Deporting Undesirable Women

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Immigration law has long labeled certain categories of immigrants "undesirable." One of the longest-standing of these categories is women who sell sex. Current immigration laws subject sellers of sex to an inconsistent array of harsh immigration penalties, including bars to entry to the United States as well as mandatory detention and removal. A historical review of prostitution-related immigration laws reveals troubling origins. Grounded in turn-of-the-twentieth-century morality, these laws singled out female sellers of sex as immoral and as threats to American marriages and families. Indeed, the first such law specifically targeted Asian women as threats to the moral fabric of the United States due to their perceived sexual deviance. Subsequent laws built upon these problematic foundations, largely without reexamining the initial goal of safeguarding American morality from the ostensible sexual threat of noncitizen women. This dark history casts a long shadow, and current laws remain rooted in these archaic notions of morality by continuing to focus penalties on sellers of sex (who tend to be women), without reciprocal penalties for buyers (who tend to be men). Contemporary societal views on sellers of sex have changed, however, as society has come to increasingly tolerate and accept sexual conduct outside the bounds of marriage. Although societal views surrounding prostitution remain complex, there is an increased understanding of the different motivations of sellers of sex, as well as a recognition that individuals forced into prostitution are victims who need protection. Prostitution-related immigration laws should be reformed to no longer penalize sellers of sex, both to bring immigration law in line with modern attitudes towards sellers of sex and to mitigate the discriminatory effect of the archaic and

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gendered moral underpinnings that initially gave rise to and continue to show in these laws.

INTRODUCTION

Ms. Zhang[1] is a Chinese woman who fled to the United States over twenty years ago to escape horrific persecution. She was granted asylum, but her story does not end there. Ms. Zhang struggled to get on her feet in the United State as a result of ongoing psychological trauma and limited English proficiency. A few years after she received asylum, Ms. Zhang had her first contact with the criminal justice system when she was arrested in a neighborhood known for prostitution.[2] She was

1. Name has been changed to protect her privacy.

2. This Article will use the term "prostitution" to refer to the sale of sexual services, which is the term used in immigration and criminal laws. This Article will use the term "sellers of sex" to refer to individuals who provide sexual services in exchange for money, goods, or services, including both those who sell sex as a result of force, fraud, or coercion, and those who choose to sell sex. This Article

not convicted of any crime. It is not clear whether Ms. Zhang in fact engaged in any prostitution-related activities. However, over the next few years, due to her actions or perhaps the fact that she was in locations where prostitution occurred or was now suspected by the police to be involved in prostitution, she continued to be targeted for arrest.[3] She was convicted of a few prostitution-related misdemeanors for intent to engage in prostitution. Ms. Zhang served hardly any prison time.

Ms. Zhang applied for lawful permanent resident status and her application was denied due to her prostitution-related convictions.[4] Although the Department of Homeland Security (DHS) often initiates removal proceedings after denying applications for such status, it did not try to deport Ms. Zhang because prostitution-related crimes are not considered serious enough to warrant the deportation of an asylee who fears persecution in her home country.[5] Almost a decade later, after no new contacts with the criminal justice system, Ms. Zhang again applied for lawful permanent resident status, and her application remains pending. If it is approved and she receives lawful permanent resident status, she could face deportation if the police target her again for prostitution-related crimes because lawful permanent residents, unlike asylees, can be deported for prostitution.[6]

Ms. Zhang's experience highlights many of the troubling facets of prostitution-related immigration laws, which have long-labelled noncitizens like her "undesirable."[7] First, there can be grave immigration consequences for selling sex, or even being suspected of selling sex, despite minimal criminal penalties. Second, prostitution-related immigration laws have targeted sellers of sex, who are often female. Third, immigration law treats prostitution-related conduct inconsistently, mandating severe penalties while at the same time providing for relief, waivers, and exceptions.

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acknowledges that prostitution, even when it is a choice, can be exploitative and the result of structures of oppression. *See* Corey S. Shdaimah et al., *Introduction* to CHALLENGING PERSPECTIVES ON STREET-BASED SEX WORK 9 (Katie Hail-Jares et al. eds., 2017) ("[T]his form of work is often exploitative, and in a world that is overwhelmingly capitalist and patriarchal, viewing sex work as a fully free choice separate from structures and mores of oppression may be unrealistic or naive."). This Article does not use "prostitute" (except when referring to or quoting from legislation, case law, or other historical sources), which can be a stigmatizing term that has social and moral undertones. This Article uses "sex worker" or "sex work" only in relation to the voluntary sale of sex as a form of employment.

3. *See infra* note 248 (discussing arrests for prostitution based on stereotyping); *see also* THE URBAN JUSTICE CENTER, REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY 5, 40–42 (2003), http://sexworkersproject.org/downloads/RevolvingDoor.pdf [https://perma.cc/PD5L-W6A4] (describing the harassment of sex workers in the form of false arrests).

4. With her application for permanent resident status, Ms. Zhang applied for a waiver of inadmissibility to overcome her prostitution convictions, but it too was denied. *See infra* note 178 and accompanying text (describing waiver of inadmissibility).

5. *See* Immigration and Nationality Act (INA) § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2012).

6. *See infra* Part II.B (describing the crimes involving moral turpitude ground of deportability).

7. *See infra* Part I (describing how legislators labeled noncitizens involved or suspected of involvement in prostitution "undesirable").

The Immigration and Nationality Act (INA) prescribes significant penalties for prostitution and related conduct. Selling sex can bar noncitizens from entering the United States, through either the denial of a visa or entry at the United States border under the inadmissibility grounds.[8] Prostitution-related activities can trigger removal proceedings to deport a noncitizen, even a lawful permanent resident, under the crimes involving moral turpitude deportability provision.[9] Such activities can also subject a noncitizen to mandatory detention during the pendency of removal proceedings.[10] Notably, certain penalties apply only to sellers of sex, and not to buyers.

To understand the current state of prostitution-related immigration laws, namely the focus on sellers of sex, this Article analyzes the historical development of such laws. Tracing this evolution, Part I shows that prostitution-related immigration laws developed primarily in the late 1800s and early 1900s to respond to the singular concern about the threat of the sexuality of noncitizen women to American morality. Part II analyzes the current legal landscape of prostitution-related immigration laws, which reveals that these morality-based origins continue to permeate the laws through a continued targeting of sellers of sex, generally women. Part III discusses contemporary societal perceptions of sellers of sex, illustrated by criminal law, and shows that sellers of sex generally are no longer viewed as immoral even though views on prostitution remain complex. In light of changed perceptions of sellers of sex, Part IV recommends that prostitution-related immigration laws be reexamined and ultimately reformed by Congress and reinterpreted by the courts to no longer penalize sellers of sex.

Especially under the Trump administration, immigration penalties are a real threat to noncitizens suspected of prostitution. Immigration law has long been a tool that has been manipulated to target vulnerable and unpopular groups, and it is now being wielded like a blunt instrument by the Trump administration. Any noncitizen who has a run-in with law enforcement, whether ultimately convicted or not, is at risk of deportation under this administration's policies.[11] These policies

8. *See* INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D); INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I). Admission is defined as "lawful entry of the alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A).

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

10. INA § 236(c)(1)(A), 8 U.S.C. § 1226(c)(1)(A) ("The Attorney General shall take into custody any alien who . . . is inadmissible by reason of having committed any offense covered in section 1182(a)(2) . . . ."). Section 212(a)(2) of the INA includes the prostitution-related ground of inadmissibility, in addition to the crimes involving moral turpitude ground. INA § 212(a)(2), 8 U.S.C. § 1182(a)(2).

11. This administration is explicitly targeting for removal noncitizens who "have been convicted of *any* criminal offense" and noncitizens who "have been *charged* with *any* criminal offense that has not been resolved." *See* Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs and Border Prot. et al., Enforcement of the Immigration Laws to Serve the National Interest 2 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [https://perma.cc/PT3W-DPY6] (emphasis added). Fears of deportation are not unfounded—

are especially problematic in the context of prostitution, where a conviction is not needed for immigration penalties to attach, and where women like Ms. Zhang can be arrested and charged, but later have their charges dropped.[12] Eliminating immigration penalties for prostitution thus offers a small but significant step towards protecting vulnerable populations that have had a long history of being targeted by morality-based provisions.

I. HISTORY OF PROSTITUTION-RELATED IMMIGRATION LEGISLATION

Prostitution-related immigration laws have a dark history—under the justification of protecting "American" morality, they labeled noncitizen women as "undesirable" and targeted them for their perceived sexuality.[13] Conceptions of American morality around the turn of the twentieth century accepted sexual intercourse only within the confines of monogamous marriage. Even when they were forced into prostitution, women, especially noncitizen women, were blamed as the primary threats to monogamous marriage, rather than the men who bought sex. The first federal prostitution-related immigration law in 1875 targeted noncitizen women, focusing on Chinese women, who were viewed as sexually deviant and thus serious threats to white families.[14] The bulk of prostitution-related immigration laws developed in the next several decades, continuing to use the protection of American morality as their justification to single out noncitizen women for increasingly harsh penalties.

A. Act Supplementary to the Acts in Relation to Immigration (Page Law) (1875)

The first federal immigration law to target prostitution was the Page Law, enacted in 1875.[15] The Page Law, passed in the context of rising anti-Chinese sentiment, targeted Chinese women as "undesirable" immigrants due to the

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Immigration and Customs Enforcement (ICE) agents have targeted noncitizens at their court appearances, including at the Human Trafficking Intervention Court in New York City, which is designed to provide rehabilitative services to individuals charged with prostitution. *See* Beth Fertig, *When ICE Shows Up in Human Trafficking Courts*, WNYC (June 22, 2017), http://www.wnyc.org/story/when-ice-shows-court/; *see also* Press Release, Immigrant Def. Project, IDP Unveils New Statistics & Trends Detailing Statewide ICE Courthouse Arrests in 2017 (Dec. 31, 2017), https://www.immigrantdefenseproject.org/wp-content/uploads/ICE-Courthouse-Arrests-Stats-Trends-2017-Press-Release-FINAL.pdf [https://perma.cc/6Y3G-LC8A] (reporting over 1200% increase from 2016 to 2017 in reports of ICE arrests or attempted arrests in New York courts).

12. *See* JOHN F. DECKER, PROSTITUTION: REGULATION AND CONTROL 104–06 (1979); *supra* note 3 (describing false arrests to harass individuals suspected of prostitution and arrests based on stereotyping). Additionally, because a conviction is not needed to trigger the prostitution inadmissibility ground, even an arrest for prostitution can arouse the suspicion of immigration officials and adjudicators. *See infra* note 128 and accompanying text.

13. *See generally* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 647 (2005) ("[R]egulation of marriage and the family and the implementation of population policy are at the root of much of American immigration law.").

14. Act Supplementary to the Acts in Relation to Immigration (Page Law), ch. 141, 18 Stat. 477 (1875) (repealed 1974); *see also infra* Part I.A (discussing the legislative history of the Page Law).

15. 18 Stat. 477.

perceived threat they posed to American morality through their potential to bring prostitution to the United States and thereby corrupt white families.[16]

The Page Law restricted the entry of women coming to the United States to engage in prostitution, and specifically targeted women from East Asia for additional restrictions.[17] Section 5 made it unlawful for "women 'imported for the purposes of prostitution'" to "immigrate into" the United States.[18] Noncitizens were subject to screening upon arrival in the United States to determine whether they were coming for purposes of prostitution.[19] Section 1 specifically targeted individuals from "China, Japan, or any Oriental country" for additional screening at a port of embarkation to determine whether they had "entered into a contract or agreement . . . for lewd and immoral purposes."[20] Women from these Asian countries needed to obtain certificates of immigration before embarking for the United States.[21] This section also criminalized the importation of women into the United States for the purposes of prostitution.[22]

Rising anti-Chinese sentiment in the wake of increased Chinese immigration to the United States was the backdrop for the Page Law, as white Americans felt threatened by the changing character of California.[23] Less than a decade after the enactment of the Page Law, Congress passed the infamous Chinese Exclusion Act in 1882, which further codified this anti-Chinese sentiment by halting the immigration of Chinese laborers to the United States, in addition to barring Chinese individuals from naturalizing.[24] In the midst of this anti-Chinese hostility, the Page

16. Not only was the Page Law the first federal immigration law to target prostitution, it was also the first federal immigration law to restrict generally the entry of "undesirable" noncitizens into the United States. *See* E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965, at 66 (1981) ("From this beginning [the 1875 Act], exclusion was to develop into a major instrument of immigration policy."). Before 1875, states generally individually regulated immigration. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 19–43 (1996) (describing state laws regulating immigration prior to the Page Law); Abrams, *supra* note 13, at 645, 664–77 (same).

17. In addition to prostitution, the Page Law also imposed penalties on the importation of coolie labor, which had previously been criminalized by the Coolie Trade Prohibition Act. *See* §§ 2, 4, 18 Stat. 477; Act of Feb. 19, 1862 (Coolie Trade Prohibition Act), ch. 27, 12 Stat. 340 (repealed 1974); *see also* RONALD J. TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 36 (1990) (defining the term "coolie" as "unfree laborers who had been kidnapped or pressed into service by coercion and shipped to foreign countries").

18. § 5, 18 Stat. 477.

19. *Id.* This screening upon arrival in the United States was not limited to Asian women. *See id.*

20. *Id.* § 1; *see also* Abrams, *supra* note 13, at 641, 695–96.

21. § 1, 18 Stat. 477; *see also* Abrams, *supra* note 13, at 698–702 (discussing immigration process for Chinese women under Page Law).

22. § 3, 18 Stat. 477 (making it a felony for "knowingly and willfully import[ing], or caus[ing] any importation of, women into the United States for the purposes of prostitution . . . ."). In addition to targeting prostitution, the Page Law made it unlawful for "persons . . . undergoing a sentence for conviction in their own country of felonious crimes" to enter the United States, excluding political prisoners. *Id.* § 5.

23. The first Chinese immigrants arrived in California in the late 1840s, and by 1880, there were over 75,000 Chinese immigrants in California. *See* Abrams, *supra* note 13, at 649–50.

24. Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943).

Law was passed to protect white American families from the perceived sexual threat of Chinese women.[25] The perceived threat was two-fold—the threat that permitting the entry of Chinese women would bring prostitution to the United States as well as lead to the birth of Chinese-origin United States citizens, further decreasing the percentage of white Americans and changing the character of the electorate on the West Coast.[26]

Before the passage of the Page Law, President Ulysses Grant addressed Congress in 1874, calling for immigration legislation against the "evil practice" of prostitution by Chinese women.[27] He explained that "[h]ardly a perceptible percentage of [Chinese women] perform any honorable labor, but they are brought for shameful purposes, to the disgrace of the communities where settled and to the great demoralization of the youth of these localities."[28] The legislative history of the Page Law mirrors President Grant's views and shows that the legislation's uncontroversial goal was to protect white families from the perceived sexual deviance of Chinese women by restricting their immigration.[29] California Congressman Horace F. Page, the bill's sponsor, explained the purpose of the Page Law as curbing the decline that Chinese women were causing in the morality of white Americans in California. He described white Americans as "stout-hearted

25. In particular, Americans focused on the differences between prevailing sexual norms in China and the United States—most notably prostitution, but also concubinage and polygamy, which were accepted in Chinese society. *See* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 136 (2000); Abrams, *supra* note 13, at 642–43. In 1870, an estimated fifty to seventy percent of the over two thousand Chinese women living in San Francisco were sellers of sex. *See* GEORGE ANTHONY PEFFER, IF THEY DON'T BRING THEIR WOMEN HERE: CHINESE FEMALE IMMIGRATION BEFORE EXCLUSION 6, 11, 124 n.13 (1999); BENSON TONG, UNSUBMISSIVE WOMEN 15 (1994); JUDY YUNG, UNBOUND FEET: A SOCIAL HISTORY OF CHINESE WOMEN IN SAN FRANCISCO 19, 45–46, 320 n.89 (1995). *But see* COTT, *supra* note 25, at 137 ("The Page Act was sparked less by the scale of Chinese prostitution, which was small, than by what it banefully represented.").

26. *See* Abrams, *supra* note 13, at 661–63 (arguing that Chinese women who emigrated to the United States were viewed as presenting a "threat of reproduction" through the potential for the birth of Chinese-origin United States citizens and for miscegenation).

27. *Id.* at 691 (quoting 3 CONG. REC. 3–4 (1874)).

28. *Id.* (quoting 3 CONG. REC. 3–4 (1874)); *see also* HUTCHINSON, *supra* note 16, at 65 (citing S. 971, 37th Cong. 1188 (1861); H.R. 1588, 37th Cong. 3895 (1861)). Even though there was a recognition that Chinese women could be forced or coerced into prostitution, they were nevertheless viewed as a threat because their perceived "slavish character" made them more susceptible to being forced or coerced. *See* Abrams, *supra* note 13, at 658 ("White women 'so much better understood' their rights that they were less likely to be duped into indentured servitude and were therefore less of a moral threat" (quoting S. REP. NO. 44-689, at 146–48 (1877) (statement of Alfred Clarke, Clerk at the San Francisco Police Department)).).

29. *See* COTT, *supra* note 25, at 137–38 ("The Chinese prostitute, standing outside of and boding no good for Christian-model monogamy, signified the threat to American values in Chinese immigration . . . ."); Abrams, *supra* note 13, at 692–95 (detailing legislative history); *supra* note 25 (describing the differences in sexual norms between the United States and China and providing estimates of the rate of prostitution among Chinese women in San Francisco); *see also* STAFF OF H. COMM. ON THE JUDICIARY, 100TH CONG., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT: HISTORICAL BACKGROUND AND ANALYSIS 7 (Comm. Print 1988) ("[The Page Law] was unaccompanied by printed reports or any House or Senate floor debate, apparently because of its noncontroversial nature.").

people" who had come to California "with their wives and children," but were now threatened by a "deadly blight."[30] His bill aimed to "'place a dividing line between vice and virtue' and 'send the brazen harlot who openly flaunts her wickedness in the faces of our wives and daughters back to her native country.'"[31] Senator Cornelius Cole described Chinese women as "the most undesirable of population, who spread disease and moral death among our white population."[32] These statements, which cast blame for prostitution solely upon noncitizen women, conspicuously fail to mention the role of buyers, a pervasive theme in prostitution-related immigration legislation.

The practical effect of the Page Law was an almost complete halt of the immigration of Chinese women.[33] The Page Law, which remained on the books for almost a century, was only the beginning of morality-based immigration legislation targeting noncitizen women as the bad actors.

B. An Act to Regulate the Immigration of Aliens into The United States (1903)

In 1903, Congress passed a comprehensive piece of immigration legislation that strengthened the provisions of the Page Law for the same purpose—to protect American morality from noncitizen women.[34] This law did not single out any particular race like the Page Law and was used to begin targeting new communities of immigrants from southern and eastern Europe in addition to Asian women.[35]

The 1903 Act enumerated expansive "classes of aliens" who were "excluded from admission into the United States."[36] These classes included "prostitutes, and persons who procure or attempt to bring in prostitutes or women for the purpose of prostitution."[37] This inclusion was uncontroversial—the legislative history found

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30. Abrams, *supra* note 13, at 694 (quoting 3 CONG. REC. APPX. 44 (1875)).

31. *Id.* at 692–95 & n.331 (quoting 3 CONG. REC. APPX. 44 (1875)).

32. Abrams, *supra* note 13, at 663 (quoting *Cornelius Cole: The Senator Interviewed by a Chronicle Reporter*, S.F. CHRON., Oct. 23, 1870, at 1).

33. *See* COTT, *supra* note 25, at 138 (discussing the impact of the Page Law on the population of Chinese women in California); PEFFER, *supra* note 25, at 9 (describing how government officials "demonstrated a consistent unwillingness, or inability, to recognize [Chinese] women who were not prostitutes among all but wealthy applicants for immigration"); Todd Stevens, *Tender Ties: Husbands' Rights and Racial Exclusion in Chinese Marriage Cases, 1882–1924*, 27 L. & SOC. INQUIRY 271, 272 (2002) (identifying one of the reasons that low numbers of Chinese women immigrated to the United States as "restrictive U.S. immigration laws, especially those concerning prostitution").

34. Immigration Act of 1903 (An Act to Regulate the Immigration of Aliens into the United States), ch. 1012, 32 Stat. 1213; *see also infra* notes 35, 42–44 and accompanying text (discussing the motivations underlying the passage of the 1903 Act).

35. *See* MARTHA GARDNER, THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870–1965, at 60–62 (2005) ("When the Immigration Acts of 1903, 1907, and 1910 reiterated general restrictions against prostitutes, the application of the policy was redirected toward new European arrivals.").

36. § 2, 32 Stat. 1213. The March 3, 1891 Act first enumerated a class of noncitizens excluded from admission. Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084.

37. § 2, 32 Stat. 1213; *see also* S. REP. NO. 80-1515, at 355 (1950) ("The barring of immigrants on moral grounds was among the very first exclusion clauses."). A conviction for prostitution was not required for exclusion, which remains the law today under the prostitution-related

it "unnecessary to offer any justification for adding such aliens to the excluded classes, since they . . . conduce to the moral and physical degradation of the American people."[38] The 1903 Act explicitly shifted the focus of prostitution-related immigration laws to admission and exclusion.[39]

Although the 1903 Act removed some of the explicit references to women, it still continued to single them out, implying only women could be sellers of sex.[40] It also retained the language from the Page Law making it a felony for anyone to import into the United States "any *woman or girl* for the purposes of prostitution."[41]

The 1903 Act's prostitution-related provisions continued to reflect concern over the threat of prostitution by noncitizen women to American morality.[42] Leading to the passage of the 1903 law, President Theodore Roosevelt encouraged Congress to take action in his annual message in 1901, finding the "present immigration laws unsatisfactory."[43] He specifically encouraged Congress to "aim to exclude absolutely . . . all persons who are of a low moral tendency or of unsavory reputation."[44] The Industrial Commission, a government agency tasked with producing reports on various issues including immigration, recommended in 1902 in a draft bill that Congress exclude "prostitutes and persons who procure or attempt to bring in prostitutes or women for the purpose of prostitution," which is language that was adopted wholesale in the 1903 Act.[45]

The morality-based rationale for prostitution-related immigration laws thus persisted, continuing to point the finger at noncitizen women. Fears surrounding

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inadmissibility ground. *See infra* text accompanying note 128. In addition to prostitutes, "idiots, insane persons . . . ; persons likely to become a public charge; . . . polygamists, anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States . . . ." were also included in the classes of aliens to be excluded admission. § 2, 32 Stat. at 1213. This Act also included a deportation provision within two years after entry for any noncitizen who entered the United States "in violation of the law." *Id.* § 20.

38. *See* S. REP. NO. 57-2119, at 2 (1902). The legislative history also justified these provisions because such noncitizens could "become public charges within a short time . . . ." *Id.*

39. *See* § 2, 32 Stat. 1213. Legislative history noted the failure of the Page Law to directly address admission. *See* 35 CONG. REC. 5764 (1902) ("The part of the bill in relation to prostitutes and procurers is to complete the evident purpose of the act of March 3, 1875, which makes the importation of such aliens a felony, but omits to provide for rejection at ports of the United States."). The 1903 Act retained criminal penalties for "the importation into the United States of any woman or girl for the purposes of prostitution . . . ." § 3, 32 Stat. 1213.

40. *See supra* text accompanying note 37. Some references to sellers of sex in the 1903 Act were gender-neutral, whereas the Page Law referred only to women. *Compare* Page Law, ch. 141, § 5, 18 Stat. 477 (1875) (repealed 1974), *with* § 2, 32 Stat. 1213.

41. *See* § 3, 32 Stat. 1213 (emphasis added).

42. These concerns may have been unfounded. *See* Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 766–68 & n.29 (2006) (summarizing the scholarship on whether early-twentieth century reformers identified a true problem or stirred up an unfounded moral panic).

43. HUTCHINSON, *supra* note 16, at 127 (quoting 57 CONG. REC. 35 (1901)).

44. *Id.* (quoting 57 CONG. REC. 35 (1901)).

45. *Id.* at 128–29 (citing FINAL REP. OF THE INDUS. COMM'N, VOL. XIX, H.R. DOC. NO. 380, at 1015 (1902)).

the sexuality of noncitizen women only served to make subsequent laws more stringent.

C. An Act to Regulate the Immigration of Aliens into the United States (1907) and Amendments (1910)

Several years later, Congress passed comprehensive immigration legislation in 1907 and amendments in 1910, which again toughened the provisions related to prostitution. The purpose of these laws continued to be the protection of Americans from the "undesirable" sexual practices of noncitizen women, who were labeled as bad actors even in cases of forced prostitution.[46]

Whereas previous laws focused on exclusion at the border, the 1907 Act added a deportation provision, which enabled immigration officers to enforce prostitution-related immigration laws in the interior of the United States for conduct committed after entry. Section 3 of the 1907 Act provided that "any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States, and shall be deported . . . ."[47] A conviction for prostitution was not required before a noncitizen female could be deported.[48] This deportation provision reflected Congress's new interest in monitoring the behavior of noncitizens after entry into the United States.

Women continued to be singled out as sellers of sex. The 1907 Act retained the exclusion provisions from prior legislation and continued to prohibit women and girls from entering the United States for the purpose of prostitution.[49] Congress also inserted a new provision to exclude "women or girls coming into the United States . . . for any other immoral purpose," a catchall term for other undesirable sexual practices.[50] The 1907 Act also modified and broadened the criminal provisions related to the importation of women and girls into the United States for

46. *See* Act of Feb. 20, 1907 (An Act to Regulate the Immigration of Aliens into the United States), ch. 1134, 34 Stat. 898; *infra* note 52 and accompanying text.

47. § 3, 34 Stat. 898. From 1908 to 1948, 14,814 noncitizens were deported under the provisions targeting immoral behavior. *See* S. REP. NO. 80-1515, at 873 (1950). This statute also criminalized harboring any alien woman or girl for the purpose of prostitution. *Id.* The Supreme Court held that this portion of the statute was unconstitutional because it encroached on the police powers of the states. Keller v. United States, 213 U.S. 138 (1909). The 1910 amendments to this statute amended the unconstitutional language of the 1907 Act. Act of March 26, 1910 (An Act to Amend an Act Entitled "An Act to Regulate the Immigration of Aliens into the United States"), ch. 128, § 3, 36 Stat. 263; *see also* United States v. Tsuji Suekichi, 199 F. 750, 752 (9th Cir. 1912).

48. *See* Lewis v. Frick, 233 U.S. 291 (1914); *Ex parte* Pouliot, 196 F. 437 (E.D. Wash. 1912).

49. § 2, 34 Stat. 898.

50. *Id.* Legislative history did not illuminate the meaning of the term "immoral purpose." *See* Dubler, *supra* note 42, at 770–71. A House of Representatives Report explained only that this language was added "in order effectively to prohibit undesirable practices alleged to have grown up." *See id.* at 770 (quoting H.R. REP. NO. 59-4558, at 19 (1906)). The Supreme Court later interpreted this term to exclude extramarital relations "short of concubinage." Hansen v. Haff, 291 U.S. 559, 562 (1934).

the purposes of prostitution.[51] However, absent from the Act was any mention of penalties for buyers of sex.

Congress used the 1907 Act to expand the scope of the prostitution-related immigration laws "'in order effectively to prohibit undesirable practices alleged to have grown up.'"[52] Although the statute did not target any particular race, Congress intended to respond to continued concerns about Chinese women entering the United States for prostitution. The Commissioner-General's Annual Immigration reports in the years prior to the 1907 Act insinuated that marriage was being used as a guise for bringing Chinese women into the United States for prostitution.[53]

Case law also posits that concerns over the sexuality of noncitizen women was the primary motivator for the sexual conduct-related provisions in the 1907 Act. The Supreme Court in *United States v. Bitty*, a case pertaining to the "immoral purpose" language in the 1907 Act, explained that "Congress, no doubt, proceeded on the ground that contact with society on the part of alien women [involved in prostitution] would be hurtful to the cause of sound private and public morality and to the general well-being of the people."[54] The Court specifically noted that prostitutes and concubines "must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse."[55]

The 1910 amendments to the 1907 Act reflected growing concerns over the corrupting influence of prostitution by noncitizen women. These amendments came in the wake of President Taft's first annual message to Congress, which

51. In addition to criminalizing the importation of any alien woman or girl for the purpose of prostitution, it criminalized the importation of any alien woman or girl "for any other immoral purpose." § 3, 34 Stat. 898. It also criminalized "directly or indirectly" importing or attempting to import any such person. *Id.* It newly criminalized harboring any alien woman or girl for the purpose of prostitution or any other immoral purpose within three years of her entry into the United States. *Id.*

52. Dubler, *supra* note 42, at 770 (quoting H.R. REP. NO. 59-4558, at 19 (1906)); *see also* H.R. REP. NO. 59-3021, at 19 (1906) ("Section 3. In this section it is attempted to extend the scope of the law, so far as it relates to the immigration of prostitutes, in order effectively to prohibit undesirable practices alleged to have grown up."); H.R. REP. NO. 59-4558, at 2 (1906) ("Section 3: Strengthens the provisions with regard to the importation of prostitutes.").

53. *See* CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP 30 (1998) (citing TREASURY DEP'T, ANNUAL REPORT OF THE COMMISSIONER-GENERAL OF IMMIGRATION (1907); TREASURY DEP'T, ANNUAL REPORT OF THE COMMISSIONER-GENERAL OF IMMIGRATION (1906)); Stevens, *supra* note 33, at 291–92 (citing TREASURY DEP'T, ANNUAL REPORT OF THE COMMISSIONER-GENERAL OF IMMIGRATION 460 (1901)).

54. United States v. Bitty, 208 U.S. 393, 401 (1908). This case showed some recognition of the role of men in illicit sexual intercourse, allowing for the prosecution of a man who "imported" a noncitizen woman for "an immoral purpose, namely [to] live with him as his concubine." *Id.* at 399–400 (internal quotation marks omitted).

55. *Id.* at 402.

expressed the need for additional legislation against the importation of prostitutes into the United States.[56]

Retaining the prostitution-related exclusion grounds from the 1903 Act, the 1910 amendments expanded existing deportation provisions to further control the conduct of noncitizens after entry into the United States.[57] The amendments mandated the deportation of any noncitizen who at any time was "found an inmate . . . of a house of prostitution or practicing prostitution after such alien shall have entered the United States."[58] The amendments removed the temporal limitation of three years after entry from the 1907 Act, making the deportation provisions significantly harsher for noncitizens involved in prostitution as compared to other classes of noncitizens subject to deportation for conduct after entry.[59] Other noncitizens, including perpetrators of violent crimes, were protected by time limits.[60]

Although they made penalties harsher, the amendments removed some gendered language from the prostitution-related laws. Specifically, the amendments replaced the reference to women and girls as prostitutes from the deportation provisions with "[a]ny alien,"[61] which was recommended by the Immigration Commission as a result of findings that males were also coming into the United

56. *See* HUTCHINSON, *supra* note 16, at 146 ("[President Taft] mentioned immigration [in his first annual message] only in connection with the need for legislation against the importation of prostitutes.").

57. *See* Act of March 26, 1910 (An Act to Amend an Act Entitled "An Act to Regulate the Immigration of Aliens into the United States"), ch. 128, § 2, 36 Stat. 263. The amendments mandated deportation for a broader class of individuals involved in prostitution, including noncitizens who managed houses of prostitution, received any part of the earnings of a prostitute, and protected prostitutes from arrest. *Id.* § 3. Congress also targeted prostitution in the interior of the United States through the Mann Act, or White Slave Traffic Act in 1910, which prohibited the importation and interstate transportation of women for immoral purposes. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)). Congress passed the Mann Act in direct response to growing hysteria that white women were being forced into prostitution and that prostitution by noncitizens was corrupting American morality. *See* GARDNER, *supra* note 35, at 51, 60 ("[C]hanging conceptions of racial otherness and anxieties about the white American family intersected with long-held concerns over the moral conduct of immigrants to produce the 'white slavery' panic."). *See generally* BRIAN DONOVAN, WHITE SLAVE CRUSADES: RACE, GENDER, AND ANTI-VICE ACTIVISM 1887–1917 (2006) (analyzing anti-vice campaigns to combat "white slavery" and their impact on racial hierarchy and categorization in the United States).

58. § 3, 36 Stat. 263.

59. *See id.*

60. *See* Act of Feb. 20, 1907 (An Act to Regulate the Immigration of Aliens into the United States), ch. 1134, §§ 20–21, 34 Stat. 898.

61. *Compare* § 3, 36 Stat. 263, *with* § 3, 34 Stat. 898.

States for prostitution.[62] However, references to women and girls remained in the exclusion provisions.[63]

Legislative history continued to refer to prostitution using a morality-based framing. Prostitution was "an evil,"[64] and the 1910 Amendments were touted as an "aid . . . in putting out this immoral fire that is now burning the very vitals out of society."[65] Immigration laws were increasingly used to target Japanese women, many of them coming to join their husbands in the United States. They were accused of misusing marriage to come to the United States for prostitution and accordingly were disproportionately barred from admission or deported as prostitutes around this time.[66] Public rhetoric on Japanese women mirrored earlier language used to describe Chinese women—William Gates, secretary of the California State Board of Charities and Corrections, stated in 1907 in a national address that "the Japanese are but little better than the Chinese," and that it was "safe to say that far more than a majority of these females were prostitutes."[67]

Legislative history shows recognition that women involved in prostitution could be victims, but there was no suggestion of relief or exceptions to penalties for such women. One representative described some women imported for prostitution as an "unfortunate class" and as "unwary and unsuspecting victim[s] . . . [who]

62. *See* 45 CONG. REC. 518 (1910) (statement of Rep. Bennet) ("[F]or those reasons which will be noted by those who have read the Immigration Commission's report, we drop the words 'women and girls' from the bill and make the law apply to all aliens who are imported for immoral purposes."); U.S. IMMIGRATION COMM'N, IMPORTING WOMEN FOR IMMORAL PURPOSES: A PARTIAL REPORT FROM THE IMMIGRATION COMMISSION ON THE IMPORTATION AND HARBORING OF WOMEN FOR IMMORAL PURPOSES, S. DOC. NO. 61-196 at 35 (1909) ("Both from the investigations of the commission and those of the Bureau of Immigration, it is clear that there is a beginning, at any rate, of a traffic in boys and men for immoral purposes. . . . [O]ur laws should be so amended as to apply to all persons engaged in immoral practices."). *But see* GARDNER, *supra* note 35, at 63 n.36 (discussing the lack of immigration investigations into male prostitution).

63. *See* § 2, 36 Stat. 263.

64. 45 CONG. REC. 519 (1910) (statement of Rep. Goebel).

65. *Id.* at 547 (statement of Rep. Cox).

66. *See* GARDNER, *supra* note 35, at 38–45 & n.18. Some Japanese women were coming to the United States as "picture" brides, marrying via proxy marriage Japanese men living in the United States. *See* COTT, *supra* note 25, at 151–55 (describing the "picture bride" marriage practice and the immigration response by the United States government). The Dillingham Commission, *see infra* note 70 and accompanying text, expressed concerns about the legitimacy of Japanese wives coming to join their husbands, stating that "a large majority of women coming in this way are intended for the purposes of prostitution." U.S. IMMIGRATION COMM'N, 61ST CONG., IMPORTATION AND HARBORING OF WOMEN FOR IMMORAL PURPOSES, vol. 19, at 69 (1911) (presented by Mr. Dillingham); *see also* HARRY A. MILLIS, THE JAPANESE PROBLEM IN THE UNITED STATES: AN INVESTIGATION FOR THE COMMISSION ON RELATIONS WITH JAPAN APPOINTED BY THE FEDERAL COUNCIL OF THE CHURCHES OF CHRIST IN AMERICA 234 (1915) ("Until recently advantage was taken of the admission of 'picture brides' to bring into this country women to be used for immoral purposes.").

67. GARDNER, *supra* note 35, at 57 (quoting W. Almont Gates, Oriental Immigration on the Pacific Coast: An Address Delivered at the National Conference of Charities and Correction at Buffalo, (June 10, 1909)); *see also* SIDNEY LEWIS GULICK, THE AMERICAN JAPANESE PROBLEM: A STUDY OF THE RACIAL RELATIONS OF THE EAST AND THE WEST 15 (1914) ("Japanese are also charged with lack of all ideas of sex morality . . . . Japanese women are so subservient that they easily become prostitutes.").

become[] the property of some debauchee or inhuman monster" upon arrival in the United States.[68] However, he incongruously promoted a "statute strong and powerful enough to enable the Government to deport persons who, by fraud or otherwise, enter the ports of the United States for the purposes of prostitution."[69] A report by the Dillingham Commission, created by the 1907 Act to investigate immigration,[70] found that some women were forced into prostitution. However, it too recommended heightened screening at ports of entry for deportation and other penalties.[71] The report also recommended removal of the three-year limitation after entry on deportation of sellers of sex, which Congress adopted in the 1910 amendments.[72] Blame for prostitution was still being leveled at female sellers of sex regardless of whether their participation was volitional, due to a singular focus on the perceived moral harm of prostitution.

D. Immigration Act of 1917

The comprehensive Immigration Act of February 5, 1917 modified the Act of 1907 as amended in 1910.[73] The 1917 Act "was designed primarily to exclude aliens with physical, mental, or moral disqualifications . . . ."[74] The legislative history continued to reflect a consensus that noncitizens coming to the United States for prostitution were among the most undesirable immigrants.[75] Prostitutes thus remained an excludable class within the 1917 Act, but the earlier references to women and girls in the exclusion provisions were removed to allow the immigration laws to capture men.[76]

The 1917 Act provided additional immigration penalties for prostitution which were inapplicable to noncitizens who committed other crimes, including

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68. 45 CONG. REC. 547 (1910) (statement of Rep. Cox).

69. *Id. But see* 45 CONG. REC. 548 (1910) (statement of Rep. Mann) ("[U]nder the provision if an alien woman comes here innocent and young and an American citizen debauches her, she is to be sent abroad on the world, although the fault is laid at our door; . . . [s]educed by an American citizen, led by an American citizen into prostitution, she would be sent out of the country by this enlightened country.").

70. *See* Act of Feb. 20, 1907 (An Act to Regulate the Immigration of Aliens into the United States), ch. 1134, § 39, 34 Stat. 898 (creating Dillingham Commission for study of immigration).

71. U.S. IMMIGRATION COMM'N, REPORT ON THE IMPORTATION AND HARBORING OF WOMEN FOR IMMORAL PURPOSES, S. DOC. No. 61-196, at 36–38 (1909).

72. *Id.* at 37.

73. Immigration Act of 1917, 39 Stat. 874.

74. S. REP. NO. 80-1515, at 66 (1950).

75. *See* 52 CONG. REC. 348 (1914) (statement of Sen. Reed) ("Against the exclusion of that class of people [including prostitutes] there is not now and has not been a single word of protest upon the floor of the Senate."); *see also id.* (describing prostitutes as in a class of noncitizens who are "evilly disposed, . . . vicious, . . . [and] wicked.").

76. *See* S. REP. NO. 63-355, at 4 (1914) (explaining that the purpose of the substitution of "persons" for "women and girls" in the "immorality" exclusion grounds was "to include males as well as females in the class"). *Compare* § 3, 39 Stat. 874, *with* White-Slave Traffic (Mann) Act, ch. 395, § 2, 36 Stat. 263 (1910). The classes of excludable aliens enumerated in the 1917 Act remained in effect until 1952. *See* S. REP. NO. 80-1515, at 335 (1950) ("The excludable classes were assembled in the act of February 5, 1917, which is presently in effect" (citation omitted).).

violent crimes, showing Congress still considered prostitution to be one of the most serious crimes for immigration purposes.[77] First, this Act marked as deportable any noncitizen who had previously been excluded or deported as a prostitute or procurer or for participating in any activity related to the business of prostitution or importation for prostitution.[78] Second, it disallowed relief from exclusion or deportation for "a female of the sexually immoral classes" by denying such a woman citizenship if she married a United States citizen after her arrest or her commission of acts that would subject her to exclusion or deportation.[79] Third, the 1917 Act added criminal penalties for noncitizens who returned or attempted to return to the United States after they had been excluded or deported under the Act's provisions "which relate to prostitutes, procurers, or other like immoral persons."[80] Other criminal activity was not subject to this harsher treatment.[81]

Between 1917 and 1952, there were only a few changes to the statutory scheme pertaining to prostitution. These changes continued the trend of imposing additional immigration penalties on noncitizens involved in prostitution by making them ineligible for certain forms of immigration relief.[82]

E. Immigration and Nationality Act (McCarran-Walter Act) (1952)

The next major legislation after the 1917 Act was the Immigration and Nationality Act of 1952, also known as the McCarran-Walter Act, which continues to provide the framework for current immigration laws.[83] This Act made several

77. § 19, 39 Stat. 874; *see also supra* text accompanying notes 59–60. The 1917 Act also made harsher the penalties for crimes involving moral turpitude, providing for the first time for the deportation of noncitizens who committed crimes involving moral turpitude. *See* § 19, 39 Stat. 874; S. REP. NO. 352 (1916).

78. § 19, 39 Stat. 874.

79. *Id.* At this time, women who were not subject to the racial bars to naturalization automatically received citizenship upon marriage to a United States citizen. *See* Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604, 604; *see also* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 419–39 (2005) (discussing the 1855 Act and subsequent laws on citizenship via marriage). There was some objection to an earlier version of the provision, which more broadly prevented a "female of the sexually immoral" classes from obtaining citizenship upon marriage to a United States citizen. *See* 53 CONG. REC. 5173 (1916) (statement of Rep. Bennet) ("[I]t seems to me that the provision ought to be stricken out. . . . You are putting under the chance of blackmail every alien woman who hereafter marries an American citizen, although she may be chaste as the driven snow, because any [person] who has a grudge or prejudice, or simply desires money . . . can cast a doubt on [her] citizenship . . . .").

80. § 4, 39 Stat. 874. The 1917 Act provided for a term of imprisonment of not more than two years. *Id.*

81. *See id.*

82. *See* Immigration Act of May 26, 1924, Pub. L. 68-139, § 214, 43 Stat. 153 (precluding prostitutes, among others, from voluntary departure, which allows certain noncitizens in removal proceedings to leave the United States without the entry of a final order of removal); Alien Registration Act, § 20, Pub. L. 76-670, ch. 439, 54 Stat. 670, 670–71 (1940) (precluding prostitutes, among others, from suspension of deportation, which allowed immigration officials to exercise discretion to suspend the deportation of certain noncitizens who were otherwise deportable).

83. Immigration and Nationality Act (McCarran-Walter Act), Pub. L. 82-414, ch. 477, 66 Stat. 163 (1952). This Act superseded the 1917 Act. *See id.*

changes to the prostitution-related provisions but retained some of the language from prior legislation.[84]

The McCarran-Walter Act expanded penalties for prostitution-related activities in several ways. First, the Act expanded the classes of noncitizens who are ineligible to receive visas and who are excluded from admission to include those who "have engaged in prostitution, or aliens coming to the United States solely, principally, or incidentally to engage in prostitution."[85] This Act newly barred noncitizens who had engaged in prostitution in the past, whereas prior legislation focused on present conduct through its exclusion of "prostitutes." The Act further broadened the scope of the prostitution exclusion provision by encompassing any noncitizen who has engaged in prostitution as well as any noncitizen coming to the United States to engage in the practice whether or not it be the noncitizen's principal purpose of entry, no longer requiring a noncitizen to be a "prostitute."[86] It also precluded an additional class of noncitizens in a catchall provision for "[a]liens coming to the United States to engage in any immoral sexual act."[87]

Second, the McCarran-Walter Act widened the scope of the deportability grounds related to prostitution, encompassing past actions related to prostitution as well as prostitution after entry. Whereas prior legislation had made deportable "any alien who shall be found an inmate . . . of a house of prostitution," the McCarran-Walter Act made deportable any noncitizen who became a member of the prostitution-related exclusion class, in other words any noncitizen who "is a prostitute, has engaged in prostitution, or is coming to the United States to solely, principally, or incidentally to engage in prostitution."[88] Despite the expansion of

84. *See In re* R-M-, 7 I. & N. Dec. 392, 395 (BIA 1957) (noting that the 1952 version of the procurement-related law "is exactly the same as the provision in the parallel statute of preexisting law, namely, section 3 of the Immigration Act of February 5, 1917, *except* that the first word 'persons' was changed to 'aliens'").

85. § 212(a), 66 Stat. 163, 182–87.

86. *See infra* notes 100–101 and accompanying text (describing the difficulty of deporting a noncitizen woman as a "prostitute"). This language specifying that prostitution could be an ancillary reason for entry was included to overcome the Supreme Court's decision in *Hansen v. Haff*, 291 U.S. 559, 562 (1934), which required that an "immoral purpose" be the purpose of a noncitizen's entry for the provision to apply. *See* S. REP. NO. 81-1515, at 357–58 (1950) (recommending that "excludable class should include persons who seek to enter the United States to engage in any illicit sexual act or other immoral act, whether that purpose be the sole, principal, or incidental purpose of their entry . . . [to] overcome the decision of the Supreme Court in *Hansen v. Haff*").

87. § 212(a)(13), 66 Stat. 163, 183. The McCarran-Walter Act failed to include language about noncitizens coming "solely, principally, or incidentally" to engage in illicit behavior in § 212(a)(13). *See id.* Therefore, the Supreme Court's holding in *Hansen v. Haff*, *see supra* note 86, continued to apply to this subsection. *See* STAFF OF H. COMM. ON THE JUDICIARY, 100TH CONG., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT: HISTORICAL BACKGROUND AND ANALYSIS 115–16 (Comm. Print 1988) (describing how § 212(a)(13) failed to overcome the holding of *Hansen* (citing *In re* B-, 5 I. & N. Dec. 185 (BIA 1953)).

88. *Compare* White-Slave Traffic (Mann) Act, ch. 395, § 3, 36 Stat. 263 (1910), *with* § 241(a)(12), 66 Stat. 163, 207 (citing § 212(a)(12), 66 Stat. 163, 182–83). This section of the McCarran-Walter Act also encompassed procurers, noncitizens who have received the proceeds of prostitution, and noncitizens connected with the management of a house of prostitution. *See* § 241(a)(12), 66 Stat. 163, 207 (citing § 212(a)(12), 66 Stat. 163, 182–83); *infra* text accompanying notes 132–134.

penalties for prostitution-related activities, the McCarran-Walter Act also harmonized some immigration penalties for prostitution and other activities deemed by Congress to be undesirable.[89]

In addition to changing the scope of the prostitution-related immigration provisions, the McCarran-Walter Act also removed the last reference to gender in these provisions.[90] It eliminated the provision that prevented "a female of the sexually immoral classes" from receiving citizenship if she married a United States citizen after her arrest.[91] Despite this change, legislators and the Board of Immigration Appeals (BIA) continued to refer to sellers of sex as only women until relatively recently.[92]

The legislative history of the McCarran-Walter Act reveals that Congress for the most part did not reexamine whether prostitution continued to warrant severe immigration penalties and whether it continued to be viewed as a serious threat to United States society. Rather, the legislative history shows that prostitution was assumed to be a serious crime. The Senate Special Subcommittee to Investigate Immigration and Naturalization recommended without significant explanation the expansion of the exclusion grounds to include noncitizens who had previously engaged in prostitution.[93] Senator Lehman, when criticizing the harshness of other portions of the McCarran-Walter Act, drew the line at noncitizens involved in prostitution, stating that "[w]e certainly should not permit the entry of subversives, criminals, prostitutes, pimps, and persons of that character."[94] Congress continued to lump prostitution, criminal activities, and subversive activities together as

89. *See* § 242(e), 66 Stat. 163, 211 (criminalizing the failure to depart or hampering the deportation process after a final order of removal for a broader class of noncitizens than those specified in the 1917 Act); H.R. REP. No. 82-1365, at 185–86 (1952); *see also* § 276, 66 Stat. 163 (providing penalties for reentry for any noncitizen who was excluded or deported); H.R. REP. NO. 82-1365, at 220 (1952). The Act also specifically enumerated for the first time a list of conduct that precluded a noncitizen from establishing good moral character. Such conduct included a noncitizen who is a prostitute, has engaged in prostitution, or is coming to the United States to solely, principally, or incidentally to engage in prostitution. § 101(f)(3), 66 Stat. 163, 172.

90. *See* 66 Stat. 163.

91. *See supra* note 79 and accompanying text.

92. *See, e.g.*, *In re* R-M-, 7 I. & N. Dec. 392, 395 (BIA 1957) ("It is well established that the term 'prostitute' relates solely to a person of the female sex."); *infra* note 117 (providing quotes where legislators referred to trafficked sellers of sex as women). The BIA is the administrative appellate body within the Executive Office of Immigration Review in the Department of Justice.

93. S. REP. NO. 81-1515, at 358 (1950) ("It is the recommendation of the subcommittee . . . that the excludable classes of immoral aliens should be enlarged to include persons who have practiced prostitution . . . , as well as those who are so engaged at the time of entry as provided in the law at present."); *see also* 22 C.F.R. § 40.7(a)(12)(ii) (2003); 52 Fed. Reg. 42594 (Nov. 5, 1987) ("The fact that an alien may have ceased to engage in prostitution shall not serve to remove the existing ground of ineligibility under INA 212(a)(12).").

94. *See, e.g.*, 98 CONG. REC. 5113, 5115 (1952) (statement of Sen. Lehman) ("[D]eportation is a harsh penalty, as harsh as any there can be. Yet under the McCarran bill, deportation is required not only for dope addicts, pimps, prostitutes, hardened criminals, and true subversives, but also for those who have misrepresented a material fact in a visa application or who arrived . . . at a place other than the one duly provided by regulation.").

analogous conduct, and noncitizens engaging in such conduct continued to be viewed as "undesirable[]."[95]

Even where legislative history recognized that prostitution may not be a serious concern, it nevertheless recommended an expansion of morality-based immigration penalties. One Senate Subcommittee Report noted that "these excludable classes [immoral aliens] no longer present a serious problem . . . ."[96] However, it went on to recommend that such noncitizens still be excluded because "should they [the exclusion grounds] be eliminated[,] the problem would again become as large as it was in the latter half of the last century."[97] A Senate Report recommended enlarging "the excludable classes of immoral aliens . . . to include persons who have practiced prostitution" and who "seek to enter the United States to engage in any illicit sexual act or other immoral act, whether that purpose be the sole, principal, or incidental purpose of their entry."[98] This suggestion ultimately was adopted in the McCarran-Walter Act.[99]

The Senate Report also recommended broadening the scope of the immigration laws to "include a comprehensive classification of immoral aliens deemed to be undesirable [that] should be broad enough to include all aliens who engage in sexual relations for hire regardless of whether they have other means of support or other employment."[100] This recommendation came in response to the concerns of an unnamed immigration official that a noncitizen woman who engages in sexual activity for compensation "is not a prostitute as long as she has some other vocation or work which she follows along with her practicing of prostitution, and [that] it has been almost impossible within the past few years in this area to make a [deportation] case on an alien prostitute . . . ."[101] Despite this focus on making the prostitution-related provisions harsher for sellers of sex, the legislative history again did not consider the role of buyers in prostitution.

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95. *See* 98 CONG. REC. 5090 (1952) (statement of Sen. McCarran) ("Senate bill 2550 also revises those provisions of the law relating to the qualitative grounds for the exclusion of aliens, so that the criminal and immoral classes, the subversives and other undesirables can be excluded from admission to the United States.").

96. S. REP. NO. 80-1515, at 358 (1950).

97. *Id.*

98. *Id.*

99. *See supra* notes 84–87.

100. S. REP. NO. 80-1515, at 393 (1950).

101. *Id.* at 392; *see also id.* at 871 (providing a table of aliens excluded from the United States in fiscal years 1940–1949, showing the number of excluded "[p]rostitutes or aliens coming for any immoral purpose" as 24 in 1940, 7 in 1944, and 3 in 1948).

F. Immigration Act of 1990 and Victims of Trafficking Violence and Protection Act (2000)

The changes in the prostitution-related immigration laws since 1952 mark the beginning of Congress's recognition that forced prostitution may warrant relief for victims in certain cases, and also that prostitution may not be as serious a crime as previously understood.

In 1957, Congress created a discretionary waiver of excludability for prostitution that was available to certain close relatives of United States citizens and lawful permanent residents.[102] The purpose of this waiver was "to prevent the separation of families"[103] due to the prior "inflexibility" of the 1952 exclusion ground that encompassed past acts of prostitution.[104]

The Immigration Act of 1990 made the next most significant changes to the immigration laws related to prostitution. First, it limited the application of the prostitution-related inadmissibility ground to noncitizens who had engaged in prostitution within ten years, whereas there was no such time limitation in the McCarran-Walter Act.[105] Prior to the enactment of the Immigration Act of 1990, the staff to the U.S. Select Commission on Immigration and Refugee Policy had recommended the bar for noncitizens who had engaged in past prostitution be completely removed, finding that "[t]he past practice of prostitution presents no threat to U.S. society."[106] Although Congress ultimately did not adopt this recommendation, it created a ten-year temporal limitation, showing a recognition that past prostitution was not in all cases detrimental to the United States despite some statements in the legislative history against loosening restrictions on prostitution.[107] In support of this provision, the legislative history shows an

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102. Act of Sept. 11, 1957, Pub. L. No. 85-316, 71 Stat. 639; *see also* Act of Sept. 26, 1961, Pub. L. No. 87-301, 75 Stat. 650, 655 (incorporating permanent waiver provision); Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911, 919 (recodifying waiver provision as section 212(h) of the INA). The waiver was available at the discretion of the Attorney General to spouses, children, and parents of United States citizens and lawful permanent residents if the noncitizen's exclusion would result in extreme hardship to the qualifying relative and the noncitizen's admission would not be contrary to the national welfare, safety, or security of the United States. *See* 79 Stat. 911, 919; *see also* 22 C.F.R. § 40.7(a)(9)(iv) (2003); 8 C.F.R. § 212.7(a) (1988); 52 Fed. Reg. 42,593 (1987).

103. SEN. REP. NO. 85-1057, at 5 (1957).

104. STAFF OF H. COMM. ON THE JUDICIARY, 100TH CONG., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT: HISTORICAL BACKGROUND AND ANALYSIS 115 (Comm. Print 1988).

105. Immigration Act of 1990 (IMMACT 90), Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5077.

106. STAFF OF H. COMM. ON THE JUDICIARY, 100TH CONG., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT: HISTORICAL BACKGROUND AND ANALYSIS 116 (Comm. Print 1988) (quoting U.S. SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE PUBLIC INTEREST: STAFF REPORT 757 (1981)).

107. *See, e.g.*, *Exclusion and Deportation of Aliens: Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 100th Cong. 50, 56 (1987) (statement of Mr. Nelson, Immigration and Naturalization Service Commissioner) ("[I]t is not clear to us that repeal of the ground of excludability and deportability relating to prostitution is warranted. In practical terms, no desirable objective is served by the admission of persons who have engaged in or who might engage in such activity."); H.R. REP. NO. 100-882, at 56 (1988) ("In the view of the Department [of Justice],

awareness that women involved in prostitution could be victims of circumstances, even if they were not trafficked or forced by third parties. For example, one representative contemplated this ten-year limitation to benefit "young girls, young women who may have been forced by [war], stuck with younger siblings to support, who turned to prostitution as a result of these kinds of conditions."[108]

Second, the Immigration Act of 1990 removed prostitution as an enumerated ground of deportability, despite some objection.[109] At the same time, however, Congress added a ground making deportable "[a]ny alien who at the time of entry or adjustment of status was within one or more of the classes of aliens excludable by the law existing at such time . . . ."[110] The effect of this provision was to trigger deportability for noncitizens who had engaged in prostitution within ten years of their dates of entry or adjustment of status. Despite this addition, the 1990 Act removed the McCarran-Walter Act's broad language allowing for the deportation of any alien who is a prostitute, has engaged in prostitution at any time, or is coming to the United States to engage in prostitution.[111]

Finally, this Act eliminated the exclusion from entry of "[a]liens coming to the United States to engage in any immoral sexual act."[112] The BIA speculated from the "scant legislative history of the repeal of [this] section" that this language was

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this change [elimination of the prostitution-related ground of exclusion] . . . would not be in the national interest. Such activity is frequently associated with violent and other serious crimes."); 132 CONG. REC. 27009, 27011 (1986) (statement of Rep. Sensenbrenner) ("I do not think it is good policy that we ought to open the door to the prostitutes . . . of this world even with a 10-year statute of limitations . . . . I am not for the procurers and prostitutes of this world . . . to have unlimited access to our country."). Even a supporter of the ten-year limitation categorized sellers of sex as "undesirables." 132 CONG. REC. 27009, 27011–12 (statement of Rep. Frank) (stating he is "generally opposed to the procurers and prostitutes of this world" and that "we are not talking about any automatic entry of undesirables").

108. 132 CONG. REC. 27009, 27011 (1986) (statement of Rep. Frank).

109. § 602, 104 Stat. at 5077. There was only limited discussion on the elimination of this deportability ground in the legislative history. *See Exclusion and Deportation of Aliens: Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 100th Cong. 50, 52 (1987) (statement of John Bolton, Assistant Attorney General, Department of Justice) ("[W]e object to the elimination of section 241(a)(12), which deals with the deportation of aliens engaged in prostitution . . . ."); *supra* note 107 (providing statement of Immigration and Naturalization Service Commissioner Nelson criticizing repeal of prostitution-related deportability provision). The Immigration Act of 1990 replaced the previous grounds of deportability related to crime, including the prostitution-related grounds, with four categories of crimes: crimes involving moral turpitude, controlled substances, certain firearm offenses, and miscellaneous crimes including sabotage, treason, and Military Selective Service Act violations. *See* H.R. REP. NO. 100-882, at 41 (1988) ("The four grounds in this category [criminal offenses] replace 241(a)(4), (11), (12), (14), and (17), which relate to crimes of moral turpitude; drug violations; prostitution; firearms violations; and treason, trading with the enemy and related crimes."). *Compare* 8 U.S.C. § 1251(a)(1)(A), *with* Immigration and Nationality Act (McCarran-Walter Act), Pub. L. 414, ch. 477, § 241(a), 66 Stat. 163 (1952).

110. 8 U.S.C. § 1251(a)(1)(A). A similar provision remains in effect today. *See infra* note 123 and accompanying text.

111. *See supra* note 88 and accompanying text.

112. *See* 104 Stat. 4978.

removed because it "was deemed either obsolete or duplicative of other language in the criminal and related exclusion category."[113]

Another significant step towards the recognition that noncitizens involved in prostitution may need protection was in 2000 when Congress passed the Victims of Trafficking Violence and Protection Act (VTVPA).[114] This law was passed in the wake of increased awareness of and frenzy over human trafficking, particularly sex trafficking.[115] The VTVPA was multi-faceted legislation targeting human trafficking. It created T and U nonimmigrant statuses for victims of severe forms of human trafficking to allow them to remain in the United States to assist in law enforcement efforts against their traffickers and for victims of serious crimes including human trafficking, respectively.[116] The legislative history is replete with references to women forced into prostitution as victims deserving of protection.[117] Although prior legislative history also recognized the potential for victimization, Congress in this legislation provided for the first time immigration relief for victims of trafficking through T and U nonimmigrant statuses.[118]

Aside from this limited relief, the prostitution-related immigration laws have not changed significantly since their inception in 1875—although they have become increasingly harsh, their basic substance and justifications remain the same. Throughout their development, the laws have focused on sellers of sex as bad

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113. *In re* Sehmi, 2014 WL 4407689, at *4 (BIA Aug. 19, 2014).

114. Victims of Trafficking Violence and Protection Act (VTVPA), Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified at 22 U.S.C. § 7101–7114 (2000)).

115. *See* Erin O'Brien & Belinda Carpenter, *Antiprostitution Agendas and the Creation of U.S. Antitrafficking Policy*, *in* CHALLENGING PERSPECTIVES ON STREET-BASED SEX WORK 257 (Katie Hail-Jares et al. eds., 2017). This law was lauded in the legislative history as "a solidly crafted piece of legislation that addresses an urgent moral and humanitarian problem." 146 CONG. REC. 7291 (2000) (statement of Rep. Gilman). One of the main criticisms of the law was that segments of the United States government were conflating voluntary sex work and human trafficking. *See, e.g.*, ALISON BASS, GETTING SCREWED: SEX WORKERS AND THE LAW 88–92 (2015).

116. 22 U.S.C. § 7101; *see also infra* notes 173–174.

117. *See, e.g.*, *Freedom from Sexual Trafficking Act of 1999: Hearing Before the Subcomm. on Int'l Operations and Human Rights*, 106th Cong. 1, 3 (1999) (statement of Sen. Smith) ("Current law and law enforcement strategies . . . often punish the victims more severely than they punish the perpetrators. When a sex-for-hire establishment is raided, the women . . . are typically deported . . . without reference to whether their participation was voluntary or involuntary."); *The Sex Trade: Trafficking of Women and Children in Europe and the United States, Hearing Before the Comm. on Sec. and Cooperation in Eur.*, 106th Cong. 3, 33, 35 (1999) (statement of Rep. Smith, Chairman, Commission on Security and Cooperation in Europe) ("[W]e will finally treat the victims—those women who have been exploited by the traffickers—for that which they are: they are victims. We will provide some safe haven for them, but we will also provide humanitarian assistance . . . ."); 146 CONG. REC. H2684 (daily ed. May 9, 2000) (statement of Rep. Gejdenson) ("These are clearly some of the most vulnerable people on the planet: people who are impoverished, often; people who have not had the opportunities to defend themselves."); *id.* at 7293 (statement of Rep. Pitts) (retelling the story of a sex trafficking victim who was ultimately deported to Mexico, and stating "if this country stands for justice at all, we can do better for this girl"); *see also id.* at H2683–86 (daily ed. May 9, 2000) (recounting stories of young women and girls who were forced into sex trafficking). Some of this language, describing victims as unwitting and helpless, is reminiscent of the language used in the early twentieth century during the White Slave Panic. *See supra* note 57.

118. *See infra* notes 173–174 and accompanying text.

actors. As the next Part describes, current prostitution-related immigration laws continue to single out sellers of sex.

II. CURRENT PROSTITUTION-RELATED IMMIGRATION LAWS

Under current immigration law, prostitution-related activities can trigger several immigration penalties. There are three main provisions in the immigration laws that encompass prostitution-related activities: an inadmissibility ground specifically for prostitution and related activities, an inadmissibility ground for crimes involving moral turpitude, and a deportability ground for crimes involving moral turpitude.[119] Under the inadmissibility grounds, a noncitizen can be denied admission into the United States, either through the denial of a visa or entry at the United States border.[120] A noncitizen is subject to the inadmissibility grounds even after a lawful entry into the United States when he or she applies to adjust status to become a lawful permanent resident.[121] The deportability grounds trigger removal for noncitizens who have been lawfully admitted to the United States, including lawful permanent residents.[122] In addition to these three provisions, an ancillary ground of deportability encompasses the prostitution-related inadmissibility ground, triggering deportation if a noncitizen was inadmissible at the time of entry or adjustment of status.[123]

Other provisions cross-reference these inadmissibility and deportability provisions to trigger additional immigration penalties. For example, these grounds can subject a noncitizen to mandatory detention during the pendency of removal proceedings.[124] A noncitizen who is captured by the inadmissibility grounds may be unable to establish good moral character, which can preclude a noncitizen from several immigration benefits including naturalization, cancellation of removal for nonpermanent residents, and voluntary departure requested at the conclusion of removal proceedings.[125]

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119. INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D) (2012); INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I); INA § 237(a)(2)(A)(i)–(ii), 8 U.S.C. § 1227(a)(2)(A)(i)–(ii).

120. *See* INA § 212, 8 U.S.C. § 1182.

121. INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A) (making deportable any noncitizen who is inadmissible at the time of adjustment of status).

122. INA § 237, 8 U.S.C. § 1227.

123. INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A); *see also supra* notes 110–114 and accompanying text.

124. INA § 236(c)(1), 8 U.S.C. § 1226(c)(1).

125. INA § 101(f)(3), 8 U.S.C. § 1101(f)(3) (listing persons who are not of "good moral character," which includes anyone who falls under the prostitution-related and crimes involving moral turpitude inadmissibility grounds); INA § 316(a), 8 U.S.C. § 1247(a) (stating that a naturalization applicant must establish good moral character for the five years preceding the date of the application); INA § 240A(b)(1)(B), 8 U.S.C. § 1229b(b)(1)(B) (stating that a noncitizen who applies for cancellation of removal must have been of "good moral character" for the ten years immediately preceding the date of the application); INA § 240(B)(b), 8 U.S.C. § 1229c(b) (stating that the noncitizen requesting voluntary departure must show good moral character for at least five years preceding the date of service of the Notice to Appear). The inadmissibility ground also can negatively affect eligibility for cancellation of removal. *See* INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (codifying the stop-time rule, whereby a period

This Part analyzes current immigration laws related to prostitution and shows that these laws continue to target sellers of sex or have targeted sellers of sex until relatively recently. This Part also shows that immigration laws are slowly starting to recognize the potential for victimization in immigration law, as well as the fact that prostitution is a low-level crime.

A. Prostitution and Commercialized Vice Inadmissibility Ground

The prostitution-related inadmissibility ground specifically references prostitution and procurement of prostitution but does not encompass buyers of sex.[126] First, this inadmissibility ground targets noncitizens who are coming to the United States "to engage in prostitution" or who have "engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status."[127] Although a conviction can be evidence of prostitution, it is not required for a finding of inadmissibility—a noncitizen need only admit to facts that show she falls under this ground.[128] However, the BIA has held that *offering* to commit

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of continuous residence terminates when a noncitizen has committed an offense in section 212(a)(2) of the INA, which includes prostitution and crimes involving moral turpitude).

126. This inadmissibility ground also includes a catch-all for any noncitizen who "is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution." INA § 212(a)(2)(D)(iii), 8 U.S.C. § 1182(a)(2)(D)(iii). "Unlawful commercialized vice" may include prostitution, gambling, illegal sales of alcohol, and narcotics addiction. *See, e.g.*, *id.*; United States v. Iqbal, 684 F.3d 507, 509 (5th Cir. 2012) (explaining that DHS had initiated removal proceedings against the noncitizen defendant, charging that he had come to the United States to engage in unlawful commercialized vice through his brother's illegal gambling enterprise); *In re* A-, 6 I. & N. Dec. 540, 553 (BIA 1955) (explaining that the noncitizen was charged with participation in unlawful commercialized vice, namely the illegal sale of liquor and gambling activities, but the charge was not sustained because the record did not establish he came to the United States to engage in the unlawful commercialized vice); *In re* B-, 6 I. & N. Dec. 98, 111 (BIA 1954) (citing addiction to narcotics as an example of commercialized vice). No published decision has extended unlawful commercialized vice to include buying sex.

127. INA § 212(a)(2)(D)(i), 8 U.S.C. § 1182(a)(2)(D)(i). Prostitution is defined as "engaging in promiscuous sexual intercourse for hire." 22 C.F.R. § 40.24(b) (2018); *see also In re* Gonzalez-Zoquiapan, 24 I. & N. Dec. 549, 553 (BIA 2008) (applying this definition of prostitution to interpret section 212(a)(2)(D) of the INA). *But see In re* Ding, 27 I. & N. Dec. 295 (BIA 2018) (holding that "prostitution" in the context of aggravated felonies in section 101(a)(43)(K)(i) of the INA is "not limited to offenses involving sexual intercourse," and defining it as "engaging in, or agreeing or offering to engage in, sexual conduct for anything of value"). Offenses related to managing a prostitution business, transportation for the purposes of prostitution, and trafficking are aggravated felonies, but simple prostitution is not. INA § 101(a)(43)(K), 8 U.S.C. § 1101(a)(43)(K). Additionally, the definition of prostitution for the purpose of the inadmissibility ground requires "elements of continuity and regularity"—a single act of prostitution is generally not sufficient. *See* 22 C.F.R. § 40.24(b); *see also In re* T-, 6 I. & N. Dec. 474, 477 (BIA 1955) ("[T]o constitute 'engaging in' there must be substantial, continuous and regular, as distinguished from casual, single or isolated, acts."). However, the BIA has interpreted "prostitution" in section 212(a)(2)(D) of the INA to allow a single conviction for prostitution to trigger inadmissibility, contrary to the regulations. *In re* Arcos-Valencia, 2005 WL 952477, at *1 (BIA Apr. 13, 2005) (per curiam) (concluding the noncitizen was inadmissible due to one conviction for engaging in prostitution).

128. *See* INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D).

prostitution is insufficient.[129] Notably, there is no statutory exception to this ground for forced prostitution. But to protect victims of forced prostitution, the BIA has read a limited duress exception into this ground.[130] The duress exception may be limited to noncitizens who have not been convicted, resting on the faulty assumption that if a noncitizen was convicted, any duress defense must have failed.[131]

Second, the prostitution-related inadmissibility grounds capture procurers of prostitution but fail to encompass buyers.[132] The BIA interpreted the term procurer to mean "a person who receives money to obtain a prostitute *for another person*."[133] The BIA specifically held the term does not include "someone who solicits another to engage in prostitution *for himself*."[134]

B. Crime Involving Moral Turpitude—Inadmissibility and Deportability Grounds

In addition to the prostitution-related inadmissibility ground, the crimes involving moral turpitude inadmissibility and deportability grounds also encompass prostitution-related activities. Like the prostitution-related inadmissibility ground, crimes involving moral turpitude jurisprudence reveals a troubling targeting of sellers of sex, generally women—prostitution has long been recognized by courts as a crime involving moral turpitude, but solicitation, offering to purchase or

129. *In re* Kum Cha Carter, 2007 WL 3318661, at *1 (BIA Sept. 14, 2007) ("[I]t is doubtful that a conviction . . . of *offering* to commit prostitution satisfies a deportation charge that the respondent *engaged in* prostitution" (quoting *In re* M-, 6 I. & N. Dec. 300, 301 (BIA 1954).).

130. *See In re* M-, 7 I. & N. Dec. 251, 252 (BIA 1956); *see also* Kerry Q. Battenfeld, Note, *Moral Crimes Post-Mellouli: Making a Case for Eliminating State-Based Prostitution Convictions as a Basis for Inadmissibility in Immigration Proceedings*, 65 BUFF. L. REV. 619, 622–25 (2017).

131. *See In re* Applicant, 2009 WL 1742009, at *2 (AAO Jan. 16, 2009) (concluding that the duress exception created by *In re M-* was not available where the applicant was convicted of prostitution); Battenfeld, *supra* note 130, at 624–25; *infra* note 222 (discussing the recognition that prostitution-related criminal laws capture individuals who are forced to sell sex).

132. *See* INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D). Specifically, this ground includes "any noncitizen who directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution." *Id.*

133. *In re* Gonzalez-Zoquiapan, 24 I. & N. Dec. 549, 552 (BIA 2008) (emphasis added). The BIA reasoned that "Congress appears to have been primarily concerned with excluding and removing aliens who were involved in the business of prostitution . . . ." *Id.*

134. *Id.* (emphasis added). However, the Administrative Appeals Office (AAO), the appellate body of U.S. Citizenship and Immigration Services (USCIS) within the Department of Homeland Security, concluded that a noncitizen was inadmissible under this ground for offering or agreeing to pay a fee to engage in sexual conduct. The AAO did not analyze the meaning of "procurer," instead assuming that it applied in that situation. *See In re* Applicant, 2004 WL 2897081, at *2 (AAO Apr. 16, 2004) (concluding that the applicant, who was convicted of offering or agreeing to pay a fee to engage in sexual conduct, "was convicted of prostitution" under section 212(a)(2)(D) of the INA). This decision is non-precedential and is not legally binding on the Department of Homeland Security, which adjudicates some immigration applications, or on the BIA.

purchasing sex, which is frequently done by men, was only more recently held to involve moral turpitude.[135]

The crimes involving moral turpitude inadmissibility ground provides that any noncitizen convicted of or who admits having committed a crime involving moral turpitude is inadmissible.[136] The deportability ground states that "[a]ny alien who . . . is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status . . .) after the date of admission . . . is deportable" if the crime is one where a sentence of one year or longer may be imposed.[137] Additionally, the INA makes deportable any noncitizen who is convicted of two or more crimes involving moral turpitude at any time after admission.[138]

The term "crime involving moral turpitude" first appeared in immigration law in 1891, prohibiting the admission of noncitizens "who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude . . . ."[139] The term was used "to separate the desirable from the undesirable immigrants, and to permit only those to land on our shores who have certain physical and moral qualities."[140] Since 1891, it has continued to be present in United States immigration law.[141]

"Crime involving moral turpitude" has not been defined in legislation or legislative history.[142] The BIA has interpreted the term "moral turpitude" to mean "conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and

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135. *See* BARBARA MEIL HOBSON, UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION 3–4 (1990) ("[W]e see a prostitution economy that expresses social and sexual inequalities within society—women are overwhelmingly the sellers of sex and men the buyers."); Maddy Coy, *Introduction* to PROSTITUTION, HARM AND GENDER INEQUALITY: THEORY, RESEARCH AND POLICY 5 (Maddy Coy ed., 2012) ("[P]rostitution disproportionately involves men buying access to women's bodies."); Donna M. Vandiver & Jessie L. Krienert, *An Assessment of a Cross-National Sample of Men and Women Arrested for Prostitution*, 4 SW. J. CRIM. JUST. 89, 90, 96 (2007) (finding that in 2001, 2,637 females and 1,382 males were arrested for prostitution according to the National Incident-Based Reporting System).

The term "solicitation" can refer to "an offer to pay or accept money in exchange for sex." *Solicitation*, BLACK'S LAW DICTIONARY (10th ed. 2014). To avoid confusion, this Article will use "solicitation" only when referring to an offer to purchase sex or to the purchase of sex.

136. INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I).

137. INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i).

138. INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii).

139. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.

140. DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 115 (2007) (quoting Special Comm. on Immigration and Naturalization, 51st Cong., 2d Sess., Rep. (ii) (1891) (internal quotation marks omitted)).

141. *See, e.g.*, INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (1952); INA § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A); Act of Feb. 20, 1907, ch. 1134, § 2, 34 Stat. 898, 898–99; Act of Mar. 3, 1903, ch. 1012, § 2, 32 Stat. 1213, 1214; *see also* S. REP. NO. 80-1515, at 350 (1950).

142. *See* Arias v. Lynch, 834 F.3d 823, 831 (7th Cir. 2016) (citing STAFF OF H. COMM. ON THE JUDICIARY, 100TH CONG., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT: HISTORICAL BACKGROUND AND ANALYSIS 10 (Comm. Print. 1988)).

man, either one's fellow man or society in general."[143] The BIA has explained that whether a crime involves moral turpitude should be judged by standards "prevailing in the United States as a whole, regarding the common view of our people concerning its moral character."[144] Courts have also held that the conduct must be committed with scienter.[145] As a general rule, if the conduct in question is *malum in se* or inherently wrong, as compared with an act that is *malum prohibitum* or conduct that is only statutorily prohibited, it involves moral turpitude.[146]

There is no fixed list of crimes that fall under the umbrella of crimes involving moral turpitude. Rather, adjudicators must determine whether conduct involves moral turpitude using the categorical approach, which requires a complex analysis of the elements of a criminal statute to determine whether all violations of the law that have a realistic probability of being prosecuted involve moral turpitude.[147] If the law punishes conduct that does not involve moral turpitude, then under the categorical approach, convictions under that law do not involve moral turpitude.[148] Courts have concluded that several categories of prostitution-related crimes involve moral turpitude, including prostitution and only recently, solicitation.[149]

1. *Prostitution* — It is long-standing precedent that prostitution is a crime involving moral turpitude.[150] But very few cases explain why prostitution involves moral turpitude, instead assuming that prostitution is a crime involving moral

143. *In re* Danesh, 19 I. & N. Dec. 669, 670 (BIA 1988); *see also* Reyes v. Lynch, 835 F.3d 556, 561 (6th Cir. 2016) (quoting *In re* Short, 20 I. & N. Dec. 136, 139 (BIA 1989)); Knapik v. Ashcroft, 384 F.3d 84, 89 (3d Cir. 2004); Marciano v. Immigration & Naturalization Serv., 450 F.2d 1022, 1025 (8th Cir. 1971).

144. *In re* G-, 1 I. & N. Dec. 59, 60 (BIA 1941). *See generally* Mary Holper, *Deportation for a Sin: Why Moral Turpitude is Void for Vagueness*, 90 NEB. L. REV. 647, 653–57 (2012) (detailing the history and definition of the term "crime involving moral turpitude").

145. *See, e.g.*, Michel v. Immigration & Naturalization Serv., 206 F.3d 253, 263 (2d Cir. 2000) ("[C]orrupt scienter is the touchstone of moral turpitude."); *In re* Abreu-Semino, 12 I. & N. Dec. 775, 777 (BIA 1968) ("[M]oral turpitude normally inheres in the intent."). Some courts, when considering crimes involving moral turpitude, have bypassed the inquiry of prevailing social mores, opting instead to determine whether a crime involves moral turpitude by the element of scienter to avoid grappling with the more difficult question of assessing morality. *See* Julie Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1059–67 (describing how an analysis of scienter has become a "stand-in[] for moral turpitude cases at the margins"). The cases do not provide coherent and reasoned justifications for this departure away from an analysis of society's moral beliefs. *See id.* ("The use of a scienter analysis as a proxy for moral turpitude has accomplished a dubious objectivity at the expense of coherence.").

146. *See, e.g.*, Mei v. Ashcroft, 393 F.3d 737, 741 (7th Cir. 2004); *see also* Simon-Kerr, *supra* note 145, at 1059 & n.417.

147. *See In re* Silva-Trevino, 26 I. & N. Dec. 826, 831 (BIA 2016).

148. *See In re* Chairez, 26 I. & N. Dec. 819 (BIA 2016); *see also In re* R-, 6 I. & N. Dec. 444, 448 (BIA 1954).

149. Case law on whether prostitution-related crimes involve moral turpitude has been relatively limited, as noncitizens can be captured by the prostitution-specific inadmissibility ground, and until 1990, could have been captured by the prostitution-specific deportability ground. *See supra* notes 88–89, 109–111, 126–127 and accompanying text.

150. *See In re* W-, 4 I. & N. Dec. 401, 402 (BIA 1951). The AAO, on the other hand, concluded in a non-precedential decision that prostitution does not involve moral turpitude because "if the sexual conduct affects only consenting adults then it may not be a crime involving moral turpitude." *See In re* Applicant, 2008 WL 4051913, at *3 (AAO May 12, 2008).

turpitude.[151] *Matter of W-*, one of the first BIA cases to address whether prostitution involves moral turpitude, concluded in 1951 without citations or reasoning that it was "well established that the crime of practicing prostitution involves moral turpitude."[152] Subsequent courts of appeals decisions have cited *Matter of W-* authoritatively, creating an echo chamber concluding without reasoning that prostitution is a crime involving moral turpitude.[153] Case law on other prostitution-related crimes, which can involve a higher degree of moral culpability than simple prostitution, also has fueled this echo chamber, with courts equating prostitution and other prostitution-related crimes to support the conclusion that all prostitution-related crimes involve moral turpitude.[154]

In 2018, the BIA revisited whether prostitution involves moral turpitude in dicta in a case about cockfighting.[155] The BIA summarily stated that prostitution "is so contrary to the standards of a civilized society as to be morally reprehensible"[156] because "of the socially degrading nature of commercialized sexual services . . . ."[157] Like in *In re W-*, the BIA again assumed that prostitution involves moral turpitude.

One of the few cases that has attempted to explain why prostitution involves moral turpitude is *Rohit v. Holder* from the Ninth Circuit in 2012.[158] To ultimately conclude that solicitation involves moral turpitude, *Rohit* reasoned that prostitution is a crime involving moral turpitude because it "always involves sexual exploitation," unlike some other sexual crimes that do not involve moral turpitude.[159] The decision does not define exploitation, nor does it provide support for this sweeping statement, which has been widely contradicted.[160]

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151. *See, e.g.*, *In re W-*, 4 I. & N. Dec. 401. Generally, courts have assumed that crimes of "sexual deviance" involve moral turpitude. *See* Simon-Kerr, *supra* note 145, at 1007.

152. *In re W-*, 4 I. & N. Dec. at 402; *see also In re* S-L-, 3 I. & N. Dec. 396, 398 (BIA 1949) (providing the Central Office conclusion that pandering is a crime involving moral turpitude because of the "turpitudinous nature of prostitution"). An earlier case held that even forced prostitution was a crime involving moral turpitude. *In re* E-, 1 I. & N. Dec. 505 (BIA 1943) (concluding crime of "compulsory prostitution of women" involves moral turpitude).

153. *See, e.g.*, Reyes v. Lynch, 835 F.3d 556, 560 (6th Cir. 2016) (affording *In re W-* Chevron deference); Florentino-Francisco v. Lynch, 611 Fed. App'x 936, 938 (10th Cir. May 27, 2015) (citing *In re W-* as precedent); Rohit v. Holder, 670 F.3d 1085, 1089 (9th Cir. 2012) (same); *see also In re* Ortega-Lopez, 27 I. & N. Dec. 382, 391–92 (2018) ("Prostitution is unquestionably a crime involving moral turpitude under the immigration laws" (citing *In re W-*, 4. I. & N. Dec. 401).).

154. *See, e.g.*, *Francisco-Florentino*, 611 Fed. App'x at 938 (citing a variety of BIA decisions on prostitution and other prostitution-related crimes to conclude that the "BIA has long viewed prostitution-related crimes as morally turpitudinous").

155. *In re Ortega-Lopez*, 27 I. & N. Dec. 382.

156. *Id.* at 386. The BIA cited *Rohit v. Holder* for this proposition. However, *Rohit*'s reasoning on why prostitution involves moral turpitude is deeply flawed. *See infra* notes 158–160, 273–276 and accompanying text.

157. *Id.* at 386. The BIA provided no support or further explanation for its statement that commercialized sexual services are socially degrading. *See id.*

158. *Rohit*, 670 F.3d 1085.

159. *Id.* at 1090; *see also infra* text accompanying notes 166–168.

160. *See infra* note 200 and accompanying text (describing choice to engage in sex work).

Outside of the crimes involving moral turpitude context, the Supreme Court explained why prostitution was immoral in 1908 in *United States v. Bitty*.[161] Although not controlling for crimes involving moral turpitude, *Bitty* still is instructive in deciphering judicial attitudes towards prostitution by noncitizens. The Supreme Court said that the root of immorality in prostitution stemmed not from the fact that it involved a commercial transaction for sex, but from the fact that it involved indiscriminate sex.[162] The Supreme Court reasoned that indiscriminate sex had detrimental effects on families and thereby on United States society, showing the Court's concern over safeguarding monogamous marriages.[163]

2. *Solicitation* — Although courts have long recognized prostitution as a crime involving moral turpitude, they only more recently recognized solicitation as such, even though states had started to recognize solicitation as a crime since the latter half of the twentieth century.[164]

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161. United States v. Bitty, 208 U.S. 393 (1908); *see also supra* notes 54–55 (summarizing *Bitty*'s discussion of the "immoral purpose" language from the 1907 Act).

162. *See Bitty*, 208 U.S. at 401. When defining prostitution, the Court stated that "[i]t refers to women who, *for hire or without hire*, offer their bodies to indiscriminate intercourse with men." *Id.* (emphasis added); *see also* Cox v. State, 84 Tex. Crim. 49, 52–53 (1917) (collecting cases); Commonwealth v. Cook, 53 Mass. 93, 97 (1846) (explaining that Webster's Dictionary defines prostitution as "the act or practice of offering the body to an indiscriminate intercourse with men"). *But see Cook*, 53 Mass. at 97–98 (defining prostitution as used in St. 1845, c. 216 as "the act of permitting illicit intercourse for hire, an indiscriminate intercourse . . . ."); State v. Stovell, 54 Me. 24, 27 (1866) (defining prostitute as "a female given to indiscriminate lewdness for gain"); THOMAS C. MACKEY, RED LIGHTS OUT: A LEGAL HISTORY OF PROSTITUTION, DISORDERLY HOUSES, AND VICE DISTRICTS, 1870–1917, at 51–54 (1987) (collecting cases from the mid-1800s defining prostitution, including those that did and did not include gain as an element).

163. *See Bitty*, 208 U.S. at 401 ("The lives and example of [prostitutes] are in hostility to the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization . . ." (internal quotation marks omitted).).

164. *See* DECKER, *supra* note 12, at 82–83; *infra* note 220 and accompanying text (collecting sources discussing the history of solicitation laws). Earlier, some jurisdictions made it unlawful to visit houses of prostitution. *See, e.g.*, Batesville v. Smythe, 138 Ark. 276, 277 (1919) (analyzing a city ordinance on prostitution that also criminalized "every male person visiting any room or tenement so used and occupied for the purpose of illicit intercourse . . ."); *Ex parte* Johnson, 73 Cal. 228, 228 (1887) (describing city of Stockton ordinance No. 229, which made it unlawful "for any person to . . . frequent . . . any [locations] kept, conducted, occupied, or maintained for the purpose of prostitution"); Brockway v. People, 2 Hill 558 (N.Y. 1842) ("Individuals in the habit of resorting to [houses of ill fame] may . . . be punished as disorderly persons" (internal citation omitted).). However, a Texas court held that occasional association between a man and a prostitute did not fall under the vagrancy law. *See* Ellis v. State, 65 Tex. Crim. 480, 481 (1912) ("The [vagrancy] statute was intended to reach a class of persons who associated with prostitutes as their equals, or who associated with them in public, and was not intended to make a vagrant of a person who, at night, went occasionally to the room of a woman with loose morals, and yet who at no other time was seen in her company.").

Parallel to the immigration context, solicitation historically has been less commonly prosecuted than prostitution. Additionally, buyers generally have been less frequently targeted for arrest than sellers. *See infra* note 225.

The first published decision to recognize solicitation as a crime involving moral turpitude under immigration law was *Rohit v. Holder* in the Ninth Circuit.[165] *Rohit* referenced prostitution in reaching this conclusion, holding that "[t]here is no meaningful distinction that would lead us to conclude that engaging in an act of prostitution is a crime of moral turpitude but that soliciting or agreeing to engage in an act of prostitution is not."[166] *Rohit* reasoned that "soliciting an act of prostitution is not significantly less 'base, vile, and depraved' than engaging in an act of prostitution."[167] The court explained that "[s]olicitation is the direct precursor to the act" and that "the base act is the intended result of the base request or offer."[168] *Rohit* did not analyze whether solicitation is a crime involving moral turpitude independent of prostitution. The Sixth, Eighth, and Tenth Circuits have recently followed suit, concluding solicitation is a crime involving moral turpitude.[169] These cases do not provide any additional rationale on why solicitation involves moral turpitude, aside from its connection to prostitution.[170]

The BIA in a non-precedential decision also concluded that solicitation involves moral turpitude.[171] It so reasoned due to "the impact offenses such as solicitation of prostitution play in the illicit sex trade, with the violator who solicits a prostitute not knowing whether the prostitute is a 'captive' of a trafficking organization, or controlled by a pimp or a more sinister person . . . ."[172]

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165. Rohit v. Holder, 670 F.3d 1085, 1089 (9th Cir. 2012). An unpublished decision recognized solicitation as a crime involving moral turpitude as early as 1996. *See* Ahmed v. Immigration & Naturalization Serv., 92 F.3d 1196, at *2 (10th Cir. Aug. 8, 1996) (unpublished) (affirming the noncitizen's deportation order based on two crimes involving moral turpitude, one of which was "prostitution as a patron"). *Ahmed* did not explain why "prostitution as a patron" involves moral turpitude. *See id.* The BIA may have recognized solicitation as a crime involving moral turpitude as early as 1947 in an unpublished case. *See In re* S-L-, 3. I. & N. Dec. 396, 397–98 (BIA 1949) (citing *In re* M-, A-6030668 (BIA 1947)). *In re S-L-* cites *In re M-* for the proposition that "the crime of soliciting prostitution involves moral turpitude." *See In re S-L-*, 3. I. & N. Dec. at 397–98 (citing *In re M-*, A-6030668). The ambiguity stems from the fact that the term "solicitation" can refer to "an offer to pay or accept money in exchange for sex." *Solicitation*, BLACK'S LAW DICTIONARY (10th ed. 2014). Outside of the immigration context, the Fifth Circuit recognized the "crime of soliciting for prostitution" as a crime involving moral turpitude for purposes of the admission of a prior criminal record in a criminal case. Thompson v. United States, 245 F.2d 232, 232 (5th Cir. 1957).

166. *Rohit*, 670 F.3d at 1090.

167. *Id.* at 1089.

168. *Id.* at 1089–90.

169. *See* Reyes v. Lynch, 835 F.3d 556, 560 (6th Cir. 2016); Gomez-Gutierrez v. Lynch, 811 F.3d 1053, 1058–59 (8th Cir. 2016); Perez v. Lynch, 630 Fed. App'x 870, 873 (10th Cir. Nov. 5, 2015); *see also* Florentino-Francisco v. Lynch, 611 Fed. App'x 936, 938 (10th Cir. May 27, 2015).

170. *See, e.g.*, *Florentino-Francisco*, 611 Fed. App'x at 938 ("If prostitution is inherently base, vile, or depraved, so too is the attempt to engage a prostitute by solicitation. Both crimes share a similar intent and result in the same act."). However, the AAO concluded in a non-precedential decision that patronizing a prostitute is not a crime involving moral turpitude because it does not involve a "vicious or corrupt mind" and is not "conduct that shocks the public conscience as being inherently base, vile, or depraved." *In re* Applicant, 2009 WL 3554141, at *3 (AAO July 1, 2009).

171. *In re* Sehmi, 2014 WL 4407689, at *6–7 (BIA Aug. 19, 2014).

172. *Id.*

Although there is recent case law on solicitation, crimes involving moral turpitude jurisprudence on prostitution, like the prostitution-specific inadmissibility ground, generally has not been critically reevaluated in recent times. One area of immigration law that has seen some change relatively recently, however, is relief and exceptions for noncitizens who are trafficked or forced into prostitution.

C. Relief, Waivers, and Exceptions

Although immigration law generally treats prostitution harshly, recently-added provisions provide specific relief for some noncitizens involved in prostitution. Noncitizens involved in prostitution may also be able to take advantage of some general waivers and exceptions for low-level crimes. These provisions show some recognition that prostitution can be a form of victimization and that it is not a serious crime.

T and U nonimmigrant statuses are relatively new forms of relief available to certain victims of human trafficking or serious crimes, respectively.[173] Sex trafficking victims can qualify for both T and U nonimmigrant statuses.[174] Noncitizens who are forced into prostitution but not trafficked and who cooperate with law enforcement may qualify for U nonimmigrant status as well as noncitizens who may have voluntarily engaged in sex work and provide information relating to prostitution activities to law enforcement.[175]

Waivers for noncitizens convicted of prostitution are available under certain circumstances. These waivers allow a noncitizen to avoid some immigration penalties. A noncitizen may apply for a waiver of most of the grounds of inadmissibility, including prostitution, when seeking U or T nonimmigrant status.[176] DHS may also waive prostitution for victims of domestic violence applying for relief under the Violence Against Women Act if it was the result of force, fraud, or coercion in certain circumstances.[177]

Some noncitizens involved in prostitution may also qualify for discretionary waivers of the prostitution and crime involving moral turpitude inadmissibility

173. INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T); INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U).

174. INA § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii); 8 C.F.R. § 214.11(a) (2018).

175. *See* INA § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii); E-mail from Sabrina Talukder, Staff Attorney, The Legal Aid Soc'y, to author (Aug. 21, 2018) (on file with author).

176. INA § 212(d)(13)–(14), 8 U.S.C. § 1182(d)(13)–(14) (providing the waivers of inadmissibility for T and U nonimmigrant status).

177. 8 C.F.R. § 204. This exception only applies if the noncitizen has not been convicted of prostitution, implying that either law enforcement does not target individuals forced into prostitution for arrest or that a duress defense in criminal court is sufficient protection from a conviction, neither of which is always true. *See id.* § 204.2(c)(1); Francisco Zornosa, *Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense*, 22 WASH. & LEE J. C.R. & SOC. JUST. 177, 188–89 (2016) (discussing the shortcomings of a duress defense for survivors of sex trafficking).

grounds.[178] Additionally, one prostitution conviction generally is not enough to trigger the crimes involving moral turpitude provisions under the petty offense exception.[179] Lastly, immigration law recognizes that prostitution is not a crime that is serious enough to warrant deportation of asylees.[180] These laws are in stark contrast to the harsh penalties that prostitution can otherwise trigger.

By providing waivers and relief for prostitution in certain instances, immigration laws now recognize that prostitution is not always a serious crime and that it can involve the victimization of sellers of sex.[181] Regardless, current laws continue to focus on sellers of sex as bad actors, a legacy of turn of the twentieth century legislation focused on morality.

III. MORALITY OF SELLERS OF SEX

This Part analyzes societal perceptions of the morality of sellers of sex, and how such views have changed since turn of the twentieth century. Sellers of sex were previously viewed as threats to society and family due largely to the perception that nonmarital sex is immoral, and because blame for prostitution was leveled only at women.[182] As consensual nonmarital sexual conduct between adults generally has become permissible, both morally and in criminal law, society has moved away from viewing sellers of sex wholesale as "fallen" women.[183] Societal views on prostitution remain complex, but with the move away from a moral framing, there is an increased recognition of the economic motivations that often lead individuals to sell sex and of the victimization of individuals forced into prostitution. There is also a recognition of other more culpable parties in the activity. These recognitions are evidence of a growing societal shift to no longer view sellers of sex as immoral.

A. Morality of Sexual Conduct: From Marriage to Consent

Changes in societal perceptions of prostitution and sellers of sex are relevant to prostitution-related immigration laws for two main reasons. First, crimes involving moral turpitude jurisprudence requires consideration of prevailing social attitudes when determining whether a noncitizen's conduct involves moral turpitude.[184] Second, the prostitution-related immigration laws developed around the turn of the twentieth century as a result of morality-based justifications—to

178. INA § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A) (providing a waiver of most of the grounds of inadmissibility, including prostitution and crimes involving moral turpitude, for noncitizens applying for nonimmigrant visas); INA § 212(h), 8 U.S.C. § 1182(h) (providing a waiver of, inter alia, the prostitution and crime involving moral turpitude inadmissibility grounds for noncitizens applying for immigrant status).

179. INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A).

180. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

181. *See supra* notes 115–118 and accompanying text (discussing the legislative history of the forms of relief available for trafficking survivors, which recognizes women can be victims needing immigration relief).

182. *See infra* notes 217–218 and accompanying text.

183. *See infra* notes 198–204 and accompanying text.

184. *See supra* note 145.

keep undesirable noncitizen women out of the United States.[185] Because these laws remain on the books in essentially the same form, reviewing societal views on the morality of sellers of sex is necessary to determine whether the underlying justifications of the laws are still valid.

Societal change, however, is notoriously difficult to approximate, with many open questions on how to measure morality.[186] Although there are many proxies for changes in societal views, this Part focuses on criminal law. Criminal law can be a useful point of reference for two main reasons. First, it is a useful measure for social change without overstating such change. Criminal law tends to be conservative in the sense that it responds slowly to changes in societal views, both in terms of penal laws themselves and enforcement practices.[187] Second, criminal law directly impacts the immigration system, with criminal activity triggering immigration consequences.

In terms of both criminal law and prevailing social views of morality, marriage delineated permissible and impermissible sexual conduct around the turn of the twentieth century[188]—adultery and sodomy were not only socially unacceptable, but generally also criminalized, whereas marital rape was not.[189] Since the 1950s, consent, rather than marriage, has become increasingly important when evaluating whether sexual conduct is permissible.[190] Consensual nonmarital sex is generally no longer viewed as impermissible and immoral.[191] Consent has affected the

185. *See supra* Part I. Part III focuses on morality since the late 1800s, since that is when Congress passed the first prostitution-related immigration laws. *See supra* Part I.

186. Courts have recognized that it is difficult, if not impossible, for society to agree on issues of morality. *See, e.g.*, Nunez v. Holder, 594 F.3d 1124, 1127–28 (9th Cir. 2010) ("There is simply no overall agreement on many issues of morality in contemporary society.").

187. The BIA has used criminal law to approximate social change in crimes involving moral turpitude cases. *See infra* notes 249, 251–252 and accompanying text.

188. *See* Judith R. Walkowitz, *The Politics of Prostitution*, 6 J. WOMEN CULTURE & SOC'Y 123, 131 (1980); *see also* Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 781 (1988) ("By tying sex to procreation, the traditional view functions to cement the relationship between biological parents and their children and to promote the family as the key social institution."). *See generally* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 9–13 (1965) ("Marriage is part of the structure of our society and it is also the basis of a moral code which condemns fornication and adultery.").

189. *See* Chamallas, *supra* note 188, at 781–82, 784–90 (describing "traditional view" of sexual conduct, where the only acceptable sexual conduct occurs within marriage and ties sex to procreation, as the prevalent legal view from the turn of the twentieth century to World War II); *see also id.* at 784 n.34 and accompanying text (describing laws punishing adultery and sodomy). Fornication (sexual intercourse between unmarried persons), without aggravating factors, was considered "furtive illicit intercourse or . . . immoral indulgence," but was not uniformly criminalized in the United States. *See In re* R-, 6 I. & N. Dec. 444, 452–54 (1954).

190. *See* Chamallas, *supra* note 188, at 790, 793–94 (describing the increase in prominence in the United States legal system of the "liberal view" of sexual conduct based on consent after World War II, which began to replace marriage as the "crucial determinant of the lawfulness of sexual conduct"). *See generally* COTT, *supra* note 25, at 180–99 (discussing changing gender roles during and after World War II).

191. *See* Chamallas, *supra* note 188, at 781–82, 784–90. One exception is extramarital sexual conduct. But when extramarital sexual conduct takes place in the context of prostitution, the person in the relationship and not the seller of sex is generally viewed as the culpable party. This contemporary

development of criminal law, as much consensual sexual conduct previously viewed as immoral is no longer criminalized or if the laws remain on the books, they are no longer enforced.[192]

The treatment of prostitution by criminal law remains one exception to this consent-based framework.[193] However, the concept of consent has started to inform societal views on prostitution. Individuals trafficked or forced to sell sex are now almost universally viewed as victims who need protection, in contrast to views around the turn of the twentieth century when such women were seen as immoral and culpable due to their participation, albeit unwilling, in sexual activity outside of marriage.[194]

The concept of consent also informs societal views on individuals who engage in prostitution but are not forced or trafficked. Certain segments of society believe for various reasons that no one can truly consent to prostitution and that it is thus a form of violence against women.[195] This position is supported by factions of feminists as well as certain conservatives, including some religious conservatives.[196] Feminists who hold this view believe that individuals who think they are choosing prostitution are actually being coerced by structural barriers, including extreme poverty and the patriarchal system.[197] Conservatives who support this position continue to limit permissible sexual conduct to the confines of heterosexual marriage, and to view prostitution in terms of morality, finding it degrading to women and thus not a true choice.[198] Both groups view sellers of sex as victims who

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view contrasts with beliefs around the turn of the twentieth century blaming sellers of sex for such transgressions. *See, e.g.*, *supra* notes 30–32 and accompanying text; *infra* notes 212–214 and accompanying text.

192. *See* WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003, at 121–27, 164–65 (2008); Traci Shallbetter Stratton, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 WASH. L. REV. 767, 769 (1998). Additionally, criminal law created new sexual crimes for lack of consent, namely marital rape. *See generally* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000).

193. *See* Chamallas, *supra* note 188, at 794 ("With respect to prostitution . . . , the liberal ideology did not succeed in changing formal legal doctrine."); *see also* Elizabeth M. Johnson, Note, *Buyers Without Remorse: Ending the Discriminatory Enforcement of Prostitution Laws*, 92 TEX. L. REV. 717, 720–25 (2014) (detailing the history of prostitution-related criminal laws in the United States).

194. *See supra* text accompanying notes 68–72 (describing the incongruous practice of recognizing women forced into prostitution as victims, but nevertheless penalizing such women under the immigration laws).

195. *See* Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism,"* 18 DIFFERENCES 128, 132–33 (2007); Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1665–66 & nn.26–28 (2010).

196. *See* Chuang, *supra* note 195, at 1680–82 & nn.99–105; Sheila Jeffreys, *Beyond 'Agency' and 'Choice' in Theorizing Prostitution*, *in* PROSTITUTION, HARM AND GENDER INEQUALITY: THEORY, RESEARCH AND POLICY, *supra* note 135, at 75–83.

197. *See* HOBSON, *supra* note 135, at 5 ("They [some feminist groups] . . . assert[ed] that no woman freely chose prostitution—that extreme coercion, desperate poverty, or mental derangement explained this phenomenon."); Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 281 (2011).

198. *See* Chuang, *supra* note 195, at 1665–66.

should be helped to leave prostitution, but do not advocate for general decriminalization or legalization, believing that criminal law can be used to target others involved in prostitution to further the goal of ultimately abolishing the practice, due to their view that it is harmful to sellers of sex under all circumstances.[199]

Another segment of the population, including some liberals and feminists, believe that individuals can consent to sex work, and find the victimization narrative, which conflates sex work and trafficking, to be problematic and paternalistic.[200] These groups push for decriminalization and legalization of prostitution, and believe that any enforcement efforts should be directed towards trafficking and other forms of forced prostitution.[201]

Despite these differences in viewpoint, individuals who sell sex are decreasingly viewed as the bad actors by both camps.[202] This recognition can be seen through some positive trends in criminal law, discussed below.[203] There is also increased recognition among both camps that sellers of sex, even individuals who choose to engage in the practice, can be victimized with impunity because they are often unable or unwilling to seek help due to risk of arrest and stigma.[204]

B. Societal Views on the Morality of Sellers of Sex Through the Lens of the Criminal Justice System

The criminal laws in various ways reflect this societal shift in attitudes towards sellers of sex, moving away from viewing the seller as a fallen or immoral woman. Criminal laws prohibiting prostitution started to be enforced regularly against sellers of sex in the early twentieth century, when the social purity movement gained

199. *See* HOBSON, *supra* note 135, at 5 ("Feminists have sought stricter enforcement of laws against keepers and pimps, and . . . criminal penalties for men who buy prostitutes' services."); Chuang, *supra* note 195, at 1669 ("[W]omen prostitutes should not be penalized themselves but instead should be the target of rescue and rehabilitation efforts.").

200. *See* HOBSON, *supra* note 135, at 220–22; Chuang, *supra* note 195, at 1671 (describing this faction's insistence "on a distinction between trafficking and prostitution").

201. *See* Chuang, *supra* note 195, at 1670–71 & nn.49–56.

202. But some segments of society continue to view sellers of sex as immoral. *See, e.g.*, ROGER SCRUTON, SEXUAL DESIRE: A MORAL PHILOSOPHY OF THE EROTIC 337–47 (1986) (arguing that sex not for the purpose of expressing love is immoral); *Trump Lawyer Rudy Giuliani Has No Respect for Stormy Daniels*, BBC NEWS (June 7, 2018) ("Someone who sells his or her body for money has no good name. . . . I may be old fashioned" (quoting former New York City mayor Rudy Giuliani).); *see also* THOMAS AQUINAS, SUMMA CONTRA GENTILES, BOOK III, PROVIDENCE, Part II, ch. 122 at 1–5 (arguing under natural law theory that sex outside of marriage and not for purpose of procreation is sin).

203. The criminal justice system's treatment of prostitution remains highly problematic in many respects, however. *See infra* note 230.

204. *See, e.g.*, Barbara G. Brents & Kathryn Hausbeck, *Violence and Legalized Brothel Prostitution in Nevada*, 20 J. INTERPERSONAL VIOLENCE 270, 287–90 (2005) ("Fear of violence is very much a part of the culture of prostitution."); Roger Matthews, *Female Prostitution and Victimization: A Realist Analysis*, 21 INT'L REV. VICTIMOLOGY 85, 89 (2015).

momentum.[205] This anti-vice movement, supported by feminist and Christian groups, endorsed the view that sex was for the purpose of procreation.[206] They advocated for legislation and enforcement against prostitution to protect families and society from the moral threat of women who sold sex.[207] By the mid-1920s, every state had criminalized prostitution in some form.[208]

Even though the sale of sex was generally a misdemeanor like today,[209] case law referred to female sellers of sex as serious criminals, and antithetical to the ideals of morality and womanhood.[210] Courts described sellers of sex using language such as "fallen" women[211] and "wayward girls."[212] Such women were believed to "present a greater single element of economic, social, moral, and hygenic [sic] loss than is the case with any other single criminal class" because of their engagement in a "vicious and degrading vocation," steeped in "sin and shame."[213]

Female sellers of sex alone were blamed for prostitution, and were singled out by state penal codes as particular dangers to society until relatively recently.[214] States

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205. DECKER, *supra* note 12, at 61, 67–69 (describing the tolerance of prostitution before the early twentieth century and the reasons for subsequently "ending toleration of prostitutes").

206. *See* COTT, *supra* note 25, at 123–24 ("Purity reformers intended . . . to stamp out extramarital sexual relations and to make sure that sex stayed linked to monogamous marriage and childbearing, as fundamental Christian morality required."). Feminists supported the social purity movement because it "seemed to be an attack on aggressive male sexuality and the double standard [for sexuality]." Walkowitz, *supra* note 188, at 131.

207. *See* COTT, *supra* note 25, at 123–24; DECKER, *supra* note 12, at 67–70 ("At the beginning of the second decade of the twentieth century, a monumental and relatively effective movement was instituted to abrogate the toleration of prostitution which generally existed in America."); THOMAS C. MACKEY, PURSUING JOHNS: CRIMINAL LAW REFORM, DEFENDING CHARACTER, AND NEW YORK CITY'S COMMITTEE OF FOURTEEN, 1920–1930, at 26, 38–39 (2005); Timothy J. Gilfoyle, *Prostitution*, *in* THE READER'S COMPANION TO AMERICAN HISTORY 875–76 (Eric Foner & John A Garraty eds., 1991).

208. *See* MACKEY, *supra* note 207, at 39; Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 243 (2000).

209. *See, e.g.*, Coker v. City of Ft. Smith, 162 Ark. 567 (1924); State v. Phillips, 26 N.D. 206 (1913) ("Any female who frequents or lives in houses of ill fame, or who commits fornication for hire, shall be deemed a prostitute, and shall be guilty of a misdemeanor."); Cox v. State, 84 Tex. Crim. 49 (1917). For a first offense, present-day laws provide for imprisonment from one day to up to one year, and fines range from $50 up to $10,000, with this upper limit being an outlier. *See, e.g.*, COLO. REV. STAT. § 18-7-201 (2017) (up to six months and/or $50–$750); D.C. CODE § 22-2701 (2017) (one to ninety days, and $500); 720 ILL. COMP. STAT. 5/11-14 (2017) (up to one year and/or $2,500); WIS. STAT. § 944.30 (2017) (up to nine months or $10,000).

210. *See, e.g.*, Milliken v. City Council of Weatherford, 54 Tex. 388, 394 (1881) (describing sellers of sex as an "unfortunate and degraded class . . . fallen beneath the true mission of women").

211. *In re* Carey, 207 P. 271, 307 (Cal. Dist. Ct. App. 1922); *Milliken*, 54 Tex. at 394.

212. People v. Jelke, 135 N.E.2d 213, 216 (N.Y. 1956).

213. *Carey*, 207 P. at 305; San Antonio v. Salvation Army, 127 S.W. 860, 863 (Tex. Civ. App. 1910).

214. *See, e.g.*, United States v. Curran, 8 F.2d 355, 355 (2d Cir. 1925) (considering a New York statute that "makes any *woman* a 'vagrant' who 'offers to commit prostitution'" (emphasis added)); *Carey*, 207 P. at 271, 274 (holding "men cannot commit the crime of carrying on the business of prostitution, except as accessories," even where the relevant ordinance was gender-neutral); People v. Brandt, 306 P.2d 1069, 1070 (Cal. App. Dep't Super. Ct. 1956) ("Obviously a male cannot be a prostitute . . . ."); Sumpter v. State, 306 N.E.2d 95, 100–01 (Ind. 1974) ("The Indiana legislature has made a policy decision that prostitution is a significant social problem only among females. Such a decision is clearly

subjected sellers of sex to prolonged detention for the ostensible purpose of rehabilitation.[215] A California court defended this prolonged detention, explaining that sellers of sex "constitute[d] a menace to the morals and social welfare of mankind" and that "[t]he right to quarantine . . . implies the right to continue the isolation so long as the danger remains . . . for the laudable purpose of reclaiming [the seller of sex] and destroying the probability of a subsequent renewal of the danger."[216]

One court even treated women who were forced into prostitution as immoral.[217] Even when there was recognition that a woman may engage in prostitution "due to social maladjustments or to the abuse of her affections," the relevant criminal law still did not view her as "an innocent person" but rather a person "steeped in crime."[218] The stigma and threat to society by women involved in prostitution outweighed all other considerations, including whether a woman was coerced, manipulated, or forced by environmental factors.

Although prostitution remains widely criminalized, the criminal justice system has shed much of its previous morality-laden language to describe sellers of sex, especially as views on nonmarital sex have changed. State penal codes no longer single out women and sellers of sex for punishment for prostitution.[219] States began

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reasonable and, therefore, should be sustained."); *see also* Jane H. Aiken, *Differentiating Sex from Sex: The Male Irresistible Impulse*, 12 N.Y.U. REV. L. & SOC. CHANGE 357, 380 (1983) (discussing the Louisiana Supreme Court's upholding of a gender-specific prostitution statute in 1974 and concluding that "women's use of [sexual] power creates a moral problem that justifies legislative action").

Men were rarely arrested or punished for buying sex or engaging in prostitution themselves. *See* BASS, *supra* note 115, at 30; HOBSON, *supra* note 135, at 34; *see also* People v. Edwards, 180 N.Y.S. 631, 635 (Ct. Gen. Sess. 1920) ("[I]t has been the custom . . . to arrest the women and let the men go . . . ."). Where state statutes did punish men, they were not subject to the same harsh penalties as women. *See* Leffel v. Municipal Court, 54 Cal. Ct. App. 3d 569, 574 (1976) ("The act of her partner in vice, while equally as nefarious, is neither commercialized nor continuous. It is proper enough to send him to jail for his offense, but it is doubtful if the scheme of impounding him for purposes of reformation would commend itself to the lawgiver.").

215. Misdemeanors at that time were commonly punished by a term of imprisonment not to exceed one year, but statutes allowing commitment to a "reformative" institution permitted significantly longer periods of commitment for women convicted of prostitution. *See* People *ex rel.* Duntz v. Coon, 22 N.Y.S. 865, 866, 870 (Gen. Term 1893) (recognizing that persons convicted of misdemeanors are generally subject to imprisonment for a term not to exceed one year, but that the relevant statute imposes imprisonment for up to five years for women convicted of a prostitution-related misdemeanor in a "house of refuge for women"); *see also Carey*, 207 P. at 271–72 (describing a California law subjecting women convicted of prostitution to indeterminate commitment at an institution aimed at the "reformation of delinquent women"). Such disproportionate "rehabilitative" punishment for only women continued until at least the 1960s, when it started to be struck down as violative of the Fourteenth Amendment. *See, e.g.*, United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968).

216. *Carey*, 207 P. at 274.

217. *See id.* ("The fallen woman alone carries on the traffic [prostitution]. If others prey upon her frailty, it is only with her co-operation—willing or unwilling.").

218. *Id.*

219. *See* Johnson, *supra* note 193, at 723–24 & nn.46–47. One court expressly disavowed the language of "fallen women" as "reek[ing] with a condescending attitude that has no place in today's jurisprudence." *See* McNeil v. State, 739 A.2d 80, 94 (Md. 1999); *see also Leffel*, 54 Cal. Ct. App. 3d 569.

to regularly criminalize solicitation in the latter half of the twentieth century, sometimes with parity in punishment with the sale of sex, marking a distinct shift in attitude towards prostitution.[220] Sellers of sex also are increasingly viewed as victims in certain scenarios.[221] Many states have recognized that forced prostitution should not be subject to criminal sanction by providing affirmative defenses as well as vacatur and expungement of convictions for victims of trafficking or forced prostitution.[222] There is also an increased awareness that economic factors lead many individuals to sell sex, evidenced by state rehabilitative diversion programs designed to encourage sellers of sex to leave sex work.[223]

This view that sellers of sex can be victims has led to a slow shift in enforcement against other parties involved in prostitution. Enforcement priorities in some jurisdictions have shifted towards buyers, pimps, and traffickers, especially as a result of increased concern surrounding sex trafficking.[224] Although women

220. *See* Pantea Javidan, *Invisible Targets: Juvenile Prostitution, Crackdown Legislation, and the Example of California*, 9 CARDOZO WOMEN'S L.J. 237, 250 (2003) (describing how California criminalized buying sex in 1986); Julie Lefler, Note, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN'S L.J. 11, 16–17 & n.45 (1999); *see also supra* note 164 (discussing early state laws criminalizing visiting houses of prostitution).

221. *See, e.g.*, State v. Washington-Davis, 867 N.W.2d 222, 240–41 (Minn. Ct. App. 2015), *aff'd*, 881 N.W.2d 531 (Minn. 2016) (discussing the pimp's "control" over prostitutes and describing the prostitutes as "victims").

222. *See, e.g.*, ALA. CODE § 13A-6-159 (2015); ARK. CODE ANN. §§ 5-70-102(c) to 103(c) (West 2015); FLA. STAT. § 943.045(16) (2017); MD. CODE ANN., CRIM. PROC. § 8-302(b)(2) (LexisNexis 2017); N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2017); N.Y. PENAL LAW § 230.01 (McKinney 2017) ("[I]t is an affirmative defense that the defendant's participation in the offense was a result of having been a victim of compelling prostitution . . . [or] a victim of sex trafficking . . . ."). *See generally* Zornosa, *supra* note 177, at 184–85 (discussing state vacatur statutes and affirmative defenses for trafficking victims). Despite some progress in the criminal laws to protect against forced prostitution, there is still criticism that the criminal laws continue to target individuals who are forced to sell sex. *See, e.g.*, Amanda Peters, *Modern Prostitution Legal Reform & the Return of Volitional Consent*, 3 VA. J. CRIM. L. 1, 3–5, 20, 29–39 (2015); Amanda Shapiro, Note, *Buyer Beware: Why Johns Should Be Charged with Statutory Rape for Buying Sex from a Child*, 23 J.L. & POL'Y 449, 461–62, 467–74 (2014).

223. *See* BARBARA G. BRENTS ET AL., THE STATE OF SEX 34–41 (2010); Chuang, *supra* note 195, at 1699–1702; Shdaimah et al., *supra* note 2, at 9; *infra* note 224; *see also, e.g.*, SARAH SCHWEIG ET AL., CTR. FOR COURT INNOVATION, PROSTITUTION DIVERSION PROGRAMS 3–5, 9–10 (2012), http://www.courtinnovation.org/sites/default/files/documents/CI_Prostitution%207.5.12%20PDF.pdf [https://perma.cc/NL6U-XXM9].

224. *See, e.g.*, Sara Jean Green, *'Buyer Beware': Early Success for Initiative Targeting Johns Instead of Prostitutes*, SEATTLE TIMES, May 16, 2015, https://www.seattletimes.com/seattle-news/crime/buyer-beware-early-success-for-initiative-targeting-johns-instead-of-prostitutes/ (reporting 2014 as the first year when "patronizing charges outpaced prostitution charges" (internal quotation omitted)); *National Law Enforcement Coalition Arrests Record Number of Johns*, COOK COUNTY SHERIFF'S OFF. (Aug. 10, 2016), https://www.cookcountysheriff.org/national-law-enforcement-coalition-arrests-record-number-johns/ [https://perma.cc/W3QP-6LLH] (reporting the National Johns Suppression Initiative arrested over 1,300 buyers of sex across eighteen states); *see also* Zak Koeske, *Dart Says He's Committed to Combatting Sex Trafficking Despite Challenges*, CHI. TRIB., Jan. 20, 2017, http://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-dart-back-page-adds-st-0122-20170120-story.html (quoting Cook County Sheriff Tom Dart as saying the police "respond to areas where we know there's prostitution going on[,] . . . see what we come across, talk to the women about getting out of the business, and . . . try to get the ones we talk to to cooperate with us to find out if there are bigger players involved here"). *But see id.* (reporting that since 2012, the Cook County sheriff's

engaged in street prostitution continue to be targeted for arrest at significantly higher rates than male buyers of sex,[225] an increasing number of jurisdictions are engaging in enforcement efforts directed at buyers.[226] Additionally, enforcement of prostitution laws generally has decreased dramatically—national arrest statistics for prostitution and commercialized vice decreased 55 percent between 1990 and 2010.[227]

Although blame has been moving away from sellers of sex, they still remain active targets of criminal laws in most jurisdictions, complicating the question of contemporary societal views on prostitution. However, the purpose of these laws generally has shifted from punishing a crime against morality to protecting the public order as the sale of sex is increasingly viewed as a victimless crime.[228] Rather than aiming to protect society from women who sell sex, many criminal laws now

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office has arrested over 3,000 sellers of sex and johns, but only 37 individuals for human trafficking and promoting prostitution).

Early laws, especially during the hysteria of the White Slave Panic, *see supra* note 57, also criminalized prostitution-related crimes—such as accepting the earnings of a prostitute, pandering, and keeping a house of prostitution—as felonies. *See, e.g.*, People v. Bain, 116 N.E. 615 (Ill. 1917) (considering an appeal from a conviction for being a keeper of a house of prostitution); Steven v. State, 150 S.W. 944 (Tex. Ct. Crim. App. 1912) (considering an appeal from a conviction for pandering); State v. Poole, 84 P. 727 (Wash. 1906) (addressing an appeal from a conviction for accepting the earnings of a prostitute). *But see* Javidan, *supra* note 220, at 250 (describing California's failure to comprehensively outlaw pimping until 1998).

225. *See* Shay-Ann M. Heiser Singh, Comment, *The Predator Accountability Act: Empowering Women in Prostitution to Pursue Their Own Justice*, 56 DEPAUL L. REV. 1035, 1062 (2007) (describing the enforcement bias against women); *see also* HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, ARREST IN THE UNITED STATES, 1990-2010, at 2, 4 (2012) (showing that the number of females arrested in the United States in 2010 for prostitution and commercialized vice was well over double the number of males). Women engaged in street prostitution are easy and visible targets, and police often use arrests of such women to bolster their arrest statistics. *See* BASS, *supra* note 115, at 30–31.

226. As of 2012, 826 United States cities and counties had tried enforcement efforts directed at individuals who purchase sex. *See* MICHAEL SHIVELY ET AL., ABT ASSOCIATES, A NATIONAL OVERVIEW OF PROSTITUTION AND SEX TRAFFICKING DEMAND REDUCTION EFFORTS: FINAL REPORT iii (2012), https://www.ncjrs.gov/pdffiles1/nij/grants/238796.pdf [https://perma.cc/F89Z-2SQP]. In some states, there is parity between arrests for men and women. *See* Johnson, *supra* note 193, at 726 n.61 (providing Wisconsin arrest statistics); *supra* note 224.

227. SNYDER, *supra* note 225, at 4 (providing arrest statistics). *But see* MEREDITH DANK ET AL., URBAN INST., CONSEQUENCES OF POLICING PROSTITUTION: AN ANALYSIS OF INDIVIDUALS ARRESTED AND PROSECUTED FOR COMMERCIAL SEX IN NEW YORK CITY (2017), https://www.urban.org/sites/default/files/publication/89451/consequences-of-policing-prostitution.pdf [https://perma.cc/AE83-TFFW].

228. *See In re* Sehmi, 2014 WL 4407689, at *7 (BIA Aug. 19, 2014) ("In the intervening period, views regarding prostitution have indeed undergone a transformation in our society, and simple prostitution in some states has become a regulatory offense and is a quality of life crime to prevent public disorder."); *see also, e.g.*, CAL. PENAL CODE § 647 (West 2017) (disorderly conduct misdemeanor); HAW. REV. STAT. §§ 706-640, 706-663 (2017) (petty misdemeanor). However, some states, like Wisconsin, retain prostitution as a morality-based crime. Prostitution appears under a section in the Wisconsin penal code entitled "Crimes Against Sexual Morality," which also still criminalizes adultery as a felony. WISC. STAT. § 944 (2017).

aim to prevent attendant harms that may be associated with prostitution such as drug use, violence, and disease.[229]

As illustrated by the criminal justice system, sellers of sex are generally no longer viewed as immoral actors, as concerns over women's sexual agency threatening societal morality have diminished since the turn of the twentieth century. This move away from a singular focus on the corrupting influence of women's sexuality has allowed for increased awareness of the economic motivations and structural factors that lead individuals to sell sex, as well as a recognition that individuals can be forced to sell sex. Although selling sex remains criminalized and the criminal justice system's approach to prostitution is far from perfect,[230] criminal law nevertheless reflects fundamental changes in societal views towards the sale of sex.

IV. RECOMMENDATIONS FOR REFORM

In light of changing societal views that generally no longer view sellers of sex as immoral actors, this Part recommends statutory and jurisprudential reforms to prostitution-related immigration laws, which continue to target sellers of sex. The development of immigration laws on prostitution has stagnated since the turn of the twentieth century, and does not reflect changed understandings of the complexities of prostitution. Although there have been a few recent reforms focusing on trafficking and forced prostitution, these reforms do not go far enough.[231] Reforms should be expanded to remove penalties for prostitution, including the voluntary sale of sex, both in the prostitution inadmissibility ground and in crimes involving moral turpitude jurisprudence.

229. *See* Brents & Hausbeck, *supra* note 204, at 274; Ronald John Weitzer, *The Politics of Prostitution in America*, *in* SEX FOR SALE 159–80 (2000); *see also* State v. Schultz, 582 N.W.2d 113, 117 (Wis. Ct. App. 1998) (upholding a prostitution statute where the "clear secular purpose [was] to protect public health and welfare, to prevent other forms of prostitution, and to prevent criminal activity associated with prostitution"); *cf.* NEV. ADMIN. CODE §§ 441A010-A325, 441A775-A815 (2016) (requiring the regular screening of sex workers in licensed brothels to prevent the spread of sexually transmitted infections).

230. One major problem is the continued disproportionate targeting of minority women for arrest. *See* SNYDER, *supra* note 225, at 2, 4 (providing arrest statistics); *see also* DANK ET AL., *supra* note 227, at 3 (describing how "broken windows policing" led to increased targeting of minority women for prostitution arrests); Johnson, *supra* note 193, at 726 & nn.63–67 (collecting cases where defendants on trial for prostitution cited statistics showing enforcement targeting women). Another major problem is police practices that lead to the potential for police abuse and increased victimization of sellers of sex, such as those that allow officers to engage in sexual contact with suspected sellers of sex prior to making an arrest. *See* Jenavieve Hatch, *Sex Workers in Alaska Say Cops Are Abusing Their Power to Solicit Sex Acts*, HUFFPOST (Aug. 17, 2017, 12:50 PM), http://www.huffingtonpost.com/entry/sex-workers-in-alaska-say-cops-are-abusing-their-power-to-solicit-sex_us_596e1d26e4b010d77673e488 [https://perma.cc/ZP9L-CSCX].

231. *See supra* text accompanying notes 114–118, 173–180.

A. Prostitution-Related Inadmissibility Ground

Prostitution should no longer be an explicit inadmissibility ground under section 212(a)(2)(D) of the INA. This provision should also include a carve out for the sale of sex in the provision encompassing unlawful commercialized vice. Such reforms are necessary because first, this provision, grounded in morality, has not been reconsidered since its inception over a century ago, despite changing societal views on sellers of sex. Second, prostitution should not be a ground of inadmissibility when solicitation is not.[232] Finally, this ground should not target sellers of sex because its application can be inconsistent and biased, as it does not require a conviction.

First, Congress should remove prostitution from the inadmissibility grounds in light of changed views on prostitution and consensual sexual activity generally. This ground was developed around the turn of the twentieth century to protect United States citizens from the perceived immorality of sellers of sex.[233] It has not been critically reexamined, and remains a relic of anachronistic morality-based immigration legislation, potentially subjecting all sellers of sex, even those who may have been forced or coerced, to penalties.[234] By contrast, the evolution of criminal laws shows that sellers of sex generally are no longer considered serious threats to morality and are no longer viewed as seeking to corrupt society and families.[235] Indeed, prostitution is legal in a handful of local jurisdictions in the United States.[236] But even though prostitution laws continue to be enforced in most United States jurisdictions, there is a growing recognition that individuals selling sex are not as culpable as they were once thought to be, even when they choose sex work, and that they can be victims.[237] Additionally, criminal laws have started to recognize exceptions for individuals forced into prostitution, unlike this inadmissibility ground.[238] Subjecting noncitizens who engage in prostitution to the harsh penalties triggered by this inadmissibility ground thus runs counter to contemporary perspectives on the culpability and dangerousness of sellers of sex.

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232. This Article is not proposing, however, that solicitation be added as a ground of inadmissibility to conform its treatment to that of prostitution under the immigration laws. Although there is disagreement on the culpability of buyers of sex, *see supra* notes 220, 224–227 and accompanying text, changes in societal views on consensual sexual activity generally, *see supra* Part III.A, counsel against creating additional immigration restrictions related to sexual morality. Moreover, this Article not only advocates for comparable treatment for sellers and buyers of sex, but also for removal of immigration penalties for sellers of sex. *See infra* notes 233–276 and accompanying text.

233. *See supra* Part I.

234. *But see supra* notes 130–131 and accompanying text (discussing a limited duress exception). Other terms in the INA are also relics of the past, including "habitual drunkard" and "crimes involving moral turpitude." *See* INA § 101(f)(1); 8 U.S.C. § 1101(f)(1) (2012); *see also* Holper, *supra* note 144, at 653–57 (detailing the history of the term "crime involving moral turpitude"). *See generally* Jayesh M. Rathod, *Distilling Americans: The Legacy of Prohibition on U.S. Immigration Law*, 51 HOUS. L. REV. 781 (2013) (discussing the history of alcohol-related provisions in immigration law).

235. *See supra* Part III.B.

236. *See* NEV. REV. STAT. §§ 201.354, 244.345 (2017).

237. *See supra* Part III.

238. *See supra* note 222 and accompanying text.

Congress has in the past eliminated immigration penalties for some consensual sexual conduct, recognizing that these laws no longer reflected societal views on the activity. For example, Congress removed the homosexuality inadmissibility ground even before the Supreme Court ruled that consensual homosexual conduct is constitutionally protected.[239] The Immigration Act of 1917 first excluded homosexuals from the United States under a provision that prohibited the admission of "persons of constitutional psychopathic inferiority" certified by a physician to be "mentally . . . defective."[240] Homosexuality continued to be subject to immigration penalties until 1990 under "psychopathic personality" and "sexual deviation" grounds.[241] Prior to the enactment of the 1990 legislation, a Congressional Report explained that "changing attitudes in American society and within the medical community toward . . . sexual orientation require a modification of the statute in order to prevent the perpetuation of unfair stigmas, and to ensure that fundamental notions of human dignity are respected."[242] The Report recommended the repeal of the "sexual deviation" ground "to make it clear that the United States does not view personal decision about sexual orientation as a danger to other people in our society."[243] Similar to how homosexuality is no longer considered a danger to society, sellers of sex are generally no longer viewed by society as dangerous and immoral.

Second, prostitution should no longer be an inadmissibility ground because solicitation, the "direct precursor" to prostitution, is not explicitly such a ground.[244] There is no meaningful reason why prostitution should be an inadmissibility ground when solicitation is not. Moreover, contemporary understanding is that buyers are just as, if not more, culpable than sellers of sex.[245] Nevertheless, if buyers of sex do

239. *See* Immigration Act of 1990 (IMMACT 90), Pub. L. No. 101-649, 104 Stat. 4978; *see also* Lawrence v. Texas, 539 U.S. 558 (2003). Although the legislative history reflects concerns over how the American public would view the removal of this ground, Congress nevertheless eliminated it. *See, e.g.*, STAFF OF H. & S. COMMS. ON THE JUDICIARY, 97TH CONG., U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 349 (Comm. Print 1981) (stating the concern of some members of the Select Commission on Immigration and Refugee Policy that the "media would focus on such proposed changes as eliminating the bar against homosexuals" and recognizing "the controversial nature of some of the proposed recommendations on grounds of exclusion").

240. Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874 (1917) (repealed 1952).

241. *See* 104 Stat. 4978; Act of Oct. 3, 1965, 79 Stat. 911; 8 U.S.C. § 1182(a)(4) (1976 and Supp. V 1981); Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 120 (1967) ("The legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals . . . ."); H.R. REP. NO. 955 (1990) (Conf. Rep.). *See generally* Robert Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 HARV. C.R.-C.L. L. REV. 439 (1994) (discussing the history of the exclusion of homosexuals).

242. H.R. REP. NO. 100-882, at 19 (1988) (Conf. Rep.). Unlike prostitution, which is a criminal exclusion, the "psychopathic personality" ground was considered to be a health-related exclusion. *See id.* at 19–20 ("Not only is this provision out of step with current notions of privacy and personal dignity, it is also inconsistent with contemporary phychiatric [sic] theories.").

243. *Id.* at 20.

244. *See* Rohit v. Holder, 670 F.3d 1085, 1089–90 (9th Cir. 2012).

245. *See supra* notes 220, 224–226 and accompanying text.

not warrant a specific inadmissibility ground in the immigration laws, neither should sellers.

Third, Congress should eliminate prostitution as an inadmissibility ground because it presents administrability problems that create inconsistent and biased enforcement. The prostitution inadmissibility ground captures conduct that may be legal in other jurisdictions, both abroad and in parts of the United States.[246] Accordingly, individuals engaging in lawful conduct may be subject to immigration penalties. Additionally, there is no bright-line test to determine whether a noncitizen's conduct falls under this ground—a conviction is not necessary.[247] If a noncitizen has no convictions, a government official must determine in some other way whether he or she has sold sex in the past, or even more challenging, whether he or she will sell sex in the future. Like criminal laws that permit police to arrest individuals for intent to commit prostitution, which are criticized for allowing police to arrest individuals who "look like prostitutes," this indeterminate standard too can lead to abuses and stereotyping by officials trying to determine whether this ground applies.[248] In light of the above reasons, Congress should eliminate prostitution as an inadmissibility ground.

B. Crimes Involving Moral Turpitude

Not only should Congress remove prostitution from the inadmissibility grounds, adjudicators should also conclude prostitution is no longer a crime involving moral turpitude. The very definition of crimes involving moral turpitude not only allows for, but requires, the reexamination of whether conduct involves

246. *See* 22 C.F.R. § 40.7(a)(12)(iii) (1990) ("A person who comes under one or more of the categories of persons described in INA 212(a)(12) is ineligible to receive a visa under that section even if the acts engaged in are not prohibited under the laws of the foreign country where the acts occurred."); Visas; Regulations and Documentation Pertaining to Both Nonimmigrants and Immigrants Under the Immigration and Nationality Act, 52 Fed. Reg. 42,590-01, 42,594 (Nov. 5, 1987) (same); *supra* text accompanying notes 126–131 (discussing the text of the prostitution inadmissibility ground).

247. *See supra* note 128 and accompanying text. But even if a conviction was required, the enforcement of prostitution-related criminal laws has a racial and gender bias. *See supra* note 230. The exclusion grounds that captured homosexuality were criticized for similar reasons related to inconsistent application. *See, e.g.*, STAFF OF H. & S. COMMS. ON THE JUDICIARY, 97TH CONG., U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 238 (Comm. Print 1981) ("Others [members of the Select Commission on Immigration and Refugee Policy] believe that such language as "mental defect" or "sexual deviation" is too vague for consistent, equitable interpretation . . . .").

248. *See* Karen Struening, *Walking While Wearing a Dress: Prostitution Loitering Ordinances and the Policing of Christopher Street*, 3 STAN. J. CRIM. L. & POL'Y 16, 18–19, 46 (2016); *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities*, HUM. RTS. WATCH (July 19, 2012), http://www.hrw.org/node/108771/section/2 [https://perma.cc/NN3K-RVVK] ("Police stops . . . are often a result of profiling, a practice of targeting individuals as suspected offenders for who they are, what they are wearing and where they are standing, rather than on the basis of any observed illegal activity."); *see also* SEN. REP. NO. 61-196, at 19 (1909) (describing how immigration officials must judge women at ports of entry "mainly by their appearance and the stories they tell"); GARDNER, *supra* note 35, at 52–57 ("[I]mmigration officials attempted to discern immoral from moral [Chinese] women through careful observation of women's appearance and their behavior and repeated interrogation of their testimony."); Abrams, *supra* note 13, at 682–83 (discussing the stereotyping of Chinese women when determining their involvement in prostitution).

moral turpitude in light of society's changed moral views.[249] Upon such a reexamination of the sale of sex, adjudicators should conclude that it does not categorically involve moral turpitude in light of contemporary understandings of the victimization of sellers of sex as well as their motivations, which show that their conduct is generally no longer considered base, vile, or depraved.

Case law has recognized this need to review whether prostitution is still a crime involving moral turpitude. Acknowledging that it had been "many years" since it had addressed this question "in a precedent decision," the BIA noted a recent "transformation" of views on prostitution.[250] Using the criminal justice system as a proxy for societal views, it noted that "simple prostitution in some states [is becoming] a regulatory offense and . . . a quality of life crime to prevent public disorder."[251] The Sixth Circuit also recognized society's changing attitudes towards prostitution.[252] It went so far as to conclude that "there is now increased attention to the question of whether and to what extent prostitution should be criminalized."[253] Both, however, declined the opportunity to reconsider whether prostitution involves moral turpitude in light of contemporary perspectives.[254]

Rather than shirk the thorny question whether prostitution involves moral turpitude in contemporary times, adjudicators should confront this issue head on, and conclude that the sale of sex is no longer a crime involving moral turpitude.

Prostitution does not categorically involve moral turpitude because state criminal laws capture conduct that does not involve moral turpitude, namely the sale of sex by individuals who are trafficked or otherwise forced to sell sex. If not all conduct that may be realistically prosecuted under the criminal statute involves

249. The BIA has explained that "the nature of a crime is measured against *contemporary* moral standards and may be susceptible to change based on the prevailing views of society." *In re* Torres-Varela, 23 I. & N. Dec. 78, 83 (BIA 2001) (emphasis added); *see also In re* Ortega-Lopez, 26 I. & N. Dec. 99, 100 n.2 (BIA 2013), *rev'd*, 834 F.3d 1015 (9th Cir. 2016), *remanded to* 27 I. & N. Dec. 382 (BIA 2018) (holding courts must consider "the evolving nature of what conduct society considers to be contrary to accepted rules of morality . . . ."). In 2013 and again on remand in 2018, the BIA addressed the question whether sponsoring or exhibiting an animal in animal fighting constituted a crime involving moral turpitude and used contemporary social norms to ultimately conclude that it does. *In re Ortega-Lopez*, 27 I. & N. Dec. at 390; *In re Ortega-Lopez*, 26 I. & N. Dec. at 100 n.2. The BIA reasoned that it involves "reprehensible conduct," namely the "intentional infliction of harm or pain on sentient beings that are compelled to fight." *In re Ortega-Lopez*, 26 I. & N. Dec. at 101–03. As support, it cited the "increasing national consensus against this activity" reflected by recent laws prohibiting animal fighting. *Id.*

250. *In re* Sehmi, 2014 WL 4407689, at *7 (BIA Aug. 19, 2014) (citing *Ortega-Lopez*, 26 I. & N. Dec. at 100 n.2). *But see supra* notes 153, 155–157 and accompanying text (describing a 2018 BIA decision that states in dicta that prostitution is "unquestionably" a crime involving moral turpitude).

251. *In re Sehmi*, 2014 WL 4407689, at *7.

252. Reyes v. Lynch, 835 F.3d 556, 561 (6th Cir. 2016) ("[O]ur society's—and the BIA's—views regarding prostitution and solicitation of prostitution may continue to transform.").

253. *Id.* (citing Emily Bazelon, *Should Prostitution Be a Crime?*, N.Y. TIMES, May 5, 2016, http://www.nytimes.com/2016/05/08/magazine/should-prostitution-be-a-crime.html).

254. *See Reyes*, 835 F.3d at 561 (deferring under *Chevron* to the BIA's precedential opinions on prostitution as a crime involving moral turpitude, concluding that they were not unreasonable); *In re Sehmi*, 2014 WL 4407689, at *7.

moral turpitude, then a conviction under that statute cannot categorically involve moral turpitude.[255] Individuals who are trafficked or otherwise forced into prostitution are routinely prosecuted under state laws criminalizing prostitution.[256] Such individuals do not act with the requisite culpable mental state, nor can their conduct be base, vile or depraved since their actions are not voluntary.[257] Because individuals who are trafficked and forced into prostitution are prosecuted under state criminal laws, prostitution cannot categorically involve moral turpitude.

Additionally, prostitution is increasingly viewed as a form of employment, with many individuals being forced to sell sex because of their economic circumstances.[258] Although prostitution remains criminalized, this cannot be the end of the moral turpitude inquiry since "[n]ot every offense contrary to good morals involves moral turpitude."[259] Something else is needed for a crime to involve moral turpitude—a "vicious motive or a corrupt mind."[260] The sale of sex as a form of employment does not reflect a vicious motive or a corrupt mind.[261] Although society at the turn of the twentieth century wholesale labeled sellers of sex as immoral, contemporary understandings of prostitution show that sellers of sex do not engage in prostitution to fulfill lustful desires or corrupt society.[262] Because not

255. *See supra* notes 147–148 and accompanying text (describing the categorical approach).

256. *See* DANK ET AL., *supra* note 227, at 1–5, 10–11, 15–22 (describing arrests and prosecutions of trafficking victims for prostitution); *supra* note 222 (describing the criticism that state criminal laws capture individuals who are forced to sell sex). Additionally, in recognition of the fact that their criminal laws are capturing individuals trafficked and forced into prostitution, some states have provided for vacatur and expungement of prostitution convictions for such victims. *See supra* note 222.

257. *See supra* notes 143–146 (describing the categorical approach). Indeed, recent legislation shows a recognition that prostitution can be a form of victimization through its creation of forms of immigration relief for noncitizens forced into prostitution. *See supra* text accompanying notes 114–118.

258. *See supra* notes 200, 223 (describing sex work as a form of employment).

259. *In re* D-, 1 I. & N. Dec. 190, 194–95 (BIA 1942). The Ninth Circuit went so far as to conclude that in the present, "consensual sexual conduct among adults may not be deemed 'base, vile, and depraved' as a matter of law simply because a majority of people happen to disapprove of a particular practice," and that "[m]ore is required for moral turpitude." Nunez v. Holder, 594 F.3d 1124, 1132–33 (9th Cir. 2010).

260. *In re D-*, 1 I. & N. Dec. at 194.

261. *See supra* notes 219–223 (describing contemporary understandings of the motivations of sellers of sex).

262. The treatment of indecent exposure in crimes involving moral turpitude jurisprudence bolsters this conclusion. When analyzing whether indecent exposure involves moral turpitude, the BIA focused on intent, holding that it does not involve moral turpitude when there is "no indication whether the exposure was to arouse the sexual desires of the parties concerned or with a lewd or lascivious intent . . . ." *In re* Cortes Medina, 26 I. & N. Dec. 79, 82–83 (BIA 2013) (quoting *In re* P-, 2 I. & N. Dec. 117, 121 (BIA 1944)). This lewd intent "is what makes it 'base, vile, or depraved, and contrary to the accepted rules of morality.'" *In re Cortes Medina*, 26 I. & N. Dec. at 82–83 (quoting *In re* Ajami, 22 I. & N. Dec. 949, 950 (BIA 1999)). *But see In re* Lambert, 11 I. & N. Dec. 340 (BIA 1965) (holding that renting a room with knowledge that it would be used for prostitution or lewdness was a crime involving moral turpitude).

all instances of prostitution involve base, vile, or depraved conduct, prostitution cannot categorically be a crime involving moral turpitude.[263]

Moreover, prostitution does not involve moral turpitude because it is conduct that is *malum prohibitum*, as compared with an act that is *malum in se*.[264] The Ninth Circuit, when concluding that statutory rape was not a crime involving moral turpitude, reasoned that the relevant criminal statute "proscribe[d] some conduct that is *malum prohibitum*."[265] The Ninth Circuit so reasoned for several reasons. First, it concluded the conduct was *malum prohibitum* because the sexual activity at issue would have been legal if the adult and minor were married, as provided in another section of the penal code.[266] Second, the Ninth Circuit cited the fact that some of the conduct encompassed by the criminal statute is legal in other states.[267] Third, the purpose of California's statutory rape law "was not moral, so much as pragmatic—they were attempting to reduce teenage pregnancies."[268] For reasons similar to those cited by the Ninth Circuit, prostitution laws proscribe conduct that is *malum prohibitum*. Prostitution is now a public order or regulatory offense in many jurisdictions, aimed to maintain order and promote public health.[269] Prostitution also is not universally criminalized—it is legal in parts of Nevada and in other countries.[270] Because prostitution laws encompass conduct that is *malum prohibitum*, prostitution should not categorically be a crime involving moral turpitude.

Finally, prostitution cannot be a crime involving moral turpitude simply because the sexual activity involves a commercial transaction.[271] Such a rationale necessarily would encompass other activities like exotic or nude dancing that can involve sexual contact, which, like prostitution, involve payment for a sexual activity, albeit of a different nature. However, nude dancing, even where it is in violation of local law, has not been considered a crime involving moral turpitude.[272]

The Ninth Circuit's decision in *Rohit v. Holder* is illustrative of the problems of concluding prostitution categorically involves moral turpitude and should not be

263. *See* Quintero-Salazar v. Keisler, 506 F.3d 688 (9th Cir. 2007) (holding that statutory rape is not categorically a crime involving moral turpitude for several reasons, including the fact that not all conduct captured by the criminal statute involves moral turpitude).

264. *See supra* note 146 and accompanying text (describing the distinction between *malum in se* and *malum prohibitium* and its use in moral turpitude analysis).

265. *Quintero-Salazar*, 506 F.3d at 693.

266. *Id.*

267. *Id.*

268. *Id.*

269. *See supra* note 228 and accompanying text.

270. *See* NEV. REV. STAT. § 201.354 (2017); Brief of Amicus, American Immigration Lawyers Ass'n at 19–21, *In re* R-S-S- (BIA 2012) (describing decriminalization and/or legalization of prostitution in other countries).

271. *See In re* Ortega-Lopez, 27 I. & N. Dec. 382, 386 (BIA 2018) (stating in dicta that prostitution involves moral turpitude because "of the socially degrading nature of commercialized sexual services . . . .").

272. Nunez v. Holder, 594 F.3d 1124, 1138 (9th Cir. 2010); *In re* Cortes Medina, 26 I. & N. Dec. 79, 85–86 (BIA 2013).

followed.[273] *Rohit* explains that prostitution involves moral turpitude because it "always involves sexual exploitation."[274] The panel's conclusion seems to have stemmed from the assumption that either all instances of prostitution are forced, or that prostitution can never be a voluntary choice and thus is always exploitative.[275] If the panel believed that all instances of prostitution are forced, this belief is factually incorrect. Although prostitution certainly can involve sexual exploitation, it is not the case that *every* instance of prostitution involves forced sex.[276] Additionally, this reading results in the punishment of the party that is being sexually exploited by triggering immigration consequences for noncitizens who sell sex. In other words, by triggering penalties for a noncitizen who sold sex, the court's reasoning suggests that the noncitizen who is being exploited and forced to sell sex is the bad actor. Even if the panel acted under the assumption that prostitution can never be a voluntary choice, the same problem of punishing the victim arises.

Because sellers of sex are generally no longer considered a serious threat to morality, and may be victims in certain cases, it is becoming increasingly difficult to justify harsh immigration penalties for prostitution, especially in light of the pragmatic and doctrinal problems identified above. Congress and the courts should therefore take this opportunity to remove these outdated morality-based provisions from immigration law.

CONCLUSION

Prostitution-related immigration laws are some of the last remaining vestiges of morality-based immigration legislation enacted at the turn of the twentieth century. These laws are outdated and fail to take into account contemporary understandings, reflected in the criminal justice system, that prostitution is not a serious crime against morality, but rather that many individuals involved in prostitution are victims or sell sex for economic reasons. Additionally, prostitution-related immigration laws continue to unfairly impact noncitizen women, making them more vulnerable to serious exploitation and abuse. These laws sow a distrust of the government, as women involved in prostitution are reluctant to report crimes to law enforcement for fear of penalties. Therefore, both to cleanse the law of the gendered and outdated notions of morality that continue to underpin these laws, and also to better protect this vulnerable population, immigration laws should dispose of penalties for the sale of sex.

It is especially important to protect this vulnerable population today in light of the Trump administration's scapegoating of noncitizens. Vociferous rhetoric

273. *See Rohit*, 670 F.3d 1085. Although *Rohit* ultimately addressed the issue whether solicitation involves moral turpitude, it referenced prostitution in concluding that it does. *See id.*

274. *Id.* at 1090. *Rohit* was attempting to distinguish prostitution from statutory rape, which the Ninth Circuit has held does not involve moral turpitude. *See id.*

275. *See supra* notes 195–199 and accompanying text (describing the belief of some feminists and evangelical Christians that prostitution cannot be a voluntary choice).

276. *See, e.g.*, Valerie Jenness, *From Sex as Sin to Sex as Work: COYOTE and the Reorganization of Prostitution as a Social Problem*, 37 SOC. PROBS. 403, 405–06 (1990).

from the administration, especially President Trump himself, mirrors that from the turn of the twentieth century, branding noncitizens as undesirable and threats to American values. When he announced his presidential bid, Trump specifically referred to Mexican immigrants as "people that have lots of problems" and who are "bringing crime."[277] In a July 2017 speech in Poland, he spoke of threats to the "West," including "dire threats . . . to our way of life." He specifically spoke of "Americans, Poles, and the nations of Europe" working together to "confront forces, whether they come from inside or out, from the South or the East, that threaten over time to undermine these values and to erase the bonds of culture, faith and tradition that make us who we are."[278] This rhetoric, which mirrors that from the turn of the century, is being translated to action, resulting in widespread targeting of noncitizens through immigration laws and policies. The Trump administration has shown no restraint. Unfettered discretion has allowed the government to use immigration laws against unpopular groups. During these increasingly tumultuous times the reforms outlined in this Article will provide some protection to noncitizens suspected of selling sex, an especially vulnerable population accused of conduct society no longer views under the same lens as it did around the turn of the twentieth century, by ensuring that they are squarely outside of the freely exercised discretionary power of the Trump administration and are no longer subject to immigration penalties.

277. *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST, June 16, 2015, https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/ [https://perma.cc/BVP6-DAN9].

278. *Trump's Speech in Warsaw (Full Transcript, Video)*, CNN (July 6, 2017), http://www.cnn.com/2017/07/06/politics/trump-speech-poland-transcript/index.html [https://perma.cc/Z4HW-7AZG].