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The Criminalization of Immigration and Intellectual Disability in the United States: A Mixed Methods Approach to Exploring Forced Exclusion

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Abstract

Public attitudes, negative stereotypes, and stigma are essential to cultural narratives about the membership status of people with intellectual disability and people who have immigrated to the United States. With a concern for the exclusion of people from participation in democratic societies, this mixed methods study explores conceptual links between the criminalization of intellectual disability and immigration. The overlay of criminal justice norms and practices onto civil law without parallel adoption of safeguards results in the misallocation of risk to individuals with out-group membership status. This study offers conceptual analysis by applying to the policy issue, standard of proof of intellectual disability in death penalty cases, the framework of membership theory and related constructs present in the scholarly literature on immigration policy. Exact measures logistic regression is used to predictively link states' standards of proof of intellectual disability with immigration status. It was found that the best model predicting the probability of a *Higher than Preponderance* standard of proof of intellectual disability in death penalty cases was a two-variable model consisting of *Prior Ban* and *Unauthorized Immigration*. This study presents recommendations for research and policy practice.

Keywords: Crimmigration, social inclusion/exclusion, membership theory, standard of proof of intellectual disability

Social work professionals in the United States routinely engage, assess, intervene with, and evaluate individuals, families, and communities who experience disenfranchisement in the form of social, political, and economic exclusion (Council on Social Work Education, 2105). Among others, populations served include people who experience exclusion based on identified criminal, immigration, and disability out-group status. Furthermore, social work practice cuts across settings, increasing and enhancing the varied roles that social work professionals can assume. Social workers allocate resources and provide services for children and families impacted by criminal justice, immigration, and disability policy; social workers may work as mental health professionals in the institutional settings (e.g., prisons, detention centers, and psychiatric hospitals) and in the community; and, social workers educate and advocate for criminal justice, immigration, and disability policies that advance social justice efforts (Ricciardelli, McGarity, & Nackerud, 2020; Ricciardelli, Nackerud, Cochrane, Sims, Crawford, & Taylor, 2019). Finally, in addition to matters of service provision, at the macro- level, criminal justice, immigration, and disability policies have implications for social justice, and human and civil rights. Social justice is not only the ethical mandate of the social work profession, but the ethic of social justice speaks to the concern for social inclusion and exclusion (International Federation of Social Workers, 2018; National Association of Social Workers, 2016).

Social Inclusion/ Exclusion

The beginning discourses of social inclusion/ exclusion are associated with 1970s France when the economically disenfranchised first 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 social inclusion/ exclusion culminated 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). In the scholarly article, *West Virginia’s Lost Youth: Appalachian Stereotypes and Residential Preferences*, George Towers (2005) describes this social ontology as simultaneously social, philosophical, geographical, and ideological. Further, this social ontology, or hierarchy, engenders power differences that inevitably result in economic, political, and social oppression and exploitation (Allman, 2013; Towers, 2005). Although often used to describe low or zero labor market involvement (Foster, 2000), beginning definitions of social inclusion/ exclusion broadened over time to reflect barriers to effective and full participation in society (Du Toit, 2004).

According to Liat Ben-Moshe (2013), a disability scholar who writes from the social inclusion/ exclusion perspective, the history of disability has been a history of confinement. This study takes the position that if disability and the prison system, irrespective of one another, represent exclusion societies, with prisons serving extreme forms of exclusion, then the intersection of intellectual disability and the death penalty is arguably one of the most extreme exclusion societies yet. The intersection of intellectual disability and the death penalty takes on a particularly nefarious tone when we come to understand the historic maltreatment that persons with intellectual disability in the United States have been made to endure. Historically, persons with intellectual disability have not been well protected under the sphere of legal rights; they have been subjected to maltreatment such as eugenic segregation, forced sterilization, and discriminatory killing; and they have largely been excluded from full and equitable participation in society. Stigma and negative stereotypes have played a central role in the decreased realization

of rights for persons with intellectual disability (Ali, Hassiotis, Strydom, & King, 2012; Werner, 2015). Concerning the recognition of civil rights among individuals with intellectual disability, the rights to have children, to receive medical treatment only after informed consent, and to vote were found to be the most challenging rights to realize owing to stigma, a construct linked to social distance and exclusion (Werner, 2015).

Eugenic Segregation and Sterilization

Eugenics is a form of social exclusion. 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 aimed at preventing individuals with intellectual disability from reproducing and raising children who, according to the hereditary theory of intelligence, would be born with intellectual disability (Task Force on Law, 1964). In addition to the 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). In the late 1800s and early 1900s, prejudices against persons with intellectual disability and mental illness resulted in the creation of isolated institutions (Bruininks, 1981; Cheung, 2013). Beginning in the 1950s, however, the concept of decentralization was integrated into the system of residential treatment for persons with intellectual disability, and external funds replaced or reduced reliance on traditional, state-subsidized institutions (Bruininks, 1981; Lerman, 1982).

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 institutionalized care of persons with intellectual disability is intimately linked to rights violations, such as forced sterilization (Lutzker, Guastaferrro, & Benka-Coker, 2016). Forced sterilization refers to the process of permanently ending a person’s ability to reproduce without having first obtained the person’s legal informed consent. Most of the statutes authorizing the use of forced sterilization 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). In this way, understanding the institutional treatment of persons with intellectual disability is integral to understanding the contemporary positioning of such individuals and groups in society.

Unlawful Execution as Discriminatory Killing

The U.S. Supreme Court famously prohibited the execution of persons with intellectual disability in the *Atkins v. Virginia* (2002) decision. Unlawful execution is a form of discriminatory killing (Greenspan, 2016). Disability scholar Stephen Greenspan notes that, “executing persons with intellectual disability was discriminatory prior to *Atkins* and (because not all prisoners said to have intellectual disability are correctly diagnosed, or given relief from legal procedural

mistakes) continues to be discriminatory after *Atkins*” (2016, p. 348). Formal policy does not guarantee protection from unlawful execution, owing to systemic bias, social stigma, and limitations in clinical diagnosis itself. In the *Atkins v. Virginia* (2002) decision, the U.S. Supreme Court determined the execution of persons with intellectual disability to be unconstitutional on the grounds that it violates the Eighth Amendment’s protection against cruel and unusual punishment because the penological aims of deterrence and retribution cannot be fulfilled (Cheung, 2013).

The U.S. Supreme Court in *Atkins* (2002) pointed to intellectual and adaptive deficits in its reasoning that defendants with intellectual disability face an increased risk of wrongful execution. People with intellectual disability are at an increased risk 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). As well, defendants with intellectual disability 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) also points to the prevalence of false confessions, the deliberate framing of suspects with intellectual disability, and naïve offending (i.e., when a person with intellectual disability is manipulated into participating in the commission of a criminal offense).

Although the *Atkins* (2002) decision represents a nationwide mandate, as of 2018, states vary on their legal definitions of intellectual disability and capital adjudication procedures, such as the standard of proof of intellectual disability. While 22 of the 27 death penalty states used the lowest standard (i.e., 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). In January 2015, Georgia executed Warren Lee Hill. There is professional consensus that had Warren Hill been criminally tried in any other state, he would have successfully evidenced intellectual disability (Ricciardelli & Ayres, 2016). In addition to being lethal when used as a standard to evidence intellectual disability, the beyond a reasonable doubt evidentiary standard is traditionally reserved for the state to prove on the issue of guilt in a criminal court proceeding; it is thought to reflect a fundamental valuing of life and liberty (Winship, 1970). When states fail to adhere to clinical standards (e.g., using standards of proof higher than the lowest), they endorse the possible—if not probable—execution of people with intellectual disability and continue a history of maltreatment and exclusion (Blume et al., 2014; Fiore, 2010; Saviello, 2015).

When states use a standard of proof of intellectual disability that is higher than the lowest, capital defendants with intellectual disability, in addition to being placed at an increased risk for unlawful execution, will also be at risk for the denial of rights and protections while in state penal custody. When defendants with intellectual disability cannot meet states’ high standards of proof, defendants will also be denied legal rights and protections to which they are otherwise entitled under Title II of the Americans with Disabilities Act (1990) (*U.S. v. Georgia*, 2006). According to Feluren (2013), people who meet criteria for the diagnosis mild intellectual disability 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, Thompson, & Lazarus, 2011) and violating the standards of the stereotype. Eighty-five percent

of individuals diagnosed as having intellectual disability fall within the mild spectrum (Blume, Johnson, & Seeds, 2009; Borromeo, 2001) and similarly, capital defendants diagnosed with mild intellectual disability represent the majority of Atkins claimants (Cheung, 2013; Feluren, 2013). This speaks to the very salient issue of social invisibility in diagnosis, which links to stigma, stereotypes, and diminished rights.

Purpose

With a concern for the exclusion of people from social, economic, and political participation in democratic societies based on membership status, this mixed methods study explores conceptual links between the criminalization of intellectual disability and immigration in the United States.

Background: U.S. Immigration Policy and Social Exclusion

In its earliest days, immigration policy of the United States was initially quite simple—anyone who could, or did, arrive here could be here. It was not until the late 1800's that formal immigration policy in the United States truly began. Increasing complexity in the formulation, implementation, and reform of U.S. immigration policy has been the mainstay since that time. This complexity rests on an ever-changing fulcrum of acceptance *versus* rejection of certain individuals and/or certain groups for admission into the country, including for some, enforced removal from the country. The major point here is that while much of U.S. immigration policy is about who is accepted for admission and how an individual or members of a group may gain citizenship, a great deal is focused on blocking/ restricting the admission of certain persons and groups. People moving about the world have traditionally been viewed as falling into two broad categories: (1) Persons who are migrating voluntarily as a function of their choice, and (2) persons who are forced migrants. Forced migration is viewed historically as a function of persons fleeing persecution, but in the present day increasingly forced migration is seen as a function of a set of multicausal factors such as intrastate conflict, poor governance and political instability, environmental change, and resource scarcity. These drivers of forced migration are complex and as the blurring of the lines between voluntary and forced migration occurs, as seen in mixed migration flows, greater protection gaps and the diminution of protection space have resulted (Zetter, 2015). Detention and deportation may be considered as two such forms of forced migration (Zetter, 2015).

Eugenics and Immigration

Rejection and removal of certain individuals and/or members of certain groups have always been central to U.S. immigration policy. In fact, immigration scholars most often cite the Chinese Exclusion Act of 1882 as the first formal expression of immigration policy by the U.S. federal government. And, as the name indicates, the Act was intended to restrict/exclude Chinese nationals from entering the country, and most importantly, forcing them to leave the United States once they had played a central role in the completion of the transnational railroad. As well, eugenics theory and policies influenced immigration laws and served as the basis for the exclusion of certain groups from being allowed entrance to the United States, such as the rejection of southern and eastern Europeans during the early 1900's.

Eugenics theory and related thought emanating from the United States circulated across national boundaries as an effective tool for controlling population and immigration. Immigration restriction as externally focused policy and sterilization with its internal policy focus were both eugenics driven policies used in immigration policy as a function of cleansing the population of unwanted characteristics (Committee on Immigration of the Eugenics Research Association, 1920). In fact, the U.S. Public Health Services “Manual for the Physical inspection of Aliens”-- included a list of excludable conditions embraced by eugenicists and included in that era-- “imbeciles, idiots, feeble-minded person, persons of constitutional psychopathic inferiority (homosexuals), vagrants, physical defectives, chronic alcoholics, polygamists, anarchists, persons afflicted with loathsome or dangerous contagious diseases, prostitutes, contract laborers, all aliens over 16 who cannot read” (Edwards, 2005).

Immigration Detention/ Deportation

The country now has a maze of entrant and visa categories. The majority of current immigration bureaucracy is formally expressed/ implemented by the Department of Justice and the Department of Homeland Security. With three main bureaus—the U.S. Immigration and Customs Enforcement (ICE), the U.S. Customs and Border Protection (CBP), and the U.S. Citizenship and Immigration Services (USCIS)-- the Department of Homeland Security does the bulk of the immigration policy and procedures implementation work. It is worth noting that the Department of Homeland Security was created following the terrorist attacks of September 11, 2001 and in the aftermath of the inclusion of national security in the immigration policy debates and considerations (Capps, Chishti, Meissner, & Mittelstadt, 2018). Statutory authorities for arresting, detaining, and deporting persons who have entered the country without inspection or without the proper documents goes back decades. The practice of jailing, otherwise known as detaining/ detention, originated in the United States in 1882, with the creation of the federal immigration inspection system. Detention and deportation, however, have to do with the violation of a civil rather than criminal matter. Deportation represents an administrative procedure enforcing the return of individuals to their home country who fail to comply with the conditions of their visas, according to the 1893 Supreme Court decision in *Fong Yue Ting v. United States*.

Even though these were civil matters, immigration detention grew harsher throughout the 20th century. Through the decades, detention was used to: (1) Ensure the thorough pre-entry inspection of European arrivals (primarily through the gateway of Ellis Island), (2) Exclude Asian entrants, and (3) Imprison those who would challenge the government of the United States, including labor organizers. With noted progression in harshness, today, in 2018, the standards governing immigrant detention facilities are based on those used for jails and pretrial prisons in the criminal justice system (Luan, 2018). Economics has played a major part in the ratcheting up of detainment and deportation of unauthorized, undocumented persons in the United States. A notable rise in the detainment of persons under the Presidential administrations of Presidents Clinton, Bush, Obama and now Trump has been accompanied by a rise in the involvement and influence of the private prison industry. In fiscal year (FY) 2016, there were approximately 353,000 immigrants identified for detention and possible removal by U.S. Immigration and Customs Enforcement (ICE). These persons passed through one of more than

200 immigration detention facilities in full operation in the United States. There has been a 60 % increase in the number of persons detained in the United States since 2001 (Luan, 2018).

Congress passed two key laws during the Presidency of Bill Clinton that had a major impact on the practices of detention and deportation. In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA) became law. In combination, these two laws significantly expanded for whom and for what reason persons who were non-citizens could be removed from the United States. Limits were placed by the new laws on the ability of immigration judges to use family hardship as a reason not to order a removal of an unauthorized/ undocumented person. Removal was also now available as a mechanism even if a person had not committed any other offense (e.g., criminal) besides entering the country without inspection or without the proper documents (Capps et al., 2018). The two laws, again in combination, ushered in a new era of “immigrant enforcement federalism” (Capps et al., 2018). The combining of immigration and criminal law has come to be known by the moniker, “crimmigration” (Stumpf, 2006). Crimmigration is viewed as an extremely toxic mechanism by which persons are forced into detainment and then removed from the United States through a process of deportation via the auspices of an immigration court of the Department of Justice, and the removal arm of the Department of Homeland Security, ICE (Capps et al., 2018). Like disability status, immigration status can determine cultural membership in the United States, and the subsequent conferment or denial of legal rights and protections. This study explores the shared criminalization of both statuses.

Methodology/ Methods

Josephine Chaumba (2013) writes about the use and value of mixed methods research in the social sciences. The scholarly literature supports the increasing recognition of the importance of combining quantitative and qualitative research methods (i.e., mixed methods) when conducting research and evaluation impacting human service populations (Chaumba, 2013). Mixed methods research is often employed in social science research because it adds, or has the potential to add, the following dimensions: voices of participants, comprehensive analyses of phenomena, and enhanced validity of findings (Chaumba, 2013). The qualitative and quantitative methods utilized in this study are conceptual analysis and exact logistic regression analysis, respectively, with the goals of: fostering a deeper understanding of the criminalization of intellectual disability and immigration in the United States (i.e., how social exclusion manifests across the two populations vis-à-vis carceral institutions and related adjudication policy and procedure); and, enhanced validity of findings. This section is comprised by two primary components: conceptual analysis methods and results, and exact logistic regression analysis and results. The concluding discussion will synthesize and critically examine findings across methods.

Exact Logistic Regression Method

Logistic regression analysis was used to obtain a best subset of explanatory variables that predicted a *Higher than Preponderance* standard of proof of intellectual disability. Due to the small sample size, specifically, the small number of states that implemented a *Higher than Preponderance* standard of proof ($n = 4$; 14.81 %), a typical logistic regression analysis was not feasible (Hosmer & Lemeshow, 2013). Rather, the exact logistic regression procedure was

chosen for this analysis. In particular, exact logistic regression has been shown to provide accurate estimates when the sample size is small and zero-cell frequency counts exist between the explanatory and binary response variables (Corcoran, Mehta, Patel, & Senchaudhuri, 2001; King & Ryan, 2002). Therefore, exact logistic regression was utilized in this study to obtain exact conditional parameter estimates, odds ratios, 95 % confidence intervals, and associated *p*-values (Mehta & Patel, 1995). In addition, all statistical analysis procedures were performed using SAS software, version 9.4 (SAS Institute, Cary NC). Exact logistic regression was performed by including the EXACT statement within SAS's PROC LOGISTIC procedure.

Sample description. The study sample was comprised by 27 death penalty states (Death Penalty Information Center, 2018). Of these states, four used a standard higher than preponderance (three states used the intermediate standard, clear and convincing evidence while Georgia was the only state to use the highest standard, beyond a reasonable doubt); the remaining 23 states used preponderance of the evidence, the lowest standard and the standard adopted by the federal government. All states using a standard higher than preponderance instituted a policy banning the execution of defendants with intellectual disability prior to the 2002 *Atkins* decision. All states using a standard higher than preponderance were located within two of nine U.S. divisions: The Mountain division in the West region and the South Atlantic division in the South region.

Of the 27-state sample, the average percent of foreign-born persons in 2016—using data promulgated by the Migrant Policy Institute—was higher among states that had adopted the higher evidentiary standards of intellectual disability. Among these states, the average percent of the population that was considered to be foreign-born was 13. This is nearly twice as high as rates in death penalty states using the standard of preponderance (7.22 %). Similar to percent foreign-born, the average estimated unauthorized immigrant population rate by state in 2014—using data promulgated by the Pew Research Center—was nearly twice as high among states that had adopted the higher evidentiary standards than it was in states using the preponderance standard. Among these states, the average unauthorized immigrant population rate was 4.03 %. Among death penalty states using the standard of preponderance, the average unauthorized immigrant population rate was 2.31 %.

Measures. The current exploratory study sought to obtain a regression model predicting standard of proof of intellectual disability among states, from a large set of candidate explanatory variables. Of the 14 explanatory variables initially considered, 10 were continuous and four were categorical variables. Prior to performing the formal variable selection procedures, multicollinearity diagnostics were performed to assess for and remove variables that were highly collinear in relation to other explanatory variables. In particular, variables that are highly collinear tend to contribute no additional information to the explanatory data set and are likely to introduce instability into the subsequent regression analysis (Belsley, Kuh, & Welsch, 2005; Chatterjee & Hadi, 2006; Friendly & Kwan, 2009). Table 1 displays the final set of candidate variables examined in this study after the multicollinearity diagnostic procedures were performed.

Table 1

Initial Set of Candidate Explanatory Variables, Definitions, and Sources

Variable Name	Definition	Source
<i>Prior Ban*</i>	Did the state have a prohibition on the death penalty for people with intellectual disability prior to the <i>Atkins</i> (2002) decision? (Yes or No)	Death Penalty Information Center
<i>Total Olmstead Claims</i>	Total number of federal Olmstead lawsuits, statements of interest, findings letters, and settlement agreements filed per state	U.S. Department of Justice Civil Rights Division
<i>Juvenile Justice</i>	Youth residing in juvenile detention, correctional and/or residential facilities, rate per 100,000, 2015	Kids Count Data Center
<i>Unauthorized Immigration</i>	Estimated unauthorized immigrant population, by state, 2014	Pew Research Center
<i>Executions before 1976</i>	Number of executions before 1976	Death Penalty Information Center
<i>Executions after 1976</i>	Number of executions after 1976	Death Penalty Information Center
<i>Forced Sterilization</i>	Total number of recorded compulsory sterilizations performed on 'mentally ill' or 'mentally deficient' persons as percent of 2018 state population	Lutz Kaelber, Associate Professor of Sociology, University of Vermont
<i>Detainer Requests</i>	State totals for law enforcement agencies sent ICE detainer requests, February - March 2017	Transactional Records Access Clearinghouse
<i>Death Penalty Reinstated</i>	Year death penalty statute was reinstated post- <i>Furman v. Georgia</i> (1976)	Death Penalty Information Center

* Indicates categorical variable

Response variable. The dichotomous standard of proof response variable was created from the original ordinal variable which consisted of three levels of standard of proof: *Preponderance of Evidence* ($n = 23$), *Clear and Convincing Evidence* ($n = 3$), and *Beyond a Reasonable Doubt* ($n = 1$). Due to the small cell counts, the variable was collapsed into a binary variable consisting of two levels, *Preponderance of Evidence* ($n = 23$) and *Higher than Preponderance* ($n = 4$). For this study, the analyses focused on estimating the probability of predicting the *Higher than Preponderance* level of standard of proof of intellectual disability.

Candidate explanatory variables. Nine candidate explanatory variables were evaluated in this study for inclusion in a final subset of variables that would best predict the probability of a *Higher than Preponderance* standard of proof. The authors selected these candidate variables based on: (1) data were promulgated by reliable, public sources and peer-review research (e.g., the Migration Policy Institute; the Death Penalty Information Center; and, the research of Tim Saviello, John Blume, and colleagues); (2) data represented issues of social exclusion in the form of state and federal public policies and/or violations therein (e.g., undue confinement, death sentencing, eugenic practices, and rate of “unauthorized” immigration); and, (3) data were related to criminal justice, immigration, and disability policy in the United States. The final dataset consisted of the following variables: *Prior Ban*, *Total Olmstead Claims*, *Juvenile Justice*, *Unauthorized Immigration*, *Executions before 1976*, *Executions after 1976*, *Forced Sterilization*, *Detainer Requests*, *Death Penalty Reinstated*.

Variable selection procedures. In the current study, a forward selection algorithm was utilized in order to arrive at a best subset of explanatory variables predicting the probability of a *Higher than Preponderance* standard of proof (Kutner, Nachtsheim, Neter, & Li, 2005). Initially, the individual effects of each candidate variable in predicting the standard of proof response were assessed by obtaining univariate exact logistic regression estimates. Those explanatory variables that possessed significant p -values below an $\alpha = .05$ criterion were considered for inclusion as a first variable in the subsequent two-variable models. Next, a best, two-variable model was sought by fitting each significant variable from the first step with each remaining variable in turn. Two-variable models in which both variables were significant were retained for consideration in the three-variable selection step. Three-variable models were then examined in the same way; however, all three-variable models were found to be either nonsignificant or could not be estimated due to the small-sample constraints outlined above. In this way, a final model was obtained that predicted the probability of the *Higher than Preponderance* standard of proof.

Results

The purpose of this study is to explore how social exclusion manifests for persons who have immigrated to the United States and for persons with intellectual disability in the United States vis-à-vis their positioning within carceral institutions (e.g., detention centers and prisons), and related adjudication policy and procedure. This Results section first addresses Exact Logistic Regression findings. Finally, this section addresses conceptual analysis findings.

Exact Logistic Regression Analysis Results

Table 2 displays descriptive statistics for the response variable, standard of proof, as well as each candidate explanatory variable. The standard of proof response variable possesses two levels, with approximately 85 % of states indicated as using the *Preponderance of Evidence* standard, and about 15 % of states using the more stringent *Higher than Preponderance* standard. Among death penalty states, 44 % had implemented a ban on the execution of persons with intellectual disability prior to the 2002 *Atkins* decision (i.e., *Prior Ban*). All states using the higher evidentiary standards (i.e., clear and convincing evidence and beyond a reasonable doubt) had a state prohibition prior to the 2002 federal mandate.

Table 2

<i>Descriptive statistics for Standard of Proof and candidate explanatory variables</i>			
	% or <i>M</i> (<i>SD</i>)	95% CI	Range
<i>Standard of Proof (%)</i>			
<i>Preponderance of Evidence (POE)</i>	85.19	66.27, 95.81	-
<i>Higher than Preponderance (HTP)</i>	14.81	4.19, 33.73	-
<i>Prior Ban (%)</i>			
No	55.56	35.33, 74.52	-
Yes	44.44	25.48, 64.67	-
<i>Total Olmstead Claims</i>	2.19 (2.54)	1.18, 3.19	0 - 10
<i>Juvenile Justice</i>	157.96 (57.30)	135.30, 180.63	54 – 296
<i>Unauthorized Immigration</i>	2.57 (1.84)	1.84, 3.29	.30 – 7.20
<i>Executions before 1976</i>	363.00 (342.62)	227.46, 498.54	15 – 1,277
<i>Executions after 1976</i>	52.67 (105.36)	10.99, 94.35	0 – 549
<i>Forced Sterilization</i>	1814.04 (4188.88)	156.97, 3471.10	0 – 20,108
<i>Detainer Requests</i>	752.56 (1339.98)	222.48, 1282.64	13 – 5292
<i>Death Penalty Reinstated</i>	1975 (5.00)	1973, 1977	1972 – 1994

N = 27; 95% CI's for the categorical variable was calculated using the Clopper-Pearson exact method

Figure 1 graphically displays odds ratios and 95% confidence bounds for each univariate exact logistic regression model. As Figure 1 suggests, among the candidate explanatory variables in this study, the most salient single variables predicting the *Higher than Preponderance* level of Standard of Proof were *Total Olmstead Claims*, *OR* = 1.69, 95 % CI [1.06, 3.44], *p* = .02, *Juvenile Justice*, *OR* = .98, 95 % CI [.95, .99], *p* = .04, and *Prior Ban*, *OR* = .12, 95 % CI [.01, .76], *p* = .03. Using the algorithm described in the Methods section, potential two-variable models were considered by starting with one significant explanatory variable from above as the first variable in the model predicting standard of proof, and then adding each of the remaining variables in turn. A single two-variable model remained in which both explanatory variables, *Prior Ban* and *Unauthorized Immigration*, significantly predicted standard of proof. No three-variable models were found where all three variables were significant, per the criteria of the forward selection algorithm (Kutner et al., 2005).

Figure 1. Odds ratios and 95% confidence bands for univariate logistic regression models predicting standard of proof (bands that do not cross over the vertical line indicate significance).

As Table 3 indicates, a two-variable model consisting of *Prior Ban*, $OR = 10.88$, 95% CI $[1.08, \infty]$, $p = .04$, and *Unauthorized Immigration*, $OR = 8.50$, 95% CI $[1.65, \infty]$, $p < .01$, was found in this study to best predict the probability of a *Higher than Preponderance* standard of proof of intellectual disability. Of note, the sufficient statistics used to estimate this exact logistic regression model were found to be maxima of the respective conditional distributions that were constructed in order to perform the exact calculations. Therefore, median unbiased estimates are reported in Table 3. Likewise, as result of the sufficient statistics calculated for the exact logistic regression analysis being maxima, the upper 95 % confidence bounds for the odds ratios in this model do not exist, and therefore the infinity symbol is displayed to indicate this (Mehta & Patel, 1995).

Table 3

Parameter Estimates, Odds Ratios, 95 % CIs, and P-Values for the Model Predicting Higher than Preponderance Standard of Proof

	Parameter Estimates	Odds Ratios	Odds Ratios 95% CI	<i>p</i>
Intercept	-4.11*	.02*	<.01, .17	<.01
<i>Prior Ban</i>	2.39*	10.88*	1.08, ∞	.04
<i>Unauthorized Immigration</i>	2.14*	8.50*	1.65, ∞	<.01

$N = 27$; Parameter estimates, odds ratios, odds ratios 95% confidence intervals, and *p*-values calculated using exact logistic regression; *Median unbiased estimates were obtained using exact logistic regression.

As the results displayed in Table 3 indicate, after controlling for the effects of *Unauthorized Immigration*, the odds of a *Higher than Preponderance* standard of proof being the criterion for a given state are 10 times higher for states that possessed a *Prior Ban* compared to states that have no history of a *Prior Ban*. Likewise, after controlling for the effects of *Prior Ban*, the odds of a *Higher than Preponderance* Standard of Proof are eight times higher with a unit increase in *Unauthorized Immigration*. In conclusion, a state's *Prior Ban* status and the frequency of *Unauthorized Immigration* were found to best explain the probability that a state will possess a *Higher than Preponderance* standard of proof criterion for determining intellectual disability in death penalty cases.

Limitations. This study is limited by the variables that were chosen and available for measure. Moreover, although exact logistic regression allows small sample estimation and inference to be performed, limitations remain with respect to the number of explanatory variables that can be estimated reliably. As a result, the final model found predicting *Higher than Preponderance* standard of proof of intellectual disability can only be considered the best model among the variables that were available in this study, as well as the number of variables that could be reliably estimated in the model.

Conceptual Analysis

The conceptual analysis links key concepts—theoretical and applied—from the literature on the securitization, or criminalization, of immigration (i.e., “crimmigration”) with key concepts related to the legal finding of intellectual disability within the context of death eligibility. The conceptual analysis invokes a theoretical framework amalgam by referencing the critical, scholarly literature on immigration policy. Specifically, this manuscript uses Strumpf's membership theory, Legomsky's concept of asymmetry, and Bourbeau's securitization (as explained by mimesis, contiguity, and lockability) to understand parallels between the criminalization of intellectual disability and immigration in the United States.

Membership theory. Strumpf's membership theory ultimately takes up the concern for the processes by which, and the mechanisms that effectuate, the social exclusion of individuals and groups from society based on immigration, or social membership, status (2006). Membership theory restricts, by formal and informal mechanisms, rights and protections to individuals who are designated members of a social contract between the government and the people (Strumpf, 2006). Combining criminal and immigration law results in the building of an ever-expanding group of outsiders by denying them the privileges that persons with citizenship status hold, such as the right to vote or to remain in the United States. Membership theory manifests in this new area through certain powers of the sovereign state: the power to punish, and the power to express moral condemnation.

Membership theory and intellectual disability. Persons with disability, including persons carrying mental health diagnoses, have historically been excluded from participation in society. Prior to the deinstitutionalization movement, persons with disability and/ or mental health diagnoses were eugenically segregated in psychiatric institutions. For persons with intellectual disability, stigma came in various forms: institutional confinement; segregation; forced sterilization and other forms of reproductive control; abuse, neglect, and preventable death/

discriminatory killing; rights denials; and, labeling. Such persons were historically labeled idiot or imbecile, with the difference in terms indicating whether or not the person was considered educable. These terms were replaced by mental retardation, which is now considered pejorative and has since been replaced with intellectual disability. It is likely that this term too will be replaced, and there is contention among some disability scholars that the entire category of disability is, on its own terms, unhelpful to inclusion efforts.

Current research supports the finding that, among the various disability categories or typologies, persons with intellectual disability experience the greatest stigma and, by extension, social distance and decreased realization of rights (i.e., voting, reproductive health, and informed consent for medical procedures) (Werner, 2015). Arguably, reproductive health and informed consent for medical procedures tie directly to the eugenics movement and sterilization practices. When a person who stands accused of a death eligible crime cannot evidence intellectual disability because the state's legal evidentiary standard is not amenable to the clinical diagnosis of intellectual disability, persons with intellectual are placed at an increased risk for unlawful execution and by extension, denial of Title II supports and services under the Americans with Disabilities Act of 1990 (U.S. v. Georgia, 2006). This effectively positions such people beyond the reach of the social contract.

Asymmetry. The internalization of criminal justice norms and practices that are punitive, and the simultaneous rejection of those that are protective or mitigating, result in what Legomsky calls, asymmetry (2007). The overlay of retributive criminal justice norms and practices onto the domain of civil law (e.g., immigration and disability law), without parallel adoption of procedural safeguards (e.g., fair procedures, proportionality, and judicial review) represent asymmetrical expressions of justice. For example, based on immigration status, people may be denied the right to access legal counsel even for cases in which they face detention and deportation (Sacchetti, 2018); or people may be detained indefinitely without further legal recourse (Montanaro, Gonzalez, & Totenberg, 2018).

Asymmetry and intellectual disability. Problematically, persons with intellectual disability (and particularly, persons classified as having 'mild' intellectual disability) will have difficulty proving intellectual disability to the standard of beyond a reasonable doubt (Blume et al., 2014; Cheung, 2013; Feluren, 2013; Saviello, 2015). When persons cannot meet high evidentiary standards of intellectual disability, they will be found death eligible, and until the time of their execution, such persons will be denied Title II supports and services for which they are otherwise legally entitled (U.S. v. Georgia, 2006). This illustrates two asymmetries at once: protection from death sentencing and provision of Title II supports and services. A third asymmetry occurs within the intellectual disability classification itself: persons diagnosed with 'mild' intellectual disability represent the majority of capital defendants raising the claim of intellectual disability (Cheung, 2013; Feluren, 2013). In this way, high standards of proof of intellectual disability create asymmetry vis-à-vis an even greater misallocation of risk to the person raising the claim of intellectual disability who violates the standards of the stereotype, and in this way increased risk for cruel and unusual punishment and the denial of supports and services while in state custody.

Asymmetry entails the adoption of punitive criminal justice norms without adoption of procedural protections in the civil law domain. In the context of intellectual disability and the

death penalty, procedural safeguards are diminished when: (1) States use standards of proof of intellectual disability higher than preponderance, therefore misallocating the risk of error to the defendant (e.g., breach of fair procedure); (2) Persons with intellectual disability are wrongfully imposed a sentence of death and therefore, as per the 2002 U.S. Constitutional ruling, subjected to punishments that are cruel and unusual (*Atkins v. Virginia*, 2002) (e.g., breach of proportionality); and, (3) Capital defendants who have unsuccessfully raised the claim of intellectual disability in states using a standard of proof higher than preponderance have limited recourse through federal appeals vis-à-vis the Antiterrorism and Effective Death Penalty Act of 1996 (e.g., breach of judicial review).

Securitization/ criminalization. Asymmetry can be thought of as resulting in Bourbeau's securitization: "[...] The processes of institutionally integrating international migration into security frameworks that employ and include control, policing, and defense—i.e., what scholars refer to as the securitization of migration" (2018, p. 1). Securitization and the asymmetric adoption of punitive norms and practices "exposes migrants to harsh consequences without the necessary procedural safeguards" (Bourbeau, 2018, p. 6) that include fair procedures, proportionality, and judicial review. In immigration law, detention and deportation can be thought of as two such processes and mechanisms of social exclusion that designate and uphold social membership practices and norms. These practices and norms tend toward an inflexible and harsh pattern of what Bourbeau (2018) refers to as, securitization. More than 10-years prior to Bourbeau (2018), Legomsky (2007) cites the term, criminalization, as denoting the importation of criminal justice (adjudication) norms into the civil sphere of society. However, not all adjudication norms within the criminal justice system are adopted. Procedural ingredients that are punitive tend to be incorporated, while those that confer/ recognize legal rights and protections tend to be rejected (Legomsky, 2007).

Securitization/ criminalization and intellectual disability. Criminalization of intellectual disability and mental health diagnoses (e.g., psychosis/ insanity) occurs when the clinical diagnostic label carries consequences for criminal conviction (including death eligibility) as well as other, collateral consequences within the criminal justice system and broader society. Persons with intellectual disability who stand accused of a death eligible crime and who are tried in states using high standards of proof will be spared execution if they meet the exaggerated standards of the stereotype—that is, if their presentation plays into the general misperceptions of the public who serve as jurors. However, such persons are likely to face a life sentence of imprisonment, which is but another form of extreme institutional confinement. If on the other hand, persons with intellectual disability violate these misperceptions and negative stereotypes, and therefore cannot meet the higher evidentiary standards, they will face the ultimate punishment: execution.

Mimesis, contiguity, and lockability. In order to explain securitization, Bourbeau (2018) points to the three interrelated processes, mimesis, contiguity, and lockability: Mimesis can take place across issues in society and is a reflexive and dynamic process: Individuals, societies, and organizations model their practice on others' practices, especially when facing uncertainty [...] this is not mirrored imitation. Rather, mimesis refers to a much deeper mechanism than imitation as it implicates importing patterns and logics and internalising them as one's own. Agents tailor other practices to their own particular context, culture, and historical-political conditions. (Bourbeau, 2018, p. 2)

The example to which Bourbeau (2018) points is the internalization of criminal adjudication norms within the immigration law context, such as the use of criminal justice norms and practices to adjudicate what is a matter of civil law.

Contiguity “emphasizes distinctiveness, connectedness, interrelations, and proximity. A focus on contiguity understands the relationship between practices and norms as complementary and permits research on their simultaneity and their multi-directionality” (Bourbeau, 2018, pp. 3-4). Bourbeau’s example for contiguity is the practice of deportation of asylum seekers (2018):

Deportation is not legally recognized as a punishment but can nonetheless arguably be considered one of the harsher consequences for asylum seekers and a cruel and disproportionate penalty. Deporting asylum seekers is often an executive decision and not a formal judiciary one that took place in a court of law with all the associated procedural safeguards and norms (pp. 6-7).

Lockability refers to choice points or critical junctures:

It is the combination between repetitiveness, critical junctures, and the ensuing path-dependent lockability that ensures continuity. Combining these helps us make sense of (a) why change from one path to another appears difficult [...] (b) how societies come to accept their current path as the commonsensical one [...] (c) how a given path gets established as part of a society’s collective identity—as a defining feature of what that society is about—and ultimately how a particular understanding of an issue is eventually ‘locked in’ (Bourbeau, 2018, p. 4).

For example, the practice of detention in facilities that resemble prisons has ‘locked in’ a cultural understanding of migration (Bourbeau, 2018).

Mimesis and intellectual disability. In the context of intellectual disability, the argument could be made that mimesis has occurred between the Department of Justice and the Department of Health and Human Services, with psychiatric institutions adopting a punitive stance justified by, ostensibly at least, a concern for safety. At one point, psychiatric institutional practices included chaining persons to the wall (prior to the advent of psychotropic medications such as Chlorpromazine), forced sterilization and other medical procedures without consent, and confinement. When persons with intellectual disability are not able to evidence intellectual disability to the state’s legal standard, that person will wrongfully be found death eligible. Until the time of execution, the person will be confined. Conversely, if a person can evidence intellectual disability, while they will not be found death eligible, they will still likely be confined for life. Confinement is arguably one method to curb sexual reproduction. Importantly, biological deterministic notions of criminality and intellectual disability both argue that genetics is the basis for the identified pathology.

Contiguity and intellectual disability. Two contiguous factors that are salient to standard of proof of intellectual disability involve the undergirding logic of the *Atkins* (2002) decision and of the beyond a reasonable doubt standard of proof. With regard to the *Atkins* (2002) decision, the U.S. Supreme Court simultaneously ruled in support of exempting persons with intellectual disability from punishments that are cruel and unusual; at the same time, however, the Court left to states a tremendous amount of discretion in deciding how to align with standards in clinical practice and norms. With regard to the beyond a reasonable doubt standard of proof, this is the highest of the three evidentiary standards and requires that a fact in issue be found to be true to

the degree of moral certainty (Reasonable doubt). In its traditional application, beyond a reasonable doubt is the standard used in criminal trials, and the standard to which the state is obligated to prove the issue of guilt (Reasonable doubt). In this context, the standard is reflective of a fundamental valuing of life and liberty (Winship, 1970) because such trials can result in the deprivation of a defendant's liberty or in the defendant's death (Reasonable Doubt, 2008). In its traditional application, the beyond a reasonable doubt evidentiary standard is intended to allocate the risk away from the defendant. However, used as a standard of proof of intellectual disability, it has the opposite effect, misallocating the risk of wrongful execution to the defendant.

Lockability and intellectual disability. In terms of lockability, states that had adopted a prohibition against the execution of persons with intellectual disability prior to the 2002 federal ban were significantly more likely to use a standard of proof higher than preponderance of the evidence. Georgia remains the only state in the nation to use the highest, beyond a reasonable doubt standard of proof of intellectual disability. Despite the co-drafter's admission that the standard was a drafting error during a 2013 legislative informational hearing, as well as testimony by clinical and legal experts as to why Georgia's standard is so problematic, the state retains the beyond a reasonable doubt standard (Informational hearing, 2013). Georgia's retention of its high standard represents an instance of lockability.

Discussion

The concern for social inclusion/ exclusion both impacts and transcends specific social groups and speaks to the overarching pursuit of equality for all people. To this day, arguments from biological determinism continue to justify criminal justice, immigration, and disability policies that—directly and indirectly, informally and formally— remove people from participation in society. People with out-group status are predictably removed by predominant cultural forces from power, from self-determination, and from visibility. Effective mechanisms for achieving forced exclusion include forced migration, forced sterilization, and confinement and criminalization. Across immigration and intellectual disability, criminalization presents as: (1) Erroneously and directly associating perceived traits (i.e., negative stereotypes) of the individual/ social group with a manufactured criminal offense; and (2), the retention of retributive practices without the adoption of procedural safeguards, including the misallocation of risk to the individual, in the criminal justice system.

As a profession whose ethical mandate is to advance social justice and human and civil rights, social work has a duty to recognize patterns of exclusion in order to participate in systemic transformation. To facilitate social, political, and economic inclusion, the authors recommend that the social work profession address matters of social exclusion across policy, practice, and education arenas. Specifically, social work professionals can participate in policy practices, including political mobilization and lobbying efforts, that advance inclusionary principles, such as social and political equality and economic equity. Likewise, social work professionals can practice inclusion with disenfranchised individuals, families, and communities by being critical of its own power and relationship with oppression and exclusionary mechanisms. For example, social work has been criticized as being paternalistic and funding sources may undercut ethical accountability. Finally, social work education can not only include social inclusion/ exclusion theory and related principles in curriculum, but as well, social work

field education can pair with criminal justice, immigration, and disability policy arenas, related services, and impacted populations.

Contribution to Social Work Policy, Practice, and Knowledge

This area of research is meaningful because it raises an important concern for the intersection of immigration and intellectual disability as representing an onerous exclusion society unto itself, wrought with social invisibility and therefore unknown experiences and outcomes. Further research on the intersection of immigration and intellectual disability is needed (e.g., what impact might intellectual disability have on individuals and families who are trying to navigate U.S. immigration policy—especially in the contemporary context; and, what are outcomes of persons with intellectual disability who are involved with the U.S. immigration system). In this vein, it should be further considered what role social invisibility plays in the intersection of immigration and intellectual disability. This might include, for example, the complex and sometimes conflicting experience and presentation of social invisibility, which can impact the recognition and conferment of legal rights. To identify the population at this intersection will likely require multiple disciplines, research paradigms, and data collection methods. These recommendations can be used to inform education-based program development and social policy change in the direction of being less punitive and more closely aligned with the egalitarian norms and practices of civil society.

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