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# What Do We Do with You: How the United States Uses Racial-Gendered Immigrant Labor to Inform its Immigrant Inclusion-Exclusion Cycle

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# WHAT DO WE DO WITH YOU: HOW THE UNITED STATES USES RACIAL-GENDERED IMMIGRANT LABOR TO INFORM ITS IMMIGRANT INCLUSION-EXCLUSION CYCLE

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## I. INTRODUCTION

The United States has constructed and continues to enforce gender, race, and labor assumptions through the Immigration and Nationality Act's ("INA") deportation rules.[1] The United States crafted its immigration laws to be flexible enough to lean on and vilify immigrant labor depending on the nation's labor needs.[2] Modern enforcement of the INA's abstract inadmissibility and deportation standards perpetuate these historical racial and gendered assumptions.[3]

This Comment focuses on the language used in the INA's inadmissibility and deportation sections and how that language allows immigration officials to alter the scope of enforcement based on the gendered labor needs of the nation. Section II of this Comment lays the foundation for how gender will be used in this Comment, how gender connects to labor and race, and how gender, race, and labor ("racial-gendered[4] labor") relate to the United States' immigration system. Section II also traces the formation of the United States' immigration structure, from one of its first exclusionary codes to the current version of the INA. Section III then discusses how the INA's vague language incorporates and perpetuates racial-gendered and labor assumptions. This Section specifically analyzes the public charge and criminal and related grounds categories within the inadmissibility and deportation statutes.[5] Section III further examines how the flexibility of this language provides discretion

* Citations Editor, *University of Cincinnati Law Review*. Thank you to the editorial team and the coworkers who helped polish this piece. Also, a broader thank you to the immigration attorneys who already know much of the history herein contained, and still continue to advocate for immigrants' rights, despite the highly discretionary and fast-moving pace surrounding this area of law.

1. *See infra* Parts II.C, II.D.; *see generally* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016) (outlining policing techniques that lead to higher contact between communities of color and the police); Simmons et al., *The Gendered Effects of Local Immigration Enforcement: Latinas' Social Isolation in Chicago, Houston, Los Angeles, and Phoenix*, 55 INT'L MIGRATION REV. 108 (2021) (discussing the relationship between local law enforcement and immigration enforcement and its effects on immigrant communities).

2. *See infra* Parts II.C, II.D.

3. *See infra* Parts II.C, II.D.

4. "Racial-gendered" is used throughout this Comment to refer to the interplay and intersection between gender perception and racial perception and how that combined perception impacts individuals within the social hierarchy.

5. INA § 212(a), 8 U.S.C. § 1182; INA § 237(a), 8 U.S.C. § 1227(a).

to immigration officials to deport immigrants for historically racial-gendered reasons under the guise of neutrality.

Throughout this Comment, foreign nationals in the United States are referred to as either "noncitizens" or "immigrants" regardless of their authorization status, whether they intend to stay or are only entering for work. By using these two terms, this Comment simplifies immigration language to make it more accessible to readers and humanizes the immigrant experience by intentionally omitting the term "alien."[6] Use of the terms "noncitizen" and "immigrant" in this Comment predominantly refers to individuals who plan to reside permanently in the United States (immigrant)[7] but may encompass some experiences had by temporary laborers (nonimmigrants).[8] Additionally, it is of note that this Comment focuses its analysis on noncitizens coming to the United States from China and Mexico. The prolonged relationship between the United States and these two nations is well documented and helps to exemplify the historical race, gender, and labor assumptions made during the creation of the INA, and how those assumptions continue today.[9]

## II. BACKGROUND

The current inadmissibility standards under the INA cannot be fully understood without first understanding the historical interplay between

6. *See* INA §§ 101-507, 8 U.S.C. §§ 1101-1537. To read further about the dehumanizing effects of the term "alien" see Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 20 U. MIAMI INTER-AM. L. REV. 263 (1996-97).

7. To learn more about the employment-based visa's specific use of "immigrant," see *Working in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS. [hereinafter USCIS, *Working in the United States*], https://www.uscis.gov/working-in-the-united-states [https://perma.cc/L4PC-MD7Z] (last visited Nov. 18, 2022). *See also* INA § 214, 8 U.S.C. § 1184; INA § 210, 8 U.S.C. § 1160; INA § 218, 8 U.S.C. § 1188; *Permanent Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS. (updated May 26, 2022) [hereinafter USCIS, *Permanent Workers*], https://www.uscis.gov/working-in-the-united-states/permanent-workers [https://perma.cc/9KGM-EAWF].

8. To learn more about the employment-based visa term "nonimmigrant" see USCIS, *Working in the United States*, *supra* note 7; *Temporary (Nonimmigrant) Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS. (updated Jan. 11, 2022) [hereinafter USCIS, *Temporary (Nonimmigrant) Workers*], https:uscis.gov/working-in-the-united-states/temporary-nonimmigrant-workers [https://perma.cc/D78X-25YU].

9. Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity, Politics, and Violence Against Women of Color*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 359 (Kimberlé Crenshaw et al. eds., 1995) [hereinafter Crenshaw, *Mapping the Margins*]; Jamie R. Abrams, *Section V: Masculinities Theory and Immigration Law: Enforcing Masculinities at the Borders*, 13 NEV. L.J. 564, 571-72 (2013); Howard S. Myers III, *Immigration Policy – Where We Are and How We Arrived: An Immigration Lawyer's Perspective*, 44 MITCHELL HAMLINE L. REV. 743, 748 (2018); Simmons et al., *supra* note 1, at 110; Kayla M. Chisholm, *Anti-Blackness in Immigration: A Comparative Analysis Between the United States of America and the United Mexican States [Estados Unidos Mexicanos]*, 31 TUL. J. INT'L & COMP. L. 145, 148-50 (2023).

gender, labor, race, and immigration law in the United States.[10] This Section begins by explaining how gender is separate from sex but is frequently conflated with visual sexual and racial traits. Part B of this Section addresses the interplay between labor and gender as it was historically constructed as well as how it is currently constructed in the United States. Part C briefly contextualizes how race, gender, and labor affect employment-based immigration authorization. Part C also describes how the racial-gendered and labor assumptions embedded in immigration law make authorized entry more difficult for some immigrants to obtain. The race, gender, and labor implications in Part C create a path to Part D's analysis of historical racial-gendered and labor exclusions based on national needs and fears, and how those exclusionary choices led to the United States' modern immigration code.

### *A. Gender*

Gender, like race, is a social construct—it does not have natural or inherent traits.[11] Misconceptions about gender occur because gender is often confused with sex.[12] Sex refers to an individual's hormones, chromosomes, and visible genitalia.[13] Colloquially, sex is simplified to mean the appearance of a person's genitalia at the time of birth.[14] Gender, by contrast, refers to the normative behaviors and social roles imposed on or rejected by an individual within a society at a particular point in history.[15] Gender is a manifestation of temporal, cultural, economic, and racial values that exist within a particular society.[16]

Because gender is specific to particular societies at particular times, it is commonly used as a tool to create and reinforce social hierarchies.[17] Hegemonic gender, the "desirable" or "acceptable" manifestations of

10. *See infra* Parts II.C, II.D.

11. Anna Karl, *Gender and Health*, WORLD HEALTH ORG., https://www.who.int/health-topics/gender#tab=tab_1; Crenshaw, *Mapping the Margins*, *supra* note 9, at 357; Abrams, *supra* note 9, at 566; Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of Sex, Gender, and Sexual Orientation in Euro-American Law and Society*, 83 CALIF. L. REV. 3, 41 (1995).

12. Valdes, *supra* note 11, at 12-14.

13. Karl, *supra* note 11.

14. *Id.*; Valdes, *supra* note 11, at 21 (noting that the visible genitalia are prioritized over other sexual factors that might be more inclusive of an intersex or transgender experience).

15. Karl, *supra* note 11; Crenshaw, *Mapping the Margins*, *supra* note 9, at 358; Abrams, *supra* note 9, at 566; Valdes, *supra* note 11, at 21.

16. Karl, *supra* note 11; Crenshaw, *Mapping the Margins*, *supra* note 9, at 358; Abrams, *supra* note 9, at 566; Valdes, *supra* note 11, at 21; James W. Messerschmidt, *Multiple Masculinities*, *in* HANDBOOKS ON SOCIOLOGY AND SOCIAL RESEARCH 144 (Barbara J. Risman et al. eds. 2018).

17. Karl, *supra* note 11; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 1989 U. CHI. LEGAL F. 139, 145, 151 (1989) [hereinafter Crenshaw, *Demarginalizing the Intersection of Race and Sex*].

gender in a society, reinforces existing social power structures in a given time and place.[18] Gender can become "deviant" or "marginalized" if it does not conform to the economic, racial, or other social traits deemed "desirable" by the hegemonic model of gender.[19]

The United States' current hegemonic gender model excludes expansive concepts of gender, instead separating people along a binary of women and men,[20] principally and predominately determined by a person's sex (in other words, a person's visible genitalia at birth).[21] This binary division awards men a higher social position and thus more economic, social and political power.[22] However, if a man is not an able-bodied, cisgendered, heterosexual, white, wealthy citizen, he begins to slip down the social ladder for failing to conform to the hegemonic model for men.[23] Similarly, women are placed in the secondary position of power economically, socially, and politically under the assumption that they are able-bodied, cisgendered, heterosexual, white, wealthy, and citizens.[24]

Hegemonic men and women must obtain additional gender symbols to secure their position in the United States' social hierarchy.[25] American men must obtain symbols of masculinity,[26] while American women must gather symbols of femininity.[27] These masculine and feminine symbols vary depending on the time period in which the individual lives.[28] Since

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18. Abrams, *supra* note 9, at 567 (quoting Cliff Cheng, *Marginalized Masculinities and Hegemonic Masculinity: An Introduction*, 7 J. MEN'S STUD. 295, 297 (1999)).

19. *Id.* at 565-68; Valdes, *supra* note 11, at 267.

20. This Comment uses woman/women and man/men in all instances even where the terms "male" or "female" may feel more grammatically appropriate. This decision is meant to negate the racialized and dehumanizing history of the term "female" and to deemphasize a woman's childbearing capacity as the defining attribute of her womanhood. ANDREA LONG CHU, FEMALES 45 (2019).

> [T]he distinction between biological females and women as a social category, far from a neutral scientific observation, developed precisely in order for the captive [B]lack women to be recognized as female—making [gynecological] research applicable to [sic] women patients in polite white society—without being granted the status of social and legal personhood… In this sense, a female has always been less than a person.

*Id.* (citing C. RILEY SNORTON, BLACK ON BOTH SIDES: A RACIAL HISTORY OF TRANS IDENTITY 17-53 (2017) (original quotation marks omitted)).

21. Valdes, *supra* note 11, at 21; Abrams, *supra* note 9, at 566-67.

22. Abrams, *supra* note 9, at 566-67; Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 17, at 151-52.

23. Valdes, *supra* note 11, at 40; Crenshaw, *Mapping the Margins*, *supra* note 9, at 362, 368.

24. Crenshaw, *Mapping the Margins*, *supra* note 9, at 362, 368; Kitty Calavita, *Gender, Migration, and Law: Crossing Borders and Bridging Disciplines*, 40 INT'L MIGRATION REV. 104, 107 (2006); Valdes, *supra* note 11, at 118, 267; Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 17, at 151.

25. Abrams, *supra* note 9, at 567-68; Valdes, *supra* note 11, at 250, 284.

26. Abrams, *supra* note 9, at 567; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588, 591 (1990).

27. Abrams, *supra* note 9, at 567; Harris, *supra* note 26, at 588, 591.

28. Crenshaw, *Mapping the Margins*, *supra* note 9, at 358; Abrams, *supra* note 9, at 566; Valdes,

the end of the nineteenth century, American society has typically defined "masculine men" (in other words, men imbued with social power) as wealthy citizens who are physically active public-facing risk-takers.[29] During this same time period, society in the United States largely defined "feminine women" as the counterweight to masculine men—citizens who passively remain in private spaces, care for the home, maintain a calm or even shy demeanor, and become mothers.[30] However, society places these feminine and masculine symbols just out of reach for many individuals through racialization, depressed wages, and noncitizen status.[31]

### *B. Labor*

Like gender construction, the gendered nature of labor depends upon the time period and geographic location examined.[32] This Part briefly outlines the history and structure of labor in the United States through gendered and racial-gendered assumptions before explaining how those historical assumptions affect the demographics of modern industries. This Part concludes by addressing how the United States' racial-gendered labor standards influence the employment-based visa system to the detriment of certain immigrants.

#### 1. Gendering Industries

The rise of industrialization in the nineteenth century created increased divisions of labor along gender lines.[33] Men began taking jobs involving machinery and technological advances while women (particularly white women) were pushed to stay out of the work force.[34] Women who needed to work, but who were pushed from prior roles in textile factories and

*supra* note 11, at 21; Ian F. Haney Lopez, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 10 LA RAZA L.J. 57, 93 (1997).

29. Valdes, *supra* note 11, at 40-41; Abrams, *supra* note 9, at 574; STEPHEN M. WHITEHEAD, MEN AND MASCULINITIES: KEY THEMES AND NEW DIRECTIONS 16-17 (2002).

30. Valdes, *supra* note 11, at 41; *see also* Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151 (1966).

31. Abrams, *supra* note 9, at 571-72, 574; Annelise Orleck, *Working Women, "Welfare Moms," and Struggles for Subsistence in the Twentieth Century*, *in* A COMPANION TO AMERICAN WOMEN'S HISTORY, 241, 242 (Nancy A. Hewitt & Anne M. Valk eds., 2021); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreigness", and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 281-295 (1997).

32. Laura Levine Frader, *Gender and Labor in World History*, *in* COMPANION TO GLOBAL GENDER HISTORY, 27, 27 (Merry E. Wiesner-Hanks & Teresa A. Meade eds., 2d ed. 2020).

33. *Id.* at 35.

34. *Id.*

printing shops, increasingly took work in the developing care sector.[35] The care sector was, and still is, defined as service work,[36] and includes jobs such as nursing, teaching, housekeeping, clerical roles, hospitality, and other service positions.[37] The care sector is still predominately staffed by women because of these twentieth-century, industrial trends.[38] At that time, the care sector was seen as the "natural" place for women due to both their "inherent" ability to nurture and their dexterous hands.[39]

Industrialization pressured men into professions that emphasized their physical prowess.[40] American society expected men to take jobs in military service, in factory work involving machinery or new technologies, or in diplomatic escapades abroad.[41] The most acceptable form of men's labor depended largely on the economic class and geographic region of the man in question.[42] Regardless of their professions, men were required to be their families' "breadwinners" and earn enough money to prevent the women in their lives from laboring.[43] If a woman contributed to her family's income, it brought shame to family men like husbands or fathers.[44] The breadwinner ideal was nearly impossible for men of color to obtain due to the drastically lower wages offered to them in comparison to their white peers.[45]

### 2. Current Industries by Gender

Today, many industries still segregate largely along gender lines that reflect the above historical trends[46] while others have reached a general

35. *Id.* at 36.

36. *Id.*; Cecilia Menjívar & Olivia Salcido, *Gendered Paths to Legal Status: The Case of Latin American Immigrants in Phoenix, Arizona*, AM. IMMIGR. COUNCIL 1, 4 (2013).

37. Frader, *supra* note 32, at 36.

38. *Id.*

39. *Id.*

40. *Id.* at 35-36.

41. These escapades abroad were often undergirded by notions of imperial conquest and the betterment of American society through imperialism. *Id.*

42. Abrams, *supra* note 9, at 577; Eva María Copeland, *Galdós's* El amigo Manso*: Masculinity, Respectability, and Bourgeois Culture*, 54 ROMANCE Q. 109, 111 (2007) (arguing that gender and class affect the social respectability available to characters who are men); Mike J. Huggins, *More Sinful Pleasures? Leisure, Respectability and the Male Middle Classes in Victorian England*, 33 J. SOC. HIST. 585, 585-86 (2000) (articulating that British middle-class respectability was practiced in different ways depending on an individual or group's gender, age, situation, or role and how close that individual or group wanted to be to working-class individuals).

43. Frader, *supra* note 32, at 35; Menjívar & Salcido, *supra* note 36, at 4-5.

44. Frader, *supra* note 32, at 35; Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 17, at 159.

45. Abrams, *supra* note 9, at 574.

46. *See Labor Force Statistics from Current Population Survey*, U.S. BUREAU OF LAB. STATS, (updated Jan. 20, 2022), https://www.bls.gov/cps/cpsaat18.htm [https://perma.cc/MHA3-VKS5].

balance between women and men.[47] For example, the administration; publication; financing and insurance; and textile and apparel manufacturing and sales industries have workforces of around 50% men and 50% women.[48] However, the healthcare; hospitality; personal care service; and childcare service industries are still dominated by women, while the automobile service; landscaping; rail transportation; and commercial; industrial machinery; and equipment repair and maintenance industries are still dominated by men.[49]

### 3. Categorizing Immigrant Labor

As national labor needs shifted from physical labor to care labor, immigrant labor and the laws that constrained it responded along gendered lines.[50] During the 1990s, the United States began seeking fewer physical laborers and more care sector workers,[51] reflecting the global trend toward expanded care labor needs that in turn increased demand for women workers.[52] Immigrant women were, and are, a large part of the growing care industry's workforce, though they do not always see the immigration benefits of this work.[53]

The United States currently uses an employment-based visa system to authorize temporary and permanent immigrant workers.[54] Temporary workers are individuals who receive permission to work in the United States with possible tax obligations, but who are otherwise uncategorized by the United States Citizenship and Immigration Services.[55] Agricultural workers and non-agricultural workers who do not have specific professional training often fall into this category.[56] These individuals are often called nonimmigrant visa holders.[57] Permanent workers, on the

47. *Id.*

48. *Id.*

49. *Id.*

50. ESTER GALLO & FRANCESCA SCRINZI, MIGRATION, MASCULINITIES AND REPRODUCTIVE LABOUR: MEN OF THE HOME (MIGRATION, DIASPORAS AND CITIZENSHIP), 1 (Robin Cohen et. al. eds., 2016).

51. Menjívar & Salcido, *supra* note 36, at 3; Tanya Golash-Boza & Pierrette Hondagneu-Sotelo, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program*, 11 LATINO STUD. 271, 273 (2013); *Immigrant Women and Girls in the United States: A Portrait of Demographic Diversity*, AM. IMMIGR. COUNCIL 1, 8 (2020) [hereinafter *Immigrant Women and Girls*] (noting 51% of Salvadorian women work in the service industry).

52. GALLO & SCRINZI, *supra* note 50, at 1.

53. Menjívar & Salcido, *supra* note 36, at 3.

54. USCIS, *Working in the United States*, *supra* note 7; *see also* INA § 214, 8 U.S.C. § 1184; INA § 210, 8 U.S.C. § 1160; INA § 218, 8 U.S.C. § 1188.

55. USCIS, *Temporary (Nonimmigrant) Workers*, *supra* note 8.

56. *Id.*

57. *Id.*

other hand, are immigrant worker who receive a full-time, permanent position with an employer in the United States.[58] Permanent workers receive a designation depending on their specific skill level, education, and country of origin among other factors.[59]

The type of work valorized under both temporary and permanent visas tends to be "men's work"—physical labor, or higher education positions that may be inaccessible to women because their country of origin does not value educating women, deemphasizes women in certain workplaces, or is economically unstable.[60] An immigrant man who works as a day laborer (such as in construction or landscaping) is more likely to receive employment authorization for his "unskilled" labor than a woman of the same nationality who does "unskilled" domestic work (such as housekeeping or as a caregiver for the elderly).[61] The employment visa criteria's preference for men's labor exists in part because of historical biases that assumed women would use their reproductive labor as mothers or sexual objects to obtain lawful status under family-based visas offered by the United States—an assumption that would almost never be aimed toward men.[62] By valuing physical work over domestic work, the employment visa program continues to systemically favor men's labor over women's and reinforce the (white) hegemonic gender expectation that women are (unpaid) homemakers, and men are breadwinners.[63]

### *C. Immigration, Labor, and Gender*

Immigrant labor is inextricably woven into the social and legal history of the United States, as is the United States' hostility toward immigrants.[64] Immigrants have heeded the call when the United States

58. USCIS, *Permanent Workers*, *supra* note 7.

59. *Id.*

60. Menjívar & Salcido, *supra* note 36, at 4; Katie Kelly, *Enforcing Stereotypes: The Self-Fulfilling Prophecies of U.S. Immigration Enforcement*, 66 UCLA L. REV. DISC 36, 40, 55-60 (2018) (outlining the failure of the Board of Immigration Appeals to provide relief under Section 240; using anecdotes to indirectly note the racial-gendered employment issues embedded in the visa system and the impact of country of origin on employment).

61. Menjívar & Salcido, *supra* note 36 at 4-5; *see also Milestone Documents: Chinese Exclusion Act (1882)*, NAT'L ARCHIVES [hereinafter *Milestone Documents*], https://www.archives.gov/milestone-documents/chinese-exclusion-act (last visited Oct. 9, 2023) ("Unskilled" as a term for immigrant labor stems from the Chinese Exclusion Act).

62. Menjívar & Salcido, *supra* note 36, at 3-4.

63. *Id.* at 4-5.

64. Abrams, *supra* note 9, at 570; Philip Martin, *Does the U.S. Need a New Bracero Program?*, 9 U.C. DAVIS J. INT'L L. & POL'Y 127 (2003).

requests workers.[65] Immigrants have helped the nation's economy[66] and infrastructure[67] and have defended its borders.[68] During the country's times of need, the United States has repeatedly looked the other way when more workers entered the United States than were authorized, only to later criminalize authorized and unauthorized immigrant workers when their labor was no longer needed.[69] This Part examines two examples of America's intentional blindness and subsequent penalization of immigrant laborers: the Chinese Exclusion Act[70] and the Bracero Program.[71] This Part then articulates how the cycle of call and subsequent penalization reinforces racial-gendered labor expectations before concluding with a discussion of how the discriminatory impact of immigration laws, like those above, persist in the current immigration system under the INA.

### 1. Welcoming Immigrants

The Chinese Exclusion Act was the penal reaction to decades of welcoming and profiting from Chinese immigrant labor.[72] During the 1800s, the United States needed new laborers to help industrialize the nation and, in the 1860s after the Civil War, to cheaply replace and supplement the newly freed African American population.[73] The United States welcomed immigrant men laborers from Europe and Asia from the

65. Abrams, *supra* note 9, at 570; Martin, *supra* note 64, at 127 (stating the number of authorized and unauthorized Mexican workers rose during both iterations of the Bracero Program); *see* Myers, *supra* note 9, at 743; Jillian Blake, *Fragile Immigration Legality Collapses in the Trump Era*, 30 S. CAL. INTERDISC. L.J. 305 (2021) (discussing the shift in immigration programs and legislation that made it (im)possible to obtain lawful immigration status that would ultimately lead to citizenship in the United States).

66. Martin, *supra* note 64, at 128 (noting the reliance employers, banks, investors, and other placed on the availability of unauthorized laborers); Myers, *supra* note 9, at 746, 749.

67. Abrams, *supra* note 9, at 570; Myers, *supra* note 9, at 746.

68. Myers, *supra* note 9, at 746 n.19 (citing STAFF OF H.R. COMM. ON THE JUDICIARY, 104TH CONG., IMMIGR. & NATIONALITY ACT 578-91 (Comm. Print 1995): "to defend unstable boundaries, and to populate new States. The belief in America as a land of asylum for the oppressed was reinforced by the commitment to the philosophy of manifest destiny.").

69. Martin, *supra* note 64, at 127 (noting the United States admitted 4.6 million Mexicans between 1942 and 1964 and also apprehended around 5.3 million Mexicans in those same years; "illegal immigrants arrived alongside legal Bracero guest workers, Mexican immigration increased, and the U.S. decision to end the program led to mutual recriminations.")

70. *Milestone Documents*, *supra* note 61.

71. Amy Tikkanen, *Bracero Program: United States History*, ENCYC. BRITANNICA (Aakanksha Gaur et al. eds.), https://www.britannica.com/topic/Bracero-Program [https://perma.cc/MPD7-JY5Q] (last visited Oct. 28, 2022).

72. *Milestone Documents*, *supra* note 61; Abrams, *supra* note 9, at 570.

73. Myers, *supra* note 9, at 746; *Coolies as a Substitute for Negroes*, 2 DEBOW'S REV., AGRIC., COM., INDUS. PROGRESS & RES. 215, 215 (1866), http://quod.lib.umich.edu/m/moajrnl/acg1336.2-02.002/219 [https://perma.cc/FNZ2-W9R9].

mid-1860s through 1882.[74] The United States especially relied on Chinese men's labor from roughly 1840 until 1882.[75] Chinese immigrant men had a strong presence in mining, laundries, and most famously, in the construction of the intercontinental railway system.[76] Southern landowners even considered using Chinese and other Asian men as replacement laborers for cotton and other crop harvesting jobs.[77]

From 1917 until 1921, and again from 1942 until 1964, the United States engaged in a similar scheme involving Mexican workers.[78] The United States entered a variety of agreements with Mexico that authorized Mexican nationals to temporarily work in the United States.[79] This program was formally known as the "Mexican Farm Labor Program," but was more commonly referred to as the Bracero Program.[80] The Bracero Program created temporary rights for Mexican laborers, who were overwhelmingly men, to work in the United States as agricultural or railway laborers.[81] Millions of Mexicans, both authorized and unauthorized, entered the United States to answer the call for laborers.[82]

### 2. Expulsion and Exclusion

In the United States, periods of welcoming immigrant laborers often precede periods of expelling immigrant laborers.[83] American citizens and politicians have historically called for the removal of immigrants in times of economic downturn and uncertainty by amplifying social stereotypes around the "criminal immigrant"[84]—a noncitizen who brings criminality, poverty, and moral turpitude[85] (defined as a criminal offense that is

74. Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 272; Saito, *supra* note 31, at 299.

75. *Milestone Documents*, *supra* note 61; Abrams, *supra* note 9, at 570.

76. Myers, *supra* note 9, at 746; Abrams, *supra* note 9, at 570.

77. *Coolies as a Substitute for Negroes*, *supra* note 73, at 215.

78. Tikkanen, *supra* note 71.

79. *Id.*

80. "Bracero" translates to "strong arm." Martin, *supra* note 64, at 128; Tikkanen, *supra* note 71.

81. Tikkanen, *supra* note 71.

82. *Id.*; Martin, *supra* note 64, at 127.

83. Tikkanen, *supra* note 71; *Milestone Documents*, *supra* note 61.

84. Criminal immigrant replaces "criminal alien." Kelly, *supra* note 60, at 44-45; Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 273, 280.

85. Moral turpitude is a vague term that relies on the interpreter's concept of morality. This term remains under-defined but is most understood to mean "a depraved or immoral act, or a violation of the basic duties owed to fellow man, or recently as a reprehensible act." (internal quotation marks omitted), *§ N.7 Crimes Involving Moral Turpitude*, IMMIGR. LEGAL RES. CTR. 111, 112 (2013); Liane LaBouef, *How "Crime of Moral Turpitude" is Defined*, HOWELL, BUCHAN & STRONG (Oct. 21, 2021), https://floridaprofessionallicenseattorney.com/2021/10/how-crime-of-moral-turpitude-is-defined/ [https://perma.cc/6YLY-UBS7] (discussing how Florida laws around crimes of moral turpitude are predominately structured from caselaw); *see also* Cornell L. Sch., *Moral Turpitude*, LEGAL INFO. INST., (updated June 2020), https://www.law.cornell.edu/wex/moral_turpitude [https://perma.cc/27HT-MBJP];

"inherently base, vile, or depraved") into the United States.[86] This fear-based stereotyping continues today.[87]

The United States' attitude toward Mexican laborers who entered through the Bracero Program soured during two different periods of economic strife.[88] The first iteration of the Bracero Program ended shortly after World War I with the onset of the Great Depression.[89] This economic downturn caused many citizens to blame Mexican laborers for "taking all the jobs,"[90] leading to both voluntary and forced repatriation campaigns that swept both Mexican-American citizens and Mexican immigrant workers into Mexico.[91] The second iteration of Bracero ended in 1964 when the American economy, although strong, faced uncertainty due to high unemployment rates and rising automation in workplaces.[92] Many American workers believed that reliance on Mexican laborers reduced wages for citizen workers.[93] What started as citizen laborers' discontent soon turned into public outcry, causing the United States government to end the Bracero Program and adopt a stricter stance on

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Granados v. Garland, 17 F.4th 475, 478 (4th Cir. 2021) (quoting Sotnikau v. Lynch, 846 F.3d 731, 736 (4th Cir. 2017)); *but see* Jordan v. De George, 341 U.S. 223, 231 n.15 (1951) (stating "[t]he phrase 'crime involving moral turpitude' presents no greater uncertainty or difficulty than language found in many other statutes repeatedly sanctioned by [the Supreme] Court"); Lucero-Rios v. Garland, No. 21-3761, 2022, U.S. App. LEXIS 20960, at *5 (6th Cir. Ct. July 28, 2022); Pooja R. Dadhania, *Deporting Undesirable Women*, 9 U.C. IRVINE L. REV. 53, 76-77 (2018).

86. The exclusion of immigrants because of criminality, poverty, and moral turpitude trended before and after this moment in United States History. *See* Myers, *supra* note 9, at 746 (noting anti-immigrant sentiments have existed since the nation's founding through an insulting quote by Benjamin Franklin: "Those who come hither are generally of the most ignorant [s]tupid [s]ort of their own [n]ation. . . . and as few of the English understand the German [l]anguage, and so cannot address them either from the [p]ress or [p]ulpit, 'tis almost impossible to remove any prejudices they once entertain. . . . Not being used to Liberty, they know not how to make a modest use of it."); Abrams, *supra* note 9, at 573-74; Luis Medina, *Immigrating While Trans: The Disproportionate Impact of the Prostitution Ground of Inadmissibility and other Provisions of the Immigration and Nationality Act on Transgender Women*, 19 ST. MARY'S L. REV. ON RACE & SOC. JUST. 254, 267 (2017); Calavita, *supra* note 24, at 109-110; Saito, *supra* note 31, at 278, 308-9, 327 (discussing the yellow peril, the recent removal of public benefits from noncitizens, and the notion that America is superior to the foreignness of immigrants).

87. *Illegal Aliens Taking U.S. Jobs*, FED'N FOR AM. IMMIGR. REFORM, (March 2020) https://www.fairus.org/issue/workforce-economy/illegal-aliens-taking-us-jobs [https://perma.cc/NGY9-VAHA]; Brennan Hoban, *Do Immigrants "Steal" Jobs from American Workers?*, BROOKINGS NOW, (Aug. 24, 2017), https://www.brookings.edu/blog/brookings-now/2017/08/24/do-immigrants-steal-jobs-from-american-workers/ [https://perma.cc/5RA2-33TG] (discussing President Donald Trump's anti-migrant rhetoric).

88. Tikkanen, *supra* note 71.

89. *Id.*

90. *Id.*; This same language is still used today. *See Illegal Aliens Taking U.S. Jobs*, *supra* note 87; Hoban, *supra* note 87.

91. Tikkanen, *supra* note 71.

92. *Id.*; Gordon Skene (gordonskene), *The Fabulous, But Flawed Economy of 1964 – Jan. 5, 1964*, PAST DAILY (updated 2015), https://pastdaily.com/2016/01/05/the-fabulous-but-flawed-economy-of-1964-january-5-1964/ [https://perma.cc/9GUB-BMVW].

93. Tikkanen, *supra* note 71.

deportation enforcement.[94] Both iterations of the Bracero Program resulted in the involuntary removal of over 1.5 million Mexican and Mexican-American laborers.[95]

A similar change in citizens' sentiments impacted Chinese laborers several decades prior.[96] Though Chinese immigrant men were welcomed into the United States from roughly 1840 until 1882,[97] Chinese and other Asian women were heavily scrutinized and frequently labeled as "lewd," "debauched," or even "moral contagion[s]."[98] They were frequently stereotyped as prostitutes ("sex workers"[99]) or otherwise morally unclean and were subsequently excluded from the United States.[100] One of the first pieces of exclusionary legislation, the Page Act of 1875, was designed to prevent the entry of "unwanted moral characteristics" and specifically, but quietly, targeted Chinese women. [101] The exclusion of Chinese women led many Chinese men in the United States to marry outside of their racial and ethnic communities, which resulted in several states passing anti-miscegenation laws prohibiting marriage between (usually white) Americans and Chinese immigrants.[102]

When the United States experienced a sharp economic downturn in the 1870s, nationalist sentiments rose.[103] This nationalist ire was aimed at all immigrant laborers, with a particular focus on Chinese laborers.[104] Social

94. Martin, *supra* note 64, at 128; Gordon Skene (gordonskene), *supra* note 92.

95. Martin, *supra* note 64, at 127; Gordon Skene (gordonskene), *supra* note 92; Hist. Art & Archives, U.S. House of Representatives, *Depression, War, and Civil Rights: Hispanics in the Southwest*, HIST., ART & ARCHIVES, https://history.house.gov/Exhibitions-and-Publications/HAIC/Historical-Essays/Separate-Interests/Depression-War-Civil-Rights/ [https://perma.cc/SVU8-YSX4] (last visited July 8, 2023).

96. Chy Lung v. Freeman, 92 U.S. 275, 276-77 (1875); Cady Lang & Paulina Cachero, *How a Long History of Intertwined Racism and Misogyny Leaves Asian Women in America Vulnerable to Violence*, TIME (April 7, 2021), https://time.com/5952819/history-anti-asian-racism-misogyny/ [https://perma.cc/TT3E-4SK9]; *Milestone Documents*, *supra* note 61; Abrams, *supra* note 9, at 569.

97. *Milestone Documents*, *supra* note 61.

98. Chy Lung v. Freeman, 92 U.S. at 276-77; Lang & Cachero, *supra* note 96.

99. "Prostitution" is still used in the INA's code to refer to sex workers. However, this Comment will use "sex worker" when the Comment is referencing individuals, though it will still use "prostitute/prostitution" when discussing the statutory language. *See* INA § 212(a), 8 U.S.C. § 1182(a)(2)(D).

100. Lang & Cachero, *supra* note 96; Abrams, *supra* note 9, at 572; Myers, *supra* note 9, at 747; *Page Act, 1875*, WOMEN & THE AM. STORY https://wams.nyhistory.org/industry-and-empire/expansion-and-empire/page-act-1875/ [https://perma.cc/A77Q-QSTC] (last visited Oct. 28, 2022).

101. *Page Act, 1875*, *supra* note 100; Myers, *supra* note 9, at 747.

102. Eric Fish, *How Mixed Chinese-Western Couples Were Treated a Century Ago*, ASIA SOC'Y (Jan. 10, 2017), https://asiasociety.org/blog/asia/how-mixed-chinese-western-couples-were-treated-century-ago [https://perma.cc/JNS7-NKAT].

103. Abrams, *supra* note 9, at 571.

104. *Id.* at 571, 575.

criticisms emasculating Chinese men increased.[105] The stereotype of Chinese women as sex workers became an excuse for American society to decry Chinese men as "unable to protect female virtue" and therefore undesirable as American citizens.[106] These and other anti-Chinese, anti-immigrant sentiments ultimately resulted in Congress passing the Chinese Exclusion Act.[107] The Chinese Exclusion Act expressly prohibited immigration from China to the United States for a ten-year period.[108] Chinese nationals could not enter the United States during that ten-year period unless they had a specific document from the Chinese government certifying the individual's right to immigrate.[109] Additionally, if a Chinese immigrant left the United States, they could not re-enter without the Chinese government's certification or a document from an American immigration officer that proved the individual previously resided in the United States.[110] Most strikingly, courts were prohibited from granting citizenship to Chinese immigrants regardless of how long they resided in the United States, but were not prohibited from deporting them.[111] The Chinese Exclusion Act was replaced by the Geary Act in the early 1900s.[112] The Geary Act continued to restrict Chinese nationals from entering the United States and established a quota capping the number of authorized immigrants from China.[113] The Geary Act also established deportation measures for Chinese immigrants who did not comply with entry requirements.[114] These admission and deportation restrictions were later extended to immigrants from other countries.[115]

Congress ultimately amended the immigration system through the Immigration Act of 1990, which established a worldwide quota and structured the immigrant visa categories we know today: family, employment, and diversity-based.[116] In 1996, the Clinton Administration

105. *Id.* at 572; Fish, *supra* note 102.

106. Abrams, *supra* 9, at 572-73.

107. *Id.* at 569.

108. *Milestone Documents*, *supra* note 61.

109. *Id.*

110. *Id.*; Chinese Exclusion Act, ch. 126 § 4, 22 Stat. 58, 59 (1882) (repealed 1943), http://loc.gov/resource/llsalvol.llsal_022/?sp=86&st=image [perma.cc/2NGM-CV5V].

111. *Milestone Documents*, *supra* note 61; Saito, *supra* note 31, at 274, n.57; *see also* Fong Yue Ting v. United States, 149 U.S. 698 (1893). Euro-American women who married Chinese men could also face deportation alongside their husbands under the Exclusion Act. Fish, *supra* note 102.

112. *Milestone Documents*, *supra* note 61.

113. *Id.*

114. *Id.*

115. *Id.*

116. *See id.* (noting that each country only receive seven percent of the total visa amount, meaning nationals from high immigration countries must wait longer to receive a visa.); *see also The Visa Bulletin*, BUREAU CONSULAR AFF. U.S. DEPT. OF STATE, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2024/visa-bulletin-for-october-2023.html [https://perma.cc/B8DC-37NF] (last visited Oct. 5, 2023) (recognizing that certain foreign nationals may need to wait longer to receive employment

passed the Illegal Immigration Reform and Migrant Responsibilities Act ("IIRIRA") which most notably broadened exclusion grounds from mere unlawful entry into the United States to the full period an individual was unlawfully present in the United States.[117] This change allowed an individual to be removed simply for being "present in violation of the law."[118] The penalization of presence expanded deportability from definite categories and time limits to a continuation over an interminable amount of time.[119]

The exclusion and deportation structures outlined above, including those added by IIRIRA and other statutory amendments, have been integrated into the Immigration and Nationality Act ("INA"), first codified in its modern form in 1952.[120]

The United States' modern deportation statutes in the INA solidified the perpetual cycles of including then excluding immigrants ("inclusion-exclusion cycle"), ultimately codifying the flexibility necessary to include or exclude immigrants based on the racial-gendered labor they could provide in response to national labor needs.[121]

### 3. Immigration Policies and Gender

The above immigration policies demonstrate the connections between the United States' labor needs, citizens' feelings of economic and labor security, and the manufactured disposability of immigrant labor.[122]

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visas based solely on their country of origin).

117. Andrew Tae-Hyun Kim, *Penalizing Presence*, 88 GEO. WASH. L. REV. 76, 84-85 (2020).

118. *Id.*

119. *Id.* at 84.

120. *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS. (updated July 10, 2019) [hereinafter USCIS, *Immigration and Nationality Act*], https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act [https://perma.cc/R8FE-M5RG]. The INA has incorporated approved congressional legislation related to immigration since 1952. *See U.S. Immigration Timeline*, HISTORY (updated Aug. 23, 2022), https://www.history.com/topics/immigration/immigration-united-states-timeline [https://perma.cc/A8PT-K64F] (last visited Oct. 31, 2022); Beth Rowen & Logan Chamberlain, *Immigration Legislation*, INFOPLEASE (updated June 2, 2020), https://www.infoplease.com/us/immigration-legislation [https://perma.cc/CR9M-3ZKH]; Dadhania, *supra* note 85, at 67-74 (describing prostitution legislation). Immigration changes are increasingly done by executive order since 2001. *See* Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 275. The INA extends beyond deportation to further outline rules for appeals, waivers, and entry and admissibility. Kim, *supra* note 117, at 83-86; USCIS, *Immigration and Nationality Act*, *supra* note 120.

121. [The INA] sought to eliminate the racial discrimination in existing immigration law, but in codifying the national quota system, Congress merely placed a mask over the continuing racial discrimination. . . . The 1952 INA preferred individuals with special skills to those who had families already in the United States.

Kelly, *supra* note 60, at 45; *see supra* notes 60-61 and accompanying text (explaining why immigrant women may be more disadvantaged in an immigration system that prefers specific skills over familial ties).

122. *See supra* Part II.C.2.

However, the gendered effects of these immigration policies are still not clear.

The gendered nature of labor discussed in Part B exists for immigrant laborers just as it does for citizen laborers; immigrant men are expected to perform "masculine" forms of work while immigrant women are expected to do more "nurturing" or care-based forms of work.[123] Historical preferences for masculine labor resulted in immigration policies, particularly deportation policies, designed to first exclude immigrant women in hopes of dissuading immigrant men from resettling in the United States.[124]

The intense desire for masculine labor at the end of the nineteenth century and in the early twentieth century created a system that was hostile toward immigrant women.[125] Social and political structures perceived immigrant women as dangerous.[126] Society presumed that immigrant women would inhabit the domestic roles of mothers and homemakers, thus allowing them to anchor immigrant men to the United States through family-building—much to the terror of predominately white citizens fearful of flourishing non-white communities.[127] Immigrant women were also perceived as fortifying immigrant men's masculinity in ways that undermined the racialized propaganda proliferated in mainstream society that vilified immigrant men.[128] The fear of immigrant women's reproductive abilities continued into the 1990s.[129]

Beyond the attacks immigrant women received because of the perceived social fortification they offered to men of the same national origin, immigrant women were also independently targeted. [130] One common stereotype perpetuated against immigrant women within the United States was that the women and their children would drain national resources by becoming "public charges"—individuals who receive government support through public systems like benefit programs.[131]

123. Frader, *supra* note 32, at 35-36; Menjívar & Salcido, *supra* note 36, at 4.

124. Fish, *supra* note 102; Lang & Cachero, *supra* note 96; Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 273.

125. Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 273.

126. *Id.*

127. *Id.*

128. Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 273; *see also* INA § 237(a)(5), 8 U.S.C. § 1227(a)(5); Menjívar & Salcido, *supra* note 36, at 7-8.

129. Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 273.

130. *Id.*; *Page Act, 1875*, *supra* note 100; Myers, *supra* note 9, at 747.

131. Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 273; Johnathan Petts, *What is the Public Charge Rule?*, IMMIGR. HELP (May 30, 2022), https://www.immigrationhelp.org/learning-center/what-is-the-public-charge-rule [https://perma.cc/L3NJ-E6K3]; *see generally* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509 (1995); *see also Public Charge Resources*, U.S. CITIZENSHIP & IIMMIGR. SERVS. (updated Apr. 26,

The preference for masculine labor over feminine labor during this period, when the United States was seriously developing its immigration system, meant it was easier for men seeking employment in the United States to find immigration benefits through work authorization, even in "unskilled" fields like construction and landscaping.[132]

The preferential treatment of men's physical labor over women's care-based labor can be seen as recently as 2013 in employment-based visa application approvals.[133] In 2023, men were more likely to obtain a visa through employment-based petitions while women were more likely to obtain a family-based visa, which helped to maintain the established hegemonic gender hierarchies.[134]

Though the United States' economy began shifting from physical labor toward care-based labor around the 1990s, this shift did not actualize into more employment-based visas or other kinds of visas for immigrant women; it only lessened deportation enforcement against immigrant women.[135] This does not mean immigrant women were not deported, it only means that national enforcement efforts focused on the deportation of men.[136] The United States' shift toward immigrant women's labor did not dissipate the malicious stereotyping of immigrant women as drains on public resources; in fact, this same negative narrative of immigrant women as likely "public charges" remains imbedded in today's immigration policies.[137] Similarly, the negative stereotypes around

2023) [hereinafter USCIS, *Public Charge Resources*], https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/public-charge-resources [https://perma.cc/8Z9C-83MT].

132. Menjívar & Salcido, *supra* note 36, at 4; Kelly, *supra* note 60, at 46.

133. Menjívar & Salcido, *supra* note 36, at 4.

134. *Id.* at 4-5 (noting that it can take several additional years for an applicant to receive work authorization even if they have been approved and received a family-based visa).

135. *Id.* at 4-6; Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 273; Jeffery S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigration Total Dips to Lowest Level in a Decade*, PEW RSCH. CTR. 1, 27 (2018) (noting unauthorized women's workers increased despite an overall decline in unauthorized immigrant workers); Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 274, 283-84 (noting only about 6-12% of deportees were women from 1992 to 1996); *Immigrant Women and Girls*, *supra* note 51, at 3.

136. Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 273-74 (stating that the United States became more interested in "criminal aliens," a term more associated with immigrant men); Emily Ryo & Ian Peacock, *The Landscape of Immigration Detention in the United States*, AM. IMMIGR. COUNCIL 1, 8 (2018) (stating the reputation of "U.S. deportation regime [is] a 'gendered racial removal program' that targets Latino men.").

137. Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 273; Menjívar & Salcido, *supra* note 36, at 7-8; INA § 237(a)(5), 8 U.S.C. § 1227(a)(5); Johnson, *supra* note 131, at 1520-21 (noting the individuals who would be excluded from the United States included individuals who became a "public charge" and "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude"; and noting how the public charge rhetoric continues); Kelly, *supra* note 60, at 38 (restating the current rhetoric around "criminal immigrant" men and the resource "drain" of immigrant women).

immigrant men proliferated in the public consciousness.[138] The public feared, and continues to fear, the "criminal immigrant"—the imagined immigrant man of color who is cruel to women and children, and who brings "lots of problems" and "crime."[139] Nationalist fears around immigrant men and women accelerated immigration enforcement against noncitizens, but particularly against immigrant men of color.[140] This racial-gendered deportation pattern occurred even as deportation rates fell in 2013.[141]

### *D. Modern Immigration Law: Deportation and Inadmissibility*

Racial-gendered and labor-related expulsion continues to mimic historical expulsion along racial-gendered lines in part because these racial-gendered biases have been built into our modern immigration code.[142] This Comment focuses on the INA and will not directly address the executive branch's power to create immigration guidelines.[143]

The INA is the primary legislative source containing the United States' deportation provisions.[144] The INA is an expansive and complex document that has remained relatively static despite occasional amendments.[145] Inadmissibility is a factor under deportation and appears in two sections of the INA.[146] First, Section 237(a), "Deportable [Noncitizens]," briefly defines inadmissible individuals as noncitizens "who at the time of entry or adjustment of status [were] within one or

138. Kim, *supra* note 117, at 80; Abrams, *supra* note 9, at 575 (showing a historic trend of negative comments concerning immigrants).

139. Simmons et al., *supra* note 1, at 113; Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 273, 280; Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016) (quoting then candidate Donald Trump), https://time.com/4473972/donald-trump-mexico-meeting-insult/ [https://perma.cc/JT9N-RC6C].

140. Ryo & Peacock, *supra* note 136, at 2 (stating nearly 80% of all detainees were immigrant men from Central America and Mexico); Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 280 (noting drug offenses led to the highest deportation numbers out of all the criminal deportations in fiscal year 2008); *see generally* Kelly, *supra* note 60.

141. *See* Passel & Cohn, *supra* note 135, at 11; Ryo & Peacock, *supra* note 136, at 8 (discussing the "gendered racial removal program" which allows the "U.S. detention regime" to deport a disproportionate amount of Latino men).

142. *See supra* note 121.

143. *See* USCIS, *Public Charge Resources*, *supra* note 131; Allison Brownell Tirres, *Mercy in Immigration Law*, 2013 B.Y.U. L. REV. 1563, 1578 (2014).

144. Executive branch directions can impact how legislation is used. For more information about this topic see Ryo & Peacock, *supra* note 136, at 7; Simmons et al., *supra* note 1, at 111; USCIS, *Immigration and Nationality Act*, *supra* note 120.

145. Myers, *supra* note 9, at 752; *see also U.S. Immigration Timeline*, *supra* note 120 and accompanying text.

146. INA § 212(a), § 8 U.S.C. 1182(a); INA § 237(a), 8 U.S.C. § 1227(a).

more of the classes of [noncitizens] inadmissible by the law existing at such time."[147] Next, Section 212(a), "Inadmissible [Noncitizens]," provides multiple categories that would make a noncitizen ineligible to be admitted to the United States or ineligible to receive a visa.[148]

This Part of this Comment reviews the language of Section 237(a) and Section 212(a) to demonstrate the discretion granted to immigration officials and how this discretion, while facially neutral, continues to perpetuate historical racial-gendered and labor stereotypes.

### 1. Discretion

The language within the INA's inadmissibility and deportation sections gives the Attorney General the discretion to deport or not deport immigrants based on border agencies' enforcement priorities as created by both the statutes and the executive branch.[149] Both Sections 212(a) and 237(a) of the INA mention the word "discretion" in relation to the Attorney General, and a number of other government offices, a combined twenty-seven times.[150] The scope of the Attorney General's discretion, as wielded through immigration agencies, is "limited" only to the broad categories found within Sections 212(a) and 237(a).[151] These "limiting" categories are written so broadly that a phrase as seemingly well-defined as "aggravated felony" can include offenses that are neither aggravated nor felonies.[152]

The high discretion granted by the broad inadmissibility language in Sections 212(a) and 237(a) creates a flexibility through which immigration officials can unequally exclude immigrants based on historical or social biases.[153] Government officials have sought even

147. INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A).

148. INA § 212(a), 8 U.S.C. § 1182(a).

149. *See* Simmons et al., *supra* note 1, at 113 (describing the relationship between immigration enforcement priorities and presidential administrations); INA § 237(a), 8 U.S.C. § 1227(a) (stating noncitizens shall be removed "upon the order of the Attorney General"); Tirres, *supra* note 143, at 1578.

150. INA § 212(a), 8 U.S.C. § 1182(referring to the Department of Homeland Security, the Secretary of State, and the Department of Health and Human Services in addition to the Attorney General); INA § 237(a), 8 U.S.C. § 1227(a); *see also* Tirres, *supra* note 143, at 1577 n.64 and accompanying text (mentioning how immigration officials are afforded a similar discretion to the prosecutorial discretion as that granted to prosecutors in criminal cases).

151. INA § 237(a), 8 U.S.C. § 1227(a); *see also* INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B); INA § 237(a)(2), 8 U.S.C. § 1227(a)(2); *see also* INA § 212(a)(2), 8 U.S.C. § 1182(a)(2); Arizona v. United States, 567 U.S. 387, 397 (2012) (articulating the role of immigration agencies like Customs and Border Patrol and Immigration and Customs Enforcement ("ICE") in enforcing immigration laws on behalf of the Department of Homeland Security).

152. Tirres, *supra* note 143, at 1587 (discussing "aggravated felony"),1588 (discussing presence).

153. Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 273; Ryo & Peacock, *supra* note 136, at 8; Simmons et al., *supra* note 1, at 110; Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1512 (2005).

broader constructions of the already highly discretionary enforcement language, which the Supreme Court has viewed skeptically.[154] Chief Justice John Roberts commented in the oral arguments for *Mellouli v. Holder* (later *Mellouli v. Lynch*):[155]

> [I]t is because you [, Assistant Attorney General,] give the [deportation statute] such a broad construction that you get the . . . unusual situation . . . that the state thinks a very minor offense [like a charge of misdemeanor possession of drug paraphernalia] . . . can become so significant that the person's deported.[156]

The Supreme Court refused to expand Section 237's interpretation and held Mr. Mellouli could not be deported under the Kansas drug conviction only because Kansas did not use the federal drug schedules or a state schedule that reflected the federal schedules.[157] Additionally, the lower court's judgment against Mr. Mellouli did not identify the substance found in his sock as a federal drug schedule's drug.[158] The Supreme Court, in its reasoning, confirmed that drug convictions must relate to a drug defined under the federal drug schedules to make the individual deportable.[159]

*Mellouli v. Lynch* demonstrates the importance of courts narrowing the interpretations of Sections 212(a) and 237(a) of the INA, since a broader interpretation would allow individuals to be deported for offenses not contemplated by the text and history of the sections.[160]

The discretion granted to immigration officials through the inadmissibility language is particularly noteworthy because, in addition to their being deportable, individuals found to have violated inadmissibility standards can be denied access to visas or other forms of authorized entry.[161] Put another way, immigration officials' subjective perceptions can cost individuals their ability to access authorized status and subject those individuals to a higher risk for deportation.[162]

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154. Jason A. Cade, *Judging Immigration in Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029, 1029 (2017) (quoting J. John Roberts); Kim, *supra* note 117, at 135-139 (outlining the Court's reluctance to read presence as a continuous violation while being asked to do so by various government entities).

155. Cade, *supra* note 154, at 1029; *see also* 575 U.S. 798 (2015).

156. Cade, *supra* note 154, at 1029 (quoting J. John Roberts Transcript of Oral Argument at 50, Mellouli v. Holder, 575 U.S. 798 (2015) (No. 13-1034)).

157. *Mellouli*, 575 U.S. at 812.

158. *Id.* at 801.

*159. Id.* at 801, 813.

160. INA § 212(a), 8 U.S.C. § 1182(a); INA § 237(a), 8 U.S.C. § 1227(a); *Mellouli*, 575 U.S. at 800-01, 809, 813.

161. INA § 212(a), 8 U.S.C. § 1182(a)(1-10).

162. Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 281 (illustrating how a noncitizen who entered without authorization but who did not commit a crime and was eligible for status can still be deported at the discretion of immigration officials).

An immigration official's discretion is clearest in the public charge subcategory of Section 212(a): "[A]ny [noncitizen] who, in the *opinion* of the consular officer . . . or in the *opinion* of the Attorney General . . . is *likely* at any time to become a public charge is inadmissible."[163]

In contrast, the public charge subcategory of Section 237(a) merely states that "any [noncitizen] who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable."[164]

This strict language in Section 237(a) restricts deportation only to individuals who actively become public charges "within five years after date of entry," meaning officials are confined to both concrete action and concrete time limits.[165]

Unfortunately, these restrictions will not prevent an immigrant from becoming inadmissible, and thus deportable, because "public charge" under the inadmissibility standard (Section 212(a)), only requires the "opinion" of an immigration official that a noncitizen "is likely at any time to become a public charge."[166] Stated more bluntly, the mere opinion of an immigration official is enough to remove a person from the United States simply because they look like they are, or will eventually become, poor.[167]

### 2. Insidious Neutrality

Section 212(a)'s and 237(a)'s inadmissibility categories mirror each other closely.[168] Section 212(a) has ten grounds for inadmissibility while Section 237(a) has seven.[169] Of these seventeen total inadmissibility grounds, four are nearly identical: criminal and related grounds, security and related grounds, public charge, and illegal entrants and immigration violators (referred to as "presence" in Section 237(a)).[170] These inadmissibility categories reflect the historical fears and trends within American society and immigration law and have historically been

163. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (emphasis added).

164. INA § 237(a)(5), 8 U.S.C. § 1227(a)(5).

165. INA § 237(a)(5), 8 U.S.C. § 1227(a)(5).

166. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4). This also means the individual would be ineligible for authorized status without a waiver of their public charge status. INA § 237(a)(1), 8 U.S.C. § 1227(a)(1).

167. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4); INA § 237(a), 8 U.S.C. § 1227(a); Johnson, *supra* note 131, at 1517-18 (noting the implicit race, gender, and class implications that often accompany debates about public benefits for noncitizen populations).

168. INA § 212(a), 8 U.S.C. § 1182(a); INA § 237(a), 8 U.S.C. § 1227(a).

169. INA § 212(a), 8 U.S.C. § 1182(a); INA § 237(a), 8 U.S.C. § 1227(a).

170. INA § 212(a)(6), 8 U.S.C. § 1182(a)(6); INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B).

weaponized against particular gender and race groups despite containing gender-neutral language after the categories' codification.[171]

Prostitution, a subcategory under the criminal and related grounds category, has frequently been used to prevent and remove unwanted immigrants, particularly immigrant women of color.[172] Public charge grounds are also frequently used against women despite the language claiming "any" noncitizen who becomes or is likely to become a public charge is inadmissible and deportable.[173] Conversely, immigrant men tend to be inadmissible and deportable under other subcategories of the criminal and related grounds, despite the language ("any noncitizen").[174] This is in part due to the over-policing of Black and Brown masculine bodies, particularly in the wake of the terrorist attacks of September 11, 2001.[175] These gendered uses of the inadmissibility grounds under INA Sections 212(a) and 237(a) have led to "generational punishment,"[176] the deterioration of immigrant communities,[177] and nearly perpetual fear among noncitizens.[178]

## III. DISCUSSION

The United States government intentionally excludes individuals through deportation when national labor and economic interests diverge from the interest of immigrants wishing to remain in the United States.[179] The inadmissibility standards under INA Sections 212(a) and 237(a) reinforce the historical inclusion-exclusion cycle by determining who is included or excluded based on racial-gendered labor needs.[180] This Section of the Comment argues that Congress must become cognizant of the historical prejudices that perpetuate this inclusion-exclusion cycle and modify the inadmissibility language found in Sections 212(a) and 237(a) to negate some of the racial-gendered impact of our immigration laws. The suggested linguistic changes presented in this Section create a starting place for Congress to begin to unravel centuries of legal prejudice

171. *See supra* Part II.C.

172. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4); INA § 237(a)(5), 8 U.S.C. § 1227(a)(5); Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 273; Chy Lung v. Freeman, 92 U.S. 275, 276-77 (1875); Lang & Cachero, *supra* note 96.

173. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4); INA § 237(a)(5), 8 U.S.C. § 1227(a)(5).

174. Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 275; Kelly, *supra* note 60, at 38, 45, 49.

175. Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 275; *see also* Carbado, *supra* note 1.

176. Simmons et al., *supra* note 1, at 110.

177. *Id.*

178. Medina, *supra* note 86, at 267; Simmons et al. *supra* note 1, at 110-11.

179. *See supra* Part II.C.2. *See also supra* Part II.D.

180. INA 212(a), 8 U.S.C. § 1182(a); INA 237(a), 8 U.S.C. § 1227(a); *see also supra* Parts II.C.1-2.

in immigration. However, the removal of this language alone will not change imbedded discrimination and must ultimately be accompanied by a shift in American society's perception of immigrants that prevent a regression back into discriminatory racial-gendered labor patterns.

Part A suggests several changes Congress could make to combine the repetitive language in the four overlapping categories of Sections 212(a) and 237(a). These changes would be beneficial but are unlikely to take effect because they would require significant work and cooperation from politicians. Part B discusses public charge[181] while Parts C, D, and E discuss criminal and related grounds.[182] Specifically, Part C analyzes controlled substance convictions. Part D discusses the ambiguity of "crimes of moral turpitude"[183] and why the term's ambiguity affords too much discretion to immigration officials. Part E discusses the separation of prostitution from other criminal subcategories in Section 212(a) and how such a separation emphasizes the racial-gendered history of sex work.

This Comment does not heavily discuss security and related grounds or presence. Others have spoken about these topics, and they are of great import and worthy of additional scholarship.[184] This Comment instead attempts to craft an overview of the continuing effects of racial-gendered trends on immigration law. More granular work is needed to fully unravel the systemic assumptions about immigrant labor that perpetuate the hegemonic and stereotypical structures connecting labor, race, and gender.

Lastly, it is of note that immigration law scholarship would benefit from more consideration of non-binary, gender non-confirming, and transgender immigrants' identities.[185] These individuals necessarily transcend the historical racial-gendered labor division because they were less documented than those within the binary, but that does not mean history cannot provide insight into current non-binary and transgender immigrant experiences and reception. Scholars could

181. INA § 212(a)(4), 8 U.S.C. §1182(a)(4); INA § 237(a)(5), 8 U.S.C. § 1227(a)(5).

182. INA § 212(a)(2), 8 U.S.C. § 1182(a)(2); INA § 237(a)(2), 8 U.S.C. § 1227(a)(2).

183. INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I); INA § 237(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I).

184. *See* Kim, *supra* note 117 (discussing presence); Cade, *supra* note 154, at 1094 (discussing presence); *see generally* Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (discussing security and immigration); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U.L. REV. 367 (2006) (discussing national policies related to security and immigration); Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13 (2019) (discussing how deference to the president on the scope of security grounds affects immigration decisions and suggesting ways to balance deference and minimize costs).

185. *See generally* Medina *supra* note 86 (describing the historical exclusion of LGBTQ+ noncitizens from the United States on medical and related grounds); *Id.* at 262 (noting the United States predominately excluded LGBTQ+ noncitizens for "mental defects" and "sexual deviation").

potentially exploit the discretion language currently allowed in Sections 212(a) and 237(a) to purpose ways to break historically binary readings of the immigration code, thus benefitting those who fall outside the binary.

### *A. Convergence*

Congress should consolidate the inadmissibility language of the four overlapping categories in Sections 212(a) and 237(a). Consolidating the language would minimize repetition while also maintaining some discretion for immigration officials. By consolidating the INA's exclusion language, Congress may also help narrow subjective reasoning that, at a minimum, perpetuates the racial-gendered stereotypes built into immigration law's inclusion-exclusion cycle.[186]

The security and related grounds categories in Sections 212(a) and 237(a) contain nearly identical language in their general security subcategories, making Section 212(a)'s expanded language more obvious.[187] A noncitizen man of color is more likely to be suspected of criminality because of racial and gendered biases, meaning the expansive language is more likely to impact immigrant men of color than other immigrant groups.[188] The expanded language in Section 212(a) allows consular officers or the Attorney General to find someone inadmissible if they *reasonably believe* an individual is seeking entry into the United States for any unlawful activity.[189] Section 237(a), by contrast, requires a noncitizen to *engage* in "criminal activity which endangers public safety or national security."[190] The criminal stereotyping of immigrant men of color by immigration officials and police under Section 212(a) means immigrant men of color are disproportionately perceived as "seeking entry into the United States for any unlawful activity."[191] Congress should eliminate the reasonable belief language provided by Section 212(a) because it allows immigration officials to speculate about a noncitizen's criminality, which is likely to impact immigrant men of color to a

186. *See supra* note 121 and accompanying text.

187. INA § 212(a)(3)(A), 8 U.S.C. § 1182(a)(3)(A); INA § 237(a)(4)(A), 8 U.S.C. § 1227(a)(4)(A).

188. Kelly, *supra* note 60, at 38, 45, 49; Carbado, *supra* note 1, at 1497 ("Marginalized groups are more vulnerable to police contact and violence because members of these groups often have non-normative identities to which stereotypes of criminality and presumptions of disorder apply").

189. INA § 212(a)(3)(A)(ii), 8 U.S.C. § 1182(a)(3)(A)(ii) ("The Attorney General knows or has reasonable grounds to believe [any noncitizen] seeks to enter the United States to engage…[in] any other unlawful activity.").

190. INA § 237(a)(4)(A)(ii), 8 U.S.C. § 1227(a)(4)(A)(ii).

191. Carbado, *supra* note 1, at 1497; Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 275; Kelly, *supra* note 60, at 38, 45, 49.

disproportionate degree.[192]

The criminal and related grounds categories of Sections 212(a) and 237(a) could also be consolidated and placed into one section, rather than be used in both.[193] Both sections discuss situations in which an individual has multiple convictions, or commits crimes involving controlled substances, or crimes of moral turpitude.[194] The most striking difference between these sections is their structure.[195]

The criminal and related grounds categories of Sections 212(a) and 237(a) play off each other in a way that enables more discretionary enforcement from immigration officials. Multiple convictions only matter under Section 237(a) in cases of moral turpitude while Section 212(a) looks more broadly to multiple offenses.[196] This can result in racial-gendered impacts because the government has historically levied crimes of moral turpitude against immigrant women while it presumes immigrant men are more likely to commit general criminal offenses.[197] Additionally, Section 237(a) allows officials to discriminate against noncitizens in a manner that would be unconstitutional if the individuals were citizens, because it allows immigration officials to consider a noncitizen's addiction status.[198] In *Robinson v. California*, the Supreme Court held that a California law imprisoning people because of their addiction status, rather than use or possession of drugs, was unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.[199] While the Supreme Court has held that noncitizens are not always entitled

192. Kelly, *supra* note 60, at 49-50; Ryo & Peacock, *supra* note 136, at 2.

193. INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B); INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (multiple convictions); INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II); INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (controlled substances); INA § 212(a)(2)(A)(I), 8 U.S.C. § 1182(a)(2)(I); INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (crimes of moral turpitude).

194. INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B); INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (multiple convictions); INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II); INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (controlled substances); INA § 212(a)(2)(A)(I), 8 U.S.C. § 1182(a)(2)(I); INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (crimes of moral turpitude).

195. INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B); INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (multiple convictions); INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II); INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (controlled substances); INA § 212(a)(2)(A)(I), 8 U.S.C. § 1182(a)(2)(I); INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (crimes of moral turpitude).

196. INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B).

197. Chy Lung v. Freeman, 92 U.S. 275, 276-77; Lang & Cachero, *supra* note 96; Simmons et. al, *supra* note 1, at 113; Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 280.

198. Robinson v. California, 370 U.S., 660, 667 (1962); INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii); *see* Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that the Fifth and Sixth Amendments to the Constitution entitle all persons to a presentment or indictment of a grand jury in "capital or other infamous crimes" as well as "life, liberty, or property without due process of law" (quoting Yick Wo. v. Hopkins, 118 U.S. 356, 369 (1886)); *see also* Yick Wo v. Hopkins, 118 U.S. at 369 (recognizing that the Equal Protection Clause of the Fourteenth Amendment to the Constitution applies to noncitizens).

199. *Robinson*, 370 U.S. at 667.

to the same protections as citizens, it is a miscarriage of justice to allow immigration officials to discriminate against noncitizens because of their addiction status when such behavior is decidedly unconstitutional.[200] Clearly, Congress should amend the criminal and related grounds category under Sections 212(a) and 237(a) to remove the distinction between crimes of moral turpitude and general offenses in the case of multiple offenses and should alter Section 237(a) so it expressly forbids status discrimination rather than enables it.

The presence categories of Sections 212(a) and 237(a) make it easy to exclude immigrants by penalizing an immigrant's existence in the United States.[201] The presence category is not as easily combined as the public charge, security and related grounds, or criminal and related grounds categories because Section 212(a) expands upon, rather than repeats, Section 237(a).[202]

The current "presence" language incentivizes immigrants to remain in the United States without authorization because they could otherwise be barred from ever obtaining authorized reentry unless they receive very specific documentation while outside the United States.[203] This same phenomenon occurred under the Chinese Exclusion Act because that law prevented permanent Chinese residents from leaving the United States. [204] If they did leave, they were frequently denied re-entry unless they could acquire the necessary government documentation.[205] The criminalization of presence also creates an avenue through which politicians and interest groups can vilify immigrants who contribute to the labor force but may not have documentation to show they "belong" in the United States.[206] The presence category under 212(a) and 237(a) expands

200. *See id.* The Gun Control Act also allows incarceration for firearm or ammunition possession, transportation, receipt, or use if the individual with the firearm or ammunition is addicted to substances, but that section has recently been challenged. United States v. Daniels, 2023 U.S. App. LEXIS 20870 (5th Cir. 2023); 18 U.S.C. § 922(g)(3); While the United States Supreme Court has not consistently extended constitutional protections to all noncitizens, it has recognized that some noncitizens prosecuted under immigration law must be afforded some constitutional protections. *See e.g.*, Landon v. Plasencia, 459 U.S. 21 (1982) (holding that lawful permanent residents who are facing exclusion from the United States are entitled to due process rights at an exclusion hearing).

201. Kim, *supra* note 117, at 81, 85 (recognizing that if an individual leaves the United States, interrupting their presence, they still risk being excluded for a minimum of three years or permanently).

202. *Compare* INA § 212(a)(6)(i), 8 U.S.C. § 1182(a)(6)(i), *with* INA § 237(a)(1)(B), 8 U.S.C. § 1182(a)(1)(B).

203. Kim, *supra* note 117, at 80.

204. *Milestone Documents*, *supra* note 61.

205. *Id.*

206. For further discussion about presence and how to remedy this section of the INA, please read Kim, *supra* note 117; Blake, *supra* note 65, at 311, 324; Hoban, *supra* note 87; Vanessa Romo, *Why Florida's New Immigration Law is Troubling Businesses and Workers Alike*, NPR (May 30, 2023), https://www.npr.org/2023/05/30/1177657218/florida-anti-immigration-law-1718-desantis [https://perma.cc/YKP9-4Q7Z].

the effects of inadmissibility and recreates exclusionary tactics used in the 1800s. These tactics reinforce racial-gendered stereotypes and allow immigration officials and social sentiments like nativism to easily turn against immigrants when their labor is no longer desirable. Congress should consolidate the repetitive language in the overlapping categories of Sections 212(a) and 237(a) to narrow immigration officials' discretion and stop existence alone from being a crime worthy of deportation.[207]

### *B. Public Charge*

Congress should remove the subjective, fortune-telling language from Section 212(a) regarding public charges. The language of Section 212(a) authorizes consular officers and the Attorney General to merely guess who could become a public charge, rather than requiring these officials to concretely determine an immigrant's public charge status.[208] This guessing leaves immigrants vulnerable to deportation based on opinions rather than facts.[209]

Under the inadmissibility standard, "any [noncitizen] who, *in the opinion* of the consular officer at the time of application for a visa . . . *is likely at any time* to become a public charge is inadmissible."[210] Officials are allowed to consider an individual's "age, health, family status, assets, resources, and financial status and education and skills" when determining if a noncitizen is likely to become a public charge.[211] If an official determines an immigrant is inadmissible as a public charge, the immigrant is deportable, regardless of whether the determination was based on actual evidence or mere perception.[212] Because "any" noncitizen could be a "likely" public charge in the opinion of an immigration official, Section 212(a) is expressly neutral.[213] However, "likely" does not require concrete proof, which gives an immigration official the discretion to

207. Unlawful entry into the United States is a misdemeanor for the first offense and can result in a fine, six months in prison and potentially deportation. *Prosecuting People for Coming to the United States*, AM. IMMIGR. COUNCIL, Aug. 23, 2021, https://www.americanimmigrationcouncil.org/research/immigration-prosecutions [https://perma.cc/XY95-6LAD]. However, an individual is inadmissible (potentially permanently) and deportable from the United States if they are unlawfully *present*, depending on the amount of time they have been in the country. USCIS, *Unlawful Presence and Inadmissibility* (updated June 24, 2022), https://www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-inadmissibility [https://perma.cc/M7KA-XSKN].

208. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4).

209. *Id.*

210. *Id.* (emphasis added).

211. INA § 212(a)(4)(B), 8 U.S.C. § 1182(a)(4)(B).

212. INA § 237(a)(5), 8 U.S.C. § 1227(a)(5).

213. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4).

determine which noncitizens fall into the category of "any"; historical precedent tells us the targeted immigrants are likely to be women.[214]

Historically, immigrant women are more likely to be deportable as public charges.[215] Immigrant women are less likely to receive work authorization through employment-based visas and may have to wait years to receive work authorization as a dependent under a family-based or employment-based visa application.[216] This means many immigrant women who have the ability and desire to work are restricted from working, which may affect their financial stability, assets, or resources.[217] These women often work even without authorization because it is the only way to support themselves and their families.[218] Though an immigration official could choose not to deport a woman working without authorization because she fills a current economic need, if domestic labor needs shift or nativist unease arises around immigrant women "taking all the jobs," this same woman could very quickly be deported.[219]

The lack of immigration security combined with the assumption that an immigrant woman is "likely" to become a public charge reinforces the deep-rooted, racial-gendered stereotypes embedded in the history of immigration law that view immigrant women as a "drain" on social resources.[220] The lack of protection for immigrant women who work diligently to better the United States' society and economy but are nevertheless deportable because they may be "likely" to become a public charge in the "opinion" of an immigration official reflects the deep-rooted inclusion-exclusion cycle.[221] Congress should narrow inadmissibility under public charge to only the language found in Section 237(a)(5) because that language is more concrete than that in Section 212(a)(4). The narrowing of public charge language to only language found under Section 237(a)(5) reduces the subjectivity of immigration officials' opinions and ensures the officials are relying on fact when making inadmissibility and deportation findings.

214. *Id.*; *see supra* notes 131, 137, and accompanying text.

215. *See supra* notes 131, 137, and accompanying text.

216. Menjívar & Salcido, *supra* note 36, at 4-5.

217. *Id.* (discussing the presumed dependency of immigrant women and how visa issuance reinforces this dependence; noting further that work authorization backlogs significantly impact women's ability to find work or to work outside certain fields).

218. *Id.* at 6 (explaining immigrant women are often forced to either rely on a spouse for financial support or must work "informal jobs" without authorization).

219. *See* Tikkanen, *supra* note 71; *supra* text accompanying notes 88-91.

220. *See supra* notes 131, 137, and accompanying text.

221. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4).

### *C. Controlled Substances*

The INA's controlled substance category is one of its most well-defined categories because it frequently requires immigration officials to present concrete proof against a targeted immigrant before they can successfully remove the individual.[222] The Supreme Court reaffirmed the concreteness of this category when it held in *Mellouli v. Lynch* that controlled substance convictions must involve a controlled substance as defined by the federal drug schedules rather than a drug that is a controlled substance only in the convicting state.[223] This decision reaffirmed that inadmissibility (Section 212(a)) or deportation (Section 237(a)) can only be achieved if the government officials can show a drug defined under Title 21 Section 802 (the federal drug schedules) was involved.[224] By affirming the language and legislative intent imbued in Section 237(a)(2)(B)(i), the Court preserved the definitiveness of "controlled substance" and protected immigrants from capricious prosecution that would have otherwise sought to make any drug conviction a deportable offense, contrary to the law.[225] The preservation of the distinct meaning of "controlled substance" makes the loophole in Section 237(a) that much more glaring.

The INA's controlled substance category oversteps by including a person's addiction status among the reasons someone can be deported.[226] Section 237(a) mandates the deportation of "any [noncitizen] who is, or at any time after admission has been, a drug abuser or addict."[227] This language means an immigrant is deportable for currently struggling with addiction or for having struggled with addiction at any time since first entering the United States.[228]

Though the Supreme Court has held that it is unconstitutional to criminally target someone because of addiction status alone, the Court's ruling currently does not apply to deportation situations, thereby making Section 237(a)'s controlled substance category permissible.[229] This discrimination is still permissible because deportation is not a criminal offense; therefore, the status protection offered in criminal cases is not applicable.[230] This is true even though the Supreme Court recognizes that

222. INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B).

223. Mellouli v. Holder, 575 U.S. 798, 813 (2015).

224. INA § 212(a)(2)(ii), 8 U.S.C. § 1182(a)(ii); INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

225. *Mellouli*, 575 U.S. at 813; *see also* Cade, *supra* note 154, at 1029.

226. INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii).

227. *Id.*

228. *Id.*

229. *Id.*; Robinson v. California, 370 U.S. 660, 667 (1962); *see also* United States v. Daniels, 2023 U.S. App. LEXIS 20870 (5th Cir. 2023); 18 U.S.C. § 922(g)(3).

230. Woodby v. Immigr. & Naturalization Serv., 385 U.S. 276, 285 (1966).

deportation cases create similar "drastic deprivation" to that found in criminal cases.[231] The United States' insistence on discriminating against noncitizens who previously suffered or currently are suffering from addiction is abhorrent. It allows immigration officials discretion under the "criminal and related grounds" that would not otherwise exist.[232] The discretion created by this subcategory forms a loophole that allows immigration officials to unnecessarily profile noncitizens compared to their citizen peers. Congress should either remove this subcategory from Section 237 or courts should recognize the undeniable equivalence between deportation and criminal cases, thus extending existing constitutional protections to immigrants who struggle with addiction.

Social consciousness currently and historically conflates immigrants with drugs.[233] The belief that immigrant are connected to drugs is rooted in the idea that both racialized immigrants and drugs are inherently immoral.[234] The ability to discriminate against migrants who have substance abuse issues revives these stereotypical images of the immoral, criminal, and dangerous (men) immigrants.[235] Immigrant men—particularly Asian, Latino, and Black men—are most vulnerable to these stereotypes because they are more likely to be over-policed due to their race.[236] The relationship between immigration officials and local law enforcement allows immigration officials to easily identify individuals struggling with substance abuse issues and then initiate deportation proceedings against them.[237]

Immigrant men's presumed proximity to criminality is crystalized by the term "criminal immigrant," a term commonly used to degrade immigrant men.[238] By allowing immigration officials to persecute immigrants for their addiction status and not just substance-related crimes, Section 237(a) contains an easy avenue for the removal of

231. *Id.* (recognizing that while deportations are not criminal proceedings, they do create a drastic deprivation in an individual's life).

232. INA § 237(a)(2), 8 U.S.C. § 1227(a)(2).

233. Reilly, *supra* note 139; Kelly, *supra* note 60, at 45; *see also* Rebecca Sharpless, *Addiction-Informed Immigration Reform*, 94 WASH. L. REV. 1891, 1933 (2019) (noting how the INA links drug use to immorality).

234. Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 280 (giving statistics related to why criminalized noncitizens were deported and stating the majority of deportations on criminal grounds resulted from drug charges); Dadhania, *supra* note 85, at 57 (discussing how immigrant sex work has historically been perceived as immigrants (particularly women) spreading immorality).

235. Abrams, *supra* note 9, at 572-73; Volpp, *supra* note 184, at 1575 n.51; Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 273.

236. Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 273, 278; Carbado, *supra* note 1, at 1488 (discussing how income affects how often one may come into contact with law enforcement).

237. Simmons et al., *supra* note 1, at 109.

238. Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 281.

unwanted immigrants, and especially immigrant men.[239] Immigration officials can choose not to prosecute immigrants for their addiction status if the specific immigrant's racial-gendered labor is economically valuable, while simultaneously choosing to remove immigrants whose labor is less valuable.[240] In this situation, the immigrant bears the burden of proving they have never been, and are not, addicted to substances since entering the United States.[241] It is dangerous for immigration officials to have the power to prosecute individuals for their addiction status under criminal and related grounds when addiction is not, in and of itself, a crime and would otherwise be an unusable tool because of constitutional restrictions.[242] Congress should remove the status language from the controlled substances subcategory of Section 237(a) because status does not focus on a tangible crime, unlike the rest of the subcategories.

### *D. Crimes of Moral Turpitude*

Congress must either remove the term "crimes of moral turpitude"[243] from Sections 212(a) and 237(a) or craft a firmer definition to negate the term's racial-gendered impact. Immigrants of color were historically associated with crimes of moral turpitude and (criminal) immorality.[244] Crimes of moral turpitude are crimes considered "inherently base, vile, or depraved, and contrary to accepted rules of morality" according to the Board of Immigration Appeals.[245] Immigration caselaw suggests certain crimes, like fraud or prostitution, are more likely to be a crime of moral turpitude than others.[246] However, crimes of moral turpitude are still open to each individual immigration official's interpretation.[247] An immigration official can subjectively determine whether or not "the actual

239. *Id.* at 280.

240. The determination to prosecute or not prosecute an immigrant is also dictated by executive branch directives. Simmons et al., *supra* note 1, at 113.

241. Pereida v. Wilkinson, 141 S. Ct. 754, 760-62 (2021) (stating a noncitizen bears the burden of seeking relief from a lawful deportation order and must show they merit favorable discretion by eliminating all "lingering uncertainty."); *Burdens and Standards of Proof* (updated Oct. 19, 2022), https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-4 [https://perma.cc/W493-RLY4].

242. Woodby v. Immigr. & Naturalization Serv., 385 U.S. 276, 285 (1966); Robinson v. California, 370 U.S., 660, 667 (1962).

243. INA § 212(a)(2)(A)(I), 8 U.S.C. § 1182(a)(2)(I); INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i).

244. *§ N.7 Crimes Involving Moral Turpitude*, *supra* note 85, at 112; Granados v. Garland, 17 F.4th 475, 478 (4th Cir. 2021).

245. Lucero-Rios v. Garland, No. 21-3761, 2022, U.S. App. LEXIS 20960, at *5 (6th Cir. July 28, 2022).

246. *Lucero-Rios*, U.S. App. LEXIS 20960, at *5; *§ N.7 Crimes Involving Moral Turpitude*, *supra* note 85, at 112; Dadhania, *supra* note 85, at 76-77.

247. *§ N.7 Crimes Involving Moral Turpitude*, *supra* note 85, at 112.

conduct constitutes a crime involving moral turpitude" so long as an immigration official can find that "the full range of conduct encompassed by the [state] statute constitutes a crime of moral turpitude."[248] Despite this language, immigration officials are not required to demonstrate that a crime is one of moral turpitude under the convicting state's statutes or caselaw.[249] If immigration officials were compelled to use state law definitions of crimes of moral turpitude, they could at least establish more objectives standards than are currently applied; however, whether an immigrant was inadmissible or deportable would then depend on the convicting state, creating inconsistency in federal immigration enforcement.[250]

If Congress created a concrete federal definition for crimes of moral turpitude, it would establish a uniform definition for immigration officials to use with all immigrants, but the definition could also cause conflict with state definitions. If Congress removed the crimes of moral turpitude subcategory entirely, they could still find immigrants inadmissible and deportable through convictions of "[two] or more [criminal] offenses" or one of the more specific inadmissibility crimes.[251] Furthermore, Congress could still deport individuals for criminal conduct, but by removing the category of crimes of moral turpitude, officials would be required to base the deportation on specific state-level criminal conduct rather than an immigration official's subjective judgment. Congress should remove the crimes of moral turpitude subcategory or affix a more concrete definition to negate the historical implication that immigrants are inherently immoral.

### *E. Prostitution: Prescriptive Immorality for Immigrant Women*

Congress should remove prostitution from its inadmissibility statutes because it is unjustly and disproportionately associated with immigrant women.[252] Immigrant women in particular have been historically classified and excluded from the United States because they engaged in

248. *Lucero-Rios*, U.S. App. LEXIS 20960, at *5.

249. *Id.*

250. *Id.*; Ohio Rev. Code § 4776.10 (2019); *see supra* note 85.

251. INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C); INA § 212(a)(2)(E), 8 U.S.C. § 1182(a)(2)(E); INA § 237(a)(2)(A)(ii-v), 8 U.S.C. § 1227(a)(2)(A)(ii-v); *but see* Granados v. Garland, 17 F.4th 475, 478-80 (4th Cir. 2021) (concluding the current federal understanding of a crime of moral turpitude is clear enough to survive a constitutional vagueness challenge).

252. Lang & Cachero, *supra* note 96; Abrams, *supra* note 9, at 572; Myers, *supra* note 9, at 747; *Page Act, 1875*, *supra* note 100; Medina, *supra* note 86, at 266-279; Dadhania, *supra* note 85, at 69.

or were accused of engaging in sex work.[253] The INA does not explicitly include prostitution in its deportation categories but does expressly name it within Section 212(a) (inadmissibility).[254] Section 212(a) contains an entire subcategory dedicated to "prostitution and commercial vice" within its criminal and related grounds category.[255] Notably, an immigrant does not need to be convicted of prostitution to be found inadmissible on prostitution grounds. If an immigrant acknowledges they engaged in prostitution within ten years of their application or intend to engage in prostitution (including for economic reasons) within ten years, they are inadmissible under prostitution grounds.[256] Immigrant sellers of sex[257] are thus inadmissible (and deportable) for considering, or actively engaging in, sex work as well as any crimes resulting from the sale of sex.[258] An immigrant found inadmissible on prostitution grounds is deportable because any inadmissible noncitizen is deportable either upon entry or upon adjustment of status.[259] This means an immigrant risks being deported if they seek authorization or residence in the United States within ten years of selling sex, possibly prolonging the amount of time the individual needs to wait before applying for or updating their immigration status.[260]

Prostitution is a particularly clear example of the INA's racial-gendered origins.[261] The prostitution category is a direct vestige of anti-Chinese women sentiments that led to the Page Act.[262] The Page Act, the explicitly exclusionary legislation that accused Chinese women of being sex workers, prevented Chinese women from entering the United States unless they could prove they were a person of desirable moral character.[263] Congress refined the exclusion of sex workers to ultimately remove the gendered language but did not remove the Page Act's moral and racial-gendered implications.[264]

Prostitution is still used to exclude immigrant women.[265] Despite the removal of the gendered language from the INA, which once barred "a

253. *See supra* text accompanying note 100; Chy Lung v. Freeman, 92 U.S. 275, 276-77 (1875); Dadhania, *supra* note 85, at 69.

254. INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D).

255. *Id.*

256. Dadhania, *supra* note 85, at 75-76.

257. *Id.*

258. *Id.* at 75.

259. INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D).

260. *Id.*

261. *See supra* text accompanying notes 98-101.

262. Dadhania, *supra* note 85, at 72; *see supra* notes 98-101 and accompanying text.

263. *See supra* notes 98-101 and accompanying text.

264. Dadhania, *supra* note 85, at 57-74.

265. *See generally* Medina, *supra* note 86.

female of the sexually immoral class" from receiving citizenship, the prostitution category in the INA remains gendered.[266] For example, transgender women from Mexico and Latin America are among the most recent victims of the United States' exclusionary policies against sex workers.[267] Similar to immigrant men who are over-policed for their "criminality," immigrant women continue to be more over-policed for their "immorality."[268] Congress should remove the prostitution subcategory from Section 212(a) because it reinforces racial-gendered stereotyping about the immorality and criminality of immigrant women.

The removal of this subcategory creates one less opportunity for immigration officials to discriminate along racial-gendered lines by removing a clear vestige of anti-immigrant, anti-women assumptions that presume immigrant women of color are more likely to engage in sex work than their (white) citizen peers.[269] Unfortunately, the subcategory's removal alone will not protect immigrant women from deportation or inadmissibility if they engage in sex work within ten years of applying for entry or adjustment of status.

As such, if Congress is scared to remove prostitution because it worries it would inadvertently endorse sex work or prevent the prosecution of individuals engaging in sex work, then its fear is unfounded. Congress could still find individuals engaging in sex work inadmissible and deportable through other criminal and related grounds subcategories like multiple convictions, or crimes of moral turpitude. Advocates who wish to protect the rights of immigrants who engage in sex work need to pursue additional measures beyond the removal of the prostitution subcategory.[270]

## IV. CONCLUSION

The above discussion has offered tangible prescriptions for Congress to remove several instances of racial-gendered stereotypes from the INA, thus allowing Congress to break the inclusion-exclusion cycle.[271]

This Comment has addressed the repetitive, expansive, and discretionary language used in Sections 212(a) and 237(a) of the INA. It points out how exclusionary immigration laws are founded on racial-

266. *Id.* at 266-79; Dadhania, *supra* note 85, at 69 (citing McCarren-Walter Act, 8 U.S.C. § 1185 (1952)).

267. *See generally* Medina, *supra* note 86.

268. Dadhania, *supra* note 85, at 54-56.

269. *See supra* text accompanying notes 100, 127.

270. *See generally* Dadhania, *supra* note 85; Linda S. Anderson, *Ending the War Against Sex Work: Why It's Time to Decriminalize Prostitution*, 21 U. MD. L.J. RACE RELIGION GENDER & CLASS 72 (2021).

271. *See supra* Parts II.C.1-2.

gendered and labor assumptions and how those assumptions are perpetuated through the vague language embedded in Sections 212(a) and 237(a). Congress should use the suggestions provided above to identify the repetitive language found in Sections 212(a) and 237(a) and remove language that unnecessarily expands immigration officials' discretion to determine an immigrant is inadmissible or deportable beyond what can be supported by objective measures.[272] It should consolidate and narrow the discretion identified in Sections 212(a) and 237(a) of the INA and remove vague language that can be imbued with racial-gendered overtones to mitigate historical and continuing exclusionary tactics that arbitrarily target immigrants of color and immigrants with certain gender identities.

Congress should not allow Sections 212(a) and 237(a) to play off each other in ways that harm immigrant communities by tearing away members who no longer serve the racial-gendered labor needs of the nation.[273] This Comment urges Congress to remove language from the public charge and controlled substance categories that allow immigration officials to rely on historically racial-gendered biases. It further argues for the complete removal of the prostitution subcategory because its origins and continued use perpetuate racial-gendered stereotypes about immigrant women's morality. Lastly, this Comment implores Congress to define or omit crimes of moral turpitude because the term's current use in the immigration context allows immigration officials to wield excessive discretion over an immigrant's inadmissibility.

The removal of racial-gendered and labor biased language alone cannot end racial-gendered biases in immigration law. To totally remove biases from immigration law will require a complete social overhaul of existing racial-gendered and labor systems. However, this Comment aims to move both laws and society toward a more equitable immigration system by starting with the easiest step, adjusting the legal language and how it is implemented.

272. Objective measures must go beyond demanding more documentation from immigrants, because such documents may not be available, may be costly to get, or may take many years to obtain. *See generally* Ali Reza Yunespour, *Documentation Problems for Asylum Seekers and Refugees from Afghanistan*, REFUGEE COUNCIL AUSTL. 1 (Rev. Oct 2022).

273. *See* Golash-Boza & Hondagneu-Sotelo, *supra* note 51, at 285.