptive functioning in individuals with below-average IQ who have been, "long institutionalized in secure environments" (Brodsky & Galloway, 2003, p. 7), such as prison inmates raising *Atkins* claims. Prison behavior is often used as a criterion for the determination of an ID claim, despite pervasive cautions against the reliability of this measure (Brodsky & Galloway, 2003). At issue here is the accuracy with which mental health professionals and non-trained prison and court officials (including jurors) can reliably infer functioning (e.g., reading comprehension) from perceived demonstrated behavior (e.g., the appearance of reading), as well as differences between the prison and non-prison settings (e.g., structure and access to services).

Prong 3: Age of Onset

The third element of an ID finding is the age of onset. Evidence of onset is usually established through a social history investigation, including an inventory of school records and medical records, and interviews with witnesses and peers who knew the defendant in the community (Blume et al., 2009). IQ testing is a widely used measure of intellectual functioning and impacts the third prong of the diagnosis because some capital defendants will have never took an IQ test before the specified age requirement (Blume et al., 2009; Cheung, 2013). Although there have been few cases to lose solely on the age-of-onset requirement (Blume et al., 2014; Feluren, 2013), some scholars have reasoned that, in order to fully uphold the *Atkins* decision, capital defendants should only be required to meet the intellectual and adaptive functioning prongs (Haydt et al., 2014). In the 2010 manual, the AAIDD specifies the age-of-onset as 18-years (Cheung, 2013). Taking a different approach than the AAIDD, the APA in the DSM-5 eliminates any reference to a cut-off age, specifying instead that the disability must be found to occur during the developmental period (Feluren, 2013).

Rate of loss by prong. A study in 2014 found that between 2008-2012, a slight majority (52 percent) of all unsuccessful *Atkins* claims lost on all three prongs; 31 percent lost on the first prong, intellectual functioning; 12 percent lost only on prong-two; finally, 2 percent lost on the age-of-onset prong (Blume et al., 2014). Regarding intellectual functioning, the court's decision to stipulate that only a reliable, individually administered, full-scale IQ score could be considered was the most significant predictor of success on intellectual functioning (Blume et al., 2014). Regarding adaptive functioning, losses on prong-two generally related to one or more of the following: 1) prison behavior; 2) the finding of malingering; 3) the purported facts of the crime itself; and, 4) stereotypes about what persons with ID can and cannot do (Blume et al., 2014).

The Role of Professional Competence

The *Atkins* (2002) decision created a special category of defendants exempt from capital punishment, with inclusion in that class established via clinical diagnosis (Haydt et al., 2014). Psychological understanding of criminal offense "and the extent to which ID is a disability" (p.106) is not necessarily strong among the general public (who may serve as jurors in capital cases) and, importantly, by lawmakers and court officials (Lindsay, 2013). There is strong potential that, in jury cases, the determination of ID may ultimately fall to the discretion of 12 laypersons who, in addition to having a lack of mental health training, are provided with contradictory expert testimony (Musso, Barker, Proto, & Gouvier, 2012). Because of a lack of training and experience, court officials and jurors alike may understand ID in a way that is inconsistent with the mild category of the diagnosis (Cheung, 2013), further substantiating the import of mental health professionals in legal proceedings involving the determination of ID. However, a point of caution is that, although some mental health professionals may have specific

experience in the clinical evaluation of persons with ID, most do not (Ellis, 2003). In any legal proceeding involving an assessment of ID, the evaluator, "must not only be skilled in the administration and interpretation of psychometric tests, but also in the assessment of adaptive behavior and the impact of intellectual impairment in the individual's life" (Ellis, 2003, p. 11).

Mild intellectual disability. The classification of mild ID is a relatively new construct, owing much to the creation of IQ tests (Haydt et al., 2014). Prior to IQ tests, individuals were identified informally based on their perceived ability to survive physically and socially in society (Haydt et al., 2014). In general, individuals with mild ID represent approximately 85 percent of those who have ID (Feluren, 2013). In a parallel way, capital defendants with mild ID represent the majority of *Atkins* claims (Cheung, 2013; Feluren, 2013). Social invisibility remains a salient concern for persons with mild ID. According to Feluren (2013), the class of individuals with mild ID will prove to be the most difficult to protect because, "they come closer to the normal border range" (p. 340), presenting with higher intellectual and adaptive functioning (Fabian et al., 2011) and thereby violating the standards of the stereotype. This is further confounded by the finding that, "when society envisions people with intellectual disabilities, people typically assume that they are those with physical manifestations of mental disabilities, such as Down Syndrome" (Cheung, 2013, p. 343). The identity of the decision maker in a capital trial procedure (i.e., judge or jury) is a powerful predictor of the likelihood that an *Atkins* claim will succeed, with juries being more reluctant to find ID (Blume et al., 2014; Feluren, 2013) because persons with mild ID "are unlikely to meet the standards of the stereotype" (Feluren, 2013, p. 355). One pause for consideration is the finding that, from 2002 - 2014, 22 of the total 23-jury determinations of ID (96 percent) ruled against the finding of ID; this is contrasted with an overall success rate of 43 percent (Blume et al., 2014).

Psychiatric comorbidity. Commonly, persons with ID experience a co-occurring psychiatric disorder: "it is not the exception, [but] the rule" (Fabian et al., 2011, p. 409; Musso et al., 2012). Like people with chronic, severe ID, people with chronic, severe psychiatric disorders typically experience substantial deficits in adaptive functioning (Haydt et al., 2014). However, because they may occur independently, "adequate professional skills to deal with one problem does not assure competency to deal with the other" (U.S. Department of Health, p. 37). One comparative study examined differences between cohorts of forensic and non-forensic patients with ID, finding that the forensic patients: (1) had lower rates of mood disorder; (2) no differences in other mental illnesses; and, (3) significantly higher rates in personality disorder (Lindsay, 2013). Personality disorder is considered a risk factor for criminal behavior in all offenders (Lindsay, 2013).

Malingering. Malingering is the term used to designate a person's exaggeration or fabrication of clinical symptoms for the purpose of achieving a secondary gain (Feluren, 2013). In the case of capital defendants raising the claim of ID, the secondary gain would be a categorical ineligibility for execution. Although the concern for potential malingering may be a valid one, it should not preclude the constitutional protection of persons with ID (Mobbs & West, 2013). Nor should it necessarily preclude a diagnosis of ID. This was a concern of the *Atkins* (2002) Court and is predicated on the assumption that, "one can fake bad, not good, on an intelligence test" (Mobbs & West, 2013, p. 587). Although the assessment of malingering is the fundamental task in forensic assessment and should always precede any conclusions drawn (Brodsky & Galloway, 2003), Blume et al. (2014) note that there are currently no formalized, reliable diagnostic assessments designed to capture the feigning of ID.

The Social Perspective: Stigma, Rights, and Inclusion

Beginning in the early 1900s, some professionals propounded a hereditary link between ID and criminality (Davis, 2009). This has contemporary import because most claims of ID are determined by juries comprised by 12 laypersons who most likely lack clinical training and knowledge of ID (Musso et al., 2012). Typically, the general lay public and court officials may lack training in mental health that is specific to ID, relying instead on stereotypes. Therefore, it is important when weighing the substantive and procedural ethics of Atkins claims to consider the historical and historic stigma of ID in the U.S. (Musso et al., 2012).

Stigma

Stigma is the process whereby certain groups of people are marginalized by society because the group norms differ from those of the dominant cultural group, with power differentials being exacerbated by socioeconomic and political differences (Ali et al., 2012). It is a process consisting of stereotypes, prejudice, and discrimination (Ali et al., 2012; Werner, 2015). Public stigma is conceptualized as the attitudes of the general public toward stigmatized individuals and groups, and can diminish participation and inclusion in the community, including a decreased realization of rights (Werner, 2105). Diminished expectations that result from and perpetuate stigma frequently lead to discrimination and diminished rights of persons with ID because these individuals are viewed by the general public as being incapable of making autonomous decisions (Werner, 2015). Related yet different, self-stigma refers to the process whereby a member of a stigmatized group psychologically internalizes the attitudes and behaviors of those upholding negative stereotypes about the group (Ali et al., 2012). In this form of stigma, the individual comes to endorse the cultural stereotypes in reference to their group membership and is therefore associated with label avoidance (Ali et al., 2012). For this and other

reasons, AAIDD warns that the use of self-rating scales is not a reliable measure of ID (Fabian et al., 2011).

Stereotypes

Stereotypes can be negative or positive, and refer to knowledge structures or attitudes about a group of people (Werner, 2015). Stereotypes and general misunderstandings about what people with ID are capable of achieving, "are likely the most significant factors affecting Prong 2 losses [adaptive functioning]" (Blume et al., 2014, p. 408). Although people with ID are often able to hold jobs, drive cars, support their families, achieve vocational skills, and live independently/interdependently, many courts have relied on these factors and other stereotypes to deny a capital defendant's claim of ID (Blume et al., 2014). One study (2012) found that college students are likely to conceptualize mild ID as more severe and easily identifiable than would often be the case, "suggesting that people may have difficulty making informed decisions about ID diagnoses in the presence of such misconceptions" (Musso et al., p. 225). Overall, and especially for individuals with ID, the rights to have children, to receive medical treatment only after consent, and to vote were found to be the most challenging rights to realize owing to public stigma, a construct that is linked to the decreased realization of rights and community inclusion (Werner, 2015).

Rights

Misguided public perceptions can have dire, real-life consequences for capital defendants who raise the claim of ID. In a 2015 study, Shirli Werner examined the relationship between public stigma and the perception of rights, as they relate to persons with ID. This study was, according to Werner (2015), one of the few studies to adopt this focus. She found the following: (1) more negative stereotypes, greater social distance and greater withdrawal behaviors were

evidenced toward individuals with ID than persons with a physical disability; (2) lower support of rights toward people with ID versus those with a physical disability; and finally, (3) a lower degree of acceptance and a higher perception of dangerousness were associated with greater social distance, which correlates with the diminished perception of rights (Werner, 2015). The perceptions of acceptance and dangerousness were the most important stereotypes associated with support of rights of persons with ID (Werner, 2015).

Social Inclusion

The beginning discourses of social inclusion are associated with 1970s France when the economically disenfranchised began to be described as the excluded (Silver & Miller, 2003). The initial uses of this vernacular referred to a variety of "disabled [sic] and destitute groups" (Allman, 2013, p. 7). This discussion of inclusion/exclusion culminated in an effort to identify a "social ontology, or the way that the existence and social positioning of groups in a hierarchically structured society would be explained" (Allman, 2013, p. 2). As cited in Allman (2013, p. 2), Towers (2005) described this social ontology as "a form of social and philosophical geography that melds ideology with place in an exercise of social, economic, and political power that invariably results in forms of oppression, and in many instances, exploitation." For this reason, sociology is well oriented to consider the phenomenon of social inclusion/exclusion beyond the traditional confines of economic contribution and natural fitness (Allman, 2013). Although often used to describe low or zero labor market involvement (Foster, 2000), beginning definitions of social exclusion broadened over time to reflect barriers to effective and full participation in society (Du Toit, 2004). For the purposes of this dissertation, and in accordance with Allman (2013), I treat social inclusion theory from a sociological perspective:

> Sociology complements biological and other natural order explanations of social stratification. Social inclusion and exclusion can function as apparati that problematize people on the margins, and by extension, contribute to their governance and control […] action and efforts to include or exclude individuals and social groups are fundamental to society as forces that govern through the oppressive or liberating effects such inclusionary or exclusionary actions promote (Allman, 2013, p. 1).

The social model of disability. Traditionally, disability has been viewed from the perspective of the medical model, which presents disability as an individual pathology with a physical or organic etiology (sometimes referred to as the disease model). Beginning in the latter half of the 1900s, the disability movement has embraced a social constructionist approach, which focuses on person-in-environment interactions that establish the underpinning structures of a shared social reality. According to the social model of disability, ID is a dynamic construct that moves to the tide of individual, societal, and environmental interactions (Shakespeare, 2013). The social model views disability (at least in part) as the result of unjust social and political conditions, such that social inequalities stem from social structures (Shakespeare, 2013). The societal disablement (e.g., exclusion and segmentation) of individuals is distinguished from 'impairment,' which is defined as a biologically based, and private-to-the-individual conception that fits the medical model (Shakespeare, 2013). In line with the assumptions of the social model of disability, the aims of this dissertation study were to better understand the ways in which politically dominant groups in society exclude individuals and groups who are in a non- or less dominant position (i.e., persons with ID), and further, to understand from a social inclusion/ exclusion perspective what are implications for policy and practice related to persons with ID. An explanation of dissertation study aims organized by chapter follows.

Aims of the Current Studies

The aim of Chapter 2, a secondary data analysis, was to explore the differences between states' death penalty statuses and standards of proof of ID across social inclusion indicators that either diminish or enhance the social, political, and economic participation of persons with ID in the public domain. Chapter 2 asked the research question: Are states that use a standard of proof of ID higher than a preponderance of the evidence significantly different from states that use a lower standard of proof or no standard of proof on social inclusion factors? It was hypothesized that states without a death penalty will be significantly more inclusive of persons with ID than will states with a death penalty. It was further hypothesized that social inclusion factors that diminish the participation of individuals with ID in the public domain will have a significant and direct relationship with states' standards of proof (i.e., the higher the standard, the greater the diminished participation and therefore the less socially inclusive). Lastly, it was hypothesized that social inclusion factors that enhance the participation of individuals with ID in the public domain will have a significant and inverse relationship with states' standards of proof (i.e., the lower the standard, the greater the enhanced participation and therefore the more socially inclusive). The aim of Chapter 3, a single case study, was to develop an in-depth understanding as to why it is that Georgia remains the only state in the nation to implement the highest standard of proof of ID, traditionally reserved for the issue of guilt and not ID, by invoking Michel Foucault's medico-judicial discourse. The aim of Chapter 4, a value-critical policy analysis, was to evaluate the policy element, standard of proof of ID, within Georgia's 1988 statute prohibiting the execution of persons with ID across the following three dimensions: (1) the social history context, (2) the judicial context, and (3) the economic context. A related, second aim of Chapter

4 was to provide policy recommendations that addressed identified challenges in each of the three dimensions.

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CHAPTER 2

A SECONDARY DATA ANALYSIS OF THE UNITED STATES' DISPARATE EVIDENTIARY STANDARDS: EXPLORING CAPITAL PUNISHMENT, INTELLECTUAL DISABILITY, AND SOCIAL INCLUSION [1]

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Abstract

The U.S. Supreme Court's *Atkins* (2002) decision exempted capital defendants with intellectual disability (ID) from execution. Although this decision represents a nationwide mandate, as of 2016, states varied on legal definitions of ID and capital procedures, such as the standard of proof of ID. As of August 2016, while 22 of the 27 death penalty states used the lowest standard, four states used the intermediate standard, and Georgia used the highest standard. Experts argue that any standard higher than the lowest leaves persons with ID vulnerable to unlawful execution and thus constitutional rights violations. Disability advocates view the unlawful execution of persons with ID as a form of discriminatory killing, and therefore as a form of maltreatment that both impacts and reflects the diminished social inclusion of persons with ID in society. The purpose of this secondary data analysis was to explore the relationship between states' death penalty statuses, and by extension, standards of proof of ID, and social inclusion factors that specifically pertain to the diminished or enhanced participation of persons with ID in society. It was found that states using the higher evidentiary standards had significantly greater instances of undue institutional confinement and forced sterilization (i.e., diminished social inclusion) than states using the lowest or no evidentiary standard. A discussion and recommendations conclude this article.

Keywords: standard of proof, intellectual disability, social inclusion, capital punishment

Introduction

When state legal definitions and capital adjudication procedures do not conform to clinical standards (e.g., standards of proof of ID higher than a preponderance of the evidence), states endorse the risk of unlawfully executing individuals with intellectual disability (ID) and in this way, the maltreatment and diminished social inclusion of persons with ID (Fiore, 2010). Social inclusion generally refers to the full and equitable participation of individuals and groups in the social, political, and economic spheres of the public domain. Maltreatment diminishes participation in society, and for persons with ID, has taken the forms of forced sterilization, undue institutional confinement, and institutional abuse and neglect (Lutzker, Guastaferro, & Benka-Coker, 2016). In this way, the maltreatment of persons with ID inhibits social inclusion (Lutzker et al., 2016). At its most extreme, examples of maltreatment have taken the form of discriminatory killing, a category that includes execution (Greenspan, 2016; Lutzker et al., 2016).

Execution was famously prohibited by the U.S. Supreme Court in the *Atkins v. Virginia* (2002) decision. Disability scholar Stephen Greenspan notes that, "executing persons with ID was discriminatory prior to *Atkins* and (because not all prisoners said to have ID are correctly diagnosed, or given relief from legal procedural mistakes) continues to be discriminatory after *Atkins*" (2016, p. 348). In the *Atkins v. Virginia* (2002) decision, the U.S. Supreme Court determined the execution of persons with ID to be unconstitutional on the grounds that it violates the Eighth Amendment's protection against cruel and unusual punishments because the penological aims of deterrence and retribution cannot be fulfilled (Cheung, 2013). Pointing to intellectual and adaptive deficits, the U.S. Supreme Court in *Atkins* (2002) thus reasoned that defendants with ID face an increased risk of wrongful execution because they "are less able to

give meaningful assistance to their counsel, typically make poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes" (Cheung, 2103, p. 319). As well, defendants with ID were found to "often have difficulty understanding and processing information, communicating, learning from their mistakes, controlling impulses, and empathizing with others" (Fiore, 2010, p. 7). Greenspan (2016) points also to the prevalence of false confessions, the deliberate framing of suspects with ID, and naïve offending (i.e., when a person with ID is manipulated into participating in the commission of a criminal offense).

Although the Atkins court in its ruling suggested that states generally conform to standard clinical practice and norms, states presently vary with regard to clinical conformity (DeMatteo, Marczyk & Pich, 2007). Conformity is determined according to state adherence to the three prongs used in clinical diagnosis: (1) deficits in intellectual functioning, (2) deficits in adaptive functioning, and (3) age of onset. According to the American Association on Intellectual and Developmental Disabilities and the American Psychiatric Association (i.e., the two leading authorities on ID cited by the Atkins court), intellectual functioning is measured using a standardized intelligence test. Both Associations establish 70-points as the approximated cutoff with an additional five-point standard margin of error (i.e., an approximated 75-point ceiling). Adaptive functioning, on the other hand, is assessed using both clinical evaluations and standardized measures (Feluren, 2013) across three broad domains of skills: (1) conceptual, (2) social, and (3) practical (Cheung, 2013; Ellis, 2003). Regarding age of onset, the American Psychiatric Association (2013) replaced the numeric cut-off of 18-years, retained in the 2010 American Association on Intellectual and Developmental Disabilities manual, with the broader, "during the developmental period."

The Court's favoring of general clinical conformity was further underscored in *Hall v. Florida* (2014). In the *Hall* (2014) decision, the U.S. Supreme Court struck down Florida's bright line IQ cutoff of 70 as violating the constitutional bar against executing defendants with ID (Hill v. U.S. Appeals Court, 2015). Specifically, the U.S. Supreme Court in *Hall* (2014) noted evidence of accepted medical practice that an IQ test score taken as sole evidence of ID was, "not conclusive evidence of intellectual capacity; and each IQ test had a standard error of measurement" (Hill v. U.S. Appeals Court, 2015, p. 10). The U.S. Supreme Court also selected to hear the case of *Moore v. Texas* in November 2016 on the issue of, "whether it violates the Eighth Amendment and this Court's decisions in *Hall v. Florida* and *Atkins v. Virginia* to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed" (Denniston, 2016, www.scotusblog.com). In its 2014 decision and 2016 selection, the U.S. Supreme Court has ostensibly expressed a continued concern for, and a preference for, general clinical conformity.

States' general conformity to standards in clinical practice and norms impacts the chance of success for capital defendants raising the claim of ID (Blume, 2015). When state legal definitions and capital procedures do not adhere to standard clinical practice and norms, states endorse the risk of unconstitutionally executing persons with ID; this is a rights violation *de facto* and an extreme form of maltreatment (Atkins v. Virginia, 2002; Blume, 2015; Fiore, 2010; Greenspan, 2016; Lutzker et al., 2016). In 2015, the overall success rate among Atkins claimants was 55 percent, which stands in sharp contrast to the success rates in certain states—even states within the same U.S. region (Blume, Johnson, Marcus, & Paavola, 2014). For instance, in the South, whereas North Carolina had a success rate of 82 percent and Mississippi had a success

rate of 57 percent, Georgia had a success rate of 11 percent and Florida had a zero percent success rate (Blume et al., 2014). Blume and colleagues (2014) found that states with the lowest success rates (i.e., Alabama, Texas, Florida, and Georgia) significantly deviated from accepted clinical standards.

Regarding general clinical conformity, standard of proof of ID is no exception to the *Atkins* (2002) decision and should be roughly commensurate with the professionally accepted degree of un/certainty in clinical diagnosis. Professionals argue that the legal standard commensurate with clinical certainty is the lowest of the three standards, a preponderance of the evidence (Saviello, 2015). As of August 2016, there were 27 death penalty state jurisdictions and 23 state jurisdictions with either no death penalty or a governor-imposed moratorium (Death Penalty Information Center, 2016). For the purpose of this study, states with a governor-imposed moratorium were classified as non-death penalty jurisdictions. As persons with ID should not face the risk of unlawful execution in non-death penalty jurisdictions because such a sentence is not an option in the first place, these 23 states effectively have no evidentiary standard for proving ID.

However, the 27 death penalty states varied on standard of proof of ID: 22 death penalty jurisdictions used the lowest standard (i.e., a preponderance of the evidence); four used the intermediate standard (i.e., clear and convincing evidence); and only Georgia used the highest standard (i.e., beyond a reasonable doubt). This means that of the 27 death penalty jurisdictions, 81.48 percent are seemingly in compliance with clinical standards and therefore the *Atkins* (2002) decision, whereas the remaining 18.52 percent of death penalty jurisdictions represent states in which persons with ID are at a disparately high risk for unlawful execution. When non-death penalty states, including states with a governor-imposed moratorium, are factored into the

equation, 10 percent of state jurisdictions represent states in which persons with ID are at a disparately high risk for unlawful execution. The unlawful execution of persons with ID is not only a violation of the U.S. Constitution, but it is also a form of discriminatory killing and maltreatment that extends, and is reflective of, the diminished social inclusion of persons with ID (Greenspan, 2016; Lutzker et al., 2016). This article focuses on state jurisdictions' death penalty statuses, and by extension, state jurisdictions' evidentiary standards of proof of ID, as a point of difference on social inclusion factors that diminish or enhance social, political, and economic participation in the public domain.

Purpose of the Study

This study explores the intersection of ID, capital punishment, and social inclusion theory. More narrowly, this study looks to states' death penalty statuses and standards of proof of ID in relation to social inclusion factors that diminish or enhance full and equitable participation in society. Such a focus represents a research topic that has received little to moderate interest, and one that has been largely taken up by legal and psychology experts. This research topic however, in addition to posing legal and clinical questions, also poses a broader question regarding social justice. The broader question of social justice begs the question of equality and entails the concern for social inclusion. Because the social work profession takes up the concern for the inclusion of persons whom society has cast aside as abnormal, less than-, or else in some other way, undeserving and undesirable, social work is well positioned as a profession to participate in this discourse in an additive fashion. The inclusion of the social work perspective could therefore be instrumental in expanding the concern over the unlawful execution of persons with ID from the scope of legal rights to a larger sphere of human rights that can be used to analyze and inform policy and practice. To this end, the purpose of this study is to explore the

relationship between states' death penalty statuses and standards of proof of ID, and social inclusion factors that pertain specifically to persons with ID in society.

Research question and objectives. This study asks the following research question: Are states that use a standard of proof of ID higher than a preponderance of the evidence significantly different from states that use a lower standard of proof or no standard of proof on social inclusion factors? To answer this question, this study has three objectives: (1) To analyze statistical differences between death penalty states (n = 27) and non-death penalty states (n = 23) on social inclusion factors for persons with ID; (2) To analyze statistical differences between non-death penalty states (n = 23), states that use a preponderance of the evidence standard (n = 22), and states that use a standard higher than a preponderance (n = 5) on social inclusion factors for persons with ID; and, (3) To analyze statistical differences between death penalty states that use the preponderance of the evidence standard (n = 22) and death penalty states that use a standard higher than a preponderance (n = 5) on social inclusion factors related to ID.

Organization of the Study

This article has four parts. First, it reviews the extant literature relevant to the intersection of ID, capital punishment, and social inclusion theory. Then the research methodology and data analysis techniques are discussed. Next, the findings are presented. The article concludes with a discussion of findings and recommendations for further research.

Review of the Literature

Social inclusion theory is conceptually integral to the project at-hand. The beginning discourses of social inclusion theory are associated with 1970s France when the economically disenfranchised began to be described as the excluded (Silver & Miller, 2003). The initial uses of this vernacular referred to a variety of "disabled [sic] and destitute groups" (Allman, 2013, p. 7).

Although often used to describe low or zero labor market involvement (Foster, 2000), beginning definitions of social inclusion broadened over time to reflect barriers to full and equitable participation in society (Du Toit, 2004). According to Allman (2013, p. 2), "Disability, like gated communities, is another example of the ways societies create cultural spaces structured by exclusion […] Prisons, like asylums and other places that remove individuals from broader social life are additional if somewhat more extreme forms of exclusion societies." If disability and the prison system, irrespective of one another, represent exclusion societies, with prisons representing "extreme" forms of exclusion, then the intersection of ID and capital punishment is arguably one of the more extreme forms of an "exclusion society" yet (Allman, 2013, p. 2).

The review of the literature has three interrelated components. The first component addresses between-state differences on capital adjudication procedures that are said to impact the life chances of capital defendants with ID (i.e., standards of proof). The second component addresses factors that have diminished the social inclusion of persons with ID (i.e., undue institutional confinement and forced sterilization). The final component addresses factors that enhance social inclusion (i.e., legislated access to education programs in the public domain).

Review of Related Research

Searching the online public university library system, and limiting results to only scholarly articles in peer review journals published from 2002 (the date of the *Atkins* decision) to 2016 (the year this study was conducted) in the U.S. using the search terms 'intellectual disability' and 'capital punishment,' yielded a total of 26 results. (Using the combination, 'intellectual disability' and 'capital punishment' and 'social inclusion' yielded zero valid results). Of the 26 results, 50 percent of all articles were published in law related journals (eight were published in law review journals [30.8 percent] and five in law-hybrid journals [19.2 percent]).

Six articles were published in psychology journals and six were published in journals specifically related to intellectual/developmental disabilities. One article was published in a mental health journal. No publications on the topic were found in social work journals. A review of the literature begins by addressing between-state differences on capital adjudication procedures that are said to impact the life chances of capital defendants with ID, with special attention paid to the standard of proof of ID.

Between-State Differences on the Death Penalty and Standard of Proof

In the fall of 2001, the American Bar Association established the Death Penalty Due Process Review Project to conduct research and to educate the public and decision-makers on the operation of capital jurisdictions' death penalty laws (American Bar Association, 2016). The purpose of the Project is to promote fairness and accuracy in death penalty systems in the U.S. and internationally (American Bar Association, 2016). According to the American Bar Association (2016), prior to the founding of the Project, many state jurisdictions possessed only anecdotal data about the functioning of their death penalty systems. In 2006, the Project began a seven-year study that concluded in 2013 and resulted in the Project development and housing of a comprehensive database on the operation of the death penalty in states that represent 65 percent of the executions that have taken place in the U.S. post-1976: (1) Alabama, (2) Arizona, (3) Florida, (4) Georgia, (5) Indiana, (6) Kentucky, (7) Missouri, (8) Ohio, (9) Pennsylvania, (10) Tennessee, (11) Texas, and (12) Virginia (American Bar Association, 2016). A majority of states on this list (58.3 percent) are located in the South region, as per the U.S. Census Bureau: Alabama, Florida, Georgia, Kentucky, Tennessee, Texas, and Virginia. This statistic alone points to between-state differences, and between-region differences, on rates of executions.

In addition to differing on the rate of execution, death penalty states in the U.S. currently vary on: if and the degree to which the state legal definition adheres to the three-prong clinical diagnosis of ID; and adjudication procedures, such as who qualifies as an expert witness, at what point in the trial ID is introduced, if there is a pretrial specifically on the issue of ID, and the standard of proof of ID (American Bar Association, 2016; Cheung, 2013; Fiore, 2010). Between-state differences raise a concern over whether states are effectuating the intent of *Atkins* (2002) and therefore as well, over the equal protection of persons with ID. Because the U.S. Supreme Court in the *Atkins* (2002) decision disagreed on how to determine the finding of ID, it declined to establish a uniform protocol for identifying protected individuals, leaving this matter to the states (DeMatteo et al., 2007; Feluren, 2013; Harvard Law Review, 2014). The Court instead suggested that state definitions of ID should generally conform to the clinical definitions and procedures promulgated by the American Psychiatric Association and the American Association on Intellectual and Developmental Disabilities (Blume et al., 2014). In response, states have adopted varying legal definitions of, and procedures for determining, ID (Blume et al., 2014; Cheung, 2013; Haydt, Greenspan, & Agharker, 2014).

However, neither the American Psychiatric Association nor the American Association on Intellectual and Developmental Disabilities definitions provide legal requirements for proving ID in the forensic setting (Cheung, 2013; Feluren, 2013; Haydt et al., 2014). In addition to expert opinion supporting preponderance of the evidence as the appropriate standard of proof, there also seems to be a consensus among death penalty states on this matter: 22 of 27 death penalty states (81.48 percent) use this, the lowest standard. Only Georgia uses the highest standard. In 2015, Georgia executed Warren Lee Hill because he could not prove deficits in adaptive functioning to the State's beyond a reasonable doubt evidentiary standard. It is worth noting that Hill's IQ

scores fell within the accepted clinical range of ID and that the judge who made the final determination leveraged Hill's adaptive strengths against his noted deficits, effectively negating the latter. Experts maintain that, had Warren Hill lived in any other state, he would have been found ineligible for execution because he would have been able to meet any of the other standards of proof (Ricciardelli & Ayres, 2016). This illustrates the importance of between-state differences, and differences on standard of proof in particular, despite the existence of federal protections. This article next offers a broader definition of standard of proof followed by an explanation of the three gradients of the standard.

Standard of proof of ID. With regard to between-state differences, states' standards of proof are important because in death penalty cases, they function as a legal double for the professionally accepted amount of un/certainty in clinical diagnosis. Not only this, but standards of proof are significant because they have direct bearing on life and death determinations of justice. A high degree of legal certainty is not commensurate with standards in clinical diagnosis and therefore, generally, it has been argued that the appropriate standard of proof is the lowest, a preponderance of the evidence (Blume, 2015; Cheung, 2013; Feluren, 2013; Fiore, 2010; Informational hearing, 2013; Saviello, 2015). While burden of proof refers to the obligation of a particular party to prove the fact-in-issue, the standard of proof refers to the obligation to adduce sufficient evidence to put a fact into issue (Saviello, 2015). Following the *Atkins* (2002) decision, every state that addressed the standard of proof issue has found that the defendant should bear the burden (Cheung, 2010; Fiore, 2010; Haydt et al., 2014). However, states vary with regard to the standard of proof they require capital defendants to meet in order to satisfy the raised claim of ID. As of August 2016, 22 of 27 death penalty states used the lowest standard (i.e., a preponderance of the evidence), four states used the intermediate standard (i.e., clear and

convincing evidence) and Georgia used the highest standard (i.e., beyond a reasonable doubt) (Saviello, 2015). All five states that used the higher standards are located in just two of nine U.S. divisions, as per the U.S. Census Bureau: the South Atlantic division (Delaware, Georgia, Florida, and North Carolina) and the Mountain division (Arizona). Eighty percent of states that use a standard of proof higher than the clinically accepted standard are located in the South Atlantic division of the U.S. An explanation of the three standards of proof of ID follows.

Preponderance of the evidence and clear and convincing evidence. The standard of preponderance requires that a particular position have more evidence in its favor than not, even if by the narrowest margin (Reasonable Doubt, 2008). It is the standard of proof used in civil trials (Preponderance of the evidence). Preponderance is based on the more convincing evidence and its likely accuracy, and does not refer to the amount of evidence (Preponderance of evidence, 2005). The majority of death penalty states (n = 22) use this, the lowest standard. Advocates of the preponderance standard also argue that it is the only standard low enough to offset all of the uncertainties associated with capital cases involving defendants with ID (Saviello, 2015). In contrast, evidence is considered to be clear and convincing if it is substantially more likely than not to be true, and is the evidentiary standard used in civil and criminal trials alike (Clear and Convincing Evidence). As of August 2016, four death penalty states (i.e., Arizona, Florida, North Carolina, and Delaware) invoked the clear and convincing standard (Saviello, 2015).

Beyond a reasonable doubt. Georgia is the only state to invoke the highest of three legal standards of proof (Reasonable Doubt, 2008), requiring sufficient doubt on the part of the jurors for acquittal of a defendant based on a lack of the evidence (Reasonable doubt). It is said to exist when jury members cannot say with moral certainty that the defendant is guilty (Burden of proof, 2002). The beyond a reasonable doubt standard of proof is used in criminal trials because such

trials can result in the deprivation of a defendant's liberty or in the defendant's death (Reasonable Doubt, 2008). In criminal trials, it is the state and not the defendant who must meet the beyond a reasonable doubt standard of proof. The logic that the state should meet the high standard and not the defendant reflects "a fundamental value determination of our society that it is far worse to convict an innocent man [sic] than to let a guilty man go free" (Winship, 1970). It would seem, then, that the beyond a reasonable doubt requirement is intended to weigh the scales of justice in favor of the defendant, not against. However, as the dissenting opinion of the 11th Circuit Court of Appeals explained in *Hill v. Schofield* (2010), "in effect, Georgia had found it better to wrongfully execute someone who is mentally retarded [sic] than to impose a life sentence on one who is not" (Fiore, 2010, p. 30). Despite this admonition, the majority opinion of the court ruled in favor of Georgia's standard of proof, citing other procedural protections that effectively render the state's capital trial scheme balanced and therefore just (Fiore, 2010).

Differences in state legal definitions of ID by standard of proof of ID. A clinical diagnosis of ID is comprised by deficits or impairments in intellectual functioning, deficits or impairments in adaptive functioning, and an age-of-onset specification that meets conditions for having occurred during the developmental period. This is specified by the American Association on Intellectual and Developmental Disabilities (2010) as the age of 18-years and by the American Psychiatric Association (2013) as, "during the developmental period." All death penalty states, with the exception of Ohio, generally conform to accepted clinical practice and norms regarding intellectual functioning. As opposed to a numeric test score, Ohio simply stipulates moderate ID (Georgetown Law, n.d.). With regard to the adaptive functioning criterion, of the five states that use an evidentiary standard higher than preponderance, two states (i.e., Georgia and North Carolina) specify three or more areas of adaptive skills deficits; two

states (i.e., Florida and Arizona) reference social norms or expectations; and the remaining state, Delaware, specifies two standard deviations (Georgetown Law, n.d.). With regard to age of onset, of the five states that use an evidentiary standard higher than preponderance, over half of states using a standard higher than preponderance (n = 3; 60 percent) specify 22-years as the age of onset cutoff and the remaining states (n = 2) specify 18-years. Georgia, the only state to invoke the beyond a reasonable doubt standard, is also the only state to specify the age of onset as during the developmental period. While the lack of numeric cutoff arguably provides expert witnesses with greater flexibility in clinical interpretation, some disability advocates have expressed concern that the lack of a numeric designation may leave too much room for states to employ overly restrictive criteria (Cheung, 2013). In turn, this raises the concern for the equal protection of persons with ID in the U.S. against discriminatory killing and maltreatment.

Factors that Diminish Social Inclusion: Undue Confinement and Forced Sterilization

Unlawful execution is a form of discriminatory killing, and in this way a more extreme instance of maltreatment perpetrated against persons with ID (Greenspan, 2016). In addition to discriminatory killing, persons with ID in the U.S. have been made to endure various forms of maltreatment over the centuries at the hands of state institutions, such as undue confinement and forced sterilization (Greenspan, 2016; Lutzker et al., 2016). Practices such as these are not only forms of maltreatment, but they also work to diminish the full and equitable participation of persons with ID in the social, political, and economic sectors of the public domain. An explanation of two such factors, undue institutional confinement and forced sterilization, follows.

Undue institutional confinement. In the late 1800s and early 1900s, prejudices against people with ID and mental illness resulted in the creation of isolated institutions (Bruininks, 1981; Cheung, 2013). Prior to 1930, there was a strong historical trend toward the expansion of

state-supported facilities. Beginning in the 1950s, however, the concept of decentralization was integrated into the system of residential treatment for persons with ID, and external funds replaced or reduced reliance on traditional, state-subsidized institutions (Bruininks, 1981; Lerman, 1982). Decentralization refers to the breakup of large institutions with a statewide catchment area into a larger number of administrative units and smaller facilities with greater regional focus (Bruininks, 1981). With regard to deinstitutionalized care, the U.S. Supreme Court's landmark *Olmstead v. LC* and *EW* (1999) decision determined that the undue institutional confinement of persons on the basis of disability constitutes unlawful segregation in violation of Title II of the 1990 Americans with Disabilities Act (Tidwell, 2008).

The *Olmstead v. LC* and *EW* (1999) case originated from Georgia, and concerned the undue confinement and unlawful segregation of Lois Curtis and Elaine Wilson. Lois Curtis and Elaine Wilson both carried a diagnosis of ID and each carried a separate mental health diagnosis. Despite a consensus among treating clinicians that a less restrictive setting would be appropriate for the two women, administrators at Georgia Regional Hospital in Atlanta maintained that Lois Curtis and Elaine Wilson would continue to be held within the confines of the state psychiatric hospital. In the *Olmstead* (1999) decision, the U.S. Supreme Court interpreted Title II as specifically prohibiting discrimination on the basis of disability in all services, programs, and activities provided to the public by state and local governments and that receive federal financial assistance. However, Title II also stipulates that the reasonable modifications standard to avoid discrimination should be balanced with the further mandate that states are not required to make modifications that will result in a fundamental alteration of their programs or services (Tidwell, 2008). Therefore, states could argue that requiring the immediate transfer of previously institutionalized persons into the community setting would fundamentally alter the activities of

the state because all available funds were being used to provide services to other persons with disabilities. Although the U.S. Supreme Court at that time mandated states to implement Olmstead Plans in order to come into compliance with the 1999 decision, some states remain non-adherent. For example, Georgia entered into a 2010 comprehensive settlement agreement with the U.S. Justice Department, which subsumed a 2008 voluntary compliance agreement with the U.S. Department of Health and Human Services regarding the state's lack of progress since the *Olmstead* (1999) ruling. To date, the comprehensive settlement agreement between Georgia and the U.S. Justice Department remains unresolved.

Forced sterilization. The institutionalized care of persons with ID is intimately linked to other forms of maltreatment, such as forced sterilization (Lutzker et al., 2016). Most of the statutes authorizing the use of forced sterilization (i.e., sterilizations performed without consent) applied only to individuals who were at that time confined to state psychiatric institutions (Task Force on Law, 1964). Decisions regarding selection criteria varied greatly, with much discretion being given to the superintendent of the institution (Task Force on Law, 1964). Sterilization is a technique of reproductive control and as such was considered to be a eugenic practice. The eugenics movement, developed by Sir Francis Galton, who coined the term eugenics in 1883, refers to the science of purifying or improving a human population vis-à-vis controlled breeding to increase the occurrence of desirable heritable characteristics, and conversely, to decrease the occurrence of undesirable traits (Galton, 1883).

As a result of the eugenics movement, sterilization laws passed in the early 1900s were aimed at preventing individuals with ID from reproducing and raising children who, according to the hereditary theory of intelligence, would be born with ID (Task Force on Law, 1964). In addition to the progressive concern for the prevention of so-called hereditary defects, the

eugenics movement was largely driven by professional self-interest, fiscal politics, political expediency, and "deep-felt cultural beliefs about economic dependency, disability, and gender" (Ladd-Taylor, 2004, p. 281). The story of institutionalized care, and the people determined by society to be deserving of such care, is therefore ingredient to understanding the history of maltreatment and diminished social inclusion of persons with ID. Efforts aimed at enhancing social inclusion have traditionally focused on deinstitutionalized care and meaningful community-living options for persons with ID that include access to employment and education programming. Because education seemingly targets a larger age range of persons with ID than does employment, legislated access to education is the focus of the next section.

Factors that Enhance Social Inclusion: Access to Public Education Programs

In the face of the historical maltreatment of persons with ID, contemporary legislative efforts have attempted to formalize and enhance the social inclusion of persons with ID. In this way, social inclusion efforts are not just forward-looking, but as well, they function in a remedial way. Research supports a hierarchy of acceptance among disability groups, with ID frequently being the least socially accepted (Werner, 2015). While public perception of dangerousness of persons with ID is often used as a criterion to withhold rights and individual autonomy, acceptance and positive perceptions of individuals may enhance their inclusion and rights status (Werner, 2015). Specifically, efforts to enhance social inclusion have focused on access to primary, secondary, and more recently, postsecondary education opportunities in the public domain.

Education. Special education services were first mandated in the 1950s (Haydt et al., 2014). Intelligence tests played a central role in the determination of service eligibility, but were also instrumental to the growing concern over racial and socioeconomic discrimination in the

public school setting (Haydt et al., 2014). Intelligence testing, official documentation of such testing, as well as resultant referrals to appropriate supports and services, is most likely to occur in the public school setting (Foster, Leland, Nihira, & Shallhass, 1967). In this way, and especially in conjunction with compulsory school attendance, the public school setting functions as a central broker of psychosocial and educational support services, and may have considerable impact on issues that arise for individuals with ID in adulthood. For instance, when a capital defendant raises the claim of ID, that defendant must establish the third prong of the definition, age of onset. This evidence is usually traced through a social history investigation, which would include a thorough inventory of school records (Blume, Johnson, & Seeds, 2009).

IDEA of 1990 and IDEIA of 2004. The Individuals with Disabilities Education Act (IDEA, 1990) and the Individuals with Disabilities Education Improvement Act (IDEIA, 2004) are the primary federal programs that authorize state and local aid for special education and related services for children with disabilities. This legislation has undergone several changes since it began as the Education for All Handicapped Children Act in 1975 (U.S. Department of Education). Part B of IDEA (1990) is the provision for assistance for education of all children with disabilities. In December 2004, President George W. Bush signed the Individuals with Disabilities Education Improvement Act (IDEIA), a major reauthorization and revision of IDEA (1990). The 2004 law preserved the basic structure and civil rights guarantees of IDEA (1990) and secured special education services for children with disabilities from the time they are born until they graduate from high school (i.e., between 18 and 22 years of age depending on the state). The Act has spurred many ideas about, and has influenced much of the contemporary language regarding, equal access to education services. Recognizable terms include: (1) free appropriate public education (FAPE); (2) individualized education program (IEP); and, (3) least

restrictive environment (LRE) (U.S. Department of Education). The logic of least restrictive environment partially underscored the U.S. Supreme Court's 1999 *Olmstead* decision (Tidwell, 2008).

HEOA of 2008. In addition to focusing on access to primary and secondary education, recent legislation has targeted postsecondary education. Started through model programs funded by the Higher Education Opportunities Act of 2008, postsecondary education programs are designed to support students with ID who are seeking to continue their transition into adult life through enhanced academic opportunities, career and technical training, and independent living instruction in order to prepare them for future employment (Hart, 2006). With a strong focus on employment outcomes, postsecondary education programs have created an additional channel by which individuals with ID may come to be included in the employment sector (Hart, 2006). Although it may be otherwise legislated in the future, postsecondary education programs (often referred to as inclusive postsecondary education programs) are currently exempt from the mandates of the Individuals with Disabilities Education Act (199) and the Individuals with Disabilities Education Improvement Act (2004) because such programs by definition require participants to have matriculated beyond the 12th grade (Higher Education Opportunities Act, 2008). Changes in the Higher Education Opportunity Act (2008) led to the first national network of Model Comprehensive Transition and Postsecondary Programs for Students with Intellectual Disabilities (TPSIDs) in 2010 and established a National Coordinating Center (i.e., Think College) for institutions of higher education that offer programs for students with ID.

In summary, a review of the literature found that the intersection of ID, capital punishment, and social inclusion theory is underresearched. As well, a review of the literature highlights parallels between the capital punishment of persons with ID and what has been a

history of maltreatment of persons with ID. Specifically, when states do not follow clinical standards, such as when states use a standard of proof higher than a preponderance of the evidence, persons with ID are placed at a disparately high risk for unlawful execution (e.g., Warren Lee Hill of Georgia). Unlawful execution is an instance of discriminatory killing that by definition entails rights violations and maltreatment. Federal legislation has attempted to ameliorate this legacy through enhanced social inclusion efforts. To this end, this study explores the relationship between states' death penalty statuses, and by extension, standards of proof of ID, and social inclusion factors that pertain specifically to persons with ID.

Methodology

For this exploratory secondary data analysis, a sample of 50 states was categorized into the following subgroups: (1) states with either no death penalty or with a governor-imposed moratorium on the death penalty (n = 23); (2) states with a death penalty (n = 27); (2a) death penalty states that use a preponderance of the evidence (n = 22); and (2b) death penalty states that use a standard of proof of ID higher than a preponderance (n = 5). Data was obtained using publically available information from reliable sources and is reflective of August 2016 death penalty statuses and evidentiary standards of ID in the U.S. Data pertaining to death penalty status, evidentiary standard of ID, and social inclusion factors of ID were compiled into a unique data set using the following sources: the Death Penalty Information Center; Tim Saviello (2015); the Disability Compendium; the National Coordinating Center for the Network of Model Comprehensive Transition and Postsecondary Programs for Students with Intellectual Disabilities; the U.S. Department of Justice Civil Rights Division; and, the Human Betterment Project as cited in Shreiber (n.d.).

Measurement

Death Penalty Status is conceptualized as states' sanctioned ability to impose a sentence of death upon a capital defendant. *Death Penalty Status* was measured using two categories: 1 = states with no death penalty or a governor-imposed moratorium on the death penalty, and 2 = states with a death penalty (as per the Death Penalty Information Center, 2016).

Standard of Proof is conceptualized as the level of certainty and the degree of evidence necessary to establish proof of ID in a capital trial (Informational hearing, 2013). For the purpose of drawing analytic contrast, *Standard of Proof* was measured in two ways. *Standard of Proof* was measured using two categories: 1 = a preponderance of the evidence, and 2 = higher than a preponderance of the evidence (i.e., clear and convincing evidence, and beyond a reasonable doubt [Saviello, 2015]). *Standard of Proof* was also measured using three categories: 1 = no applicable standard, 2 = preponderance of the evidence, and 3 = higher than a preponderance of the evidence (i.e., clear and convincing evidence, and beyond a reasonable doubt [Saviello, 2015]).

Social inclusion. Social inclusion factors are conceptualized as bidirectional factors that either diminish or enhance the participation of persons with ID in society. Instances of maltreatment, for example, diminish the participation of persons with ID through impositions of violence or the outright denial of personhood and associated legal rights. Unlawful execution, undue institutional confinement, and forced sterilization are all forms of maltreatment that can be said to diminish social inclusion. Factors that enhance social inclusion are those that increase participation of persons with ID in the social, political, and economic sectors of the public domain. To varying degrees, legislated access to public resources, such as education, enhance the social inclusion of persons with ID. The four social inclusion factors are:

IDEA Part B. This variable is operationalized as the number of students with intellectual disability ages 6-21 served under Part B of the Individuals with Disabilities Education Act as a percent of the U.S. population (as per the Disability Compendium).

Postsecondary Education. This variable is operationalized as the number of transition and postsecondary programs for students with ID as of 2015 (as per the National Coordinating Center for the Network of Model Comprehensive Transition and Postsecondary Programs for Students with Intellectual Disabilities).

Undue Institutional Confinement. This variable is operationalized as the total number of federal Olmstead lawsuits, statements of interest, findings letters, and settlement agreements related to undue confinement on the basis of disability and therefore unlawful segregation (as per the U.S. Department of Justice Civil Rights Division).

Forced Sterilization Rate. This variable is operationalized as the number of sterilizations reported per 100,000 in 1956 (as per the Human Betterment Project as cited in Schreiber [n.d.]).

Results

Independent samples *T*-tests and a one-way analysis of variance (*ANOVA*) were run to answer the research question regarding mean differences between states according to death penalty status and standard of proof of ID across four social inclusion factors: *IDEA Part B, Postsecondary Education, Undue Institutional Confinement,* and *Forced Sterilization Rate.* In order to meet the assumptions of these robust statistical procedures, variables were examined for missingness and normality. Initial exploration determined that all variables met assumptions of the tests.

Initially, an independent samples *T*-test was calculated comparing the mean differences in social inclusion factors between states with a death penalty ($n = 27$) and states with no death

penalty (n = 23) (Table 2.1). Equal variance was assumed, as there was no significant difference found between death penalty states and non-death penalty states on social inclusion factors. Subsequently, an independent samples *T*-test was calculated comparing the mean differences in social inclusion factors between states using the evidentiary standard, a preponderance of the evidence, and states using the higher standards (i.e., clear and convincing evidence, and beyond a reasonable doubt) (Table 2.2). Significant difference was found on the social inclusion factor, *Undue Institutional Confinement* (t (25) = - 2.49, $p < .05$). The mean number of federal Olmstead lawsuits, statements of interest, findings letters, and settlement agreements was significantly lower in states with a preponderance of the evidence standard ($\bar{x}$ = .91, SD = 1.31) than in states with a higher evidentiary standard ($\bar{x}$ = 2.8, SD = 2.39).

[INSERT TABLE 2.1]

[INSERT TABLE 2.2]

Lastly, a one-way analysis of variance (*ANOVA*) was calculated comparing the mean differences in social inclusion factors between states with no evidentiary standard (n = 23), states using a preponderance of the evidence standard of proof (n = 22), and states using a standard of proof higher than a preponderance (n = 5) (Table 2.3). Significant difference was found on two factors: *Undue Institutional Confinement* (F (2, 47) = 14.04, $p < .001$) and *Forced Sterilization Rate* (F (2, 47) = 5.09, $p < .01$). Tukey's *HSD* was used to determine the nature of the differences between the standards of proof (i.e., no standard, a preponderance, and higher than a preponderance). Regarding *Undue Institutional Confinement*, this analysis revealed that states using a standard of proof higher than a preponderance of the evidence had a significantly greater mean total number of Olmstead lawsuits, statements of interest, findings letters, and settlement agreements ($\bar{X}$ = 2.8, SD = 2.39) than did states using the preponderance of the evidence

standard ($\bar{X}$ = .91, *SD* = 1.31) and states with no evidentiary standard ($\bar{X}$ = .7, *SD* = 1.11). Regarding *Forced Sterilization Rate*, this analysis revealed that states with an evidentiary standard higher than a preponderance of the evidence had a significantly greater mean sterilization rate ($\bar{X}$ =3.17, *SD* = 3.0) than states with no evidentiary standard ($\bar{X}$ = .37, *SD* = .72).

[INSERT TABLE 2.3]

Discussion

This study underscored the social work profession's potentially important and perhaps overlooked role in the discourse on ID and capital punishment by assessing the relationship between states' death penalty statuses and standards of proof of ID on social inclusion factors pertaining to ID. In exploring the relationship between states' death penalty statuses, standards of proof, and social inclusion factors, this study revealed three key findings. First, there were no significant differences between death penalty states and non-death penalty states on social inclusion factors specifically pertaining to ID. Second, states that used the higher evidentiary standards were found to significantly differ from states that used the lowest standard and states with no evidentiary standard (i.e., non-death penalty states) on the social inclusion factor, *Undue Institutional Confinement*. States using the higher standards of proof had a significantly greater number of federal Olmstead lawsuits, statements of interest, findings letters, and settlement agreements than did states using the lowest or no standard. Third, the rate of forced sterilization only rose to the level of statistical significance once states using the higher standards were compared to states using no standard (i.e., non-death penalty states).

With regard to *Undue Institutional Confinement*, 27 of 50 states (54 percent) had zero federal Olmstead lawsuits, statements of interest, findings letters, or settlement agreements.

Among the 50 states, the mean number of Olmstead related claims was 1, with a median and mode of zero. Florida had the largest number of claims (n = 6), followed by California (n = 5), Georgia (n = 4), Mississippi (n = 3), and North Carolina (n = 3). One hundred percent of this group is comprised by states with a death penalty; 83 percent are located in the South Region of the U.S.; and, 60 percent (n = 3) both use a standard of proof higher than preponderance and are located in the South Atlantic division in the South Region of the U.S. All remaining states in the U.S. have filed two or fewer Olmstead claims. With regard to *Forced Sterilization*, 28 of 50 states (56 percent) reported a rate of zero. The mean reported rate among all states was .67, with a median and mode of zero. Georgia had the highest reported rate with 7.22, followed by North Carolina with 4.88. All other states fell below three. (It is worth noting that Delaware reported a rate of 2.98.) Georgia and North Carolina (and Delaware) are death penalty states located in the South Atlantic division in the South region of the U.S., and use a standard of proof higher than preponderance. An additional commonality is that Georgia and North Carolina both also had a disproportionately high number of Olmstead claims. This seems to be conceptually sound as the literature supports the co-incidence of institutionalized care and forced sterilization. *Forced Sterilization* was neither significant on death penalty status nor on standard of proof alone, but rose to the level of statistical significance in the space where status and standard converged.

In summary, on the selected social inclusion factors, states using the higher standards of proof of ID were found to be less socially inclusive than states using the lowest and clinically accepted standard, a preponderance of the evidence, and states with no evidentiary standard of ID. However, it should also be noted that the converse did not hold true. That is, states with no standard or states with the lowest standard were not found to be more socially inclusive than states using the higher standards on factors related to access to public education. This finding is

addressed in the limitations section that follows. From a broader perspective, the failure to ensure that persons with ID are afforded legal protections against maltreatment and discriminatory killing that includes unlawful execution may be symptomatic of a mainstream U.S. ideology that does not value the social inclusion of persons with ID or persons labeled 'criminal,' much less such persons who are labeled as being both. As well, that person with ID are positioned within the penal system in the first place may speak to the inadequacies of the current systems of care in the U.S. The statistical significance of *Undue Institutional Confinement* raises the systemic concern that persons with ID who live in states with high evidentiary standards have simply, or systematically, been transitioned from state psychiatric institutions to state penal institutions, with little concern for the undue confinement and unlawful segregation finding in the *Olmstead* (1999) decision. Existentially, confinement seems to entail a certain social invisibility, be that through reproductive control, physical and social confinement, maltreatment, or discriminatory killings such as juridical impositions of death. Overall, these findings seem to indicate significant relationships between states' regional and divisional locations, states' history of institutionalized care and associated mal-/practices such as forced sterilization, and states' standards of proof of ID. In this vein, a working hypothesis that could be considered for future research is: the modern system of prison is to the state psychiatric hospital as standard of proof of ID is to forced sterilization.

Study Limitations and Recommendations for Future Research

Due to a lack of prior research on standard of proof of intellectual disability (ID) and social inclusion factors, this study used an exploratory rather than an explanatory design, rendering statistically significant relationships within the data non-causal. As this study was a preliminary study, additional analyses should be conducted that examine the relationship

between states' death penalty statuses, standards of proof, and a larger number of social inclusion factors with greater variance. Specifically, factors that enhance participation should be further explored (this study used only education-related factors) and the relationship between higher standards of proof and undue institutional confinement should be more deeply examined. As well, future studies that examine education-related factors should consider using data that is publically available through the National Center for Education Statistics. Future research should seek to determine to what degree the positioning of persons with ID in the penal system is a form of re-institutionalized care in the face of the *Olmstead* (1999) federal mandate for deinstitutionalized care. Future studies should also seek to build a regression model that is capable of statistically predicting states' standards of proof. As well, further humanization of this research topic is required. To this end, qualitative studies should be conducted that focus on the first-hand, lived experiences of current capital defendants and death row inmates raising the claim of ID, former death row inmates who have been removed due to a finding of ID, and their loved ones. Lastly, case studies should be conducted to determine how it is that death penalty states such as Georgia came to implement standards of proof higher than preponderance, and value-critical policy analyses should be conducted in order to examine and challenge these standards.

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Table 2.1

Independent Samples T-test of Mean Differences on Social Inclusion Factors by Death Penalty Status (N = 50)

	Death Penalty			No Death Penalty					
	X	*SD*	*N*	*X*	*SD*	*N*	*t*	*df*	*p*
IDEA Part B	2.4	2.48	27	1.51	1.4	23	-1.6	42	.12
Postsecondary Education	4.22	4.53	27	5.7	6.7	23	.92	48	.36
Undue Institutional Confinement	1.26	1.68	27	.7	1.11	23	-1.38	48	.18
Rate of Forced Sterilization	.92	1.73	27	.37	.72	23	-1.52	36	.14

Table 2.2

Independent Samples T-test of Mean Differences on Social Inclusion by Evidentiary Standards (N = 31)

	Death Penalty: Preponderance Of the Evidence			Death Penalty: Higher than Preponderance					
	X	*SD*	*n*	*X*	*SD*	*n*	*t*	*df*	*p*
IDEA Part B	2.19	2.52	22	3.34	2.31	5	- .93	25	.36
Postsecondary Education	3.95	4.39	22	6.4	5.37	5	- 1.08	25	.29
Undue Institutional Confinement	.91	1.31	22	2.8	2.39	5	- 2.49	25	.02*
Forced Sterilization	.41	.74	22	3.17	2.97	5	- 2.06	4	.11

Table 2.3

One-Way ANOVA on Social Inclusion Factors by Death Penalty Status and Standard (N = 50)

	No Death Penalty: No Standard *n* = 23		Death Penalty: Preponderance of the Evidence *n* = 22		Death Penalty: Higher than a Preponderance *n* = 5		*ANOVA*	
	$\bar{X}$	*SD*	$\bar{X}$	*SD*	$\bar{X}$	*SD*	*F*	*P*
IDEA Part B	1.51	1.4	2.19	2.52	3.34	2.31	1.82	.17
Postsecondary Education	5.7	6.7	3.73	4.3	6.4	5.37	.89	.42
Undue Institutional Confinement	.7	1.11	.91	1.31	2.8	2.39	5.09	.01*
Rate of Forced Sterilization	.37	.72	.41	.74	3.17	3.0	14.04	.001**

CHAPTER 3

THE CASE OF INTELLECTUAL DISABILITY VS. CAPITAL PUNISHMENT: A FOUCAULDIAN ANALYSIS OF GEORGIA'S BEYOND A REASONABLE DOUBT STANDARD OF PROOF [2]

[2] Ricciardelli, L. To be submitted to *Journal of Qualitative Criminal Justice & Criminology.*

Abstract

In this single-case study, I use Michel Foucault's medico-judicial discourse to critically examine why it is that Georgia retains its beyond a reasonable doubt standard of proof of intellectual disability (ID). To explain why Georgia is the only state in the nation to invoke this highest standard of proof, I obtained and transcribed a legislative informational hearing that occurred in 2013. As well, I conducted 11 semi-structured interviews with purposefully selected key informants who work in the public domain and who have professional expertise in ID, capital adjudication, and/or related Georgia policy and procedure. I used Van Maanen's (2011) impressionist narrative tale technique to richly describe the informational hearing. Each tale corresponded with one of the three powers that Foucault ascribes to the medico-judicial discourse: 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). Following each of the three narrative tales, I used the constant comparative method to analyze the interview responses and observational data, and to develop themes and dimensions according to key issues, recurrent events, and activities in the data that emerged. I conclude the study with a discussion of theoretical implications and nine recommendations to address content information that was either insufficient or incorrect in the 2013 legislative hearing.

Keywords: intellectual disability, capital punishment, medico-judicial discourse

Introduction

According to Michel Foucault (2003), the historical intertwining of medical diagnosis (i.e., medicine) and criminal justice procedure (i.e., law) gave rise to a modern, hybrid discourse which has found doctors laying claim to judicial power and judges laying claim to medical power. Foucault thusly 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 during his January 8th, 1975 lecture at College de France, because "these everyday discourses of truth that kill and provoke laughter are at the very heart of our judicial system" (Foucault, 2003, p. 6). It is not difficult to imagine how Foucault's medico-judicial discourse would be relevant to the better-known pursuits of forensic science, such as the raised insanity defense. However, having died in 1984, Foucault could not have known that, 4-years later in Georgia and 18-years later at the level of the federal government, his theory would have a special application for persons with intellectual disability (ID) facing execution in the U.S.

In *Atkins v. Virginia* (2002), the U.S. Supreme Court ruled that the execution of capital defendants with ID is unconstitutional. The Court reasoned that diminished moral culpability, rooted in intellectual and adaptive deficits, rendered the punishment of execution disproportionate to the offense and therefore a violation of the Eighth Amendment's protection against cruel and unusual punishments (Atkins v. Virginia, 2002). Although the *Atkins v. Virginia* (2002) decision barred the execution of persons with ID, it provided minimal specification regarding adjudication procedure. One exception to the lack of specification was the suggestions that states should generally conform to standard clinical practice and norms (Atkins v. Virginia, 2002). The *Atkins* (2002) decision is unique insofar as it expressed a

constitutional rule that hinges on a definition and diagnostic criteria established by clinically trained mental health professionals (Feluren, 2013), and thereby formalized at the federal level the medico-judicial discourse on ID and capital punishment.

It has been argued that states' standards of proof should, in accordance with *Atkins* (2002), adhere to standard clinical practice and norms. Scholars claim that: (1) when states do not adhere to standards in clinical practice and norms, this can negatively impact the chance of success for capital defendants raising the claim of ID (Blume, 2015); and accordingly, (2) when states use a standard of proof of ID that is higher than a preponderance of the evidence (i.e., the lowest of the three standards), capital defendants face an increased risk of unlawful execution because the lowest standard is the only standard commensurate with accepted clinical practice and norms, as it is the only standard low enough to offset the procedural challenges that defendants with ID face in the criminal justice system (Informational hearing, 2013). The standard of proof is the standard that the trier of fact has to reach in order to decide that a fact has been proven sufficiently (Informational hearing, 2013). There are three evidentiary standards: (1) the lowest, a preponderance of the evidence; (2) the intermediate, clear and convincing evidence; and (3) the highest, beyond a reasonable doubt. As of August 2016, 22 out of 27 death penalty states (81.48 percent) had adopted the lowest and clinically accepted standard, a preponderance of the evidence. Georgia, an anomaly in the nation, is the only state to require defendants to prove ID to the highest, beyond a reasonable doubt standard, which is a standard traditionally reserved for the prosecution (Informational hearing, 2013).

As an example of the real life impact of states' standards of proof of ID, in 2015, Georgia executed Warren Lee Hill because the presiding judge found that the evidence of deficits in Warren Hill's adaptive functioning were not enough to satisfy the State's high, beyond a

reasonable doubt standard of proof. It has been speculated that, had Hill been tried in any other state, he would have been spared from execution. However, Georgia is not only an anomaly in the nation with regard to standard of proof; Georgia was also the first state in the nation to invoke a statutory bar against the execution of persons with ID in 1988 and the only state to raise the issue of ID during the guilt/innocence phase of a capital trial, arguably conflating issues of criminality with issues of disability.

Statement of Purpose

The purpose of this single-case study is to use Foucault's medico-judicial discourse as a way to critically examine why it is that Georgia remains the only state in the nation to implement the highest standard of proof of ID, beyond a reasonable doubt. To address this question, I observed a two-hour long informational hearing on Georgia's beyond a reasonable doubt standard of proof of ID that took place in 2013. I also conducted 11 semi-structured interviews with purposefully selected key informants who work in the public domain and who have professional expertise in ID, capital adjudication, and/or related Georgia policy and procedure.

Study Limitations

Single-case studies have been criticized for a seeming lack of methodological guidelines (Yin, 2013). However, I attempted to offset this concern by invoking specific methodological referents (i.e., the impressionist narrative tale as articulated by Van Maanen [2011] and the constant comparative method as articulated by Bogdan and Biklen [2011]). I also provided a theoretical framework (i.e., Foucault's medico-judicial discourse) to add a further layer of transparency to my decision-making processes. An additional critique of case study research is its lack of generalizability. However, for reasons already mentioned, Georgia represents a unique case and it is specificity not generalizability that is the desired research goal. A final criticism of

case study research concerns reliability and replicability, which is to say, researcher subjectivity. To offset this concern, I verified the description and interpretation of interview data by taking a preliminary draft of the case to key informants for feedback, and in the following section, I provide a researcher subjectivities statement.

Subjectivities statement. In this statement I will disclose my personal and professional experiences that, to varying degrees, I understand as having informed not only this study, but as well, my research interests in general. I am a licensed master of social work. Before pursuing both of my degrees in higher education, I worked in the community setting providing supports and services for adults with intellectual/developmental disabilities. With slight variation in program structures, my professional titles under each provider were similarly descriptive: 'community support coordinator' and 'community resource coordinator.' Both titles seemed to be highly reflective of the deinstitutionalization movement that has come to embody the contemporary mode of service-provision in Georgia and the U.S. (i.e., community-based). In both job positions, I worked to balance a combination of direct care responsibilities, the oversight of direct care staff, and case management tasks that included resource allocation and community collaboration. During this time, I learned many things.

I learned that a state and its contracted agencies are presently able to exploit historically no-to-low wage earning populations simply by placing one in the direct care of the other, and by continuing to pay minimum wages to the employed group despite the important nature and tremendous responsibility of the work, and by requiring employees to provide their own resources such as transportation while at the same time providing no reimbursement or insurance coverage. I saw, beyond all that even, a broken system of care where persons with intellectual/ developmental disabilities were allowed to have only meagerly savings in their accounts

(addressed by the 2015 ABLE Act), or who were unable to see a psychiatrist because the only local practitioner who accepted Medicaid left the practice, or who could not afford the dental care they needed. While I saw all of this, I saw also the staggering range of presentation and abilities and preferences of adults with intellectual/ developmental disabilities. Having had the experiences that I have had, I cannot see the execution (or even the threat of execution) of persons with ID as much beyond the extended apparatus of a historic willingness to erase and exclude.

How I Organize this Study

To assist the reader, I offer a brief overview of how I organize this study. I begin by offering a historical explanation of how it is that Georgia came to adopt the beyond a reasonable doubt standard of proof of ID. This explanation serves as a background. In the "Research Study" section that follows, I detail my sampling, data collection, and data analysis methods. I also provide an explanation of Michel Foucault's medico-judicial discourse, which drives my sampling and analysis strategies. Following my analysis, I offer a discussion section.

Background: Georgia was the First State in the Nation to Impose a Statutory Ban

Georgia's 1988 statute was the first in the nation to bar the execution of persons with ID, owing to the negative state and national publicity that followed Georgia's execution of Jerome Bowden in 1986. It was apparent to the public audience that the execution of Jerome Bowden, who could not count to 10 (Bowden v. Kemp, 1986), violated standards in decency. Jerome Bowden's sister, Josephine Bowden, once recalled that while he was cutting her grass for her, the mower ran out of gasoline (Bowden v. Kemp, 1986). In response, Jerome Bowden filled the gas tank with water and proceeded to wander off (Bowden v. Kemp, 1986). She also reported that Jerome Bowden would sit on his bed and rock himself back and forth for hours on end (Bowden

v. Kemp, 1986). When Josephine Bowden reported to Jerome Bowden that law enforcement had been looking for him in response to the robbery and stabbing deaths of Kathryn Stryker, 55, and Wessie Jenkins, Kathryn's 76-year old paralyzed, bedridden mother, he went to the police station to find out how he could help them in the investigation (Bowden v. Kemp, 1986). Although Jerome Bowden initially denied any involvement, he signed a written statement acknowledging his guilt (Bowden v. Kemp, 1986). Yet, there was no physical evidence linking Jerome Bowden to the scene of the crime (Bowden v. Kemp, 1986). The only thing implicating him to the scene of the crime was the testimony of 16-year old James Graves (Bowden v. Kemp, 1986). In contrast, there was substantial evidence linking James Graves, later determined to be legally insane, to the crime scene (Bowden v. Kemp, 1986). It was later determined that the detective on the case, Detective Myles, had promised Jerome Bowden that if he signed the confession, he would avoid execution (Bowden v. Kemp, 1986). Yet, when Jerome Bowden's clemency attorney asked if he had read his own confession statement, he responded that he had not, but that he had tried (Bowden v. Kemp, 1986).

When Georgia granted a 90-day stay of execution to have Jerome Bowden's mental capacity assessed, he asked his attorney if a stay of execution meant that he could watch television that night (Bowden v. Kemp, 1986). During the 90-day stay, Dr. Irwin Knopf, a psychologist hired by Georgia's State Board of Pardons and Paroles from Emory University (Saviello, 2015) administered an IQ test to Jerome Bowden. He achieved his highest score ever (i.e., 65-points) and was reportedly so proud of his test score that he told his trial lawyers: "I tried real hard. I did the best I could" (Bowden v. Kemp, 1986). Despite being well within the clinically accepted test score range of ID, Dr. Knopf concluded that Jerome Bowden was not sufficiently impaired so as to warrant clemency (Bowden v. Kemp, 1986). Relying entirely on

the hired psychologist's single test result, Georgia's State Board of Pardons and Paroles refused to grant Jerome Bowden reprieve (Bowden v. Kemp, 1986). Leading up to his execution, Jerome Bowden was reportedly scared and told an interviewer that he was, "going off to live on a little cloud," and that he hoped to someday live on a cloud next to the prison guard who he had befriended (Saviello, 2015, p. 5). The execution of Jerome Bowden led Georgia to create the first statute in the nation prohibiting the execution of persons with ID.

Georgia's Standard of Proof is the Result of a Drafting Error

In 2013, the House of Representatives Non-Civil Judiciary Committee convened to gather information regarding Georgia's beyond a reasonable doubt standard of proof of ID and to discuss the implications of lowering the standard (Informational Hearing, 2013). Attorney Jack Martin with the Georgia Association of Criminal Defense Lawyers co-authored the statute in 1988 with Joe Drolet, who was at that time the lobbyist for the Prosecutors from the Fulton County Attorneys Office (Informational Hearing, 2013). As with the drafting of the statute, Jack Martin also played a primary role in the 2013 legislative hearing on Georgia's standard of proof, and was the first person to testify. 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, and there were polls that were done by the Georgia State that indicated that 75 percent of Georgians supported the death penalty. Sixty-six per cent of Georgians did not support it for the mentally retarded [sic]. So what happened was, there was a consensus among the legislature, including the Attorney General Mike Bowers, at that time, who as you all know, as the attorney general is most responsible for imposing or supporting the death penalty or convictions that have been

imposed, came together and decided, we got to do something about this in Georgia. And at the same time—and if I give too much detail, I think it's helpful to know the history of where we are. 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. And there were a lot of proposals that were thrown out back and forth and, toward the end of the session as all of you know, we were trying to get something passed, things were rushed, and Joe Drolet, who used to be 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 – which had been expanded now at that time to be both, 'guilty, but mentally ill' and 'guilty, but mentally *retarded'* [sic]— 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. That small, little, one sentence…[…] The reason why I say I was at fault, I wasn't thinking clearly enough. Nor was Joe, I think, because 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. And it gave the jury *one more* option in terms of clearly mentally ill, but not legally insane. That statute and its burden [sic: standard] of proof says, 'you have to find a person *guilty beyond a reasonable doubt*'—because you don't want somebody to be punished unless you're sure they're guilty beyond a reasonable doubt—'*and*, mentally retarded [sic]' […] 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 ID, for which there is none. Table 3.1 presents a timeline of relevant policies and events leading up to the 2013 legislative informational hearing.

[INSERT TABLE 3.1]

Methodology

In accord with standard procedures in case study research, I bounded the present single-case study by the geopolitical dimension, standard of proof of ID in Georgia (Yin, 2013). In this study, standard of proof of ID is ingredient to the medico-judicial negotiation of the definition of ID because the Atkins court asked states to generally conform to standards in clinical practice and norms. Given this logic, the designated standard of proof should therefore correspond with the professionally accepted level of scientific certainty (or rather, uncertainty) in clinical

diagnosis. Thus, it becomes the responsibility of death penalty jurisdictions to insure that certainty in diagnosis is accurately reflected in the selection of evidentiary standard (i.e., a preponderance of the evidence; clear and convincing evidence; or, beyond a reasonable doubt). Georgia, the focus of this case study, is the only state to locate this match in the highest evidentiary standard, beyond a reasonable doubt. Although there would have been no legal mandate for Georgia to align its standard of proof with standards in clinical practice and norms at the time the statute was created in 1988, as of 2002, a constitutional mandate now exists at the federal level. This raises the question: why has Georgia retained its uniquely high, beyond a reasonable doubt standard of proof of ID? Because the intersection of ID and capital punishment represents a form of Foucault's medico-judicial discourse with the power to kill, the power to tell truth, and the power to invoke laughter, I use his theoretical framework as expressed in his January 8th, 1975 lecture on abnormality at the College de France (2003) to critically examine Georgia's standard of proof. An overview of the theoretical framework used in this case study follows.

Review of the Theoretical Literature

According to Miles, Huberman and Saldana (2014), case studies may be theoretically driven. In this study, I use Foucault's medico-judicial discourse to drive my selection of interview participants and to provide structure for the initial selection of categories. As is presently discussed, Foucault's analytics of exclusion undergird social inclusion theory. The early discourses on social inclusion are associated with the 1970s in France, when the economically disenfranchised began to be described as being the excluded (Silver & Miller, 2003). The language of exclusion originally referred to a variety of, "disabled and destitute groups" (Allman, 2013, p. 7). Early definitions of social inclusion were relegated to economic

participation, initially being used to describe no or low labor market involvement (Foster, 2000). However, definitions of social inclusion broadened over time to reflect a myriad of barriers to full and equitable participation in society by excluded individuals, and thus social inclusion came to embrace such ideas as social and political participation (Du Toit, 2004).

Normalization

Normalization involves the construction of an idealized norm of conduct. Individuals who conform to the prevailing norms are rewarded, while those who do not are met with punishment: exclusion and individuation (Foucault, 1977). In this way, power is inescapable, for it is itself endemic to the very structures and fabric of society. When thoughts and behaviors come to be viewed as being normative, or normal, they become the embodiment of taken-for-granted assumptions about what is appropriate and desirable for everyday life. People who do not adhere to prevailing social norms are often prevented from full and equitable participation in the public domain. Gillies (2005) adds to this that, frequently, the undesirable behaviors of the in-group are rewarded while the undesirable behaviors of the out-group are punished. Importantly, the power to implement sanctions requires all involved parties to have internalized that such an expression of power (i.e., punishment and reward) is a real possibility in the first place. Self-subjugation is possible, argues Foucault, because individuals come to internalize the social control forces that are inherent within every social system vis-à-vis the normalization process (Foucault, 1977). Foucault thus creates a landscape of Western civilization in which individuals become the participants of their own subjugation in what he terms disciplinary power.

Disciplinary power. In his 1975 book, *Discipline and Punish*, Foucault's analysis shows how normative techniques and institutions, developed for different and often innocuous

purposes, converge to create the modern system of disciplinary power (Foucault, 1977). At the core of Foucault's disciplinary power are three primary techniques of control: (1) hierarchical observation, (2) normalizing judgment, and (3) the examination. According to Foucault, disciplinary power is the masterfully efficient result of the normalization process (1977). It exerts maximum social control with a minimal expenditure of force.

> The maximization of effects of power on the basis of the disqualification of the one who produces them […] This grotesque mechanism of power, or this grotesque cog in the mechanism of power, has a long history in the structures and political functioning of our societies […] The grotesque is one of the essential processes of arbitrary sovereignty (Foucault, 2003, p. 12).

The medico-judicial discourse. The normalization process results in social exclusion that is rooted in a broader rhetoric of abnormality (Foucault, 2003). According to disability scholar Liat Ben Moshe, who applies Foucault's theoretical framework to the specific intersection of disability and the carceral system, "the power of normalization is cloaked by medical notions of illness and legal notions of recidivism" (Ben Moshe, 2013, p. 135). This is echoed by Foucault's claim in his 1975 lecture at the College de France that the historical intertwining of medicine and law have given rise to a hybrid discourse which finds doctors laying claim to judicial power and judges laying claim to medical power (2003). According to Foucault, this professional intertwining has resulted in what he terms the medico-judicial discourse, which does not originate from medicine or law, but from a larger rhetoric of abnormality (2003). The medico-judicial discourse is one that: (1) involves a decision of justice that ultimately concerns a person's freedom, and sometimes life and death (i.e., life and death); (2) enjoys scientific status

(i.e., truth); and (3) involves an element of humor that has the power to invoke laughter (i.e., humor) (Foucault, 2003).

Twinning. The medico-judicial discourse and all of its expressed powers is, according to Foucault, "at the very heart of our judicial system" (Foucault, 2003, p. 6). Its function is to twin the offense with criminality and the author of the offense with the new character of the delinquent (Foucault, 2003). In so doing, expert psychiatric opinion becomes an expression of power that aims "to show how the individual already resembles his [sic] crime before he has already committed it" (Foucault, 2003, p. 19). The aim of the medico-judicial discourse is to determine whether an individual's identified, so-called abnormalities have a pathological etiology and whether the identified abnormalities create a mental disorder that is enough to restrict penal responsibility (Foucault, 2003). Legitimized notions of what is normal result in the exclusion and individuation of persons who do not adhere to the prevailing norms (Foucault, 1977). Individuals and groups who do not adhere to the prevailing norms are labeled as being abnormal and dangerous, and this labeling is the essential role of the expert psychiatric opinion: "In short, expert psychiatric opinion makes it possible to constitute a psychologico-ethical double of the offense […] The purpose […] is clearly to facilitate transition from being accused to being convicted" (Foucault, 2003, pp.16, 22). Expert psychiatric opinion, according to Foucault, allows the legal offense, as defined by the law, to be doubled with a series of non-legal labels that are not the offense itself, but simply point to a characteristic or behavior that is thought to have in some way led to, or caused, the offense in the first place (Foucault, 2003). Foucault (2003) refers to this as twinning. In this way, the first function of psychiatric opinion is to twin the offense with criminality (Foucault, 2003). The second function is to double the author of the offense with the delinquent, or abnormal, subject; and the final function of expert

psychiatric opinion is to effect the conversion of punishment into curing (Foucault, 2003). However, "this infracriminal, parapathological series, in which both the illegality of desire and the deficiency of the subject are set out, is in no way intended to answer the question of responsibility" (Foucault, 2003, p. 21). The medico-judicial discourse is instead intended to inform the techniques of discipline and punishment (Foucault, 2003).

Selection of Sample

In accord with Miles, Huberman, and Saldana (2014), and as is common practice in case study research, I used a theoretically driven sampling strategy (i.e., Foucault's medico-judicial discourse) to purposefully select key informants for interview participation, which ultimately, and rather serendipitously, led to my possession of a two-hour video recording of the informational hearing on Georgia's beyond a reasonable doubt standard of proof that occurred in 2013. Also in accord with Miles and colleagues (2014), I used a within-case sampling strategy. A primary goal of within-case analysis is to describe, understand, and explain what has happened in a single, bounded context, or case (Miles et al., 2014). I selected within-case sampling because the primary concern of this study is for the conditions under which the construct, standard of proof, operates within Georgia's medico-judicial discourse on ID and capital punishment, and not with the generalization of these particular findings to other settings (Miles et al., 2014).

Interview sample. Based on Foucault's medico-judicial discourse, I purposefully selected key informants to interview based on their work in the public domain and professional expertise in the ID-capital punishment intersection. After receiving approval from the university's institutional review board, I recruited experts to participate in a face-to-face, semi-structured interview via email and phone. In the recruitment letter, I requested that selected interview participants who did not feel they qualified as key informants to, in lieu of

participation, identify colleagues who they believed would meet the selection criteria (i.e., professionals with expertise in ID, capital adjudication, and/or related Georgia policy and procedure). Table 3.2 presents the professional credentials of the 11 experts selected for study participation. I conducted all interviews between the months of June and September of 2016.

One week prior to each scheduled interview, I emailed a copy of the consent form, interview questions, and a glossary of relevant terms to the interview participant. At the time of the interview, I provided hard copies of all three forms. I conducted eight face-to-face interviews, two phone interviews, and one email interview. Face-to-face interviews lasted between 45- and 75-minutes, with most interviews lasting just over 60-minutes. Face-to-face interviews were conducted in the key informants' place of employment, as per their choice, and recorded using a handheld device and the computer program, Garage Band, on my laptop. I transcribed the eight face-to-face interviews verbatim. I did not record phone interviews, as per the request of participants, but instead used jottings. Key informants held influential positions and it was important to some key informants that I indicate upfront that the views expressed during the interview do not necessarily reflect the positions of the professional organization with which they were affiliated. In further consideration of their protection, I subsequently made the decision to withhold all names of the key informants who participated in interviews. Key informants revealed themselves to be experts on the ID-capital punishment intersection who were highly knowledgeable and required only minimal prompting to address the following question: "In your professional opinion, why does Georgia remain the only state in the nation to use the beyond a reasonable doubt standard of proof of intellectual disability?"

[INSERT TABLE 3.2]

Observation sample. It was following a short series of fortunate events that I came into the possession of a video of the 2013 legislative hearing on Georgia's standard of proof. (I had tried to locate this video previously during my review of the literature, but I was unable to navigate past the broken web link; I trudged forward intent on reviewing documents instead.) The series of events was ignited after one key informant declined to participate due to concerns over meeting the selection criteria. As requested, he instead offered me the names of two of his colleagues. It was one of his colleagues, and my first interview of the study, who provided me with a list of resources that he had thoughtfully prepared in advance of the interview, and who mentioned in passing a video of the 2013 legislative hearing. One of the resources he gave to me was an article that had been written by his former student for a class project; he pointed to the web link in the footnote.

This was the very same article I had read in my review of the literature. Excitedly, I went home and retrieved the article electronically, clicking on that familiar link. It was still broken. As before, I tried again to outmaneuver the obstacle, first manually keying in the web address and then trying to locate it through the Georgia General Assembly webpage. Finding my efforts to be of no avail, I emailed the interview participant to ask if he might know a work-around. As it turned out, he had the video. The video recording, upon review, displayed information that informed how it is that Georgia came to implement the highest standard of proof of ID, beyond a reasonable doubt. Even among the key informants, who all have tremendous professional expertise, there was disagreement regarding this point. At the same time the video offered historical insight into the beyond a reasonable doubt standard, it also represented Georgia's contemporary medico-judicial discourse on the capital punishment of persons with ID. Thus, as with the key informants who participated in interviews, the video could speak to why it is that

Georgia retains its beyond a reasonable doubt standard. After all, this was the ostensible reason for the 2013 hearing.

On multiple occasions, I reviewed the two-hour video recording of the 2013 legislative informational hearing on Georgia's standard of proof of ID and transcribed it verbatim. The hearing, sponsored by the Georgia House of Representatives Judicial Non-Civil Committee, took place on October 24, 2013 from approximately 9:30 am – 11:30 am. The agenda lists the ending time as 12:30 pm and describes itself as a, "hearing from interested parties on the narrow issue of the burden [sic] of proof requirement for determining mental retardation [sic] as it relates to the administration of the death penalty pursuant to Georgia law […] The agenda is subject to change at the Chair's discretion" (Georgia House of Representatives Judiciary Non-Civil Committee, 2013). Although the topic of discussion is Georgia's beyond a reasonable doubt standard of proof, the committee meeting is labeled an informational hearing on the "burden" of proof. (I further address this misnomer in my account of an impressionist tale of truth.) Chairman Rich Golick presides over the hearing and orchestrates the presentations of informants from a variety of organizations: the Georgia Association of Criminal Defense Lawyers; the Federal Defenders' Office; disability advocates that include representatives from the organizations, All About Developmental Disability, the Center for Leadership in Disability, and the Georgia Council on Developmental Disabilities; and the Georgia District Attorneys' Association and the Prosecuting Attorneys' Council of Georgia. In the opening and closing of the hearing, Georgia's beyond a reasonable doubt standard of proof of ID seems but an afterthought.

Data Analysis

Because the 2013 legislative hearing occurred prior to the interviews that I conducted in 2016 and because the hearing explains so well the history of Georgia's standard of proof using

firsthand sources, I elected to use the 2013 legislative hearing data in a foundational way. This is reflected in my structuring and sequencing of the analysis. The structure of the narratives of the hearing was an impressionist tale (Van Maanen, 2011). Impressionist tales are written to convey the drama of what occurred, selectively holding back on interpretations in order to reflect suspense. Impressionist tales allow both the researcher's thought processes and the participants' actions to come forward. Impressionist tales are written to maintain the audience's attention by focusing on unique and interesting aspects of a case, here assumed to be Georgia's uniquely high standard of proof of ID. 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).

In this study, I structure three impressionist tales from the 2013 legislative hearing in accord with Foucault's medico-judicial discourse. The three impressionist tales from the 2013 legislative hearing are representative of categories and function as vignettes. Each tale, itself a category, corresponds with one of the three powers ascribed by Foucault to the medico-judicial discourse: life and death, truth, and humor. From within each impressionist tale category, I used the constant comparative method as described by Bogdan and Biklen (2011) to analyze the interview and observation data, and to develop themes according to key issues, recurrent events, and activities in the data that emerged.

Analysis

An analysis of findings is presented according to the three impressionist tale categories: life and death, truth, and humor. From within each category, I develop themes and dimensions by analyzing the legislative hearing in iterative fashion with the interview data.

Analysis: 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). The power of life and death, as expressed by Georgia's death penalty status and standard of proof of ID, plays a critical role in Georgia's contemporary medico-judicial discourse on the capital punishment of persons with ID. An impressionist tale of life and death as expressed in the 2013 legislative hearing follows.

An impressionist tale of life and death: "a vehicle for a more expansive issue" v. "a few not a flood". As the video opens, sprawling scroll fades into a sterile rendition of the democratic process from vantage points that more often than not make it difficult to focus on individual faces. The cordial sounding voice of Chairman Rich Golick wafts in as though from on high, catching him mid-sentence, and functions as a sort of verbal lassoing. The scroll dissolves into a grainy picture flush with fluorescent light and gives way to a wave-shaped, heavy-looking, 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 a the table are the key players: the Georgia House of Representatives Judicial Non-Civil Committee, led by Chairman Rich Golick; the Georgia Association of Criminal Defense Lawyers; the Federal Defenders' Office; disability advocates that include representatives from the organizations, All About Developmental Disability, the Center for Disability Leadership, and the Georgia Council on Developmental Disabilities; and the District Attorneys' Association of Georgia and the Prosecuting Attorneys' Council of Georgia. They are gathered to hash out what has been erroneously labeled an informational hearing on Georgia's "burden" of proof that a

capital defendant raising the claim of ID must meet. 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 quickly slips into three admissions and one 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," warns the Chairman. As is discussed in my analysis of humor, the Chairman later reveals that his veiled admonishment is indeed intended for a specific target. The positioning of the admonishment both at the opening of the hearing in an insidious way and at the closing of the hearing in an overt way betrays the admonishment as an important, if not central, concern of the hearing on the State's standard of proof of ID.

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 noticeably absent. 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 addition to the politics of the Post-Reconstruction Era in the South, Georgia and the federal government have had a tenuous history with regard to the death penalty and state sovereign power. The U.S. Supreme Court started and ended a four-year national moratorium on the death penalty based on, among a select few others, two cases from Georgia: *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976). 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 ID 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. The three-prongs of a clinical ID diagnosis are: (1) intellectual functioning, (2) adaptive functioning, and (3) age-of-onset. Though the definition may be clear insofar as there are three-prongs, substantively, Georgia retains great latitude.

Chairman Golick reiterates his underlying concern for state sovereignty in the imposition of a death sentence, 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 scope not from the

vantage point of the structural forces (i.e., federal and state powers), but from the vantage point of the individuals who have been most subjugated to those forces:

> As it relates to the standard of, excuse me, the *burden* 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 4 or 5 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, revealing his convictions:

> 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 ID. Danny Porter, referencing the earlier testimony of Jack Martin and others advocating for a lowered standard, equivocates 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* [from mental retardation (sic)] 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 (i.e., "incorrect"). He has presented a straw-man argument, a logical fallacy that occurs when a person exaggerates the counterargument to present his or her own position as being more reasonable. 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 ID and persons with developmental disability: "*But*, we are concerned, as prosecutors, with the *expansion* of the definition to include other developmental disorders such as Autism." 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 ID 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, this bit of misinformation goes unchallenged. (So too does the reference to Georgia's Code as being narrow in its definition of ID.) 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.

As in his opening statement, the Chairman again pushes the issue of the death penalty itself from off the table. This time, however, in removing it from the table, he also removes the issue of standard of proof. Here is the essential argument: (1) the death penalty status and scheme should not be changed; (2) altering the standard of proof will necessarily change the death penalty status and scheme; (3) therefore, the standard of proof should not be changed. And thus concludes the impressionist tale of life and death in Georgia's medico-judicial discourse on standard of proof.

Thematic analysis of observational and interview data. Using the constant comparative method, I analyzed the interview responses and observational data on life and death from Georgia's 2013 legislative hearing, and developed themes according to key issues, recurrent events, and activities in the data that emerged (Bogdan & Biklen, 2011). Two themes emerged from the observational and interview data: economy/efficiency and scope/floodgates. From the economy/efficiency theme emerged two dimensions: (1) some individuals and systems benefit by retaining the current standard of proof; and (2) there is a desire, or perceived desire, by existing state entities to do no more than is required. From the scope/ floodgates theme also emerged two dimensions: (1) the State's position is that the current standard is both constitutional and fair because the statute is globally balanced; and (2) the State's position is that

a lowered standard will result in unintended expansions (e.g., to include all death row inmates and authors of felonies; to include persons all persons with developmental disability; retroactive application; the abolition of the death penalty itself).

Some individuals and systems benefit by retaining the current standard of proof.

A: We're not just talking about plantations. We're not just talking about agriculture. In other words, we're talking about industry […] This was the backbone of the economic system from about 1890 to about 1930 or so. It continued beyond that time; it also started before that time. But it really got going—they're using the criminal law system, right, as a way to maintain the economy and the nature of law, of the legal system that is necessary to maintain slavery required an incredible buy-in to an authoritarian regime that continued into the Jim Crowe period.

B: There are multiple levels. The first level is that, when you have a strong presence in the legislature or in the state of prosecutors, their job is to make their job easier. Their job is to lobby on different things: discovery, standards of proof.

C: And you cannot get away from the small town, prosecutorial discretion system, right, and the ways in which people really perceived prosecutors making careers for themselves on successful death penalty cases. And so if you've got a point in time—I would say like 10-years ago—there's prosecutors without question who were calling the death penalty all the time and it was for their own personal goals, right? And so, is it in their interest to maintain a high level? Absolutely. And so, it's the prosecutors who are looking for their own advancement—looking for a righteous solution, or a righteous finding. So, I think those two things do get clouded in together.

There is a desire by existing state entities to do no more than is required.

A: Post-enaction, the issue was litigated and the Georgia Supreme Court decided in favor of beyond a reasonable doubt. That's where the inertia set in. At the time, Georgia was the first and only state to provide any statutory protection, so there was a sense of "mission accomplished" and no energy to make any further changes. Georgia is a conservative state, and as the rest of the country began to make changes, again there was no energy or support to make any further changes. And so on and so on.

B: But once that was created and once the legislature is forced to sort of do something, it's very rarely going to do more.

C: Primarily because they are from the point of view of the legislature. With the ban that was set into place 30 years ago, they've done their due diligence. There's a ban on it. It's there.

The State's position is that the current standard is both constitutional and fair because the statute is globally balanced.

A: Well, if you're going to do that, then you're going to mess with the entire statutory scheme and so I don't know if that can be done […] but then the State would say, hey, if you're going to lower the standard, then we want to start excluding evidence now. Because now that we've got the higher standard, we let it all ride—we let it all in. We don't exclude anything. We let them [the defense] have whatever they want to have. But if you're going to change the standard—and lower the standard for them—then we want more competency evidence presented during that phase of the trial and we want to decide what it is.

B: So they first say, this competency stage of trial is a procedural safeguard for intellectually disabled people.

C: And so, these are the factors that the 11th Circuit and the Georgia Supreme Court are taking into account when they say, okay, I understand this standard is the highest standard in the country, but: you require unanimity; you allow them to present it in guilt/innocence; you allow them to present it again in sentencing […] if you look at our whole broad statutory scheme, which includes our competency to proceed statute, as well as allowing a defendant to present intellectual disability in the guilt/innocence phase of the trial—and they can raise it again in the sentencing phase at the end. Globally, as a whole, our scheme is constitutional.

The State's position is that a lowered standard will result in unintended expansions.

A: But I noticed an uptick in it after Atkins, so after 2002. It seemed like to me that almost every case we had in XYZ County wanted to raise intellectual disability.

B: Well, this is what you gotta understand: our statute, OCGA 17-7-131, applies to all felonies […] So it would change the standard for every felony in the state as a substantive defense to the crime and then it would also be retroactive.

C: The judiciary on the other hand says we have a high standard of proof because it should be difficult to prove diminished capacity within this legal setting or else everyone that's on Georgia's death row would have access to that as a new line of appeal. And that would have to be answered to. Everybody would immediately claim that they had a low IQ. That's their argument in a nutshell.

Truth

According to Foucault, the medico-judicial discourse has the power to make truth claims. He explains that the power of truth functions to legitimize the power to kill:

> From what does this power of life and death derive? From the judicial system perhaps, but these discourses also have this power by virtue of the fact that they function as discourses of truth within the judicial system. They function as discourses of truth because they are discourses with a scientific status, or discourses expressed exclusively by qualified people within a scientific institution […] Where the institution appointed to govern justice and the institutions qualified to express the truth encounter each other, or more concisely, where the court and the expert encounter each other, where judicial institutions and medical knowledge, or scientific knowledge in general, intersect, statements are formulated having the status of true discourses with considerable judicial effects (Foucault, 2003, pp. 6, 11).

An impressionist tale of scientific truth as expressed in the 2013 legislative hearing follows.

An impressionist tale of truth: "we don't have anything beyond a reasonable doubt" v. "stepping out carefully and with a greater sense of caution". Following 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. Rita Young 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 that encapsulates the medico-judicial negotiation of Georgia's definition of ID, manifest as the standard of proof.

Following the testimony of Rita Young and Stacey Ramirez, psychiatrist Roy Sanders is called to answer questions related to the science of diagnosis. This line of testimony would have been more appropriate for a licensed psychologist with a background in developing and interpreting psychometric tests. 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, astutely recognizing his own accusation:

> 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, intent on locating a translational meaning that aligns with Georgia's highest standard of proof: "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 an earnest 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 veritable quagmire of language. It is an awkward dance of brief interaction in the form of toe stepping made notably more awkward by the dancers' gradual realization that no one seems to really know the others' moves. In fact, the descriptor "awkward" is used four times throughout the hearing, and the term "odd" is used three-times to describe Georgia's capital trial procedure and discrepancies in professional terminology. In what might be described 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 questioning. 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 already correctly identified as being a preponderance of the evidence: (e.g., "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"). It is dizzying. 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.* That would be a real concern for the future. Anything can be discussed certainly, it's just, you know, we're stepping out *carefully* and with a greater sense of caution.

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 Tim 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. Representative Pak asks:

> I guess my question is, so I know we're not in *court* because in *court*, expert testimony, lay witness testimony are supposed to be weighed the same. But in actuality, we know that we prefer the experts. The question is, is intellectual disability an area where scientists can *never* get to a consensus where we as lawyers view it as that burden can never be met type of thing
>
> […] I mean, are we imposing a *burden* that we just can't, is *impossible* to meet?

The exchange with Roy Sanders ends with the issue of certainty remaining uncertain.

Danny Porter with the District Attorneys' Association of Georgia turns back to the matter of expert testimony: "Bringing in two *equally qualified* doctors, and one says yes and one says no, I think juries kind of just wash it to tell you the truth." (Perhaps ironically, neither the District Attorneys' Association nor the Prosecuting Attorneys' Council provide expert testimony to the

contrary of Roy Sanders' assertion that the closest legal translation to reasonable medical certainty is a preponderance of the evidence.) Chairman Golick responds to Danny Porter's pseudo-scientific claim agreeably, and with a note of finality: "That *would be* human nature to look at something else." Despite their philosophical waxing, research suggests that juror decision-making is a more complex process. According to Butler and Moran (2007), the process of death qualification results in the selection of differentially partial jurors. Although death qualified and excludable jurors are able to realize when incorrect scientific procedures are being used, death-qualified jurors are less likely to take this into consideration when evaluating the importance of the evidence (Butler & Moran, 2007). As a result, capital defendants "are having their fate determined by a homogenous, unrepresentative subgroup of the population that is prone to basing life and death decisions on flawed science" (Butler & Moran, 2007, p. 568). An objection to Danny Porter's juror decision-making theory is never raised, however, and confirmation bias is mistaken for scientific truth. And thus concludes the impressionist tale of truth in Georgia's medico-judicial discourse on standard of proof.

Thematic analysis of observational and interview data. Using the constant comparative method, I analyzed the interview responses and observational data on truth from Georgia's 2013 legislative hearing, and developed themes according to key issues, recurrent events, and activities in the data that emerged (Bogdan & Biklen, 2011). Two themes emerged from the data: demonstrability/certainty and risk/dangerousness. From the demonstrability/certainty theme emerged three dimensions: (1) the State's position is that persons with ID who approach the normal functioning border are malingering; those who do not will either be found to be incompetent, or else are incapable of authoring the offense in the first place; (2) social invisibility is a salient risk factor for persons with ID who approach the normal functioning

border; and (3) some individuals with ID will lack records of such due to gaps within the state system of care rooted in social inequalities. From the risk/dangerousness emerged four dimensions: (1) the beyond a reasonable doubt standard of proof impacts the allocation of risk to the defendant; (2) the concern for the protection of society is professionally endorsed; (3) the phrase, "worst of the worst" is a rhetorical strategy employed by both death penalty advocates and critics; and, (4) dangerousness is a forward-looking concept that bridges notions of curability with notions of public safety.

The State's position is that persons with ID who approach the normal functioning border are malingering; those who do not will either be found to be incompetent, or else are incapable of authoring the offense in the first place.

> ***A:*** So, anyway, in the competency phase *of* the trial, the defendant has a standard of preponderance, though he has to prove to the preponderance of the evidence that he's competent to proceed and if he's severely ID, he probably will make that burden and will not be tried until he can be competent to proceed.
>
> ***B:*** Because the only people who really qualify or who are going to be found to be intellectually disabled are people who aren't going to have the wherewithal to *commit* the crime in the *first* place.
>
> ***C:*** It's the cases where we're more cynical, where the evidence isn't as strong, where, okay, he took an IQ test while he was in prison and he scored a 68. Well, what did he do in the 12th grade? That's the kind of stuff that we're *fighting* over.
>
> ***D:*** The reason why this is so complicated is because no one can really agree on who's *really* intellectually disabled because a lot of times, prosecutors—and I told you, we're cynical people—we will have a guy who is high functioning, who's *married*, a job, never

did anything wrong, and all of a sudden he commits capital murder, we seek the death penalty [snaps fingers], and he's intellectually disabled. And we're like, huh? How's he gotten through life? […] We want to see *how* people were living in the community *before* they caught this capital case, so to speak.

Social invisibility is a salient risk factor for persons with ID who approach the normal functioning border.

A: The entire apparatus of law enforcement needs to have a special understanding of intellectual disabilities and how they manifest, how they can be masked and camouflaged and *why* that would happen.

B: They haven't been around it [intellectual disability]. It hasn't been exposed to them. It's not something that they would see in their day-to-day lives necessarily. And if they do, do they recognize it as such?

C: I think the fact that people *cover up* their intellectual disability is a problem for defense because we don't always appreciate how intense it is, right, because people have *covered* it.

D: Many clinicians *don't* have the expertise and *will* make the same kind of decisions based on stereotypes as laypeople. So that has got to be taken into account. You know, the AAIDD—their user guide has great sort of discussion on stereotypes. Those need to be put just front and center in any discussion of how we evaluate intellectual disability because those stereotypes are *lethal*.

Some individuals with ID will lack records of such due to gaps within the state system of care rooted in demographic variables.

A: And the other thing I should say is that with a critical, or a vulnerable population, many folks if you're African American, Latino, poor White, you don't actually get the services for whatever reason because of your status—your socioeconomic status. So therefore, sometimes, a determination *cannot even be made*. We're trying to find school records, but we can't find these school records to document it; we can't find these places where they may have gone. And it might have happened, it might not have happened. But because they're from a vulnerable class of our population, it did not happen. A person could go to school and they may end up dropping out, but a teacher, nobody, ever said, we might need to get this child evaluated.

B: *Now*, with that being said, I would also add that it is shocking to me, in general, the overall *lack in concern* that there is, in Georgia, to social service populations [...] We have the most *appalling* human services and lack of support for people *in general*, so yes, disabilities plays into that. Absolutely, without *question*. We do not recognize that there's a federal role and mandate to pay for people who are hurting. I don't think we recognize that.

The beyond a reasonable doubt standard of proof impacts the allocation of risk to the defendant.

A: But *interestingly*, when you look at the standard of *proof,* when the standard of proof changes, what you're really doing is *reallocating* the *risk* of a misinterpretation, or the risk of an *erroneous* finding.

B: Does the Georgia prison system provide the kind of comprehensive diagnostic treatment and care that is necessary? Absolutely not. And this is another problem with the reasonable doubt standard because it's preventing people from being identified as having a disability, which could be helpful to prisons whose duty and *responsibility* it is to care for these people *properly*.

C: What Georgia's burden of proof does is it ensures that just about *everyone* who's going to encounter the criminal justice system and has an intellectual disability is going to be executed […] the defendant should not have to bear the risk that simply because he had a girlfriend or had a driver's license, that his claim is going to be thrown out the window because those are things that are within the capability of someone with *mild* intellectual disability.

The concern for the protection of society is professionally endorsed.

A: The difference is, is that in a criminal case, we are punishing something that someone has *done*…punishing criminal *behavior*. Not only *punishing* criminal behavior, but we're *protecting society*. There are these competing, dual roles […] whereas *criminal* jurisprudence says, this person has committed a *wrong* against society and now we have to punish them, but we also need to *protect society.*

B: The issue becomes who do we integrate—because, I, as a defense lawyer, I do understand the need to protect society from people that may harm them […] So again, it's this kind of view in terms of socially and culturally—how we view the right to protect society against helping someone.

C: While diminished moral culpability clearly reduces the deterrent or retributive effect of incarceration, it would not reduce the effectiveness incarceration has on protecting

society. I would think that would need to be addressed as well in order to prepare against the opposing view.

The phrase, "worst of the worst" is a rhetorical strategy employed by both death penalty advocates and critics.

A: But in light of the exonerations and in light of what we know about—just in light of *culturally* where we are in this country, but people, juries still—XYZ County juries, Georgia juries—still impose the death penalty. And they impose it in the most horrible cases you can imagine […] Even just regular shootings are horrible. Every murder is tragic in a certain way, but you will learn, and you have seen, that the death penalty statutes reserve the death penalty for only the worst of murders.

B: It's kind of, the idea here, the common denominator is that you're talking about categories of offenders who inherently lack the culpability, the *moral* culpability, to be worthy of execution. They are by definition, they can't exercise the kind of mature judgment and therefore premeditation, essentially that would make them be rightfully considered the worst of the worst—worthy of execution.

C: And we've got to be far more clear about the people who are executed are *not* the worst of the worst, right. And if we want it to be a society that executes the worst of the worst, that's not people with intellectual disabilities.

Dangerousness is a forward-looking concept that bridges notions of curability with notions of public safety.

A: But if we think that you may be a danger, we don't worry about treatment as much as about putting you in a place where you can't hurt someone. And that's the issue […] could they hurt someone later?

B: Instead, the Texas jury answers three questions and one of those questions refers to future dangerousness. And so you can see how, by Penry raising, well, I'm mentally retarded, *I always have been*, that a jury could see, oh, gosh, if he has been mentally retarded and he committed this murder and he is not ever going to be *cured* of his mental retardation as opposed to the mental illness, which theoretically you can be cured of, that if he committed this homicide because of his MR, or in part due to his MR, he's gonna do it again, so obviously he is a danger in the future.

C: There's a warehousing element for some people who are so dangerous we might just not want them out, and that's a very small group of people and that's a different category.

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:

> This is not the first time that the functioning of judicial truth has not only raised questions but also caused laughter. You know that at the end of the eighteenth century […] the way in which the proof of truth was administered in penal justice gave rise to both irony and criticism (Foucault, 2003, p. 6).

An impressionist tale of humor in Georgia's 2013 medico-judicial discourse on standard of proof follows.

An impressionist tale of humor: "not always a guarantee" v. "more likely than not".

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 ID. 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, but soft and amiable. It carries a trademark Southern, sonorous twang, tapping into something transcendental, but then catching on something sharply existential that makes this sound-stamp distinctly his own:

> 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 seemingly sympathetic toward disability rights on the one hand, but who, on the other hand, will never transgress the legal norm by using the relevant clinical terminology, *intellectual disability*—even if it means using language that is pejorative. In his opening assertion, Danny Porter underscores the legal norm of retribution that constitutes 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. To protect persons with ID from being mistreated is, in his personal life, to "take *direct* action" and a gesture that suggests he is brave and chivalrous for his willingness to exact justice. However, in his professional life, the "*direct* action" that he takes is directed against criminal defendants that at times may include persons with ID. 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 if the standard of proof

for which he advocates is retained. This paradox represents a sort of duplicity that always affords him the upper hand, for society sees him as being admirable in both his personal and professional aim, even when these aims occasionally conflict.

Danny Porter continues to hurl an assault of scope-based defenses in the direction of the committee before Chuck Spahos speaks, making the additional appeal that any risk of executing a person unlawfully due to Georgia's high standard of proof is offset by the balance found within Georgia's global scheme, as per the 11th Circuit Court of Appeals in *Hill v. Schofield* (2010). However, it is likely that committee members were previously aware that Georgia's standard of proof had been ruled upon three-years ago by the federal circuit court, and that the ruling did not result in a mandate for Georgia to lower its standard. The demonstrated reverence for capital punishment and lackadaisical pursuit for scientific truth that includes such offenses as the mislabeling of the hearing itself, and in the absence of a federal mandate to legislate change, begs the question: intentional or otherwise, did the hearing serve an ulterior purpose? The remaining eight minutes of the hearing bring Chairman Golick's opening statements quickly to mind: "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 final moments of the hearing serve to bookend Chairman Golick's subtle admonishment that came at the beginning of the hearing. Representative Coomer initiates the confrontation:

> 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 accusatory, 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, recognizing quickly that they themselves are now on trial, 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. "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, setting up Chairman Golick to initiate the ultimate 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.

District Attorney Danny Porter uses a combination of self-deprecation and passive-aggression to create what comes to be collectively accepted as a moment of levity. "That's not always a guarantee," Danny Porter says 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 self-deprecating 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. Here again as before, the laughter seems to function as an acknowledgement of the underlying duplicity. 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. Relationally, the offering signifies the Chairman's trust in Danny Porter. Meanwhile and duplicitously, persons with ID, whom Danny Porter professes to protect in his personal life, remain as an out-group who must prove their out-group status to the highest standard in order to be spared from execution. In both instances, laughter occurs in the moments where the hearing becomes most revealed for what it is, and the tension becomes too great. This is not so much an informational hearing on the standard of proof as it is a display of disciplinary power. And thus concludes the impressionist tale of humor in Georgia's medico-judicial discourse on standard of proof.

Thematic analysis of observational and interview data. Using the constant comparative method, I analyzed the interview responses and observational data on humor from Georgia's 2013 legislative hearing, and developed themes according to key issues, recurrent events, and activities in the data that emerged (Bogdan & Biklen, 2011). One theme emerged from the data: duplicity/irony. From this theme emerged the dimension: threats of violence, overt acknowledgements of underlying conflict, and the misallocation of risk to persons who should otherwise not be found to be morally culpable invokes laughter within the discourse on capital punishment.

Threats of violence, overt acknowledgements of underlying conflict, and the misallocation of risk to persons who should otherwise not be found to be morally culpable invokes laughter within the discourse on capital punishment.

A: [Following laughter at the idea that someone can legally defend his or herself in a death penalty case who otherwise should not be eligible to do so] It's kind of this thing where someone is sick, right, and they don't know that they're sick, sometimes that really, in my opinion, evidence that you really are sick! And with Mr. X, no, he didn't—in terms of any type of intellectual disability, in terms of any kind of mental health defense, he would not allow that to be used. And the courts—basically, we had to get off the case because it was a conflict at that time because we were saying that our client was incompetent to stand trial, to be tried—not just to be tried for the death penalty, but just to be tried because he would not be able to assist us. So the court, going through that—and I think that I was by that time off the case, but at some point, one of the judges decided that he was competent to stand trial, and then they also made the finding that he was competent to represent himself. So there has to be a ruling and a lot of times, that's in the hands of the trial court. To this day, I disagree with it, but that's what they wrote […] It's not the first time that's happened in Georgia. I think another case that I was on briefly when I first came here in 2005— the Mr. Y case that I believe was out in Douglas County. Same thing. Even at first glance, you would have first thought that Mr. Lamar was incompetent to stand trial, incompetent to represent himself, but the courts found otherwise. They at least found that he was competent to stand trial. And the issue goes to—it's a separate inquiry, a Faretta inquiry, and when you have to do when the client wants to represent themselves and the judges do that, and says, okay, I guess he can.

He's been found competent to stand trial itself and we have to do this separate inquiry. So, but I think that there's a kind of… willingness when you have a serious case like this—too much of willingness—to leave it at the foot of, let's just say in Georgia courts, not a willingness to not go deeper than the surface.

B: [Following laughter at the question of who will advocate for a national model of standards] Well no, wait, let me take that back. The battles that we have had are about enforcing the federal 8th Amendment exemption under Atkins. You know, and you're right. What we have been saying is that the constitution ought to have a say in that, in restraining states from enacting standards that are not consistent with accurate clinical diagnosis. And so that is the battle we have been having with the standard of proof. And so if you look at the Hall v. Florida decision that came out recently, the same kind of battle where the Florida courts were saying, 'if you have an IQ over 70, literally over 70—71, then the inquiry stops because you don't qualify anymore.' That goes absolutely against clinical understanding of intellectual disability and the U.S. Supreme Court properly said, 'you can't do that anymore; you've got to look at what the clinical consensus says, and your laws cannot go against that—that violates the Constitution.' So, in that sense, that is saying to the entire country, you can't just say nonsense—you can't make up nonsense standards. There's a case out of Texas right now where the standards are so ridiculous, it says if you take a test, if you're like Lenny from Of Mice and Men, then you qualify.

C: At the competency stage of a trial, the defendant has the burden—as they do in every state because it is impossible to get into someone's mind, right? That would be an impossible standard. In no other place do we have to exactly prove what was exactly in

your mind when you pulled the trigger—or exactly what was in your mind at the time you committed the crime…except in certain cases where it's first degree murder, we have to prove specific intent. But those things can be proven by actions, right? If you loaded the gun, then reloaded the gun, I can prove that you had the specific intent to kill this person. If you shot him in the head 14 times, I can prove through your actions you have specific intent (not you…) [laughter]. You can't do that when you're talking intellectual disability. You can't do that. You can't do that when you're talking about the psych defenses that we have—Bi-Polar Disorder, Schizophrenia. You can't do that. It's impossible to do that and the law has recognized that. That's why in every state, the defendant has the burden of proving these ID. So, anyway, in the competency phase of the trial, the defendant has a standard of preponderance, though he has to prove to the preponderance of the evidence that he's competent to proceed and if he's severely ID, he probably will make that burden and will not be tried until he can be competent to proceed.

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, or at least Representative Christian Coomer, know something that no testifying participant knows: the purpose of the meeting is not to "get educated" about the "science" of ID and to discuss implications of a lowered standard of proof. 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: once in the opening, and twice in the closing; (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," as evidenced in this analysis; 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 (i.e., the Victim Restitutions Act of 2005 and the Crime Victims Bill of Rights in 2009).

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). However, because the 2013 informational hearing operated as an expression of power more so than an opportunity "to get educated" about the implications of lowering Georgia's high standard of proof, a new hearing should be held to address this policy issue and to address the lack of information (e.g., the likely number of claims to come forward and projected cost) and to address the misinformation (e.g., that "intellectual disability" entails a broader diagnostic range than "mental retardation" [sic]). If a new hearing cannot be arranged, an alternative political platform should be considered. As well, research must be done in advance and a broader range of experts should be purposefully

selected to participate. Table 3.3 presents a Foucauldian analysis of Georgia's standard of proof of ID, translating key theoretical concepts to the policy issue of focus.

[INSERT TABLE 3.3]

Recommendations for a Future Hearing

Based on the finding that information in the 2013 legislative hearing on Georgia's beyond a reasonable doubt standard of proof of ID was either insufficient or incorrect, I recommend that the following nine content areas be further addressed in a subsequent hearing:

(1) Standard of proof versus burden of proof;

(2) The specificity/ lack of in Georgia's legal definition of ID and ramifications as presented in academic, peer-review research;

(3) The science of diagnosis (e.g., strengths in adaptive functioning do not negate deficits; how issues of validity and reliability are statistically accounted for in psychometric testing);

(4) The statutory impact of moderating the standard of proof (e.g., it is unclear if the standard would apply to all felonies since the U.S. Constitutional ruling only specifies death penalty cases);

(5) The likely number of claims to come forward as a result of a lowered standard of proof and accompanying cost analyses;

(6) The relationship between intellectual disability, 'mental retardation' [sic], and developmental disability, and legal terms such as competency and insanity;

(7) The word 'reasonable' does not make the beyond a reasonable doubt standard of proof the legal equivalent of reasonable medical certainty;

(8) Juror decision-making processes and systematic differences between death qualified and non-death qualified juries; and,

(9) The ways in which stereotypes, stigma, and social invisibility have real life impact for individuals with ID generally and especially in the criminal justice system.

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Table 3.1

Timeline of Related Policies Leading up to Georgia's 2013 Legislative Informational Hearing

Date	Policy/ Event	Relevant Testimony from the 2013 Georgia Legislative Informational Hearing
April, 1986	*Ford v. Wainwright*	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 (Jack Martin, 2013).
June, 1986	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. [Following the execution of Jerome Bowden] there were polls that were done by Georgia State that indicated that 75 percent of Georgians supported the death penalty. Sixty-six per cent of Georgians did not support it for the mentally retarded [sic]. So what happened was, there was a consensus among the legislature, including the Attorney General […] we got to do something about this in Georgia (Jack Martin, 2013).
1988	Georgia's Statute: OCGA 17-7-131	We were trying to get something passed, things were rushed, and Joe Drolet, who used to be 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 – which had been expanded now at that time to be both, 'guilty, but mentally ill' and 'guilty, but mentally *retarded'* [sic]— 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. That small, little, one sentence…[…] That statute and its burden [sic: standard] of proof says, 'you have to find a person *guilty beyond a reasonable doubt*' […] It was *sloppy* draftsmanship, pure and simple (Jack Martin, 2013).
January, 1989	*Penry v. Lynaugh*	Ultimately, in Atkins versus Virginia—that was in 2002—the United States Supreme Court finally weighed in. Before that time, there had been a case called Penry versus Lynaugh. And Penry had said, you can raise mental retardation [sic] in the sentencing phase of a capital case, but it wasn't an absolute bar to the death penalty (Jack Martin, 2013).
December, 1989	*Fleming v. Zant*	So, what happens is that after that statute passed, the Georgia Supreme *Court* in a case called Fleming…in the Fleming case, the Georgia Supreme Court said, okay, the legislatures held that we shouldn't execute the mentally retarded [sic], 66 percent of Georgians *oppose* that. We believe there's a consensus against the execution of the mentally retarded [sic], so that under the Georgia Constitution—not just the statute—their cruel and unusual provision, you can't execute a person who is mentally retarded [sic]. Interestingly enough, they had a problem then. The statute only applied to cases tried after July-one, 1988, but there were people who were clearly mentally retarded [sic] who were on death row who hadn't gotten the *benefit* of that statute. Now we had a constitutional prohibition against executing the mentally retarded [sic], how do we deal with these people who didn't get the benefit of the statute? And what they say is,

		we'll have a hearing […] the Georgia Supreme Court said, the burden of proof in that hearing would be by a preponderance of the evidence—more likely than not, as opposed to beyond a reasonable doubt (Jack Martin, 2013).
December, 1994	*Burgess v. State*	But it was odd that if you were tried after the statute had passed the burden of proof was beyond a reasonable doubt, but that if it was just a constitutional provision from prior, it was preponderance of the evidence. That ultimately came to a head in a case called State versus Burgess, in which I was the appellate lawyer and the trial lawyer in that case. And in that case, we argued that that was an equal protections problem, you can't have two burdens of proof. The Georgia Supreme Court declined all that. They said, we're gonna hold that. So we've had for years now these two burdens of proof in these cases. And it's been an odd situation throughout (Jack Martin, 2013).
June, 2002	*Atkins v. Virginia*	In Atkins versus Virginia, they *reversed* that decision [*Penry*] they said, well, there's now been an increasing consensus against the execution of the mentally retarded [sic]—and by the way, Georgia, it mentions Georgia was the first state to do that—so the Georgia statute ultimately led the way, in part, to Atkins making a *national* prohibition against the death penalty. Unfortunately, in Atkins, the Supreme Court said, we'll leave to the states how you're going to implement this and different states have come up with different ways of doing this. Some states and the federal government do it in a pre-trial hearing. Georgia has this *odd* procedure where you have to try during the guilt/innocence phase of the trial and that burden of proof, as the Chairman said, is beyond a reasonable doubt, is the *only* state that has such a high burden. So Georgia was the leader on this in 1988, and now we're at the back of the bus (Jack Martin, 2013).
June, 2010	*Hill v. Schofield*	And what I'll ask you to do is consider, just as the Georgia Supreme Court and the Federal Courts have, is Georgia's *process*. The concept and the process. And if I could, I'll quote the most recent federal ruling in the [Warren Lee] Hill case: 'We have discussed the Georgia process as to mental retardation [sic] and the death penalty, and when evaluated as a whole, it contains substantial procedural protections. The Georgia statute allows the defendant to raise the issue of mental retardation [sic] in the *guilt* phase of a criminal trial, *and* permits a jury to find the defendant guilty, but mentally retarded [sic]' (Chuck Spahos, 2013).

Table 3.2

Professional Affiliations and Job Titles of Interview Participants

#	Professional Affiliation	Job Title
1	University of Georgia School of Law	Law Professor and Director of the Capital Assistance Project
2	University of Georgia School of Social Work	Academic Researcher of Capital Punishment
3	University of Georgia School of Law	Law Professor and Director of the Criminal Defense Clinic
4	Georgia State University School of Social Work	Professor of Social Work, Mitigation Specialist
5	Prosecuting Attorneys' Council of Georgia	Director of Capital Litigation
6	Georgia Resource Center	Executive Director, Capital Defender
7	Metro Capital Defenders' Office of Georgia	Supervising Attorney, Capital Defender
8	Georgia State Senate	Senator, Senate Non-civil Judiciary Committee Member
9	Atlanta Legal Aid	Director of the Disability Integration Project
10	Federal Defenders for the Middle District of Georgia	Supervising Branch Manager
11	Clinical and Forensic Psychology	Psychologist

Table 3.3

A Foucauldian Analysis of Georgia's Standard of Proof

Foucauldian Concept	Conceptual Definition	Analysis of Substantive Application
The Medico-Judicial Discourse	The intertwining of medicine and the law that becomes its own hybrid process of power based on medical notions of illness and legal notions of recidivism	The 2013 Georgia Legislative Informational Hearing
Twinning	Infracriminal, parapathological doubling in the medico-judicial discourse that: *Twins the offense with criminality *Twins the offender with the abnormal or delinquent subject *Twins the punishment with the cure	Georgia is the only state to introduce intellectual disability during the guilt/innocence phase of the trial: *Intellectual disability ←→ Criminality *Capital defendant ←→ Abnormal subject *Execution ←→ Rehabilitation
Discourses that Kill	A discourse of power; a decision of justice that ultimately concerns a person's freedom, life and death	Discussion about the death penalty and by extension, Georgia's state sovereign power to impose the punishment of death upon select members of its constituency
Discourses that Make Truth Claims	A discourse of power that occurs within the judiciary, enjoys a scientific status, and is expressed exclusively by qualified people within a scientific institution	Discussion about the rightful position of clinical experts within the context of capital punishment and criminal jurisprudence in Georgia
Discourses that Invoke Laughter	A discourse of power that uses humor	Discussion about the separation of powers among the government branches and so the sovereign power of the branches; a parallel or correlate of the discourse on life/death
Grotesque	The maximization of effects of power on the basis of the disqualification of the one who produces them	The "inertia" → the enmeshment of the legislative and judiciary branches that is actively masked by scope- and economic-based concerns
Disciplinary Power	Individuals become the participants of their own subjugation	As expressed by: the ultimate aim of the hearing; the video surveillance of the hearing; the enmeshment of the branches
Exclusion	A process of power; a social filtering aimed at "pure community"	Within this discourse: committee members from non-members; individuals advocating for change from those advocating for no change Within the broader discourse: the execution of persons with intellectual disability
Individuation	A process of power; strict divisions made for the purpose of "containment"	Within this discourse: identification and separation of members of the prosecuting organizations Within the broader discourse: intellectual

		disability v. ‘mild’ intellectual disability v. developmental disability v. mental retardation [sic] v. insanity v. competency v. mental illness
Knowledge/ Power	Power is mutually entailed by knowledge, for through knowledge, there is resistance	The committee is aware that this hearing will be used as a platform to confront officials of the judiciary; judiciary officials, unaware, offer no resistance to the expressed power

CHAPTER 4

A VALUE-CRITICAL POLICY ANALYSIS OF GEORGIA'S STANDARD OF PROOF OF INTELLECTUAL DISABILITY [3]

[3] Ricciardelli, L. To be submitted to *Journal of Disability Policy Studies.*

Abstract

The *Atkins v. Virginia* (2002) decision barred the execution of persons with intellectual disability (ID), but provided minimal specification regarding adjudication procedure. One exception to the lack of instruction was the recommendation that states generally conform to accepted clinical practice and norms, positioning professional associations to take an important role in this discourse. I use Chambers and Wedel's value-critical method of analysis to examine the policy element, standard of proof of ID, within Georgia's 1988 statute prohibiting the execution of persons with ID. Owing to the public outcry that followed Georgia's execution of Jerome Bowden, the 1988 statute was the first in the nation to bar such executions, and indeed predated the *Atkins* (2002) decision by 14-years. However, due to a drafting error, Georgia was also the only state to invoke the highest standard of proof, beyond a reasonable doubt. When states use a standard of proof of ID that is higher than the lowest standard, a preponderance of the evidence, capital defendants with ID are at an increased risk for unlawful execution and denial of supports and services. I present findings across three dimensions: (1) the social history context, (2) the judicial context, and (3) the economic context. A discussion and recommendations follow.

Keywords: intellectual disability, Atkins v. Virginia; standard of proof, death penalty, value-critical policy analysis

Introduction

The *Atkins v. Virginia* (2002) decision barred the execution of persons with intellectual disability (ID), but provided minimal specification regarding adjudication procedure. One exception to the lack of instruction was the recommendation that states generally conform to accepted clinical practice and norms, positioning professional associations to take a critical role in this discourse. Whereas the *Atkins* (2002) decision and related issues have typically been examined from a criminal justice perspective, I use Chambers and Wedel's (2009) value-critical method of policy analysis to examine the policy element, standard of proof of ID, within Georgia's 1988 statute prohibiting the execution of persons with ID. Georgia was the first state in the nation to bar the execution of persons with ID. As will later be explained, due to a drafting error, it was also the only state to invoke the highest evidentiary standard (i.e., beyond a reasonable doubt). When states use a standard of proof of ID that is higher than the lowest standard, capital defendants with ID are at an increased risk for unlawful execution (Saviello, 2014), as well as denial of supports and services that they would otherwise be entitled to under Title II of the 1990 Americans with Disabilities Act (ADA). Of the 27 death penalty states in August 2016, 22 states (and the federal jurisdiction) used the lowest standard (i.e., preponderance of the evidence); four states used the intermediate standard (i.e., clear and convincing evidence), and only Georgia used the highest standard, beyond a reasonable doubt (Saviello, 2014).

Perhaps owing to the ambiguities within the *Atkins* (2002) decision, the U.S. Supreme Court has within the past five-years begun to hear cases regarding states' conformity to accepted clinical practice and norms (e.g., Hall v. Florida [2014] and Moore v. Texas [2016]). Because Georgia is the only state to invoke the highest standard of proof of ID that a defendant must meet

to be found ineligible for death sentencing, it is likely that should the U.S. Supreme Court take a case from Georgia on the issue of standard of proof, the Court will examine it from the perspective of clinical conformity (Informational hearing, 2013). Typically applied to the prosecution in criminal cases, Georgia imposes an evidentiary standard of beyond a reasonable doubt, which is not only the highest standard in the nation, but as well, the highest standard in the world (Informational hearing, 2013). As will be argued in this policy analysis, such a standard is incommensurate with accepted clinical practice and norms (U.S. Department of Justice, 2015) because it ignores inherent imprecision in diagnosis that is accounted for in the standard error of measure and in the decision to accept a Type I versus a Type II error (i.e., to choose between a false positive or a false negative).

In terms of error preference, "which error is deemed more serious will vary from study to study, depending on the value judgments we make about various considerations" (Rubin, 2013, p.129). In the present scenario, a Type I error occurs when a person who should be death eligible (i.e., the person is not evidenced to have ID) is not found to be so, and is erroneously (but not unlawfully) spared from execution. A type II error, however, occurs when a person who should not be death eligible (i.e., a person who is evidenced to have ID) is erroneously (and unlawfully) sentenced to death. Because mental health professionals are held to a do-no-harm ethical mandate, the Type I error is preferable in this scenario. As well, the 1989 state consensus determined by the Georgia Supreme Court in support of the 1988 statutory ban, seemingly upholds the peoples' preference for a Type I error. However, by retaining the highest standard of proof, Georgia endorses a preference for Type II error, which entails the risks of unlawful execution and thereby cruel and unusual punishments of persons with ID (Saviello, 2014). In contrast, the beyond a reasonable doubt standard in all criminal cases is traditionally invoked in

the direction of Type I error: that is, persons are innocent until proven guilty beyond a reasonable doubt. Georgia's disparate uses of the beyond a reasonable doubt evidentiary standard represents a stark incongruence.

Organization of this Article

To assist the reader, in this section I provide an overview of the organization of this value-critical analysis of the policy element, standard of proof, within Georgia's 1988 statute prohibiting the execution of persons with ID. In the forthcoming sections, I provide: (1) an explanation of Chambers and Wedel's value-critical approach to policy analysis, and a justification for why this is a suitable method for the present policy; (2) a comparative description of the 2002 *Atkins* decision and Georgia's statute and standard of proof of ID as per Chambers and Wedel (2009) in terms of policy goals and objectives; forms of benefits or services delivered; entitlement rules and structure for service delivery; financing method; and interactions among the foregoing elements; (3) analysis of the social history context; (4) analysis of the judicial context; and (5) analysis of the economic context. In the social history analysis, I elucidate what has been a pattern of gross, historical maltreatment of persons with ID in Georgia by drawing on the history of sterilization and institutionalization that includes the *Olmstead v. LC* and *EW* (1999) decision and the resultant and ongoing federal settlement agreements. In the analysis of the judicial context, I examine the implications of five related U.S. Supreme Court decisions: *Atkins v. Virginia* (2002); *Hall v. Florida* (2014); *Moore v. Texas* (2016); *US v. Georgia* (2006); and *Roper v. Simmons* (2005). In my analysis of the economic context, I use Chambers and Wedel's (2009) criteria: adequacy, equity, and efficiency. Following these analyses, I provide (6) a discussion and recommendations relative to the analytic contexts.

Statement of purpose. The purpose of this analysis is to critically examine the policy element, standard of proof, within Georgia's 1988 statute prohibiting the execution of persons with ID using the social history, judicial, and economic contexts, and to make policy recommendations accordingly.

Methodology

This article assumes that a national or state consensus on the evolving standards of decency, as was achieved in 1989 in Georgia and 2002 in the U.S. regarding the execution of persons with ID, represents a social policy issue. For this reason, I employ a value-critical approach to this public policy analysis. First coined by Martin Rein in 1976, the value-critical approach "subjects goals and values to critical review, that is, values themselves become the object of analysis; they are not merely accepted as a voluntary choice of the will, unamenable to further debate" (Rein, 1976, p. 13). The aim of value-critical analysis is to contribute to the public discourse on policy conflicts by taking the policy goals as subjects of analysis (Rein, 1976).

Chambers and Wedel (2009) adapted Rein's value-critical method to meet the specific needs of social work and human service practitioners. In accordance with Chambers and Wedel (2009), I describe both the 2002 *Atkins* decision and the policy element, standard of proof, within Georgia's 1988 statute barring the execution of persons with ID in terms of: (1) goals and objectives; (2) forms of benefits or services delivered; (3) entitlement rules and structure for service delivery; (4) financing method; and (5) interactions among the foregoing elements. Additionally, Chambers and Wedel's (2009) value-critical approach suggests three practical, but diverse types of criteria used for evaluating the features of social policy: (1) the fit of the policy element to the social problem of concern (i.e., the social history context); (2) criteria that are

uniquely useful for a single policy element (i.e., the judicial context); and (3) the consequences of the policy element with regard to adequacy, equity, and efficiency for program participants (i.e., the economic context).

Background and Policy Description of Georgia's 1988 Statute

Owing to the public outcry that followed Georgia's execution of Jerome Bowden (Informational hearing, 2013), Georgia's 1988 statute was the first in the nation to ban the execution of persons with ID. However, due to a drafting error in the statute, Georgia was also the only state to invoke the highest standard of proof, beyond a reasonable doubt, placing capital defendants with ID at an increased risk for unlawful execution (Saviello, 2014), and therefore cruel and unusual punishments and denial of supports and services to which they are otherwise entitled under Title II of the ADA (1990).

The Execution of Jerome Bowden

On June 25, 1986, Georgia executed Jerome Bowden (Bowden v. Kemp, 1986). Like Ivon Ray Stanley, who was executed two years prior, Jerome Bowden was an African American male in his early-20s whose top standardized score on intelligence tests never surpassed 65-points (Bowden v. Kemp, 1986). The difference was that the execution of Jerome Bowden ignited national public outrage and embarrassment for Georgia (Informational hearing, 2013). It was clear to the public that Jerome Bowden, who could not count to 10, was an unfit candidate for execution. In describing Jerome Bowden, a former neighbor reported the following:

> Before I knew [Jerome], I heard boys talking about him in the neighborhood, calling him crazy and retarded [sic]. People used to tease him, but it didn't seem to bother him. He didn't understand. He thought they were paying him a compliment […] One time he took some money from [his employer], but it seems like someone may have put him up to it,

> because he didn't seem to know what he was doing. He didn't try to hide it. I don't think he meant to keep it. I think maybe he just forgot to turn it in, because he was just standing around with it in his pocket when they came looking for it. This is why I don't think he made the decision by himself. He was easily influenced by others (Bowden v. Kemp, 1986).

Jerome Bowden's sister, Josephine, recalled that once while Jerome was cutting her grass, the mower ran out of gasoline. In response, Jerome filled the gas tank with water and proceeded to wander off. She further recalled that, when he was not working, Jerome would sit on his bed and rock himself back and forth for hours upon hours. When Josephine reported to Jerome that law enforcement had been looking for him in response to the robbery and stabbing murders of Kathryn Stryker, 55, and Wessie Jenkins, Kathryn's 76-year old paralyzed, bedridden mother, Jerome went to the police station to find out how he could help. Although he initially denied any involvement, he eventually signed a written statement acknowledging his guilt. The problem was, the only thing implicating Jerome to the crime was the testimony of 16-year old James Graves. Although no physical evidence linked Jerome to the scene of the crime, there was substantial evidence linking James, later determined to be legally insane: a wig, a pellet gun, and stolen jewelry. As well, pawnbroker Sammie Roberts testified that he paid James Graves 10-dollars for a television set, later determined to have belonged to Kathryn Stryker and Wessie Jenkins. Whereas James was a minor and therefore only received a life sentence, Jerome was issued a sentence of death a mere 56-days following his arrest (Bowden v. Kemp, 1986).

Jerome Bowden, despite signing the confession, maintained his innocence. It was later found that Detective Myles had promised Jerome that if he signed the confession, he would avoid execution. When Jerome's clemency attorney asked if Jerome had read his own confession

statement, he responded, “I tried.” Although Jerome clearly demonstrated cognitive deficits, his trial lawyer did not raise ID as part of his defense. When Georgia granted a 90-day stay of execution to have Jerome’s mental capacity assessed, he asked his attorney if a “stay” meant that he could watch television that night (Bowden v. Kemp, 1986). During the 90-day stay, Dr. Irwin Knopf, a psychologist from Emory University in Georgia who was hired by Georgia’s State Board of Pardons and Paroles (Saviello, 2014) administered an IQ test to Jerome, who achieved his highest standardized score ever: 65-points. Jerome was reportedly proud of his test score, telling his trial lawyers: “I tried real hard. I did the best I could” (Bowden v. Kemp, 1986). Despite being well within the accepted test score range of ID, Dr. Knopf concluded that Jerome was not sufficiently impaired so as to merit clemency. Relying entirely on the hired psychologist’s single test result, Georgia’s State Board of Pardons and Paroles refused to grant Jerome clemency, and he was executed (Bowden v. Kemp, 1986).

A Drafting Error

The execution of Jerome Bowden led Georgia to create the first statute in the nation prohibiting the execution of persons with ID in 1988. In 2013, the House of Representatives Non-Civil Judiciary Committee convened to gather information regarding Georgia’s beyond a reasonable doubt standard of proof of ID and the implications of lowering it (Informational Hearing, 2013). The first testimony was given by attorney Jack Martin of the Georgia Association of Criminal Defense Lawyers, who co-authored the statute in 1988 with Joe Drolet, who was at that time the lobbyist for the Prosecutors from the Fulton County Attorneys Office (Informational Hearing, 2013). In careful detail, Jack Martin explained the etiology of Georgia’ beyond a reasonable doubt evidentiary standard of ID:

There was the execution of Jerome Bowden, who everybody knew was mentally retarded [sic], parole board did not stop that execution, and there were polls that were done by the Georgia State that indicated that 75 percent of Georgians supported the death penalty. Sixty-six per cent of Georgians did not support it for the mentally retarded [sic]. So what happened was, there was a consensus among the legislature, including the Attorney General, Mike Bowers, at that time, who as you all know, as the attorney general is most responsible for imposing or supporting the death penalty or convictions that have been imposed, came together and decided, we got to do something about this in Georgia. And at the same time—and if I give too much detail, I think it's helpful to know the history of where we are. 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. And there were a lot of proposals that were thrown out back and forth and, toward the end of the session as all of you know, we were trying to get something passed, things were rushed, and Joe Drolet, who used to be 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 – which had been expanded now at that time to be both, 'guilty, but mentally ill' and 'guilty, but mentally *retarded'* [sic]— 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. That small, little, one sentence…[…] The reason why I say I was at fault, I wasn't thinking clearly enough. Nor was Joe, I think, because 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. And it gave the jury *one more* option in terms of clearly mentally ill, but not legally insane. That statute and its burden [sic: standard] of proof says, 'you have to find a person *guilty beyond a reasonable doubt*'—because you don't want somebody to be punished unless you're sure they're guilty beyond a reasonable doubt—'*and*, mentally retarded [sic]' […] 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 ID, for which there is none (Informational hearing, 2013).

Policy Description

Though Georgia's statue was borne of shame and its evidentiary standard was borne of sloppiness (Informational hearing, 2013), Georgia was still considered to be a progressive leader by virtue of it being the first state in the nation to bar the execution of persons with ID. Although there would have been no mandate for Georgia to generally comply with accepted clinical practice and norms when the statute was drafted in 1988, such a mandate has ostensibly existed for all death penalty states since the U.S. Supreme Court's *Atkins* decision in 2002. In this section, I provide a comparative description of the *Atkins* (2002) decision and the policy element, standard of proof, within Georgia's 1988 statute. I compare each policy along the following criteria, in line with Chambers and Wedel's (2009) value-critical approach to policy analysis: (1) goals and objectives; (2) forms of benefits or services delivered; (3) entitlement rules and structure for service delivery; (4) financing method; and (5) interactions among the foregoing elements.

Goals and objectives. Regarding policy goals and objectives, the *Atkins* (2002) ruling ostensibly provided a federal protection for all individuals with ID. However, at the same time, the Court also stated that, "Not all people who claim to be mentally retarded [sic] will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus" (Atkins v. Virginia, 2002). The national consensus found that, in light of evolving standards of decency, no person with ID is to be executed because such a punishment is excessive and therefore cruel and unusual. Thus, the U.S. Supreme Court introduced a certain amount of tension in its federal opinion regarding criteria for evidencing ID: the criteria are simultaneously beholden to a national consensus and to standards in clinical practice and norms. While clinical practice and norms will include persons with ID who defy the stereotype and who

present closer to the normal functioning border, the national consensus may not necessarily include this class of defendants. The intersection of the national consensus and clinical guidelines may be found to exist in the federal mandate that states should generally conform to clinical practice and norms.

By its very definition, Georgia's beyond a reasonable doubt standard of proof is unamenable to the diagnosis of ID in persons who present closer to the normal functioning border, and who thereby defy the standards of the stereotype. In the language of the American Psychiatric Association, one of two leading authorities on ID cited by the U.S. Supreme Court in *Atkins* (2002), persons who approach the normal functioning border would be labeled as having mild intellectual disability (MID) (American Psychiatric Association, 2013). Eighty-five percent of individuals diagnosed as having ID fall within the mild spectrum (i.e., a score range of between 50-55 and approximately 70-75 points) (Blume et al., 2009; Borromeo, 2001) and similarly, capital defendants diagnosed with mild ID represent the majority of Atkins claimants (Cheung, 2013; Feluren, 2013).

The lack of legal protection for persons with ID who approach the normal functioning border is but one manifestation of the phenomenon, social invisibility. Social invisibility occurs when an individual is not known as having ID because of a sufficiently high level of adaptive behavior, and becomes, "in effect, socially invisible" (Foster et al., 1967, p. 142). According to Feluren (2013), this class of individuals will be the most challenging to protect because they defy the standards of the stereotype. Social invisibility is further exacerbated by the idea that, "when society envisions people with intellectual disabilities, people typically assume that they are those with physical manifestations of mental disabilities, such as Down Syndrome" (Cheung, 2013, p. 343). By not extending protections to persons with mild ID, Georgia's beyond a reasonable

doubt evidentiary standard violates clinical practice and norms, and seemingly violates the 2002 national consensus found in *Atkins*.

Forms and benefits of services delivered. Regarding forms and benefits of services delivered, the *Atkins* (2002) decision created a nationwide exemption of persons with ID from execution, and accordingly, from the imposition of punishments that are cruel and unusual. In 2016, while the federal government and 22 states invoked the lowest standard, a preponderance of the evidence, five states used a standard higher than this, with Georgia being the only state to invoke the highest. In addition to raising concerns about Georgia's ability to protect persons with ID from execution and cruel and unusual punishments, there is an additional concern that emanates from Georgia's beyond a reasonable doubt evidentiary standard: if persons with ID are unable to meet the State's high standard, they will also necessarily be denied Title II supports and services to which they would otherwise be entitled under the Americans with Disabilities Act (1990) while confined in prison.

Entitlement rules and structure of service delivery. Although the U.S. Supreme Court recommended that state legal definitions of ID should generally conform to the prevailing clinical definitions (i.e., those promulgated by the American Association on Intellectual and Developmental Disabilities and the American Psychiatric Association), implementation has been largely left to states' discretion. However, states that violate standards in clinical practice and norms are beginning to be challenged at the federal level, as per the U.S. Supreme Court cases, *Hall v. Florida* (2014) and *Texas v. Moore* (2016). Georgia's entitlement rules are the following: ID means having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior that manifested during the developmental period. These criteria must be proved to the evidentiary standard of beyond a reasonable doubt

(Proceedings upon plea of insanity or mental incompetency at time of crime, 2014). As with entitlement rules, the organizational structure for service delivery was left to the states in the 2002 *Atkins* decision. In Georgia, service delivery is dependent upon the Georgia General Assembly; state attorney general and 49 state district attorneys; prosecutors and defense attorneys; clinical experts (e.g., mental health professionals); and, judges and jurors.

Financing methods. Regarding financing methods, the cost of the *Atkins* (2002) decision is borne of various state and federal arrangements. In Georgia, the costs associated with such adjudications have not been formally analyzed. Therefore, it is unclear to what extent Georgia's high standard of proof may cost the state extra money and resources vis-à-vis the appeals process.

Interactions among foregoing policy elements. The U.S. Supreme Court cautiously upheld the central role of clinical practice and norms in capital adjudications involving the raised claim of ID. However, recent U.S. Supreme Court cases have taken up the concern for state conformity to accepted clinical practice and norms (Hall v. Florida, 2014; Moore v. Texas, 2016). Should the issue of Georgia's standard of proof go forward to the U.S. Supreme Court, it is likely to be examined in the context of clinical conformity (Informational hearing, 2013). As such, the Court may find that the State's high standard of proof is incommensurate, if not antithetical, to both the national consensus and standards in clinical practice and norms. The U.S. Supreme Court may additionally find that Georgia's high standard of proof of ID results in the state's unlawful denial of supports and services to which defendants with ID should otherwise be entitled under Title II of the Americans with Disabilities Act (1990) while in state custody. The forthcoming sections provide respective analyses of the social history, judicial, and economic contexts with regard to Georgia's high standard of proof in the 1988 statutory ban.

Analysis: The Social History Context

In this value-critical analysis, and in line with Chambers and Wedel (2009), I begin by examining the fit of the policy element (i.e., Georgia's standard of proof) with the social history context of persons with ID in Georgia. I take for granted the assumption that the state and federal consensuses that executing persons with ID does not meet society's evolving standards of decency, as was achieved in 1989 in Georgia and 2002 in the U.S, represent a social policy issue.

The Eugenics Movement and Forced Sterilization in Georgia

The hereditary theory of intelligence provided the basis for the eugenics movement, and was a compelling explanation for the persistence of poverty and family dysfunction in the wake of early social welfare reform (Ladd-Taylor, 2004). As a result of the eugenics movement, sterilization laws were passed in the early 1900s in order to prevent persons with ID from reproducing and raising children with ID (Task Force on Law, 1964). Forced sterilization, also known as compulsory sterilization, refers to the process of permanently ending a person's ability to reproduce without having first obtained that person's consent. The primary groups targeted by eugenicists in Georgia were persons with mental and physical disabilities (Kaeilber, 2012). The eugenics movement in Georgia occurred in a two-step process. Initially, those individuals deemed as genetically inferior were recommended for segregation rather than sterilization (Larson, 1995; Lombardo, 2011). However, a lack of funding for facilities towards this purpose and overcrowded conditions eventually led to the second step, which was outright sterilization (Larson, 1995; Lombardo, 2011).

From a cost-based perspective, the economic downturn of the Great Depression in conjunction with overcrowding in state institutions was a pivotal factor in bringing about public reconsideration of Georgia's sterilization law (Lombardo, 2011). Although a sterilization bill

was originally introduced in 1913, spurred by increasing populations of "degenerates" housed in state institutions (Lombardo, 2011), in 1935, the Georgia General Assembly passed the first sterilization bill. However, then Georgia Governor, Eugene Talmadge, who was opposed to Progressive measures and who famously vetoed all New Deal legislations, also vetoed the 1935 sterilization bill, which was associated with the Progressive movement (Larson, 1995). Two years later in 1937, an amended version of the bill was reintroduced and signed into law by newly appointed Georgia Governor E.D. Rivers (Larson, 1995). It was in this way that Georgia came to be the 32nd and last state to impose a forced sterilization law, and the state responsible for the fifth highest number of sterilizations in the U.S. (Kaeilber, 2012). As Edward Larson wrote in his book about eugenics in the Deep South, “the Georgia program started later than the others, but caught up rapidly” (Larson, 1995, p. 158).

After the passage of the sterilization law in 1937, the sterilization rate in Georgia climbed slowly until increasing significantly post-World War II (Larson, 1995). Georgia’s sterilization law sought to curb reproductive rights, taking aim at individuals in custodial institutions who were presumed likely, if released without sterilization, to procreate a child, or children, who would have a tendency toward disability (Larson, 1995). In the years between 1940 and 1950, forced sterilizations were performed at an approximate rate of 80 per year. Between 1950 and 1960, the rate of forced sterilization nearly tripled to 220 sterilizations per year (Kaeilber, 2012). According to one record, Georgia had the highest reported sterilization rate per 100,000 in 1956 at 7.22 (Schreiber). The rate of sterilizations decreased substantially after 1960 until the practice finally ended in roughly 1963 (Kaeilber, 2012). Georgia’s law remained on the books until 1970 (S. Res. 247, 2007). Most of the statutes authorizing the use of forced sterilization applied only to individuals who were, during that time, confined to institutions (Task Force on Law, 1964).

Decisions regarding selection criteria for sterilization varied greatly, with much discretion given to the superintendent of the institution (Task Force on Law, 1964). For this reason, this analysis of the social history context turns now to the topic of institutional confinement in Georgia.

Institutional Confinement in Georgia

In the early decades of the 1800s, there was a Progressive movement among several states to reform prisons, create public schools, and establish state-run hospitals for individuals with mental health diagnoses. In 1837, Georgia legislators authorized the creation of a state "Lunatic, Idiot, and Epileptic Asylum." Five years later, the facility opened as the Georgia Lunatic Asylum. Now called Central State Hospital, it is considered to be the largest of its kind in the world from its origin in 1842 until the 1950s (Cranford, 1981; Monroe, 2015). Along with what was then called the Georgia Training School for Mental Defectives (now called East Central Regional Hospital at Gracewood, or just Gracewood), these two institutions were the most prominent in the state, and the two institutions that performed forced sterilizations (Larson, 1995). Despite a general similarity in their prominence, there were great disparities between the Central State and Gracewood hospitals. Prior to World War II, Central State received significantly greater funding than Gracewood, an institution that came under the control of five different governmental agencies between 1921 and 1940 (Kaeilber, 2012). This was reflected in the hospitals' respective 1932 admission rates: Gracewood had 249 residents compared to Central State with nearly 6,000 (Kaeilber, 2012).

East Central Regional Hospital at Gracewood. Gracewood Hospital opened in 1921. The hospital originally functioned as a warehouse for individuals who were eugenically segregated from the rest of society. Most of these eugenically segregated individuals were persons with ID (Kaeilber, 2012). Following the passage of Georgia's sterilization law in 1935,

the superintendent of Gracewood hospital was appointed by executive order to serve as member of the State Board of Eugenics (Stoneman, 2015). The hospital gained notoriety when, in 1939, there was a fire in one of the dormitories that resulted in the death of six patients, alerting an outraged public to the overcrowded conditions (Kaeilber, 2012). Gracewood began performing sterilization operations in the 1940s by suggesting it as a condition for release (Kaeilber, 2012). However, it was stronger than a suggestion: if family members did not submit a written objection within 10-days of the notification of sterilization, the lack of response was interpreted as implied consent and the operation was performed (Kaeilber, 2012). In total, Gracewood conducted 408 forced sterilizations (Kaeilber, 2012).

Central State Hospital at Milledgeville. Although Central State never performed forced sterilizations on more than two percent of its patient population in any given year, owing to its large patient population size, the hospital still performed over 200 operations per year. Located in Milledgeville, Georgia, the antebellum state capitol, Central State Hospital saw a period of tremendous growth in the 1940s: 200 facilities neatly mapped over 2,000 acres of land that housed up to 13,000 patients (Monroe, 2015). However, by the 1950s, the hospital outgrew its resources as reflected by a meagerly one to 100 staff-to-patient ratio (Monroe, 2015). On par with the psychiatric knowledge of the time, and reflective of the prevailing social norms, Central State doctors practiced lobotomies, insulin shock, and early electroshock therapy (Monroe, 2015). Prior to the advent of psychotropic medications (e.g., Thorazine), persons who exhibited harmful or pathologized behavior were chained to the hospital walls (Cranford, 1981).

In 1959, Jack Nelson of the Atlanta Constitution was sent to investigate the conditions of the hospital after reports of a snake pit surfaced. What Nelson instead found was that a total of 48 doctors were responsible for the care of thousands, and that some of the identified doctors

were later found to be patients hired from off the wards (Monroe, 2015). Other "documented abuses included the regular practice of having nurses perform surgical operations, including vasectomies and salpingectomies, on patients, without supervision by a physician" (Larson, 1995, p. 159). Following the investigative exposé, and in response to public outrage, the governor appointed a physician-led advisory committee (Larson, 1995). In turn, the committee revealed to the public the rate at which sterilization was being practiced within the confines of the insulated hospital (Larson, 1995). Because hospital administrators had previously kept this knowledge hidden from public view, the commission's findings elicited further outrage (Larson, 1995).

In another instance of public outrage, in 1997, members of the now Georgia Council on Developmental Disabilities toured one of the cemeteries at Central State Hospital (Stoneman, 2013). The members discovered that, during the late 1960s or early 1970's, the grave markers of the deceased had been either pushed into the earth or pulled out for the purposes of facilitating lawn maintenance (Stoneman, 2013). Further research revealed that the six cemeteries on the hospital grounds interred upward of 30,000 individuals who were largely unidentifiable. Joe Ingram, a hospital employee for over 50-years, is attributed with the following quote (Stoneman, 2013, p. 1):

> Rows upon rows of numbered, small, rusted markers as far as you can see. No names, just numbers. It must have been the most gruesome sight in Georgia. Unknown humans, shunned when living, deprived of their very names in death- and literally known only to God.

However, the perils of state institutional care did not disappear with the federal mandate for deinstitutionalization in the *Olmstead* (1999) decision, which is discussed next.

Abuse, Neglect, and Preventable Death in Georgia

Despite a consensus among clinicians that a less restrictive setting would be appropriate for the wellbeing of the two women under consideration, administrators at Georgia Regional Hospital in Atlanta maintained that Lois Curtis and Elaine Wilson would continue to be held within the confines of the state psychiatric hospital. Lois Curtis and Elaine Wilson, who had long been institutionalized, were both diagnosed with ID and each carried a separate mental health diagnosis. According to the Disability Integration Project at the Atlanta Legal Aid Society, Sue Jamieson filed a lawsuit on behalf of the two women for supports to be provided in the community. The lawsuit eventually became the landmark *Olmstead v. LC* and *EW* (1999) decision, in which the U.S. Supreme Court concluded that undue confinement on the basis of disability constitutes unlawful segregation in violation of Title II of the ADA (1990).

The *Olmstead* Court (1999) interpreted Title II as specifically prohibiting discrimination on the basis of disability in all services, programs, and activities provided to the public by state and local governments and that receive federal financial assistance. However, also under Title II, the reasonable modifications standard to avoid discrimination is to be balanced with the further mandate that states are not required to make modifications that will result in a fundamental alteration of their programs or services (Tidwell, 2009). Using a cost-based and fundamental alterations defense, Georgia argued for many years that requiring the immediate transfer of previously institutionalized persons into the community setting would fundamentally alter the activities of the state because all available funds were currently being used to provide services to other persons with disabilities (Tidwell, 2009).

Reasonable pace and effective planning. In response to *Olmstead* (1999), the U.S. Supreme Court mandated that states demonstrate compliance with deinstitutionalized care through the construction and achievement of measurable objectives (Tidwell, 2008). Referred to as Olmstead Plans, these were initiatives to move individuals with mental disabilities (i.e., mental health diagnoses and intellectual/ developmental disabilities) from state institutional settings into more integrative, appropriate settings (Tidwell, 2008). The Court recognized that, while states did not have to make modifications that would fundamentally alter programs or services, states could demonstrate compliance with the reasonable modifications standard to avoid discrimination vis-à-vis, "a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moves at a reasonable pace" (Olmstead v. L.C., 1999). In the 1999 *Olmstead* decision, the U.S. Supreme Court did not operationally define what is "reasonable pace" or an "effectively working plan," instead leaving these terms to the interpretation of the states (much like the 2002 Atkins court in asking states to "generally conform" to accepted clinical practice and norms). Eventually, however, the Court began to narrow its *Olmstead* (1999) decision just as it now seems to be doing with the *Atkins* (2002) decision. This point will be elaborated upon in the judicial context analysis.

Georgia's Olmstead Plan. In response to the federal mandate for state-developed Olmstead Plans, Georgia Governor Roy Barnes assembled the Blue Ribbon Task Force in 1999 (Tidwell, 2008). By 2001, the Task Force had completed its Final Report and Recommendations. However, as Amy Tidwell (2008) noted, no outward commitment was made by former Governor Barnes to implement the recommendations of the Blue Ribbon Task Force, and no plan was ever formally submitted. In 2004, former Georgia Governor Sonny Purdue announced the release of

the State's Strategic Olmstead Plan, labeled a "document of intents" (p. 19), as it lacked measurable outcomes and target dates (Tidwell, 2008). At best, it was a proclamation of good faith. At worst, it was an evasion of the federal mandate. While the plan called for the identification, evaluation, and re-evaluation of Georgia residents at-risk for institutionalization, the plan failed to stipulate: (1) a timeframe for when persons would be moved from institutions; (2) how many persons would receive services prior to the waiting list taking effect; and (3) how the state would implement the forward movement of individuals on the waiting list for State Medicaid Waivers (Tidwell, 2008). In fact, no plan to update Georgia's plan was made until 2008, the year Georgia entered into a voluntary compliance agreement with the U.S. Department of Health and Human Services, Office for Civil Rights. The agreement called for, "new, concrete and realistic Olmstead goals" (U.S. Department of Health and Human Services, 2008). According to the Georgia Council on Developmental Disabilities, as of February 2017, upwards of 9,000 individuals with intellectual/developmental disabilities remain on the waiting list to receive State Medicaid Waivers (GCDD, February 8, 2017).

Resultant federal settlement agreements. Since the 1999 *Olmstead* decision, Georgia has entered into two settlement agreements with the federal government. The initial agreement was a voluntary compliance agreement in 2008 with the U.S. Department of Health and Human Services, Office for Civil Rights, with the agreed upon outcome that Georgia would update its Olmstead Plan by 2009. The updated plan was to include specific and measurable objectives, ostensibly making Georgia accountable for its unlawful segregation of persons with ID. This initial settlement agreement came nearly 10-years following the 1999 *Olmstead* decision, and perhaps problematically, during the beginning of an economic collapse that greatly impacted the entire nation. It is important to note, however, that prior to the 2008 economic collapse, Georgia

cited the cost-based and fundamental alteration defense as a justification for non-compliance with *Olmstead* (1999).

One year prior to the voluntary compliance agreement with the U.S. Department of Health and Human Services, the U.S. Justice Department began an investigation into the conditions of Georgia's state hospitals, citing a high frequency of preventable deaths (U.S. Department of Justice, 2010). According to the Atlanta Journal Constitution, from 2002 through 2006, there were at least 115 patient deaths in Georgia's state psychiatric hospitals that resulted from neglect, abuse, or other suspicious conditions; state authorities substantiated almost 200 reports of patient abuse during the same period (Judd & Miller, 2007). The U.S. Justice Department's investigation resulted in a 2010 comprehensive settlement agreement with Georgia regarding the State's mental health and intellectual/ developmental disabilities system—an agreement that subsumed the former 2008 voluntary compliance agreement, and as explained next, an agreement that has yet to be resolved (U.S. Department of Justice, 2010).

U.S. Justice Department Comprehensive Settlement Agreement (2010). Just over two months since the July 1, 2015 deadline of the U.S. Justice Department's comprehensive settlement agreement with Georgia, independent reviewer Elizabeth Jones evaluated the current status of the agreement in her fifth report. Jones found that Georgia remained out of compliance with four key provisions of the agreement: (1), move 150 individuals with intellectual/ developmental disabilities from the state hospital setting into the community; (2) develop Individualized Service Plans that are person-centered; (3), assist individuals to gain access to necessary services (e.g., medical, social, education, supported employment); and (4), monitor the Individual Service Plan to make referrals, service alterations, and other amendments as needed (Jones, 2015). Jones (2015) found:

> Although the State has proposed, and begun to implement, some reasonable plans to rectify these recurrent gaps in the community system, there has been inadequate progress statewide and a failure to establish and meet meaningful timelines. Thus, substantial compliance with these provisions will require additional time, resources and strategies for reform (p. 3).

Jones' 2015 findings were congruent with a 2013 report conducted by Georgia State University for the State. The report found that, "many residences were not clean, had safety issues or didn't have adequate food supplies. Many individuals lacked access to dental services" (Report, 2014, p. 2). This led Frank Berry, then the Director of the Georgia Department of Behavioral Health and Developmental Disabilities, to place multiple moratoriums on the movement of individuals into the community setting until the department could "be sure they are moving into high-quality placements" (Report, 2104, p. 2).

The comprehensive settlement agreement with the U.S. Justice Department began over concerns about the abuse, neglect, and preventable deaths of persons with ID in the care of state institutions. Five-years later, in an independent compliance review, it was found that residents with ID in Georgia were still at an increased risk for abuse, neglect, and preventable death in the community (Jones, 2015). Thus, persons with ID in Georgia were determined to be at-risk for maltreatment across both the institutional and community settings. As was also revealed in the ongoing comprehensive settlement agreement, the segregation of persons with disabilities is not relegated only for adults in Georgia. Children in Georgia with disabilities are also vulnerable to civil rights violations. In October 2015, the U.S. Justice Department challenged the Georgia Department of Education over the state's Georgia Network for Educational and Therapeutic Supports program, stating that it violates Title II of the ADA (1990) by "unnecessarily

segregating students with disabilities" (GCDD, 2015). The comprehensive settlement agreement remains unresolved and an additional five-year extension has been filed for 2020, 21-years after the original *Olmstead* (1999) decision.

Analysis: The Judicial Context

As per Chambers and Wedel (2009), this value-critical analysis includes criteria that are uniquely useful for a single policy element (i.e., the U.S. Constitutionality of Georgia's statute and standard of proof). In the analysis of the judicial context, the implications of five related U.S. Supreme Court decisions are examined: *Atkins v. Virginia* (2002); *Hall v. Florida* (2014); *Moore v. Texas* (2016); *US v. Georgia* (2006); and *Roper v. Simmons* (2005). Because Georgia is the only state to invoke the highest standard of proof of ID that a defendant must meet to be found ineligible for death sentencing, it is likely that should the U.S. Supreme Court take a case from Georgia on the issue of standard of proof, the Court will examine it from the lens of conformity to standard clinical practice and norms (Informational Hearing, 2013).

Atkins v. Virginia (2002)

In the landmark *Atkins* decision of 2002, the U.S. Supreme Court determined there to be a national consensus that the aims of execution (i.e., retribution and deterrence) cannot be penologically fulfilled when capital defendants are evidenced to have ID. Deficits in intellectual and adaptive functioning of persons with ID are understood to preclude moral culpability, rendering execution inherently excessive and therefore a violation of the Eighth Amendment's protection against cruel and unusual punishments (Cheung, 2013). As well, the Court cited the rationale that defendants with ID face an increased risk of wrongful execution because they, "are less able to give meaningful assistance to their counsel, typically make poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes" (Cheung,

2013, p. 319). The U.S. Supreme Court also opined that persons with ID had significant impairments in their abilities to: (1) process information; (2) logically reason; (3) control their impulses; and (4) learn from experience (DeMatteo, Marczyk, & Pich, 2007). Not only did the Court express concern that individuals with ID are less morally culpable, but the Court also expressed concern that individuals with ID are fundamentally more at-risk for wrongful conviction in the U.S. criminal justice system (DeMatteo et al., 2007).

Although the Court categorically barred the execution of individuals with ID, it entrusted to states the responsibility of generally aligning their legal definitions with accepted clinical practice and norms (i.e., those promulgated by the American Association of Intellectual Disability and the American Psychiatric Association). The *Atkins* decision of 2002 is unique insofar as it expresses a constitutional rule that hinges on a definition and diagnostic criteria from clinically trained mental health professionals (Feluren, 2013). Importantly, clinical definitions are intended to inform interventions (e.g., matching skill deficits with appropriate psychosocial supports) (Ellis, 2003; Feluren, 2013; Foster, Leland, Nihira, & Shallhass, 1967), meaning that the aim and spirit of clinical diagnosis is habilitative in nature, and may stand in direct contrast to the punitive aims of the criminal justice system, especially in death penalty cases. At stake with a mis- or non- diagnosis in the clinical arena is a lack of appropriate supports and services and the resultant consequences. At stake with a mis- or non- diagnosis in the criminal justice system is execution. This alone illustrates a disparity in clinical and legal norms that is echoed by the American Psychiatric Association, publisher of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5, 2010), in its, 'Cautionary Statement for Forensic use of DSM-5':

> Although the DSM-5 diagnostic criteria and text are primarily designed to assist clinicians in conducting clinical assessment, case formulation, and treatment planning,

DSM-5 is also used as a reference for the courts and attorneys in assessing the forensic consequences of mental disorders. As a result, it is important to note that the definition of mental disorder included in DSM-5 was developed to meet the needs of clinicians, public health professionals, and research investigators rather than all of the technical needs of the courts and legal professionals.

Blume, Johnson, Marcus, and Paavola (2014) found that in states that significantly deviate from accepted clinical methods for determining ID (i.e., Georgia, Florida, Alabama, and Texas), death row inmates and capital defendants raising claims of ID had the lowest success rates. This finding raises troubling implications about the role of arbitrary features such as geographic location in the determination of justice. According to their 2014 study, from 2002 to 2013, approximately 7.7 percent (n = 371) of death row inmates and capital defendants raised claims of ID, and an estimated 55 percent of such claims were substantiated (Blume et al., 2104). The low rate of claim, and that the majority of claims were successful, undermine two strategies frequently employed to counter suggestions that high standards of proof should be lowered to a preponderance of the evidence: (1) offering a floodgates argument rooted in the value of judicial economy and (2) arguing that people with ID who approach the normal range of functioning are malingering and are thus undeserving of the constitutional protection in the first place. Although the assessment of malingering is the fundamental task in forensic assessment and should always precede any conclusions drawn (Brodsky & Galloway, 2003), Blume et al. (2014) note that there are currently no formalized, reliable diagnostic assessments designed to capture the feigning of ID. Moreover, a finding of malingering should not preclude the constitutional protection of persons with ID (Mobbs & West, 2013).

Interpretation of Atkins (2002) in Georgia. In 2003, Justice Carley of the Georgia State Supreme Court overturned Muscogee County Superior Court Judge Allen's 2002 decision that *Atkins v. Virginia* (2002) could not be enforced properly under Georgia's beyond a reasonable doubt standard of proof (Renaud, 2003). On the contrary, Justice Carley found that nothing in *Atkins* (2002) specifies standard of proof (Head v. Hill, 2003). Justice Carley further concluded that any risk of wrongful execution is "sufficiently counterbalanced by the joint safeguards of Georgia's procedure for demonstrating incompetency to stand trial under the preponderance of the evidence standard and mental retardation [sic] under the beyond a reasonable doubt standard" (Head v. Hill, 2003). However, at the competency stage, the State need only to prove that the defendant is, more likely than not, legally competent. Legal competency in the U.S. refers to the ability of the defendant to understand and participate in legal proceedings (C. Lamar, personal communication, August 19, 2016). While the State carries the burden, it must only proved that a person is legally competent to proceed to the lowest standard of proof, a preponderance of the evidence. Thus, it is more likely than not that a person will be found competent to stand trial. Oddly, if the State proves the defendant is competent to stand trial, and the issue of ID is raised again during the guilt/innocence phase of the trial as a substantive defense, the burden shifts to the defense and the standard is raised to beyond a reasonable doubt. In the 2013 legislative informational hearing on Georgia's beyond a reasonable doubt standard of proof, this shift in burden and standard was referred to as Georgia's "odd procedure" (Informational hearing, 2013).

Therefore, not only will a person be found more likely than not competent to stand trial, but that same person will more likely than not be found eligible for death sentencing. This is not a procedural protection, but instead a gross misallocation of risk to the defendant. The other important issue at-hand is that procedurally, it conflates competency with ID so that the only

cases that are likely to not go forward to the death sentencing phase will be those in which the individual was deemed incompetent to stand trial. Using legal competency as a proxy for clinical criteria in the diagnosis of ID violates standards in clinical practice and norms, as does using the beyond a reasonable doubt evidentiary standard of ID (Department of Justice, 2015). In this vein, the American Psychiatric Association (2001) warns that, "problems, such as assessing competency, take on particular importance in cases where the death penalty is applied to such populations [persons with mental health diagnoses and/ or intellectual disability]."

***Hall v. Florida* (2014) and *Moore v. Texas* (2016)**

On May 27, 2014, in *Hall v. Florida* (2014), the U.S. Supreme Court held that a State cannot execute a person whose IQ test score falls within the test's plus or minus five-point margin of error unless the individual has been able to present additional evidence of ID (Brumback, 2014; Hill v. U.S. Court of Appeals, 2015, p. 10). Leading up to this decision, the Florida Supreme Court had interpreted the Florida statute to mean that a defendant or inmate sentenced to death was required to show an IQ test score of 70-points or below before being permitted to present any additional evidence of ID. The U.S. Supreme Court struck down Florida's rigid IQ cut-off of 70-points as violating the Eighth Amendment's prohibition on cruel and unusual punishments on the grounds that the rule "misuse[d an] IQ score on its own terms," in a way that risked the execution of those with ID (Hill v. U.S. Appeals Court, 2015, p. 10). According to a peer-review article published by the American Psychological Association, Florida's procedure to limit *Atkins v. Virginia* (2002) evaluations to a bright line 70- point IQ threshold was contrary to standard clinical practice and norms (Taylor & Krauss, 2014).

Florida therefore violated accepted standards in clinical practice and norms in the following way: (1) by not accounting for the standard error of measure and (2) by imposing a

legal procedure that resulted in the non-clinically accepted sequencing and therefore weighting of diagnostic criteria, Florida effectively (3) eliminated the non-IQ clinical criteria (i.e., adaptive functioning and age of onset). *Hall v. Florida* (2014) was therefore not only a substantive ruling, but it was also a procedural ruling: states need not only generally conform to substantive clinical criteria, but they must also generally conform to accepted methods in clinical diagnosis. Lending further credence to this interpretation was the decision of the U.S. Supreme Court to hear the case of *Moore v. Texas* in November 2016 on the issue of, "whether it violates the Eighth Amendment and this Court's decisions in *Hall v. Florida* and *Atkins v. Virginia* to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed" (Denniston, 2016). *Moore* (2016), then, represents the second case the U.S. Supreme Court has taken in just the past three-years in an attempt to further narrow the substantive and procedural criteria used to satisfy a legal claim of ID.

***U.S. v. Georgia* (2006)**

Unlike the *Hall* (2014) and *Moore* (2016) hearings, *U.S. v. Georgia* (2006) was not a capital case. It did, however, provide a federal ruling on the rights of defendants with ID to receive supports and services while in the custody of state prisons. In the case of *U.S. v. Georgia* (2006), an inmate named Tony Goodman in the Georgia State Prison who was paraplegic sued the State of Georgia and the Georgia Department of Corrections on the claim that he was not able to move his wheelchair in his cell; he was forced to sit in his own bodily excretions because prison officials refused to provide assistance; he was denied physical therapy and medical treatment; and he was denied access to prison programs and services due to his disability (Rosado). The U.S. federal government intervened to defend the constitutionality of Title II's

abrogation of state sovereign immunity, which is to say, "inmates are entitled to appropriate supports and services, no matter what" (Rosado). Title II of the 1990 Americans with Disabilities Act (ADA) reads:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Disabilities include physical and sensory disabilities, as well as, mental health diagnoses and intellectual disability (Rosado). The ADA (1990) defines a public entity as: "any department, agency, special purpose district, or other instrumentality of a State or States or local government" (U.S.C. § 12131). State prisons therefore meet the definition of a public entity according to the ADA (1990) (Rosado). In January of 2006, the U.S. Supreme Court unanimously ruled that Title II of the ADA 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). The U.S. Supreme Court upheld that, if Goodman were able to establish a claim of violation of his Due Process rights, he should be afforded the opportunity to bring a private cause of action for damages against both the State of Georgia and the Georgia Department of Corrections (Rosado). However, in the current policy context, because persons with ID (and particularly, persons with ID who come closer to the normal range of functioning and who thereby violate the stereotype) will have difficulty proving ID to the standard of beyond a reasonable doubt, it stands to reason that persons with ID are likely being denied Title II supports and services. Therefore, further evaluation of inmates using clinically accepted practice and norms is necessary to determine the prevalence of this issue, and in this way, the prevalence of unlawful execution.

***Roper v. Simmons* (2005)**

In the 2005 *Roper v. Simmons* decision, the U.S. Supreme Court determined that the execution of non-adult offenders is unconstitutional. The Court's decision drew precedence from the 2002 *Atkins* decision, linking deficits in cognitive development with diminished moral culpability. As was done in the 2002 *Atkins* decision, the U.S. Supreme Court made this determination through a national consensus on society's evolving standards of decency. Although there are now two protected classes of capital defendants (i.e., persons who commissioned a crime before the age of majority and persons with ID), the criteria by which a person is said to meet the definition of the respective classes is strikingly different. While all states recognize the federal standard of 18-years as the age of majority, states vary on their definitions of ID and the procedures (e.g., the standard of proof) by which this claim is said to be met. This alone makes salient risk factors, such as accidents of geography, in life-and-death determinations of justice for one "protected" class (i.e., adults with ID), but not for the other (i.e., persons under the age of majority).

When the U.S. Supreme Court established a national age of majority at 18-years and ruled in *Roper v. Simmons* (2005) that the execution of minors is unconstitutional citing the same cognitive impairments used in *Atkins* (2002), it may have inadvertently left itself open to future Equal Protection claims. If the Court were to take such a hypothetical case, and if it looked to other death penalty states to establish a national consensus, it would hypothetically instate the lowest evidentiary standard, a preponderance of the evidence, as this is the standard adopted by the federal government and 83.3 percent of death penalty states. Through the imposition of a national standard informed by what the majority of death penalty states are doing procedurally and substantively, Georgia's 1988 statute may be changed and the evidentiary standard lowered.

Analysis: The Economic Context

As per Chambers and Wedel (2009), the analysis of the economic context uses the criteria: adequacy, equity, and efficiency. Adequacy is addressed first. In a tautological manner, states will never unlawfully execute a person who meets the state legal definition of ID. From a U.S. Constitutional standpoint, so long as the state legal definitions generally conform to standards in clinical practice and norms, this should not raise concern, as theoretically, persons with ID will rightfully be found ineligible for execution (Atkins v. Virginia, 2002). However, in states that deviate from clinical standards, it cannot be known to what extent persons with ID are being executed because all persons found eligible for death sentencing will not have met, as a matter of legal procedure, the state's definition of ID. Insofar as Georgia's standard of proof is incommensurate with accepted clinical practice and norms, it is unknown to what extent Georgia is executing defendants with ID, and therefore, to what extent the State's statute adequately protects persons with ID from unlawful execution and U.S. Constitutional rights violations.

Similarly, Georgia's beyond a reasonable doubt evidentiary standard is not equitable because it does not protect legally competent defendants who approach the normal functioning border, and who are therefore effectively socially invisible. As discussed in the analysis of the social history context, Georgia's statute and standard of proof does not equitably protect all defendants with ID. Persons who approach the normal functioning border, defying the standards of the stereotype, and who are effectively rendered socially invisible, will by definition be unable to prove deficits to the high standard of beyond a reasonable doubt. Again, these individuals not only comprise the largest category of Atkins claimants (Cheung, 2013; Feluren, 2013), but as well, they represent the majority (85 percent) of persons with ID in the general population (Blume, Johnson, & Seeds, 2009; Borromeo, 2001). Lastly, efficiency is operationalized in this

analysis as cost-effectiveness, and it is impacted by adequacy and equity. Because the prevalence of ID on Georgia's death row is at this time unknown, it is also unknown to what extent Georgia's high standard of proof may cost the state extra money and resources vis-à-vis the appeals process.

Discussion

I used Chambers and Wedel's value-critical method of analysis to examine the policy element, standard of proof of ID, within Georgia's 1988 statute prohibiting the execution of persons with ID. I analyzed this social policy across three dimensions: (1) the social history context, (2) the judicial context, and (3) the economic context. With regard to the social history context, Georgia has historically expressed a willingness to violate the rights of persons with ID through the employment of economic arguments. Examples include the expressed willingness to perform forced sterilizations (e.g., the 10-day implied consent policy at East Central Regional Hospital at Gracewood); to impose undue confinement and unlawful segregation (e.g., *Olmstead v. LC* and *EW* [1999]); to continue to use language that stigmatizes (e.g., not replacing the term, 'mental retardation' [sic] with intellectual disability); and to leave persons with ID vulnerable to conditions that result in abuse, neglect, and preventable death (e.g., *U.S. v. Georgia* [2010]). This policy analysis argues that the state's beyond a reasonable doubt standard of proof is a continued expression of its willingness to violate the rights of persons with ID. The high evidentiary standard again leaves persons with ID at-risk for abuse (e.g., at the hands of other inmates and prison personnel, as well as criminal justice procedures); neglect (e.g., denial of supports and services that should otherwise be provided under Title II of the ADA [1990] and which may ameliorate the risk for abuse); preventable death (e.g., unlawful execution); stigmatization (e.g., in addition to being labeled 'mentally retarded' [sic] under the statute, being labeled a criminal);

and reproductive control vis-à-vis confinement and execution. Lastly, Georgia's high standard seemingly does not reflect the will of the people as per the 1989 state consensus and 2002 national consensus on evolving standards of decency.

Regarding the judicial context, given Georgia's preponderance of the evidence standard for competency and beyond a reasonable doubt standard for ID, legal competency is currently functioning as a proxy for the clinical criteria used to diagnose ID. This grossly misallocates risk to the defendant, all but ensures that only persons with ID who are also found legally incompetent will be spared from execution, and is a flagrant violation of accepted clinical practice and norms because legal competency is not equivocal to a clinical finding of ID. Additionally, Georgia's high evidentiary standard of ID expresses a preference to unlawfully execute persons with ID over the risk of erroneously sparing a capital defendant from execution. Because mental health professionals are held to a do-no-harm ethical mandate, the latter option should be preferable over the former. This preference in and of itself is reflective of a prevailing clinical norm that should be accounted for in the legal determination as to whether Georgia's statute generally conforms to clinical standards.

Lastly, and with regard to the economic context, much remains unknown in terms of the adequacy and efficiency of Georgia's statute. Further analysis is needed to determine to what extent Georgia is executing persons who, although they meet a clinical diagnosis of ID, do not meet the State's legal standard of proof of ID. With regard to efficiency, or cost-effectiveness, it is also unknown to what extent Georgia's high standard of proof may cost the state extra money and resources vis-à-vis the appeals process. Neither is it known what costs the State would incur by reducing the standard of proof, and if over time, a change would result in cost savings. It is therefore unknown to what extent Georgia's statute is cost-effective. With regard to equity,

Georgia's beyond a reasonable doubt evidentiary standard does not protect defendants to the extent that they approach the normal functioning border. Therefore, Georgia's standard of proof is not equitable because it does not equally protect all members of the intended class.

Recommendations

Recommendations are now offered respective of the social history, judicial, and economic contexts examined in this value-critical analysis. Although this policy analysis focused on Georgia's beyond a reasonable doubt standard of proof, recommendations may have application to other states that use the clear and convincing evidentiary standard. It is further hoped that the recommendations may be of use to legal professionals who are addressing this policy issue from the criminal justice logic.

The social history context. With regard to the social history context, the gross and historical maltreatment of persons with ID renders Georgia's standard of proof not just a criminal justice issue, but as well, a social justice issue. Therefore, advocates and activists should organize to achieve greater public awareness of this policy issue and the social implications of a high standard of proof of ID. In order to fully explain the implications of Georgia's standard of proof, education is needed on the issues of stigma, stereotypes, and social invisibility. To achieve this recommendation, the gross and historical maltreatment of persons with ID can be taught at any and all levels of education, including as part of the curriculum required for social work program accreditation in higher education. To this end, a specialized syllabus could be developed for a social work elective on the intersection of capital punishment and ID, or this topic could be integrated into a course taught on cultural diversity. As well, education should target the general public who may serve as death-qualified jurors, and to attorneys, judges, lawmakers, and law enforcement officials. For example, social workers can help to conduct defense initiated victims

outreach, potentially bridging the gap between the victim's family and the defendant, and thereby the defense and prosecution. Social work experts and other key informants in this field may also organize and facilitate informational sessions for officials of the law. Perhaps this endeavor could take the form of a non-profit organization, with no cost to the State. Other social work professionals should work evaluate/ research the effectiveness of such interventions, looking to publicly available data such as sentencing rates to incorporate into statistical analyses.

The judicial context. Mental health professionals (i.e., psychologists, psychiatrists, and social workers) should mobilize to evaluate death row inmates for ID in states that implement a standard higher than a preponderance of the evidence (e.g., Georgia). In this way, it can be known to what extent persons with ID are being denied supports and services to which they are otherwise entitled under Title II of the Americans with Disabilities Act (1990). In this way, mental health professionals can begin to assess the rate at which Georgia is executing persons with ID, since the use of non-clinical, legal definitions renders this an impossibility and effectively allows states to remain unaccountable for their maltreatment of persons with ID. Such an assessment may help a case go forward to the U.S. Supreme Court on the issue of Georgia's standard of proof. This is no easy matter and will require inter-professional collaboration, with much guidance by way of law. There will also need to be developed a promulgated, agreed upon set of clinical logics to serve as a standardized backdrop against states' disparate legal definitions and procedures. Not only will this endeavor be complex and time-consuming, but it is also likely to require a great deal of funding, as experts who devote their time and expertise will require financial compensation. Potential funding sources may include the American Civil Liberties Union; the National Association for the Advancement of Colored People; the Southern Poverty

Law Center; the American Bar Association; and the government, such as the U.S. Department of Justice.

The economic context. As was the recommendation in the judicial context, to determine adequacy, mental health professionals should organize with lawyers and assess death row inmates for ID in states that invoke an evidentiary standard higher than the lowest. Related complications to this endeavor were discussed with the previous recommendation for assessment of ID in prisons. To determine efficiency, a cost analysis must be conducted that includes potential Title II claims against the State. Analyses findings should be triangulated, subject to rigorous review, and factor change over specified amounts of time. And finally, to achieve equity will require lowering the standard of proof to a preponderance of the evidence or else imposing a moratorium on the death penalty itself. The possibility of a moratorium or a federally imposed model of standards should be used to leverage states' interests in lowering their standards of proof to a preponderance of the evidence.

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CHAPTER 5

CONCLUSIONS

The overall purpose of this dissertation was to better understand the theoretical, policy, and practice implications of standards of proof of ID higher than a preponderance of the evidence. The first study (Chapter 2) was a secondary data analysis. The purpose of the first study was to explore the relationship between states' death penalty statuses and standards of proof of ID and social inclusion factors that diminish or enhance participation of persons with ID in society. Independent variables were conceptualized as social inclusion factors specifically related to ID. Two factors were conceptualized as diminishing social inclusion (i.e., *Undue Institutional Confinement* and *Forced Sterilization Rate*) and two factors were conceptualized as enhancing social inclusion (i.e., *IDEA Part B* and *Postsecondary Education*). The first study addressed the following research question: Are states that use a standard of proof of ID higher than a preponderance of the evidence significantly different from states that use a lower standard of proof or no standard of proof on social inclusion factors? To answer this question, this study employed three objectives: (1) To analyze statistical differences between death penalty states (n = 27) and non-death penalty states (n = 23) on social inclusion factors for persons with ID; (2) To analyze statistical differences between non-death penalty states (n = 23), states that use a preponderance of the evidence standard (n = 22), and states that use a standard higher than a preponderance (n = 5) on social inclusion factors for persons with ID; and, (3) To analyze statistical differences between death penalty states that use the preponderance of the evidence standard (n = 22) and death penalty states that use a standard higher than a preponderance (n = 5) on social inclusion factors related to ID. Independent samples T-tests and a one-way analysis of

variance (*ANOVA*) were conducted to determine statistically significant differences across states' death penalty statuses and standards of proof on social inclusion factors.

The second study (Chapter 3) was a single-case study of Georgia's standard of proof of ID, beyond a reasonable doubt. The purpose of the study was to use Foucault's medico-judicial discourse as a way to critically examine why it is that Georgia remains the only state in the nation to invoke the highest standard of proof of ID. To address this question, I observed a two-hour long informational hearing on Georgia's beyond a reasonable doubt standard of proof of ID that took place in 2013. I also conducted 11 semi-structured interviews with purposefully selected key informants who work in the public domain and who have professional expertise in ID, capital adjudication, and/or related Georgia policy and procedure. In this analysis, I selected three interactions in the legislative hearing that served as examples of Foucault's medico-judicial discourses that have the power of: (1) life and death, (2) truth, and (3) humor. I described each of these discourses using Van-Mannen's (2011) impressionist narrative tale technique. The respective discursive powers served as my three data codes, through which I then identified five emergent categories. I applied the five categories to the interview data using the constant comparative method and developed themes and dimensions accordingly.

The third study (Chapter 4) was a policy analysis of the policy element, standard of proof, within Georgia's 1988 statute prohibiting the execution of persons with ID. The purpose of the study was to use Chamber and Wedel's value-critical method of analysis and to make recommendations accordingly. The aim of value-critical analysis is to contribute to the public discourse on policy conflicts by taking the policy goals as subjects of analysis. In accordance with Chambers and Wedel, I described both the 2002 *Atkins* decision and Georgia's evidentiary standard in terms of: policy goals and objectives; forms of benefits or services delivered;

entitlement rules; administrative or organizational structure for service delivery; financing method; and, interactions among the foregoing elements. Additionally, I used Chambers and Wedel's recommended supplementary criteria: (1) the fit of the policy element to the social problem of concern (i.e., the social history context); (2) criteria that are uniquely useful for a single policy element (i.e., the judicial context); and (3) the consequences of the policy element with regard to adequacy, equity, and efficiency for program participants (i.e., the economic context).

Discussion of Findings

A discussion of findings organized according to chapter follows.

Chapter 2. This study revealed three key findings. First, there were no significant differences between death penalty states and non-death penalty states on social inclusion factors. Second, social inclusion factors related to access to education never reached statistical significance. Third, states that used the higher evidentiary standards were found to statistically differ from states that used the lowest standard or no standard (i.e., non-death penalty states) on two social inclusion factors, *Undue Institutional Confinement* and *Forced Sterilization Rate*. States using the higher standards of proof had a significantly greater number of forced sterilizations and federal Olmstead lawsuits, statements of interest, findings letters, and settlement agreements than did states using the lowest standard and states with no standard (i.e., non-death penalty states). States using the higher evidentiary standards were found to have a statistically significant greater reported rate of forced sterilization than did states with no standard (i.e., non-death penalty states). In this way, it may be said that states using the higher standards of proof of ID are less socially inclusive than states using a preponderance of the evidence, and states with no evidentiary standard of ID.

The social inclusion factors, *Undue Institutional Confinement* and *Forced Sterilization Rate*, rose to the level of statistical significance consistently and in combination. Most forced sterilizations occurred in state institutions where persons with ID and mental illness were warehoused for decades. Furthermore, it was argued that this finding is conceptually sound because North Carolina and Georgia, states that use the higher evidentiary standards, are infamous for their prevalent use of forced sterilization, with the latter also being the home of one of the world's largest psychiatric institution (i.e., Central State Hospital). From a broader perspective, the failure to ensure that persons with ID are afforded legal protections against maltreatment and discriminatory killing may be reflective of a mainstream American culture that does not value the inclusion of persons with ID in society. As well, that person with ID are positioned within the penal system in the first place may speak to the inadequacies of the current systems of care in the U.S. The statistical significance of *Undue Institutional Confinement* raises the systemic concern that persons with ID who live in states with high evidentiary standards have simply been transitioned from one institutional setting (i.e., state psychiatric institutions) to another (i.e., state penal institutions)—a seeming evasion of the *Olmstead* (1999) federal mandate for deinstitutionalized care.

Chapter 3. Georgia's retention of its beyond a reasonable doubt standard of proof of ID was examined as being rooted in a broader medico-judicial discourse on ID and capital punishment. From a Foucauldian perspective, Georgia retains its uniquely high standard of proof because those who have the power to change the standard (i.e., the state legislature) have instead used this issue as a platform to express disciplinary power over the other state government branches, other professions, and the federal government. Because the expression of power was found to be the primary purpose of the 2013 legislative hearing, it was subsequently

recommended that a new hearing should be held to address Georgia's standard of proof in order to address the lack of information and misinformation that occurred during the hearing.

In this analysis, I preselected codes based on Foucault's theory of the medico-judicial discourse: (1) discourses that have the power to kill, (2) discourses that have the power to make truth claims, and (3) discourses that have the power to evoke laughter. I applied these codes to the 2013 legislative hearing data and the following categories emerged: (1a) economy/ efficiency and (1b) scope/floodgates; (2a) certainty/demonstrability and (2b) risk/ dangerousness; and, (3) duplicity/irony. I then examined interview data in accord with these categories to develop 13 related themes. The following 13 themes emerged:

T1. Arguments of economy/efficiency are understood as being driven by individuals and entities who benefit by retaining the current standard of proof.

T2. Arguments of economy/efficiency are rooted in a desire by existing state entities to do no more than is required.

T3. The state's position is that the current standard is both constitutional and fair because the statute is globally balanced.

T4. The state's position is that a lowered standard will result in the following expansions: to include all death row inmates and authors of felonies; retroactive application; the abolition of the death penalty itself.

T5. The state's position is that persons with intellectual disability who approach the normal functioning border are malingering; those who do not will either be found to be incompetent, or else are incapable of authoring the offense in the first place.

T6. Social invisibility is a salient challenge for persons with intellectual disability who approach the normal functioning border.

T7. Some individuals with intellectual disability will lack records of such due to gaps within the state system of care rooted in systemic biases.

T8. The beyond a reasonable doubt standard of proof allocates the risk of unlawful execution to the defendant.

T9. The concern for the protection of society is professionally endorsed.

T10. The phrase, 'worst of the worst' is a rhetorical strategy for both death penalty supporters and abolitionists.

T11. Dangerousness is a forward-looking concept that bridges notions of curability with notions of public safety.

T12. Threats of violence, overt acknowledgements of underlying conflict, and the misallocation of risk to persons who should otherwise not be found to be morally culpable invokes laughter within the discourse on capital punishment.

Thematic dimensions developed in the interview data were used in combination with observational data from the 2013 legislative hearing in order to inform the recommendations for a future information session to clarify former points of confusion.

Chapter 4. I used Chambers and Wedel's value-critical method of analysis to examine the policy element, standard of proof of ID, within Georgia's 1988 statute prohibiting the execution of persons with ID. I analyzed this social policy across three dimensions: (1) the social history context, (2) the judicial context, and (3) the economic context.

The social history context. Georgia has historically expressed a willingness to violate the rights of persons with ID through the employment of economic arguments. Examples include the expressed willingness to perform forced sterilizations (e.g., the 10-day implied consent policy at East Central Regional Hospital at Gracewood); to impose undue confinement and unlawful

segregation (e.g., *Olmstead v. LC* and *EW* [1999]); to continue to use language that stigmatizes (e.g., not replacing the term, 'mental retardation' [sic] with intellectual disability); and to leave persons with ID vulnerable to conditions that result in abuse, neglect, and preventable death (e.g., *U.S. v. Georgia* [2010]). This policy analysis found that the state's beyond a reasonable doubt standard of proof is a continued expression of its willingness to violate the rights of persons with ID. The high evidentiary standard again leaves persons with ID at-risk for abuse (e.g., at the hands of other inmates and prison personnel); neglect (e.g., denial of supports and services that should otherwise be provided under Title II of the ADA [1990] and which may ameliorate the risk for abuse); preventable death (e.g., unlawful execution); stigmatization (e.g., in addition to being labeled 'mentally retarded' [sic] under the statute, being labeled a criminal); and reproductive control vis-à-vis confinement and execution. Lastly, Georgia's high standard seemingly does not reflect the will of the people per the 1989 state consensus on evolving standards of decency.

The judicial context. In *Atkins v. Virginia* (2002), the Court asked states to generally conform to accepted clinical practice and norms. Given Georgia's preponderance of the evidence standard for competency and beyond a reasonable doubt standard for ID, legal competency was found to function as a proxy for the clinical criteria used to diagnose ID. This was in turn determined to grossly misallocate risk to the defendant, all but ensure that only persons with ID who are also found legally incompetent will be spared from execution, and violate accepted clinical practice and norms. In *U.S. v. Georgia* (2006), the Court upheld Title II's abrogation of state sovereign immunity. Therefore, if inmates are able to establish a claim of violation of Due Process, they are entitled to bring a private cause of action for damages against Georgia. However, because persons with ID will have difficulty proving it beyond a reasonable doubt, it

stands to reason that persons with ID are also likely being denied Title II supports and services. When the U.S. Supreme Court established a national age of majority at 18-years and ruled in *Roper v. Simmons* (2005) that the execution of minors is unconstitutional citing the same cognitive impairments used in *Atkins* (2002), it may have inadvertently left itself open to future Equal Protection claims. If the Court were to take such a hypothetical case, and if it looked to other death penalty states to establish a national consensus, it would instate the lowest evidentiary standard, a preponderance of the evidence, as this is the standard adopted by the federal government and 81.48 percent of death penalty states.

The economic context. With regard to adequacy, because only persons who do not meet Georgia's legal definition of ID will be executed, Georgia will technically never execute a person with ID. It is unknown to what extent Georgia is executing persons who would meet the clinical definition of ID but not the legal definition to the beyond a reasonable doubt standard. It is therefore unknown to what extent Georgia's statute is adequately protecting persons with ID. With regard to equity, Georgia's beyond a reasonable doubt evidentiary standard inversely excludes defendants to the extent that they approach the normal functioning range, and who thereby violate the standards of the stereotype. Therefore, Georgia's standard of proof and statute are not equitable because they do not equally protect all members of the intended class of defendants. With regard to efficiency, or cost-effectiveness, it is unknown to what extent Georgia's high standard of proof may cost the state extra money and resources vis-à-vis the appeals process. Neither is it known what costs the State would incur by reducing the standard of proof, and if over time, a change would result in cost savings. It is therefore unknown to what extent Georgia's statute is cost-effective.

Interaction among the foregoing findings. Standard of proof of ID was found to function partially as a broader indicator of social inclusion for persons with ID, with states that use a standard higher than preponderance being less socially inclusive of persons with ID. Georgia, the only state to use the highest evidentiary standard, was no exception to this finding. In fact, the state has expressed a historical willingness to violate the rights of persons with ID by endorsing policies and procedures that leave persons with ID at a disparate risk for abuse, neglect, preventable death (i.e., unlawful execution and discriminatory killing), and other forms of diminished social inclusion. However, it should be noted that the converse did not hold true. That is, states with lower standards were not found to be more socially inclusive than states using the higher standards. Because Georgia has erroneously equated the legal standard, beyond a reasonable doubt, with a reasonable degree of medical certainty, should the U.S. Supreme Court take a case from Georgia on this issue, the Court will likely determine that Georgia is not conforming with standards in clinical practice and norms. Georgia's standard of proof should theoretically be found unconstitutional. In addition to being unconstitutional, Georgia's standard of proof is inequitable, leaving persons who present closer to the normal functioning border most vulnerable to rights violations that include unlawful execution (i.e., persons with mild ID). Further, it is unknown if Georgia's standard is adequate or economically efficient. Such information was either not exchanged or not sufficiently addressed in the state's 2013 legislative informational hearing. The subtext of the hearing indicates that the aim of the legislative committee and its chair was not necessarily to become better informed, but rather to demonstrate disciplinary power over the clinical community and officials of the judiciary, and ultimately, over itself. The social inclusion of persons with ID as expressed by the State's evidentiary standard has yet to be taken up as a legitimate concern by government officials.

Discussion of Policy Recommendations

In this dissertation, I made two broad recommendations to address the challenges inherent in Georgia's high standard of proof of ID. The first recommendation (Chapter 2) was to hold an additional informational hearing on Georgia's standard of proof. The second recommendation was to clinically evaluate Georgia inmates, and particularly death row inmates, for ID to ensure that individuals are receiving supports and services to which they are entitled under Title II of the Americans with Disabilities Act (1990).

An additional informational hearing. Because the 2013 informational hearing operated as an expression of power more than it did as an opportunity to become educated on the implications of lowering Georgia's high standard of proof, a new hearing should be held to address this policy issue. The following content information in the hearing was either insufficient, incorrect, or functioned as a general point of confusion, and therefore should be further addressed: (1) the difference between the standard of proof and burden of proof; (2) the lack of specificity in Georgia's legal definition of ID and ramifications as presented in academic, peer-review research; (3) the science of diagnosis (e.g., strengths in adaptive functioning do not negate deficits; how issues of validity and reliability are statistically accounted for in psychometric testing); (4) The statutory impact of moderating the standard of proof (e.g., it is unclear if the standard would apply to all felonies since the U.S. Constitutional ruling only specifies death penalty cases); (5) the likely number of claims to come forward as a result of a lowered standard of proof and accompanying cost analyses; (6) the relationship between intellectual disability, 'mental retardation' [sic], and developmental disability, and legal terms such as competency and insanity; (7) the word 'reasonable' does not make the beyond a reasonable doubt standard of proof the legal equivalent of reasonable medical certainty; (8) juror

decision-making processes and systematic differences between death qualified and non-death qualified juries; and, (9) stereotypes, stigma, and social invisibility have real life impact for individuals with intellectual disability, and especially in the criminal justice system.

Clinical evaluation of Georgia inmates. Mental health professionals (i.e., psychologists, psychiatrists, and social workers) should mobilize to evaluate Georgia death row inmates for ID. In this way, it can be known to what extent persons with ID are being denied supports and services to which they are otherwise entitled under Title II of the ADA (1990). In this way, mental health professionals can simultaneously assess the rate at which Georgia is executing persons with ID (the use of non-clinical, legal definitions renders this an impossibility because the definition becomes tautological and effectively allows states to remain unaccountable for their maltreatment of persons with ID). Such an assessment may help a case go forward to the U.S. Supreme Court on the issue of Georgia's standard of proof.

Limitations

Research limitations organized according to chapter follow.

Chapter 2. Due to a lack of prior research on standard of proof of ID, capital punishment, and social inclusion, this study used an exploratory rather than an explanatory design, rendering statistically significant relationships within the data non-causal. As this study was a preliminary study, additional analyses should be conducted that examine the relationship between states' death penalty statuses, standards of proof, and a larger number of social inclusion factors with greater variance. Specifically, factors that enhance participation should be further explored (this study used only education-related factors) and the relationship between higher standards of proof and undue institutional confinement should be more deeply examined.

Chapter 3. Single-case studies have been criticized for a seeming lack of methodological guidelines (Yin, 2009). However, I attempted to offset this concern by invoking specific methodological referents (i.e., the constant comparative method as articulated in Bogdan and Biklen). I also provided a theoretical framework (i.e., Foucault's medico-judicial discourse) to add a further layer of transparency to my decision-making process. I promulgated my theoretical assumptions in a table that translated Foucault's key concepts to the applied policy context. A second criticism of case study research concerns reliability and replicability, which is to say, researcher subjectivity. To offset this concern, I provided a 'subjectivities statement' as part of the second study (Chapter 3). The final critique of case study research is its lack of generalizability. However, Georgia represents a unique case and generalizability was never the desired goal. Rather, specificity was.

Chapter 4. This study uses a particular policy approach and not others, which in and of itself represents researcher bias. Though I interviewed legal and clinical experts and politicians for the second study (Chapter 3), the analysis could be made stronger by the further inclusion of interdisciplinary collaboration (e.g., an economist to provide further insight about the criterion, 'efficiency'). This in part drives my recommendation for a cost analysis.

Implications for Social Work

What follow are implications for policy, practice, research, theory, and social work education in Georgia.

Policy. Social work professionals should have a more prominent position within the discourse on Georgia policy related to standard of proof. Efforts to lower Georgia's standard of proof could be greatly bolstered by social work professionals who are skilled in advocacy and community organization. Such an effort by social workers could result in an additional

informational hearing that is informed by research and professional expertise. In addition to the National Association of Social Worker's public statement that it stands in opposition to the death penalty, the Association in 2008 officially endorsed, "Advocacy in collaboration with people with disabilities and their families to reduce discrimination, stigma, and restriction of rights based on inaccurate perceptions of individuals with disabilities in their communities and in society." In attempting to affect change to state policy by lowering Georgia's standard, social work professionals should use various educational methods that address misperceptions about what persons with ID can and cannot do.

Practice. The *Atkins* decision of 2002 is unique insofar as it expresses a constitutional rule that hinges entirely on a definition and diagnostic criteria established by clinically trained mental health professionals. State variance and imprecision in diagnosis have substantive implications for persons with ID and for professionals such as social workers (perhaps especially in Georgia) who may testify as expert witnesses in the clinical-legal determination of ID; serve as mitigation experts in capital cases involving the claim of ID; work therapeutically with capital defendants with ID and/ or their family members; or who, in any capacity, participate in the clinical diagnosis of ID. In accord with the do-no-harm ethical mandate of the profession, mental health professionals (i.e., psychologists, psychiatrists, and social workers) should mobilize to evaluate Georgia death row inmates for ID. In this way, it can be known to what extent persons with ID are being denied supports and services to which they are otherwise entitled under Title II of the ADA (1990), and in this way persons with ID on death row may be able to be removed.

Research. A review of the scholarly literature found that 30.8 percent of articles on this topic were published in law review journals (n = 8). Additionally, 19.2 percent (n = 5) of peer review articles were published in law-hybrid journals (e.g., *Behavior and the Law; Psychology,*

Crime, & Law; Law and Inequality). If these two categories are collapsed, 50 percent of all articles were published in law related journals. Six articles were published in psychology journals (23.1 percent) and six were published in journals specifically related to intellectual/ developmental disabilities (23.1 percent). One article (3.8 percent) was published in a mental health journal (i.e., *Criminal Behavior and Mental Health*). No journals specifically mentioned social work. While the law review articles did consistently touch upon social issues (e.g., stigma, stereotypes, and social invisibility) that are argued to disproportionately affect capital defendants with mild ID, it seems that, by and large, social work has yet to take up the unconstitutional execution of persons with ID as a social justice issue. This dissertation is a call for a stronger social work presence in the research on states' disparate standards of proof of ID and implications for social justice.

Theory. Foucault provides a valuable framework from which to understand the intersection of ID and capital punishment as being rooted in a larger rhetoric of abnormality. Specifically, his medico-judicial discourse lent itself to the analysis of power inherent in and expressed by Georgia's standard of proof. If social inclusion theory holds that disability, like prison, represents an exclusion society, then it is suggested here that the intersection of disability and prison in the context of the death penalty represent one of the most extreme forms of exclusion society yet. Future research should continue to explore the ID-capital punishment intersection broadly as an issue of social inclusion and specifically as an instance of Foucault's medico-judicial discourse. The latter is helpful in developing insight regarding power structure.

Social work education. Social work departments and schools should consider the following topics for inclusion in their undergraduate and graduate program curricula: (1) disability and criminality represent issues of social inclusion, which is the concern of social

justice and therefore the concern of the social work profession; (2) policy analysis as a core knowledge that social workers possess; (3) a distinctive philosophical stance in practice, research, and theory that connects issues of disability and criminality with the larger concern for social justice at the individual and structural levels; and (4) research skills as competency skills that enable social workers to advocate for persons with ID in the custody of care systems (e.g., state hospitals), and especially for those persons with ID who are in the custody of the state prison system.

Recommendations for Future Research

Future research should look to further examine the causal relationship between states' death penalty statuses, standards of proof, and social inclusion indicators. To do this, additional variables will need to be selected for analysis. Future research studies should build a regression model that is capable of statistically predicting states' differing standards of proof. Future research should focus on developing an educational protocol on the subject of ID, capital punishment, and social inclusion that can be presented to court officials, lawmakers, law enforcement, and laypersons; further research should evaluate effectiveness of the protocol longitudinally and across groups and settings. Future research studies should construct a medico-judicial evaluation team for the purposes of assessing death penalty states' compliance with the 2002 *Atkins* decision, and specifically if state death row inmates in states using higher evidentiary standards are inadvertently being denied access to Title II services to which they would otherwise be entitled. Lastly, greater humanization of this subject matter is required. Qualitative research should be conducted that focuses on the first-hand lived experiences of current capital defendants and death row raising the claim of ID and former death row inmates with ID, and their loved ones.