

# A Critical Race Feminism Critique of Immigration Laws That Exclude Sex Workers: Moving from Theory to Praxis

Monika Batra Kashyap†

## ABSTRACT

*This Article is the first to apply a critical race feminism (CRF) critique to the current immigration law in the United States, Immigration and Nationality Act (INA) § 212(a)(2)(D)(i), which excludes immigrants for engaging in sex work.<sup>1</sup> This Article will use critical historical methodology to center the role of women of color as the primary targets of not only the first federal law to criminalize sex workers, but also the first explicitly racist immigration law in United States history. The Article will also employ theories of anti-essentialism and intersectionality to show how INA § 212(a)(2)(D)(i) both silences the voices and experiences of women of color sex workers and refuses to recognize the impacts of multiple intersecting systems of oppression. Finally, the Article will connect the critique of INA § 212(a)(2)(D)(i) to the anti-carceral feminist movement to decriminalize sex work in order to move from theory to praxis, and to inspire advocacy strategies and law reform efforts that point to a broader project of transformation. The ultimate goal of this Article is to strengthen links between critical race and immigration law scholarship so that scholars can continue to use*

---

DOI: <https://doi.org/10.15779/Z389G5GF5N>

†. Visiting Clinical Professor of Law, Seattle University School of Law, Ronald A. Peterson Law Clinic. J.D., University of California, Berkeley, School of Law. I am deeply grateful to Angela Harris, Thalia González, and Leigh Goodmark for their inspiration, mentorship, and critical feedback on earlier drafts of this Article. For their excellent research assistance, I thank Skye Milne, Aman Vora, Reagan Ricker, and Amandeep Mann. This Article is inspired by the lived experiences and struggles of my clients in the Immigrant Justice Clinic at Seattle University School of Law.

1. This Article uses the term “sex work/er” in solidarity with the sex workers' rights movement that embraces the term as a political signifier of their fight for economic justice and rejection of the stigmatized and criminalized designations of “prostitution”/“prostitute.” The terms “prostitution”/“prostitute” will be used only when quoting or referring to statutes, legislation, or the text from other authors. In particular, the Article will use “prostitution” when referring to the INA’s “prostitution exclusion”—namely, section 212(a)(2)(D)(i) of the Immigration and Nationality Act (INA) of 1952.

*CRF as an exploratory analytical tool to examine the intersections of race, class, and gender within immigration law.*

INTRODUCTION ..... 53

I. INTRODUCING CRITICAL RACE FEMINISM..... 57

    A. Critical Historical Methodology ..... 58

    B. Anti-Essentialism and Intersectionality Theory ..... 58

    C. Commitment to Praxis ..... 61

II. INA § 212(A)(2)(D)(I) AND CRITICAL HISTORICAL METHODOLOGY ..... 62

    A. The Racist and White Supremacist Origins of INA § 212(a)(2)(D)(i) ..... 63

    B. The Evolution of INA § 212(a)(2)(D)(i) ..... 65

III. INA § 212(A)(2)(D)(I) AND ANTI-ESSENTIALISM AND INTERSECTIONALITY THEORY ..... 69

    A. INA § 212(a)(2)(D)(i) is Essentialist ..... 70

    B. INA § 212(a)(2)(D)(i) is Anti-Intersectional ..... 71

IV. INA § 212(A)(2)(D)(I) AND MOVING TOWARD PRAXIS ..... 73

    A. The Anti-Carceral Feminist Movement ..... 75

    B. The Anti-Carceral Feminist Movement to Decriminalize Sex Work and the Abolishment of INA § 212(a)(2)(D)(i)..... 76

CONCLUSION ..... 79

**INTRODUCTION**

Immigration law is built upon a framework of exclusion. From its inception as a nation state, the United States established exclusionary immigration laws.<sup>2</sup> From 1776 to 1875, states erected immigration laws with the sole intent of reifying “otherness” and excluding people from participating socially, politically, and economically in society, based on classifications of criminality, poverty, disability, contagious disease, race, slavery, and ideological grounds.<sup>3</sup> In 1875, Congress passed the Page Act of 1875, which was the first federal law to exclude immigrants from entering the country.<sup>4</sup> The Act did so by explicitly defining two distinct categories of immigrants: “persons who are undergoing a sentence for conviction in their own country of felonious crimes” and “women imported for

---

2. See generally Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993) (outlining early state and federal regulation of immigration during the period of 1776-1885); KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS (2004) (tracing the history of exclusions in U.S. immigration law).

3. Neuman, *supra* note 2, at 1841 (discussing the five major categories of immigration policy implemented by state regulation, including the movement of criminals, public health regulation, regulation of the movement of the poor, regulation of slavery, and other policies of racial subordination).

4. Page Act of 1875, ch. 141, § 5, 18 Stat. 477, 477 (repealed 1943).

the purposes of prostitution.”<sup>5</sup> These two targets of the Page Act of 1875—felons and sex workers—have been consistently and continuously excluded under U.S. immigration law through the present day.

Moreover, since 1875, the federal government has expanded exclusionary immigration laws extensively and codified nearly forty distinct categories of exclusion,<sup>6</sup> now referred to as “inadmissibility grounds.”<sup>7</sup> The Immigration and Nationality Act of 1952 (INA)<sup>8</sup>—the foundation of present immigration law—sets forth the current grounds of inadmissibility, organized into ten categories: health,<sup>9</sup> criminal activity,<sup>10</sup> national security,<sup>11</sup> poverty,<sup>12</sup> labor protection,<sup>13</sup> fraud and immigration violations,<sup>14</sup> inadequate documents,<sup>15</sup> military service in the U.S.,<sup>16</sup> polygamy,<sup>17</sup> unlawful voting,<sup>18</sup> and other miscellaneous grounds.<sup>19</sup> The inadmissibility ground excluding immigrant sex workers that is the subject of this Article, INA § 212(a)(2)(D)(i), is categorized under the INA’s crime-related grounds of inadmissibility category.<sup>20</sup> This exclusionary ground bars any immigrant who is coming to the U.S. “solely, principally, or incidentally” to engage in sex work—or who has engaged in sex work within the past ten years.<sup>21</sup>

All grounds of inadmissibility control whether an immigrant can live within the boundaries of the United States.<sup>22</sup> All immigrants seeking to live permanently

5. *Id.*

6. The nearly forty grounds of inadmissibility are listed in Section 212 of the INA.

7. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) replaced the term “exclusion grounds” with the term “inadmissibility grounds.” See THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 428 (5th ed. 2003). This Article will refer to the prostitution-related ground of inadmissibility as Section 212(a)(2)(D)(i) of the INA and “the prostitution exclusion” interchangeably.

8. INA, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

9. See INA § 212(a)(1), 8 U.S.C. § 1182(a)(1).

10. See *id.* § 212(a)(2)(A)(i)(I) (crimes involving moral turpitude); § 212(a)(2)(D) (prostitution); § 212(a)(2)(A)(i)(II) (drug related crimes); § 212(a)(2)(B) (multiple criminal convictions); § 212(a)(2)(C) (drug trafficking); § 212(a)(2)(E) (involvement in “serious criminal activity”); § 212(a)(2)(G) (foreign government officials who have committed particularly severe violations of religious freedom); § 212(a)(2)(H) (significant trafficking in persons); and § 212(a)(2)(I) (money laundering).

11. See *id.* § 212(a)(3).

12. See *id.* § 212(a)(4)(A).

13. See *id.* § 212(a)(5).

14. See *id.* § 212(a)(6).

15. See *id.* § 212(a)(7).

16. *Id.* § 212(a)(8) renders inadmissible any immigrant who is “permanently ineligible to citizenship” and any person who departed from or remained outside the United States in order to avoid military training or service during a period of war.

17. See *id.* § 212(a)(10)(A).

18. See *id.* § 212(a)(10)(D).

19. “Other miscellaneous grounds” include guardians required to accompany excluded immigrants, international child abductors, and former citizens who renounced their citizenship in order to avoid taxation. See *id.* § 212(a)(10)(B); § 212(a)(10)(C); and § 212(a)(10)(E).

20. See *id.* § 212(a)(2)(D).

21. *Id.* § 212(a)(2)(D)(i).

22. Although the process of “being admitted” does apply to an immigrant who is outside the

in the U.S. are subject to these grounds of inadmissibility<sup>23</sup> and any immigrant who is deemed to be “inadmissible” based on these grounds may also be subject to deportation.<sup>24</sup>

Critical immigration scholars have critiqued many of these grounds of inadmissibility for their inhumanity, racially disparate impacts, racist motivations, and outdated underpinnings. For example, the public charge inadmissibility ground<sup>25</sup> has been criticized for its racially discriminatory application,<sup>26</sup> its devastating effects on public health,<sup>27</sup> and for impeding public welfare goals to provide for those in need.<sup>28</sup> The “drug abuser or addict”<sup>29</sup> health-related ground of inadmissibility has been criticized for failing to align with the contemporary understanding of substance addiction as a medical condition,<sup>30</sup> while also serving as an excuse for excluding persons based on racial profiling.<sup>31</sup> The health-related

---

country and seeking to enter the U.S., a majority of immigrants gain permanent “legal status” through petitions for “adjustment of status” while they are already in the United States. Those seeking to adjust their status include refugees, asylum-seekers, certain temporary workers, foreign students, family members of U.S. citizens and green card holders, and those immigrants who have not attained “legal status.” When these immigrants file an application for permanent residence while in the U.S., all grounds of inadmissibility apply to them as well.

23. INA § 212(a), 8 U.S.C. § 1182(a). Even some immigrants who are *not* seeking to live permanently in the U.S. are subject to these grounds including applicants for certain VAWA-related provisions such as U-Visas and T-Visas.
24. Section 237(a) of the INA sets out the categories of deportable immigrants including those who are deemed inadmissible. *See* INA § 237 (current version at 8 U.S.C. § 1227(a)).
25. INA § 212(a)(4)(A).
26. *See, e.g.*, Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1134 (1998) (arguing that the public charge exclusion has a disproportionate effect on immigrants of color from developing nations); *see also* Cori Alonso-Yoder, *Publicly Charged: A Critical Examination of Immigrant Public Benefit Restrictions*, 97 DENVER U. L. REV. 1, 6-8, 33 (2019) (arguing that the public charge exclusion must be understood “as a discriminatory, racially motivated policy”); Lisa Sun-Hee Park, *Perpetuation of Poverty Through “Public Charge,”* 78 DENVER U. L. REV. 1161, 1171-72 (2001) (describing the discriminatory effects of the public charge exclusion in the 1990s on immigrant communities); Anna Shifrin Faber, Note, *A Vessel for Discrimination: The Public Charge Standard of Inadmissibility and Deportation*, 108 GEO. L.J. 1363, 1369-80 (2020) (discussing the discriminatory history of public charge over the three phases of immigration law).
27. Medha D. Makhlof, *The Public Charge Rule as Public Health Policy*, 16 IND. HEALTH L. REV. 177, 198-208 (2019) (describing the predicted adverse impact of the proposed changes to public charge on public benefits enrollment and how the proposed rules represented a harmful departure from the current policy).
28. *See* Joseph Daval, Note, *The Problem with Public Charge*, 130 YALE L. J. 998, 1007 (2021) (arguing public charge exclusion impedes public welfare aims by deterring noncitizens from receiving public benefits).
29. *See* INA § 212(a)(1)(A)(iv) (excluding an immigrant who is determined to be a drug abuser or addict).
30. *See* Rebecca Sharpless, *Addiction-Informed Immigration Reform*, 94 WASH. L. REV. 1891, 1893 (2019) (discussing immigration law’s exclusionary treatment of noncitizens with substance use disorder); *see also* Wilber A. Barillas, *Collateral Damage: Drug Enforcement & Its Impact on the Deportation of Legal Permanent Residents*, 34 B.C. J. L. & SOC. JUST. 1, 11, 25 (2014) (“[M]any Americans have begun to adopt a more tolerant view of drugs... This more accepting attitude has manifested itself in recent state laws.”)
31. *See* Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM & MARY L. REV. 163, 186

inadmissibility ground that concerns mental-health<sup>32</sup> has been critiqued for retraumatizing immigrant survivors of violence,<sup>33</sup> while also reinforcing white supremacist beliefs about race and ability.<sup>34</sup> Crime-related grounds of inadmissibility in general have been critiqued for their racist motivations and racially disparate impacts.<sup>35</sup> Finally, the prostitution-related inadmissibility ground has been criticized for being rooted in archaic notions of morality, failing to penalize immigrant solicitors of sex, and unfairly impacting transgender immigrants.<sup>36</sup> This Article adds a new dimension to the rich work of critical immigration scholarship by directing attention to the prostitution-related ground of inadmissibility through the distinct lens of critical race feminism.

To advance this critique, this Article proceeds in four parts. Part I foregrounds the central analytical tools and approaches of critical race feminism to provide immigration scholars with an unexamined framework through which to understand the INA's prostitution exclusion, INA § 212(a)(2)(D)(i). Part II follows by deploying a critical historical methodology to expose the roots of INA § 212(a)(2)(D)(i) as racist and white supremacist legislation borne from, and inspired by, the racialized and sexualized targeting of women of color. Using anti-essentialism theory, Part III (A) exposes how INA § 212(a)(2)(D)(i) reflects white supremacy and reifies patriarchy by essentializing all sex workers, all sex work, and all women—thereby silencing the voices and experiences of sex workers themselves, especially women of color sex workers. Using intersectionality

---

(2008) (stating immigrant officials' harsh interrogation approaches are troubling because immigration enforcement has a history of racially profiling noncitizens).

32. See INA § 212(a)(1)(A)(iii) (excluding an immigrant who has been determined to have or have had a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others).
33. See Monika Batra Kashyap, *Heartless Immigration Law: Rubbing Salt into the Wound of Immigrant Survivors of Domestic Violence*, 95 TUL. L. REV. 51, 54 (2020) (arguing the enforcement of INA § 212(a)(1)(A)(iii) retraumatizes immigrant survivors of interpersonal violence).
34. See Monika Batra Kashyap, *Toward a Race Conscious Critique of Mental Health-Related Exclusionary Immigration Laws*, 26 MICH. J. RACE & L. 87, 89 (2021) (discussing how INA § 212(a)(1)(A)(iii) reinforces white supremacist, racist, and ableist ideologies that influence concepts of citizenship and belonging).
35. See, e.g., César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1461–67 (2013) (reviewing the history of discrimination noncitizens experienced from the United States' political and cultural institutions that led to the enmeshment of criminal law and immigration law); see also Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 994 (2016) (discussing how immigrants of color have been subjected to abuse by law enforcement); see Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 194 (2018) (critiquing the merger of the immigration and criminal legal systems for the disparate impacts on people of color).
36. See Pooja R. Dadhania, *Deporting Undesirable Women*, 9 UC IRVINE LAW REV. 53, 53, 76 (2018) (critiquing the INA's prostitution exclusion for contravening societal views on sex work, for failing to punish solicitors of sex workers, and for giving rise to administrative inconsistencies in enforcement); Luis Medina, *Immigrating While Trans: The Disproportionate Impact of the Prostitution Ground of Inadmissibility and other provisions of the Immigration and Nationality Act on Transgendered Women*, 19 THE SCHOLAR 253, 281 (2017) (arguing that the INA's prostitution exclusion disproportionately impacts transgender women).

theory, Part III (B) exposes the ways in which INA § 212(a)(2)(D)(i) refuses to recognize that multiple systems of oppression intersect with each other to produce overlapping and reinforcing harms for sex workers. Part IV moves theoretical critiques into praxis by explicitly connecting the critique of INA § 212(a)(2)(D)(i) to the emerging anti-carceral feminist movement to decriminalize sex work. The Article concludes by challenging immigration and critical race scholars alike to further explore the utility of critical race feminism as an analytical tool to examine the intersections of gender, race, and class in immigration law and, importantly, as a source of inspiration for transformative legal reform.

### I. INTRODUCING CRITICAL RACE FEMINISM

Critical Race Feminism (CRF) is an analytical framework that emerged within the legal academy at the end of the twentieth century to emphasize and center the legal concerns of poor women<sup>37</sup> of color.<sup>38</sup> As a critical modality within the larger Crit movement, CRF theorizes specifically and directly about the multiplicity of ways in which existing legal paradigms have allowed women of color to fall between the cracks.<sup>39</sup> As the name reflects, CRF draws from both Critical Race Theory (CRT) and feminist legal theory.<sup>40</sup> From CRT, CRF adopts the understanding that racism is normal and ordinary in American society and in particular, that “racism has been an integral part of the American legal system from its founding.”<sup>41</sup> And from feminist jurisprudence, CRF embraces an “emphasis on gender oppression within a system of patriarchy”<sup>42</sup> and that there is a social and legal construction of the power of gender.<sup>43</sup> However, CRF not only draws from CRT and feminist legal theory, but also identifies and responds to their shortcomings with unique theoretical and practical contributions.<sup>44</sup> These

---

37. For the purposes of this article, “women” refers to anyone who identifies as a woman or is subject to discrimination based on being perceived as a woman--whether the individual is cisgender, transgender, or nonbinary.

38. See ADRIEN KATHERINE WING, INTRODUCTION TO CRITICAL RACE FEMINISM: A READER 1 (Adrien K. Wing ed., New York University Press 2d ed. 2003) (discussing the emergence of CRF) [hereinafter WING, *CRF*]; see also Adrien K. Wing & Christine A. Willis, *From Theory to Praxis: Black Women, Gangs, and Critical Race Feminism*, 11 LA RAZA L.J. 1, 2 n.9 (1999) (explaining that critical race feminists are predominantly scholarly women of color focusing their writing on topics relevant to race and gender) [hereinafter Wing, *Praxis*].

39. WING, *CRF*, *supra* note 38 at 2.

40. *Id.* at 4.

41. Adrien Katherine Wing, *Violence and State Accountability: Critical Race Feminism*, 1 GEO. J. GENDER & L. 95, 96 (1999) (“[CRF] believe[s] that racism has been an integral part of the American legal system from its founding, rather than an aberrational spot on the pristine white body politic.”).

42. *Id.* at 98.

43. See Wing, *Praxis*, *supra* note 38 at 3.

44. See Angela Onwuachi-Willig, *This Bridge Called Our Backs: An Introduction to “The Future of Critical Race Feminism,”* 39 U.C. DAVIS L. REV. 733, 736 (2006) (describing how critical race feminists amplify the voices of people excluded from the dominant legal theory); WING, *CRF*, *supra* note 38 at 7 (noting that CRF has made analytical contributions that have greatly enhanced CRT and feminist legal theory).

contributions include the use of critical historical methodology, theoretical frameworks of anti-essentialism and intersectionality, and a commitment to action—or praxis.<sup>45</sup> This Part of the Article will discuss each of these contributions.

### A. Critical Historical Methodology

As a multidisciplinary approach, CRF draws from a wide array of legal and non-legal disciplinary traditions such as history, sociology, political science, economics, anthropology, African American studies, and women’s studies.<sup>46</sup> Critical race feminist scholar Adrien K. Wing explains that the significance of CRF—like CRT—is a crystalline recognition that the law alone is not a “sufficient basis to formulate solutions to our racial dilemmas.”<sup>47</sup> Moreover, as Wing explains, synthesizing multidisciplinary bodies of knowledge into a theoretical framework of CRF can help “create comprehensive and practical strategies which address the needs of our communities.”<sup>48</sup> Therefore, CRF endorses a multidisciplinary approach that helps to make the understanding of CRF’s “distinctive” voice more accessible to those “who do not understand hyper-technical legal language.”<sup>49</sup> In particular, CRF specifically believes in using “critical historical methodology” in order to “demarginalize” the roles people of color have played in history—roles that have evaded the interests of traditional historians.<sup>50</sup> It is this method that will be utilized to begin the CRF critique that is the focus of this Article.

### B. Anti-Essentialism and Intersectionality Theory

Anti-essentialism and intersectionality theories represent the heart of a CRF framework. Critical race feminism rejects the ways in which CRT “essentializes” all people of color by failing to recognize that the experiences of men of color may differ significantly from those of women of color.<sup>51</sup> Critical race feminism also rejects the ways in which mainstream feminism “essentializes” all women by “subsuming the variable experiences of women of color within the experience of white, middle class women”—while also paying “insufficient attention to the central role of white supremacy’s subordination of women of color” effectuated

---

45. Paulo Freire has defined praxis as the interrelationship between action and reflection. See PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 51 (Myra Bergman Ramos trans., Continuum International Publishing Group 2005) (1970).

46. WING, *CRF*, *supra* note 38 at 6.

47. Wing, *supra* note 41 at 97.

48. Wing, *Praxis*, *supra* note 38 at 4.

49. Wing, *supra* note 41 at 97.

50. Wing, *CRF*, *supra* note 38 at 6.

51. WING, *supra* note 41 at 98; see also Adrien K. Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 ALB. L. REV. 943, 947 (1997) (discussing the genesis of CRF and noting that “much of CRT seemed to present the essentialist term “minority,” when it really meant African-American men”).

by both white men and white women.<sup>52</sup>

In her seminal article, *Race and Essentialism in Feminist Legal Theory*, critical race feminist scholar Angela Harris exposes the limitations of feminist legal theory by arguing that it relies on “gender essentialism.”<sup>53</sup> Harris describes gender essentialism as the notion that “that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.”<sup>54</sup> Harris offers the example of the experience of rape for black women—which she points out is “radically different” from that of white women.<sup>55</sup> Harris explains that the experience of rape for black women is “deeply rooted in color” and includes a unique vulnerability to rape, a unique lack of legal protection—and also a unique ambivalence that recognizes the victimization of black men by a criminal justice system that has “consistently ignored violence against women while perpetrating it against men.”<sup>56</sup>

Therefore, Harris argues that “gender essentialism” not only silences women of color who have traditionally been kept from speaking,<sup>57</sup> but also represents a “broken promise—the promise to listen to women’s stories, the promise of feminist method.”<sup>58</sup> Thus, Harris encourages the adoption of a “multiple consciousness” approach to feminism—an approach that recognizes the “multiplicitousness” of the self.<sup>59</sup> Such an approach calls into question the notion of a unitary “women’s experience” by recognizing that people are oppressed not only on the single basis of gender but also on the bases of multiple “inextricable” categories including race, class, and sexual orientation.<sup>60</sup> Harris argues that the

---

52. Wing, *supra* note 41 at 98.

53. See Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

54. *Id.* at 585; see also Berta Esperanza Hernandez-Truyol, *Latindia II — Latinas/os, Natives, and Mestizajes — Latcrit Navigation of Nuevos Mundos, Nuevas Fronteras and Nuevas Teorias*, 33 U.C. DAVIS L. REV. 851, 862 n.26 (2000) (noting that an essentialist outlook assumes that there is “one legitimate, genuine universal voice that speaks for all members of a group, thus assuming a monolithic experience for all within the particular group — be it women, Blacks, Latinas/os, Asians, etc.”); Tina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 BERKELEY WOMEN’S L.J. 16, 19 (1995) (noting that the concept of essentialism “assumes that the experience of being a member of the group under discussion is a stable one, one with a clear meaning, a meaning constant through time, space, and different historical, social, political, and personal contexts.”). For an exploration of the ways in which gender essentialism impacts trans individuals, see EITHNE LUIBHEID, ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER 153 (2002) (explaining that because gender protection laws are implicitly based on notions of immutable, binary gender categories, courts often decide that these laws are inapplicable to trans people); see also Paisley Currah and Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 57 (2000).

55. Harris, *supra* note 53 at 601.

56. *Id.* at 598–601.

57. *Id.* at 585.

58. *Id.* at 601.

59. *Id.* at 608 (discussing the importance of offering post-essentialist feminist theory, the recognition of a “self that is multiplicitous, not unitary.”)

60. *Id.* at 587 (discussing the notion of multiple consciousness as appropriate to describe a world



adoption of this multiple consciousness approach is how feminist legal theory can avoid creating an essentialist world where the experience of women of color will always be “forcibly fragmented” before being analyzed.<sup>61</sup>

In her pivotal article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, critical race feminist scholar, Kimberlé Crenshaw introduced the concept of intersectionality as a theoretical framework that not only considers the intersections of multiple identities such as race, class, and gender—but also recognizes that multiple systems of oppression intersect with each other to produce overlapping and reinforcing harms.<sup>62</sup> For example, in the context of the criminalization of women of color—where systems of racial and gender oppression intersect—Crenshaw argues that intersectionality theory is more “analytically attentive” to the dynamics that contribute to the vulnerability of women of color to profiling, arrest, conviction, and ultimately, incarceration by the criminal justice system.<sup>63</sup>

Therefore, while CRF has proven particularly useful in analyzing the racialized and gendered aspects of violence against women of color including rape, domestic violence, and sexual harassment,<sup>64</sup> it has also inspired a broader conception of “gender violence” that centers a critique of the criminal justice system and recognizes the role the state plays in perpetrating violence against communities of color.<sup>65</sup> In other words, CRF offers a distinctive framework for

---

in which “people are not oppressed only or primarily on the basis of gender, but on the bases of race, class, sexual orientation, and other categories in inextricable webs.”)

61. *Id.* at 589.
62. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (using the concept of intersectionality to denote the various ways in which race and gender interact to shape the multiple dimensions of Black women's employment experiences); see also Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (using intersectionality to describe the location of women of color within overlapping systems of subordination) [hereinafter, Crenshaw, *Mapping*].
63. Kimberlé Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA LAW REV. 1418, 1422–24 (2012).
64. Harris, *supra* note 53 at 598 (1990) (applying a CRF analysis to rape and noting that “for [B]lack women, rape is a far more complex experience, and an experience as deeply rooted in color as in gender.”); Crenshaw, *Mapping*, *supra* note 62 at 1241 (discussing the intersections of race and gender in the context of violence against women of color); see also Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 234 (1994) (acknowledging that “[r]acial and cultural differences are critical considerations in analyzing and responding to the crisis of domestic violence”); Tanya Kateri Hernandez, *Sexual Harassment and Racial Disparity: The Mutual Construction of Race and Gender*, 4 J. GENDER RACE & JUST. 183, 196 (2001) (noting that “race has everything to do with sexual harassment generally.”)
65. See Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 780 (2000) (arguing that “traditional practices of law enforcement incorporate or facilitate gender violence, whether it is directed at women, sexual minorities, or racial-ethnic minorities.”); see also Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J. L & POL’Y 13, 15 (2011) (arguing that the violence perpetrated by “the men who investigate, arrest, and incarcerate the criminals” can be

analyzing multiple forms of violence against women without deemphasizing or privileging one form over another.<sup>66</sup> As a result, CRF has helped to mobilize theoretical interrogations and on-the-ground interventions to gender violence that support struggles against private violence without ignoring struggles against state-sponsored gender violence.<sup>67</sup>

Indeed, CRF is not only useful for understanding the unique experiences of women of color who experience both racial and gender oppression, but also of those who sit at the intersections of additional systems of oppression including class, sexuality, age, color, nation, ethnicity, and ability.<sup>68</sup> As professor Johonna Turner explains, CRF seeks to “increasingly focus on the experiences of those on the margins, which may include the poor and working-class, transgender people, involvement or participation in the sex trade, migrant and refugee status, and experiences of incarceration and confinement.”<sup>69</sup>

### C. Commitment to Praxis

The centrality of praxis—as a co-influence of theory and practice—underpins the work of critical race feminists.<sup>70</sup> As Wing explains, the role of CRF is not to simply theorize about the ways in which existing legal paradigms have allowed women of color to fall through the cracks, but to intentionally contribute to the creative process of developing solutions to problems that impact those subordinated in society.<sup>71</sup> In this way, CRF wholeheartedly embraces critical race praxis—the commitment to combining “critical, pragmatic, socio-legal analysis with political lawyering and community organizing to practice justice by and for

---

described as “gender violence.”) [hereinafter Harris, *Heteropatriarchy*]; Annette Ruth Appell & Adrienne D. Davis, *Access to Justice: Mass Incarceration and Masculinity Through a Black Feminist Lens*, 37 WASH. U. J. L. & POL’Y 1, 4 (2011) (applying a CRF framework to approach the phenomenon of mass incarceration because CRF “is particularly adept at prosecuting the gendered dimensions of power and state violence.”).

66. See Harris, *Heteropatriarchy*, *supra* note 65 at 17 (offering a CRF-inspired approach of transformative justice as a way to support the struggles against private violence without ignoring struggles against state-sponsored gender violence).

67. *Id.*

68. See Crenshaw, *Mapping*, *supra* note 62 at 1244-45 n.9 (“While the primary intersections that I explore here are between race and gender, the concept can and should be expanded by factoring in issues such as class, sexual orientation, age, and color.”); see also Patricia Hill Collins, *Intersectionality’s Definitional Dilemmas*, 41 ANN. REV. SOC. 1, 11-13 (2015) (explaining the deepening of intersectional theory by “expand[ing] the focus on race, class, and gender to incorporate sexuality, nation, ethnicity, age, and ability as similar categories of analysis.”)

69. Johonna Turner, *Race, Gender and Restorative Justice: Ten Gifts of a Critical Race Feminist Approach*, 23 RICH. PUB. INT. L. REV. 267, 273 (2019).

70. Wing, *Praxis*, *supra* note 38 at 4.

71. Adrien K. Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-First Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 815-24 (2001) (discussing the goals and genesis of CRF); Wing, *Praxis*, *supra* note 38 at 3.

racialized communities.”<sup>72</sup>

As Wing further explains, critical race feminists “cannot afford to adopt the classic detached, ivory tower model of scholarship when so many are suffering,” and instead, they feel compelled to be involved in the “development of solutions to our people’s problems.”<sup>73</sup> According to Wing, praxis can take many forms—racial justice lawyering and community organizing, “[c]oalition building, political activism, board memberships, speeches, and even writing.”<sup>74</sup> Wing clarifies that CRF does not believe in praxis “instead of theory,” but rather, CRF believes that *both* are essential to “our people’s literal and figurative future.”<sup>75</sup>

The theoretical and practical contributions offered by CRF and described above—critical historical methodology, anti-essentialism and intersectionality theory, and a commitment to praxis—can serve as tools for “challenging subordination at its core” and for “setting the stage for truly transformative change in our society.”<sup>76</sup> In turning these tools specifically to the INA’s prostitution exclusion, § 212(a)(2)(D)(i), this Article demonstrates how these CRF contributions can provide immigration and critical race scholars with a further framework through which to understand and address immigration laws’ modality of exclusion.

## II. INA § 212(A)(2)(D)(I) AND CRITICAL HISTORICAL METHODOLOGY

This Part of this Article will begin the CRF critique of INA § 212(a)(2)(D)(i) by employing the multidisciplinary tool of critical historical methodology to center the role that women of color—as racialized and sexualized targets—played in spurring the enactment of both the first federal immigration law and the first federal anti-prostitution law in U.S. history. The roots of the INA’s prostitution exclusion emerged from the Page Act of 1875,<sup>77</sup> which until relatively recently<sup>78</sup> has been largely under-recognized and even rendered invisible by legal scholars and historians.<sup>79</sup> This is an oversight in the academic discourse as the Page Act was not only the very first federal immigration law to be enacted in the United

---

72. Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 829–30 (1997) (noting that critical race praxis understands that “[i]n addition to ideas and ideals, justice is something experienced through practice.”)

73. WING, *CRF*, *supra* note 38 at 6.

74. ADRIEN K. WING, *GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER* 6 (Adrien K. Wing ed., 2000) (“There are many forms that praxis can take.”)

75. WING, *CRF*, *supra* note 38 at 6.

76. Onwuachi-Willig, *supra* note 44 at 736.

77. Immigration Act, ch. 141, § 3, 18 Stat. 477, 477 (1875) (repealed 1943).

78. See generally Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005) (discussing the Page Act of 1875 and emphasizing its significance as the first racially restrictive federal immigration law in U.S. history).

79. *Id.* at 645 (“The Page Law itself is surprisingly understudied. Legal scholars and historians interested in immigration often ignore the Page Law altogether.”)

States, but it also the first federal anti-prostitution law in the United States.<sup>80</sup> As the first section sets forth, the Page Act criminalized Asian women from “China, Japan, or any Oriental country” by denying them entry into the United States if they were suspected of being sex workers who entered into a contract for “lewd and immoral purposes.”<sup>81</sup> A subsequent section makes it a felony to “import, or cause any importation of . . . [or] knowingly or willfully hold, or attempt to hold . . . to such purposes” any woman for prostitution.<sup>82</sup> Yet another section criminalized sex work by barring “women imported for the purposes of prostitution” from entering the United States;<sup>83</sup> by declaring void all contracts made in the service of prostitution;<sup>84</sup> and by including criminal penalties of up to five years imprisonment or \$5000 in fines for the importation of prostitutes.<sup>85</sup>

By specifically targeting Asian women, the Page Act served as the first racially restrictive federal immigration law, *i.e.*, explicitly singling out one race for invidious treatment.<sup>86</sup> This Part of the Article will locate the roots of the INA’s prostitution exclusion in the racist, sexist, and white supremacist ideologies aimed at women of color that fueled the passage the Page Act of 1875. Doing so will not only provide an important foundation for a CRF-based critique of INA § 212(a)(2)(D)(i), but it will also help demarginalize the role immigrant women of color played as racialized and sexualized targets in the formation of restrictive immigration laws and anti-prostitution legislation.

#### A. The Racist and White Supremacist Origins of INA § 212(a)(2)(D)(i)

The racist belief that all Chinese women were innately prostitutes was bolstered by nineteenth century theories of race promoted by the nativism, scientific racism, and eugenic movements.<sup>87</sup> Common to these movements was

---

80. See Ann Wagner & Rachel McCann, *Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 17, 36 (2017) (“The Page Act was an unprecedented move by the federal government to regulate immigration, which throughout the 19<sup>th</sup> century had been controlled by states. It was also the first federal law to regulate the commercial sex industry.”)

81. Immigration Act, ch. 141, § 1, 18 Stat. 477, 477 (1875) (repealed 1943); see also Abrams, *supra* note 78 at 695–96 (explaining that American consuls in foreign ports were required to screen Asian women “before they even left their home countries, and refuse to grant them an immigration certificate if they suspected them of prostitution, a hurdle not imposed on immigrants from other ports, such as those in Europe.”)

82. Immigration Act, ch. 141, § 3, 18 Stat. 477, 477 (1875) (repealed 1943).

83. Immigration Act, ch. 141, § 5, 18 Stat. 477, 477 (1875) (repealed 1943).

84. *Id.*

85. *Id.*

86. Abrams, *supra* note 78 at 702 (noting that the Page Act was “the first restrictive immigration law passed in direct response to the desire to exclude a particular group of people”).

87. *Id.* at 662 (noting that “nineteenth-century theories of race posited several distinct races, each with innate characteristics”); JESSICA PLILEY, *POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI* 16–17 (2014) (noting that the “pseudo-scientific rationale of modern racism” informed beliefs about Chinese sex worker[s], who were considered the “embodiment of immorality through their natural lasciviousness”); see also ROBERT WALD SUSSMAN, *THE*

the presumed superiority of the white Anglo-Saxon race and the concomitant fear of the degeneration of the white race through the threat of supposedly racially inferior, unassimilable, undesirable immigrants.<sup>88</sup> Also common to these movements was the belief that mixing the superior white race with inferior races would result in the degeneration of the superior white race.<sup>89</sup> Therefore, these movements magnified concerns about prostitution,<sup>90</sup> and in particular about Chinese prostitutes who were viewed as “vector[s] of disease”<sup>91</sup> equipped with the “polluting power” to degenerate the white population.<sup>92</sup> As Abrams frames it, “Chinese women were threatening not only because they might reproduce with Chinese men but also because they could infect the white population by producing weak, hybrid progeny.”<sup>93</sup> Not surprisingly, in 1875, the American Medical Association identified Chinese prostitutes as a “source of contamination” on the “nation’s bloodstream.”<sup>94</sup>

While the Page Act targeted women from “any Oriental country,” immigration legal scholar Stuart Chang explains that the Act was “discriminatorily applied and aimed to exclude all Chinese women based on a constructed stereotype that Chinese women had a cultural inclination toward prostitution.”<sup>95</sup> Similarly, immigration legal scholar Kerry Abrams explains that the Page Act was fueled by deeply racist presumptions about the “Chinese race” having a “servile disposition” from “ages of benumbing despotism.”<sup>96</sup> Therefore, Congress

---

MYTH OF RACE: THE TROUBLING PERSISTENCE OF AN UNSCIENTIFIC IDEA 43-64 (2014) (discussing eugenics and other nineteenth-century theories of race); *see generally* REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM (1981) (providing a history of scientific racism in the United States).

88. *See e.g.*, Megumi Dick Osumi, *Asians and California’s Anti-Miscegenation Laws*, in *ASIAN AND PACIFIC AMERICAN EXPERIENCES: WOMEN’S PERSPECTIVES* 1, 7 (Nobuya Tsuchida ed., 1982) (explaining that nineteenth-century social scientists believed that American governmental institutions were “designed by and for Teutonic people” and would be weakened by “commingling” with Asians).
89. Abrams, *supra* note 78 at 662 (noting that nineteenth-century theories of race held that mixing races would result in “the degeneration of the superior race.”)
90. *See* Ann M. Lucas, *Race, Class, Gender and Deviancy: The Criminalization of Prostitution*, 10 *BERKELEY WOMEN’S L. J.* 47, 58 (1995) (“Fears of racial degeneration, common in connection with the era’s [E]ugenics movement, magnified concerns about prostitution.”)
91. PLILEY, *supra* note 87 at 16–17 (noting that the “pseudo-scientific rationale of modern racism” informed beliefs about the Chinese sex worker as a “vector of disease”).
92. Abrams, *supra* note 78 at 662 (discussing the impact of “[n]ineteenth century theories of race” in fueling anti-Chinese animosity rooted in the fear of the “polluting power” of Chinese women to degenerate the white population).
93. *Id.* at 663.
94. *Id.* at 693 n.330 (citing LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 10–11 (1995)).
95. Stewart Chang, *Feminism in Yellowface*, 38 *HARV. J.L. & GENDER* 235, 242 (2015); *see also* Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, in *ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943*, at 94-95, 97 (Sucheng Chan ed., 1991) (discussing the effect of stereotyping in the late nineteenth century that led to the assumption that *all* Chinese women on the Pacific Coast were prostitutes).
96. Abrams, *supra* note 78 at 659 (quoting Report of the Joint Special Committee to Investigate Chinese Immigration, S. Rep. No. 44-689, at vi (1876), reprinted in U.S. Congress, Report of the Committees of the Senate of the United States for the Second Session of the Forty-Fourth Congress (Washington, Gov’t Printing Office 1877)).

believed that *all* Chinese women were “innately prostitutes” who were “willing to indenture themselves into servitude.”<sup>97</sup> Moreover, this innate “slave-like mentality” of Chinese women was viewed to be a characteristic that was “fundamentally at odds with citizenship in a participatory democracy.”<sup>98</sup>

Accordingly, when Congressman Horace Page<sup>99</sup> introduced the Page Act, he argued that China was sending to the United States women who were “none but the lowest and most depraved of her subjects”—and that America was becoming “her cess-pool.”<sup>100</sup> He argued that White Americans were “stout-hearted people” who were now threatened by carriers of disease and a “deadly blight.”<sup>101</sup> Page argued that the exclusion of Chinese women was intended 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.”<sup>102</sup>

Thus, the INA’s prostitution exclusion is a lasting legacy of a racist and sexist immigration law that targeted women of color with the racist and white supremacist logic that Asian women were innately servile vectors of disease that threatened the purity of the white race. INA § 212(a)(2)(D)(i) is also a legacy of a law that targeted women of color in order to “shape the racial and cultural population” of the United States.<sup>103</sup> As Abrams explains, the impact of the Page Act led to the “virtually complete exclusion of Chinese women” from the United States,<sup>104</sup> which “prevented the birth of Chinese American children and stunted the growth of Chinese American communities.”<sup>105</sup>

### B. The Evolution of INA § 212(a)(2)(D)(i)

The racism and white supremacist ideologies that fueled the Page Act of

---

97. *Id.* at 658 (discussing that Congress’ belief that all Chinese women were prostitutes was due to their “perceived docility” which made them “innately prostitutes” ... “willing to indenture themselves into servitude.”); *see also* Chang, *supra* note 95, at 241 n.46 (2015) (stating that “[p]roponents of federal action also held the view that the Chinese were culturally conditioned to condone slavery and sexual debasement.”)

98. Abrams, *supra* note 78 at 643; *see also* Cong. Globe, 39th Cong., at 1056 (1st Sess. 1866) (statement of Rep. Higby) (stating that “[The Chinese] buy and sell their women like cattle, and the trade is mostly for the purpose of prostitution. That is their character. *You cannot make citizens of them.*”) (emphasis added).

99. *See* Abrams, *supra* note 78 at 690—91 (explaining that Representative Horace Page “made a career out of drafting and advocating anti-Chinese legislation” and that, between 1873 and 1875, he sponsored seven pieces of legislation aimed at restricting Chinese immigration).

100. 3 Cong. Rec. app’x. at 44 (1875).

101. *Id.*

102. *Id.*

103. Abrams, *supra* note 78 at 647; *see also* Chang, *supra* note 95 at 242, 266 (2015) (describing how the Page Act resulted in skewed gender ratios between Chinese men and women, the inability to form families, and a decrease in the size of the Chinese population in the United States).

104. Abrams, *supra* note 78 at 698.

105. *Id.* at 641; *see also* *THE CHINESE EXCLUSION ACT: A SPECIAL PRESENTATION OF AMERICAN EXPERIENCE* (PBS 2018), <https://www.pbs.org/wgbh/americanexperience/films/chinese-exclusion-act/> [<https://perma.cc/SQG9-NRFF>] (noting that the Congressional intent of the Page Act was to effectuate the “ethnic cleansing” of the Chinese race).

1875 continued to influence subsequent anti-prostitution immigration legislation.<sup>106</sup> From 1875 to 1990, the bulk of anti-prostitution immigration legislation expanded the scope of the criminalization of sex workers. The remainder of this Part will set forth the significant pieces of immigration legislation following the Page Act that sought to expand the criminalization of sex work by broadening the scope of—and increasing the penalties associated with—the exclusions put in place by the Page Act.

The Immigration Act of 1907 was "a law deeply intertwined with concerns about Asian immigration" and in particular with concerns "about the entry into the United States of Chinese women to be prostitutes."<sup>107</sup> Indeed, the 1907 Act was intended to "extend the scope" of the criminalization of immigrant sex workers<sup>108</sup> and "strengthen" laws that related to the importation of sex workers.<sup>109</sup> First, the 1907 Act created a deportation provision subjecting sex workers to deportation if they engaged in prostitution within three years of entering the United States.<sup>110</sup> While the Page Act focused on excluding sex workers at the border, the 1907 Act criminalized immigrant women for conduct committed after entry, albeit limiting the scope of criminalization to three years of entry.<sup>111</sup> Through a 1910 amendment<sup>112</sup> to the 1907 Act, the temporal limitation of "three years after entry" was removed so that an immigrant could be deported for engaging in sex work *at any point* after entering the United States.<sup>113</sup>

Second, the 1907 Act included new blanket language ("for any other

106. Moreover, the racism and white supremacist ideologies that fueled the Page Act of 1875 also "helped to pave the way for the criminalization of prostitution itself." See Das, *supra* note 35 at 185. Indeed, before the Page Act, sex work was not a crime in the United States. See Lucas, *supra* note 90 at 47. By 1925 every state had passed some form of anti-prostitution law. See Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 243 (2000).

107. See Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 770 (2006); see also Todd Stevens, *Tender Ties: Husbands' Rights and Racial Exclusion in Chinese Marriage Cases, 1882-1924*, 27 LAW & SOC. INQUIRY 271, 291-93 (2002) (noting that the 1907 Act was a response to immigration officials who "had been clamoring for help in stopping the immigration of Chinese prostitutes specifically.")

108. See H.R. REP. NO. 59-3021, at 19 (1906) (stating the purpose of Section 3 is "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.")

109. See H.R. REP. NO. 59-4558, at 2 (1906) (stating the purpose of Section 3 to strengthen "the provisions with regard to the importation of prostitutes.")

110. § 3, 34 Stat. 898. This section of the 1907 Act also included new "for any other immoral purpose" language that expanded the reach of criminalization to cover "undesirable practices alleged to have grown up in relation to the immigration of prostitutes." U.S. v. Bitty, 155 F. 938, 939 (C.C.S.D. N.Y. 1907).

111. Dadhania, *supra* note 36 at 62.

112. See Act of March 26, 1910, ch. 128, § 2, 36 Stat. 263 (amending an act entitled "An Act to regulate the immigration of aliens into the United States").

113. See *id.* § 3 (mandating the deportation of an immigrant "who shall be found an inmate . . . of a house of prostitution or practicing prostitution after such alien shall have entered the United States"); see also Dadhania, *supra* note 36 at 64 (noting that the 1910 amendments made the deportation provision significantly harsher for immigrant sex workers than for many other immigrants subjected to deportation). The 1910 amendments created new deportation provisions for those who managed houses of prostitution, received any part of the earnings of a prostitute, and protected prostitutes from arrest. See § 2, 36 Stat. 263.

immoral purpose”<sup>114</sup> that expanded the reach of criminalization to cover “undesirable practices alleged to have grown up in relation to the immigration of prostitutes.”<sup>115</sup> This new language was integrated throughout the 1907 Act to criminalize the importation of woman for the purpose of prostitution or “any other immoral purpose”<sup>116</sup>—as well as the harboring of an immigrant woman for the purpose of prostitution or “any other immoral purpose” within three years of her entry into the United States.<sup>117</sup>

Like the Page Act and the Immigration Act of 1907, the Immigration Act of 1917<sup>118</sup> was a law deeply steeped in racism and white supremacy that continued expansion of the criminalization of sex work.<sup>119</sup> For example, the Act added criminal penalties (imprisonment up to two years) for immigrants who attempted to return to the United States after being deported for prostitution.<sup>120</sup> It also rendered deportable an immigrant who had previously been barred from entry or deported for any prostitution-related activity.<sup>121</sup> Further, the 1917 Act denied citizenship to “a female of the sexually immoral classes” if she was found to ever have engaged in prostitution.<sup>122</sup>

Left unchallenged in the prior iterations, the racist and white supremacist provisions of the Immigration Act of 1917 were codified into the Immigration and Nationality Act of 1952, which further expanded the criminalization of prostitution.<sup>123</sup> Significantly, the 1952 Act created a new bar that deported and excluded sex workers for engaging in prostitution at any time in the past—whereas

- 
114. The “any other immoral purpose” language would later be adopted by the White-Slave Traffic Act (WSTA) of 1910 and used to criminalize prostitutes. See Jennifer Chacón, *Misery and Miopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3015 (explaining that while the stated intent of the WSTA was to protect women from interstate and international trafficking, the enforcement of the law revealed another unstated intent of the law—namely to abolish prostitution by criminalizing sex workers).
115. See *Bitty*, 155 F. at 939 (C.C.S.D. N.Y. 1907) (interpreting the words “or for any other immoral purpose” to have been added to the word “prostitution,” to prevent undesirable practices alleged “to have grown up in relation to the immigration of prostitutes”).
116. 34 Stat. 898 § 3.
117. 34 Stat. 898 § 3.
118. Law of Feb. 5, 1917 (Immigration Act of 1917), Pub. L. No. 47-301, ch. 29, 39 Stat. 874 § 3, 875–76 (1917).
119. The 1917 Act was also known as the “Asiatic Barred Zone Act” because it excluded immigrants from most of Asia and countries adjacent to Asia. See Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 *YALE L. J. & HUMAN.* 51 (2016) (discussing the congressionally invented “Asiatic Barred Zone” and noting that barred countries included India, Burma, Siam, the Malay States, Arabia, Afghanistan, part of Russia, and most of the Polynesian Islands); *id.* at 57, 77, 77 n.131.
120. *Id.* at § 4. The 1917 Act provided for a term of imprisonment of not more than two years.
121. See *id.* § 19. The 1917 Act also rendered deportable immigrants for committing a “crime involving moral turpitude”; see also S. REP. NO. 352 (1916).
122. 39 Stat. 874 § 19; see also Dadhania, *supra* note 36 at 67 (noting that such “harsher treatment” did not apply to immigrants who committed other violent crimes).
123. See Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, § 201(a), 66 Stat. 163163, 175 (later codified as 8 U.S.C.) (repealed 1965); see also 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).)



prior legislation focused on present or future prostitution.<sup>124</sup> Specifically, the Act barred immigrants who “have engaged in prostitution”—without any time limit.<sup>125</sup> It was not until 1990 that a 10-year time limit was placed on the prostitution exclusion through the Immigration Act of 1990.<sup>126</sup> This change gave rise to the current prostitution exclusion, INA § 212(a)(2)(D)(i), which is currently codified under the “criminal and related grounds” of the INA. This law renders inadmissible any immigrant who:

“is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status.”<sup>127</sup>

While convictions are not required for a finding of inadmissibility under INA § 212(a)(2)(D)(i),<sup>128</sup> convictions are often used as evidence to indicate a “pattern of behavior”<sup>129</sup> of engaging in prostitution under INA § 212(a)(2)(D)(i).<sup>130</sup> In fact, even one conviction alone can be used to establish a “pattern” of prostitution-related behavior and may be used as the basis for an inadmissibility finding under INA § 212(a)(2)(D)(i).<sup>131</sup> Moreover, an arrest for prostitution—even without a conviction—can signal a “pattern of behavior” to adjudicators, resulting in an inadmissibility finding under INA § 212(a)(2)(D)(i).<sup>132</sup>

- 
124. *See supra* notes 113-114 and accompanying text (discussing the 1910 amendment to the 1907 Act which allowed for deportation for engaging in sex work *at any point after* entering the United States).
125. Immigration and Nationality Act (McCarran-Walter Act), Pub. L. 82-414, ch. 477, 66 Stat. 163, 182 (1952).
126. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).
127. INA, 8 U.S.C.A. § 1182(a)(2)(D)(i) (2012).
128. *See id.* § (a)(2)(D); *see also* U.S. Dep’t of Justice, OFFICE OF IMMIGR. LITIG., IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS: PADILLA V. KENTUCKY, 13 (Nov. 2010).
129. 22 C.F.R. § 40.24(b). Agency regulations provide that a finding that an immigrant “has ‘engaged’ in prostitution” must be based on “a pattern of behavior or deliberate course of conduct entered into primarily for financial gain or for other considerations of material value.” *Id.*
130. *See* *Kepilino v. Gonzales*, 454 F.3d 1057, 1060 (9th Cir. 2006) (using records of conviction as evidence to determine whether immigrant engaged in a regular pattern of prostitution); *see also* *Matter of Oscar Gonzalez-Zoquiapan*, 24 I. & N. Dec. 549, 550-51 (B.I.A. 2008) (relying on the immigrant’s conviction documents as evidence while acknowledging that “section 212(a)(2)(D)(ii) of the Act does not require a conviction”); *see also* § N.10 *Sex Offenses*, IMMIGRANT LEGAL RESOURCE CENTER, 16 (March 2016), [https://www.ilrc.org/sites/default/files/resources/n.10\\_sex\\_offenses\\_2014\\_final.pdf](https://www.ilrc.org/sites/default/files/resources/n.10_sex_offenses_2014_final.pdf) (noting that while no conviction is required for an inadmissibility finding based on engaging in prostitution, a conviction “will serve as evidence.”)
131. *See* *In re: Salvador Arcos-Valencia*, No. AXX XX0 433 - LOS, 2005 WL 952477, at \*1 (BIA Apr. 13, 2005) (per curiam) (allowing a single conviction for prostitution to trigger inadmissibility).
132. *See* *Nivonram v. Gonzales*, 192 F.App’x. 285, 286-87 (5th Cir. 2006) (the approving finding that an immigrant had engaged in prostitution based on arrests alone); *see also* *Dadhanian, supra* note 36 at 57 (noting that such a policy is especially problematic in the context of sex work, where immigrant sex workers can “be arrested and charged, but later have their charges dropped.”) *Dadhanian* adds that an arrest “for prostitution can arouse the suspicion of immigration officials and adjudicators” leading to an inadmissibility finding under INA § 212(a)(2)(D)(i). *Id.* at n.12.

Immigrants who have worked in localities where sex work is legal are still rendered inadmissible under INA § 212(a)(2)(D)(i).<sup>133</sup> The prostitution exclusion is also a statutory bar to a finding of good moral character<sup>134</sup>—and is considered a crime of moral turpitude (CIMT)<sup>135</sup>—both of which can be used to render an immigrant inadmissible or deportable.<sup>136</sup> Notably, INA § 212(a)(2)(D) does not exclude solicitors of sex.<sup>137</sup> However, solicitation is considered a CIMT and can be used to render an immigrant inadmissible or deportable.<sup>138</sup>

The INA’s prostitution exclusion originated from a racist and white supremacist immigration law—the Page Act of 1875—borne from and inspired by the racialized and sexualized targeting of women of color as “pernicious weapon[s]” who were “infusing a poison into the Anglo-Saxon blood” and imperiling the “future of the American nation.”<sup>139</sup> Indeed, the Page Act paved the way for the Chinese Exclusion Act of 1882 which explicitly prohibited the entry of Chinese laborers into the United States.<sup>140</sup> As Abrams explains, the Page Act “provided anti-Chinese forces with a foothold that paved the way for the Chinese Exclusion Act.”<sup>141</sup>

### III. INA § 212(A)(2)(D)(I) AND ANTI-ESSENTIALISM AND INTERSECTIONALITY THEORY

With roots in the Page Act of 1875—a deeply racist, white supremacist, and sexist law—the INA’s prostitution exclusion, INA § 212(a)(2)(D)(i), is ripe for

---

133. 22 CFR § 40.24(c); *see also* Matter of G, 5 I&N Dec. 559 (B.I.A. 1953).

134. INA § 101(f), 8 U.S.C. § 1101(f) (2008) (rendering ineligible for consideration as persons of good moral character habitual drunkards, persons practicing polygamy, smugglers, gamblers, persons convicted of or admitting to CIMTs, persons convicted of aggravated felonies, and persons engaged in prostitution).

135. The term “crime involving moral turpitude” first appeared in immigration law in 1891. *See* Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.

136. In almost every situation in which immigrants apply for a U.S. immigration benefit, whether avoiding deportation or applying for citizenship, an immigrant must show their “good moral character.” It is long-standing precedent that prostitution is a crime of moral turpitude. *See* *In re W-*, 4 I. & N. Dec. 401, 402 (B.I.A. 1951).

137. While subsection (ii) of INA § 212(a)(2)(D) does criminalize procurers of prostitution, procurers are not considered solicitors. *See* Matter of Gonzalez-Zoquiapan, 24 I&N Dec. 549, 551 (B.I.A. 2008) (explaining that the word “procure” in INA § 212(a)(2)(D)(ii) does not refer to solicitation, but rather means “[t]o obtain [a prostitute] for another”).

138. *See* *In re: Sehmi*, 2014 WL 4407689, at \*6-7 (BIA Aug. 19, 2014); *see also* *Rohit v. Holder*, 670 F.3d 1085, 1089 (9th Cir. 2012); *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 F.App’x. 870, 873 (10th Cir. 2015); *Florentino-Francisco v. Lynch*, 611 F.App’x. 936, 938 (10th Cir. 2015).

139. *See* NAYAN SHAH, *CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO’S CHINATOWN* 107 (2001) (quoting Dr. Mary Sawtelle).

140. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943). Abrams adds that most legal scholars and historians point to the Chinese Exclusion Act of 1882 as the first racially restrictive federal immigration law. *See* Abrams, *supra* note 78 at 645. Congressman Horace Page, who authored the Page Act, later sponsored the Chinese Exclusion Act of 1882. *Id.* at 691.

141. Abrams, *supra* note 78 at 702.

further critique through the lens of critical race feminism (CRF). This Part of the Article will apply such an analysis using CRF theories of anti-essentialism and intersectionality.

### A. INA § 212(a)(2)(D)(i) is Essentialist

As Harris explains, essentialism is the notion that a “unitary” or “essential” experience can be isolated and described independently of gender, race, class, sexual orientation, and other realities of experience.<sup>142</sup> Laws that criminalize sex work—such as INA § 212(a)(2)(D)(i)—are essentializing in three ways. First, these laws essentialize *all sex workers* as victims who are in need of saving by laws that criminalize sex work; second, these laws essentialize *all sex work* as a form of violence that can never be a source of economic empowerment; and third, these laws essentialize *all women* by presuming that all women face the same barriers and have the same options for achieving financial independence.<sup>143</sup>

Critical race feminist scholar I. India Thusi provides a foundation for highlighting the essentializing aspects of INA § 212(a)(2)(D)(i). For example, Thusi argues that a common rationale for the continued criminalization of sex work in the United States has been expressed in terms of protecting “the community”—including sex workers themselves—from “the dangers of commercialized sex and sex trafficking.”<sup>144</sup> As a result, *all sex workers* are perceived only as “victims” in the crime of prostitution—a crime that must be abolished through criminalization.<sup>145</sup> By supporting the criminalization of sex work, INA § 212(a)(2)(D)(i) reinforces the essentialist view that *all women* experience sex work in the same way—as a form of violence in which all sex workers are “victims” in a system of male subordination who cannot exhibit agency.<sup>146</sup>

Further, Thusi argues that the essentialist framing of *all sex work* as only a form of violence is itself a reproduction of patriarchy and white supremacy by silencing the voices and experiences of sex workers themselves—especially sex workers with intersectional identities.<sup>147</sup> Such an essentialist view of sex work fails to consider that sex work can be a tool for female economic empowerment for immigrant women of color<sup>148</sup>—both inside and outside the United States.<sup>149</sup>

142. See *infra* Part II B (discussing essentialism in the context of “gender essentialism”).

143. I. India Thusi, *Radical Feminist Harms on Sex Workers*, 22 LEWIS & CLARK L. REV. 185 (2018).

144. I. India Thusi, *Harm Sex and Consequences*, 2019 UTAH L. REV. 159, 184 (2019) (explaining that in the United States, prostitution has been conflated with human trafficking, and anti-prostitution laws are based on a narrative of sex workers as victims and victims of trafficking rings.).

145. *Id.* at 203.

146. *Id.* at 196.

147. *Id.* at 214.

148. Thusi, *supra* note 143 at 213 (noting that there is a critical need to consider different contexts and how sex work can “become a tool for female empowerment” for women of color).

149. See Kamala Kempadoo, *Women of Color and the Global Sex Trade: Transnational Feminist*

Therefore, laws that criminalize sex work—like INA § 212(a)(2)(D)(i)—similarly reify white supremacy and patriarchy by failing to recognize circumstances where women are able to exploit the desires of men in order to greater economic freedom from male patriarchal structures.<sup>150</sup>

Relatedly, Thusi argues that laws that criminalize sex work essentialize *all women* by failing to consider the experiences of women of color who often face constrained choices and systemic barriers.<sup>151</sup> For example, because women of color face overlapping systems of oppression, they must often choose the least harmful option and balance the risks with the real harms of “being unable to feed a child, or living in a country with high unemployment.”<sup>152</sup> Thusi points out that because women of color often have more limited economic options<sup>153</sup> and often face employment discrimination,<sup>154</sup> sex work not only provides them with higher economic opportunities<sup>155</sup>—but also gives them a way to mitigate against the other real harms they face.<sup>156</sup> Therefore, laws that criminalize sex work—like INA § 212(a)(2)(D)(i)—essentialize women by failing to recognize the “complicated reality” in which women of color live.<sup>157</sup>

### B. INA § 212(a)(2)(D)(i) is Anti-Intersectional

As Crenshaw explains, intersectionality theory recognizes that multiple systems of oppression intersect with each other to produce overlapping and reinforcing harms.<sup>158</sup> Laws that criminalize sex workers—such as INA § 212(a)(2)(D)(i)—are anti-intersectional in three principal ways. First, such laws fail to acknowledge the multiple systems of oppression that make certain sex workers—namely, women of color—disproportionately vulnerable to

---

*Perspectives*, 1 MERIDIANS 28, 43 (2001) (emphasizing that sex work can be a tool of empowerment for women of color in the Global South).

150. Thusi, *supra* note 143 at 221.

151. *Id.* at 214 (adding that “[a]dopting an intersectional lens makes it clear that one could almost always argue that women, particularly women with multiple identities, are making choices in a paradigm of structural disadvantage.”)

152. *Id.* at 227–28.

153. *Id.* at 222.

154. *Id.* at 213; *see also* Cheryl N. Butler, *A Critical Race Feminist Perspective on Prostitution and Sex Trafficking in America*, 27 YALE J. L. & FEMINISM, 95, 134–39 (2015) (arguing that several “structural state sanctioned factors” including racism, poverty, unequal educational opportunities, unequal employment opportunities, and inadequate health care drive many women of color into sex work as a means of economic survival).

155. Thusi, *supra* note 144 at 206, 212–13 (noting that the “prevalence of sex work amongst women is suggestive of the limited economic opportunities women generally face” and that sex workers “often turn to their work because of limited economic potential in other forms of labor.”)

156. Thusi, *supra* note 143 at 228. Thusi clarifies that while sex workers may in fact sometimes be “victims” – they have “developed mechanisms for managing these risks and have perhaps chosen to face the risks associated with sex work over those associated with abject poverty.” *Id.* at 215.

157. *Id.* at 215.

158. *See supra* Part I B (discussing intersectionality theory).

criminalization.<sup>159</sup> For example, there are historical and institutional biases within society and the criminal legal system based on race, gender, sexuality, and gender identity that render women of color sex workers as “highly sexualized and sexually available”<sup>160</sup>—and, as a result, innately “blameworthy.”<sup>161</sup> As a result of these biases, women of color are not only over-represented in the modern U.S. sex work industry,<sup>162</sup> but they are also disproportionately subjected to profiling, arrest, and prosecution by the criminal legal system.<sup>163</sup> By using arrests and convictions as a basis for inadmissibility and deportation, INA § 212(a)(2)(D)(i) fails to take into account how systems of oppression intersect and result in women of color sex workers being disproportionately vulnerable to criminalization.<sup>164</sup>

Second, by relying upon and legitimizing the enforcement mechanisms of the criminal legal system, INA § 212(a)(2)(D)(i) fails to recognize the role the criminal legal system—as a system of oppression—plays in perpetrating violence against communities of color.<sup>165</sup> As Thusi reminds us, an intersectional approach to questions of criminalization places “suspicion of the criminal legal system to

---

159. See generally Crenshaw, Mapping, *supra* note 62.

160. Krishna de la Cruz, Comment, *Exploring the Conflicts Within Carceral Feminism: A Call to Revocalize the Women Who Continue to Suffer*, 19 SCHOLAR: ST. MARY’S L. REV. RACE & SOC. JUST. 79, 90 (2017) (noting that police officers perceive sex workers of color as “highly sexualized and sexually available” and thus target them for detention and arrest).

161. Thusi, *supra* note 144 at 162 (discussing the need for an intersectional approach to criminal legal theory). Thusi further argues that a retributivist approach to criminal law that criminalizes sex work “provides a theoretical tool for assigning blame and using popular morality as a sword against sexual deviants.” *Id.* at 188; see also Butler, *supra* note 154 at 125–28 (arguing that modern-day racialized sexual stereotypes of women of color are enduring legacies of stereotypes used to enforce Black slavery and colonialization).

162. See Butler at 127 (arguing that racialized sexual stereotypes of women of color as “sexually loose” and “naturally sexual” has created a culture of “racialized sexual objectification” that drives supply and demand in America’s modern sex work industry and has resulted in the “modern disproportionality” of women of color sex workers today).

163. See Jasmine Sankofa, *From Margin to Center: Sex Work Decriminalization is a Racial Justice Issue*, AMNESTY INT’L USA (Dec. 12, 2016), <https://www.amnestyusa.org/from-margin-to-center-sex-work-decriminalization-is-a-racial-justice-issue/> [https://perma.cc/XT6C-LCB8] (arguing that women of color sex workers are the primary subjects of violence and prosecution against individuals perceived as sex workers); see also Lucas, *supra* note 90 at 49 (noting that women of color “disproportionately suffer police harassment and arrest, while their sisters who are often white, more financially stable, less publicly visible, and less ‘offensive’ to the public, are treated more leniently.”); Danielle Augustson & Alyssa George, *Prostitution and Sex Work*, 16 GEO. J. GENDER & L. 229, 231 (2015) (“Often police do not consistently enforce prostitution laws except against the most visible sex workers—street sex workers, women of color, transgender workers, and immigrants.”); Chelsea Breakstone, “*I Don’t Really Sleep*”: *Street-Based Sex Work, Public Housing Rights, and Harm Reduction*, 18 CUNY L. REV. 337, 350 (2015) (describing how Black and Latinx sex workers are “more likely to be arrested and prosecuted for prostitution-related offenses.”); Sex Workers Project, *Revolving Door: An Analysis of Street-Based Prostitution in New York City*, URBAN JUSTICE CTR. 35 (2003), <http://sexworkersproject.org/downloads/RevolvingDoor.pdf> (noting that women of color received more harassment from police than white women).

164. See *supra* notes 129-133 and accompanying text (discussing impact of prostitution-related arrests and convictions under INA § 212(a)(2)(D)(i)).

165. See *supra* notes 62-68 and accompanying text (discussing the analytical benefits of intersectionality theory). For a discussion of how the criminal legal system disproportionately harms trans people of color, see generally Medina, *supra* note 35.

the forefront”<sup>166</sup> and presumes that the criminal legal system is “likely illegitimate with a negative influence that must be minimized and mitigated.”<sup>167</sup> By giving the criminal legal system the power to determine the inadmissibility and deportability of immigrant sex workers, INA § 212(a)(2)(D)(i) fails to acknowledge “the enormity and inhumanity of our criminal justice system, as well as its flawed premises.”<sup>168</sup>

Finally, INA § 212(a)(2)(D)(i) fails to recognize the ways in which the system of criminalization itself produces additional harms for sex workers. Thus argues that an intersectional approach to the criminalization of sex work recognizes the harms that criminalization itself inflicts on sex workers.<sup>169</sup> For example, because criminalization creates a fear of arrest, sex workers are less likely to turn to the criminal legal system as a source of protection and are less protected from violent encounters as a result.<sup>170</sup> Moreover, the fear of arrest forces sex workers “underground” where they are less likely to seek social services or medical treatment.<sup>171</sup> The fear of arrest also results in stigma, social marginalization, and isolation that prevents sex workers from seeking redress against exploitation or poor work conditions.<sup>172</sup> And for sex workers who are also immigrants, the fear of arrest is compounded by the fear of deportation.<sup>173</sup> By refusing to recognize the impacts of multiple and overlapping systems of oppression—including the ways in which the system of criminalization harms sex workers—INA § 212(a)(2)(D)(i) is unapologetically anti-intersectional.

#### IV. INA § 212(A)(2)(D)(I) AND MOVING TOWARD PRAXIS

The United States is one of the only industrialized nations in the world that totally criminalizes sex work.<sup>174</sup> Total criminalization is a legal approach to sex work that criminalizes all aspects of sex work including the sale, purchase, and all sex work-related activities such as solicitation, living off the earnings of sex work,

---

166. Thusi, *supra* note 144 at 194.

167. *Id.* at 195.

168. See Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 587–95 (2009) (arguing that feminists ought to be consistent in critiquing “the enormity and inhumanity of our criminal justice system,” as well as its flawed premises).

169. Thusi, *supra* note 144 at 195.

170. *Id.* at 207 (noting that criminalization forces sex workers “to hesitate when considering whether to inform police officers about a violent encounter”).

171. *Id.* at 206–11.

172. *Id.* at 208.

173. *Id.* at 183–34 (giving the example of an immigrant sex worker who faces immigration proceedings as a result of any criminal legal intervention because “she is also an immigrant.”)

174. See Melinda Chateaufort, *Sex Workers Unite: A History of the Movement From Stonewall to Slutwalk 5* (2013) (“Sex work is legal in fifty nations, including Canada, Mexico, Brazil, Macau, the Netherlands, Austria, New Zealand, Israel, Germany, France, and England; it is legal with limitations in another eleven nations, including Australia, India, Norway, Japan, and Spain.”)

and brothel-keeping.<sup>175</sup> This is the dominant approach taken in all fifty U.S. states.<sup>176</sup> While penalties for sex workers differ from state to state, sixteen states impose fines and incarceration that can exceed six months for the first prostitution offense.<sup>177</sup>

In contrast to the total criminalization approach, the total decriminalization approach to sex work opposes all forms of criminalization and other forms of legal oppression that address sex work.<sup>178</sup> Decriminalization applies not only to sex workers but also to clients, third parties, families, partners, and friends.<sup>179</sup> Supporters of decriminalization include sex worker rights groups,<sup>180</sup> sex-positive feminists,<sup>181</sup> international human rights organizations,<sup>182</sup> and public health

- 
175. Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1668 (2010).
176. See ProCon.org, *US Federal and State Prostitution Laws and Related Punishments*, PROCON.ORG (May 4, 2018), <https://prostitution.procon.org/us-federal-and-state-prostitution-laws-and-related-punishments/>. The only exception is in ten rural counties in Nevada which allow for prostitution based in brothels. See NEV. REV. STAT. § 201.354 (2017) (making prostitution based in brothels legal in Nevada).
177. These states include Alabama, ALA. CODE §§ 13A-12-122, 13A-5-7 (2018); Arizona, ARIZ. REV. STAT. ANN. §§ 13-3214, 13-707 (2014); Connecticut, CONN. GEN. STAT. §§ 53a-82, 53a-26 (2016); Georgia, GA. CODE ANN. §§ 16-6-9, 16-6-13(a)(2), 17-10-3 (2019); Illinois, 720 ILL. COMP. STAT. 5/11-14, 730 ILL. COMP. STAT. 5/5-4.5-55 (2019); Indiana, IND. CODE §§ 35-45-4-2, 35-50-3-2 (2018); Iowa, IOWA CODE §§ 725.1, 903.1 (2015); Massachusetts, MASS. GEN. LAWS ch. 272 § 53A (2011); Michigan, – MICH. COMP. LAWS §§ 750.448-449, 750.451 (2017); Minnesota, MINN. STAT. §§ 609.324, 609.0341 (2020); Oregon, OR. REV. STAT. §§ 167.007, 161.615(1) (2018); Pennsylvania, 18 PA. CONS. STAT. §§ 5902, 1104(3) (2011); South Dakota, S.D. CODIFIED LAWS §§ 22-23-1, 22-23-9, 22-6-2 (2019); Vermont, VT. STAT. ANN. tit. 13 § 2631 (2011); Virginia, VA. CODE ANN. §§ 18.2-346, 18.2-11(a) (2020); Wisconsin, WIS. STAT. §§ 944.30, 939.51(3)(a) (2013).
178. Chuang, *supra* note 175 at 1668.
179. *Who we are*, GLOB. NETWORK OF SEX WORK PROJECTS, <https://www.nswp.org/who-we-are> [<https://perma.cc/7AF5-8ESK>] (defining “third parties” as “managers, brothel keepers, receptionists, maids, drivers, landlords, hotels who rent rooms to sex workers and anyone else who is seen as facilitating sex work.”); *see also id.* at 1669.)
180. See Priscilla Alexander, *Why This Book?* in *SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 14–15* (Frederique Delacoste & Priscilla Alexander eds., 1987) (noting that the sex workers’ rights movement has advocated for decriminalization of sex work since the late 1970s).
181. Aziz Ahmed, *Feminism, Power, and Sex Work in the Context of HIV/AIDS: Consequences for Women’s Health*, 34 HARV. J. L. & GENDER 225, 230-31 (2011) (discussing the evolution of “sex-positive” feminists who “grew tired of the dominance feminist framing of sex” and instead regarded sex as a place of potential agency for women, rather than inevitable subordination.)
182. Human Rights Watch, Amnesty International, and the Platform for International Cooperation on Undocumented Migrants (PICUM) have all called for the decriminalization of sex work on human rights grounds. See, e.g., *Why Sex Work Should Be Decriminalized*, HUMAN RIGHTS WATCH, <https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized> [<https://perma.cc/DY97-9962>]; *Policy on State Obligations to Respect, Protect and Fulfill the Human Rights of Sex Workers*, AMNESTY INT’L 3 (May 26, 2016), <https://www.amnesty.org/en/documents/pol30/4062/2016/en/> [<https://perma.cc/UTU7-WD8P>]; *Safeguarding the Human Rights and Dignity of Undocumented Migrant Sex Workers*, PICUM (2019), <https://static1.squarespace.com/static/5e4835857fed934d19bd9673/t/5e7fdd5ee8e5be5d58b9a7eb/1585438046970/Safeguarding-the-human-rights-and-dignity-of-undocumented-migrant-sex-workers+PICUM.pdf>.

scholars<sup>183</sup>—all of whom argue that decriminalization makes sex work safer by allowing sex workers to “collectivize, mobilize, and change an often-unsafe work environment under the leadership and direction of sex workers.”<sup>184</sup>

Importantly, the call for the decriminalization of sex work has also been championed by an emergent intersectional anti-carceral feminist movement grounded in principles of critical race feminism. This Part of the Article will link the critique of INA § 212(a)(2)(D)(i) to the platforms and strategies of this movement to inspire immigration law reform efforts that are in alignment with principles of critical race feminism and to move from theory toward praxis.

### A. The Anti-Carceral Feminist Movement

The anti-carceral feminist movement is an on-the-ground intervention to gender violence mobilized by the theoretical principles of critical race feminism. In her discussion of the emergence of anti-carceralism within the feminist movement, anti-violence scholar Mimi E. Kim explains that by the turn of the millennium, a “growing chorus of critics” led by women of color mobilized a new response to gender violence that centered a critique of “the criminal justice system and of the mainstream anti-violence movement’s embrace of that system.”<sup>185</sup> These women of color critics were “increasingly disenchanted” with the criminal justice system and increasingly aware of “its insidious role in the decimation of poor black and brown communities.”<sup>186</sup> They recognized that feminism was in “desperate need” of a “trenchant critique” of gender violence without simultaneously “collaborating with the carceral state and its war on communities of color.”<sup>187</sup> And they insisted that feminists “should not be channeling their efforts into helping the government find new, better, and easier ways to incarcerate people.”<sup>188</sup> The result was a “strident new social movement”—often called “anti-carceral feminism.”<sup>189</sup>

Kim locates the catalyzing moment of the anti-carceral feminist movement at a “Color of Violence” conference held in 2000 by INCITE! Women of Color Against Violence, now called INCITE! Women and Trans People of Color Against Violence (INCITE!).<sup>190</sup> Importantly, this movement articulated an

---

183. Ahmed, *supra* note 181 at 232.

184. *Id.*

185. Mimi Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 J. ETHNIC. & CULTURAL DIVERSITY IN SOC. WORK, 219, 224-25 (2018).

186. Harris, *Heteropatriarchy*, *supra* note 65 at 17 (“[In the past decade], scholars and activists committed to ending domestic violence and violence against sexual minorities have become increasingly disenchanted with the criminal justice system, and increasingly aware of its insidious role in the decimation of poor black and brown communities.”)

187. Appell and Davis, *supra* note 65 at 6.

188. Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 824 (2007).

189. Mimi Kim, *Anti-Carceral Feminism: The Contradictions of Progress and the Possibilities of Counter-Hegemonic Struggle*, 35 J. WOMEN & SOC. WORK 309, 310 (2020).

190. Kim, *supra* note 185 at 225.



explicitly “anti-criminalization stance” within the anti-violence movement, and a turn away from an “unquestioned reliance on law enforcement.”<sup>191</sup> For example, in her keynote address at the INCITE! conference, Angela Davis explained the need for an approach to address violence against poor women of color that does not further “the conservative project of sequestering millions of men of color in accordance with the contemporary dictates of globalized capital and its prison industrial complex.”<sup>192</sup>

In line with its anti-criminalization stance, anti-carceral feminism promotes responses to community harms and interpersonal violence that fall under the general rubric of “transformative justice.”<sup>193</sup> Kim describes transformative justice as a “flexible set of politics and practices committed to collective and community-based mobilization, nonpunitive practices of accountability, and a theory and practice of violence prevention and intervention that addresses the context of historic and systemic oppression.”<sup>194</sup> Transformative justice proposes responses to gender violence that are nonpunitive, noncarceral, collective interventions that do not rely upon a direct service program or the state.<sup>195</sup> These practices include responses such as base building, mutual aid, and community accountability to protect their communities.<sup>196</sup>

### **B. The Anti-Carceral Feminist Movement to Decriminalize Sex Work and the Abolishment of INA § 212(a)(2)(D)(i)**

The anti-carceral feminist movement represented a powerful shift in the feminist movement and opened the door for multi-dimensional responses to questions of criminalization, including the criminalization of sex work. INCITE! is one example of a visionary anti-carceral feminist organization that embodies principles of critical race feminism and integrates principles of critical race

---

191. *Id.*; Kim, *supra* note 189 at 313.

192. Angela Davis, *The Color of Violence Against Women*, COLORLINES (Oct. 10, 2000), <http://csf.colorado.edu/soc/m-fem/2000/msg01004.htm> [<https://perma.cc/7882-EGLK>].

193. Kim, *supra* note 185 at 226; *cf.* Kim, *supra* note 190, at 314 (noting that while transformative justice finds its “contemporary lineage” in anti-carceral feminism and abolitionist social movements, transformative justice is a “continuation of [I]ndigenous practices left unwritten, unrecognized, and largely erased by colonial and neocolonial histories.”)

194. Kim, *supra* note 189 at 319.

195. *See id.* at 320 (describing a pilot intervention and documentation program grounded in principles of transformative justice launched by Creative Interventions); *see also* Kim, *supra* note 183 at 227 (noting that “because transformative justice solutions tend to lie within marginalized communities and more radical social movement spaces outside of institutions, these processes have been informal, decentralized, and largely undocumented.”); I. India Thusi, *Feminist Scripts for Punishment*, 134 HARV. L. REV. 2449, 2479-2481 (2020) (detailing the community accountability strategies advanced by Creative Interventions, Critical Resistance, and INCITE!).

196. *See, e.g.*, Chanelle Gallant, *When Your Money Counts On It: Sex Work and Transformative Justice*, in BEYOND SURVIVAL: STRATEGIES AND STORIES FROM THE TRANSFORMATIVE JUSTICE MOVEMENT 192–96 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020) (describing strategies such as collecting and sharing information about aggressive clients, conducting self-defense trainings, organizing neighborhood sex-worker protection networks, and providing health care and mental health support).

feminism into its call for the decriminalization of sex work.<sup>197</sup> For example, INCITE!’s call for the decriminalization of sex work centers the experiences of sex workers with intersectional identities who experience multiple systems of oppression, including oppression by the criminal legal system. INCITE! recognizes that women of color sex workers—and particularly transgender women of color sex workers—are disproportionately profiled, harassed, detained, and arrested by the criminal legal system due to police officers’ “internalization and perpetuation” of racialized and gendered stereotypes framing women of color as “highly sexualized and sexually available.”<sup>198</sup> Further, INCITE! recognizes that as a result of such stereotypes, sex workers of color are rendered wholly unprotected by the police in incidents involving domestic or sexual violence.<sup>199</sup> By centering the stories of state violence committed against women of color, INCITE! calls for the decriminalization of sex work and for community-based responses that do not rely on the criminal justice system.

The Movement for Black Lives (MBL)<sup>200</sup> is another anti-carceral feminist organization<sup>201</sup> that integrates principles of critical race feminism into their call for the decriminalization of sex work.<sup>202</sup> First and foremost, MBL understands how women of color—namely, Black women—are uniquely impacted by intersecting systems of oppression:

“Black women have historically and continue to experience some of the highest rates of violence, including lethal, physical, and sexual violence; highest rates of maternal mortality and stress-related medical conditions; and some of the highest rates of poverty and unemployment, of any group in the United States. Black women also have the highest rates of stops, police violence, arrests, incarceration, and carceral control among women, and represent the fastest growing prison and jail populations in the country. Black women also bear the brunt of the financial impacts of mass incarceration.”<sup>203</sup>

Significantly, MBL recognizes that the policing of sex work has consistently

---

197. *See Analysis*, INCITE! <https://incite-national.org/analysis/> (stating that INCITE! organizes from the framework that locates women of color as living in the dangerous intersections of sexism and racism, as well as other oppressions—and places women, gender-nonconforming, and trans people of color at the center of the analysis) [<https://perma.cc/H55C-ZX5Z>].

198. *Policing Sex Work*, INCITE!, 26 (2015), <http://www.incite-national.org/page/policing-sex-work> [<http://perma.cc/5AFCVUW8>].

199. *Id.* at 27.

200. *About Us*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/about-us/> [<https://perma.cc/3YLM-V5YZ>].

201. *See* Thusi, *supra* note 195 at 2481–82 (describing the Movement for Black Lives as part of “a burgeoning millennial, feminist movement that is intersectional, noncarceral, and committed to social justice.”)

202. *See End the War on Black Women*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/end-the-war-black-women> [<https://perma.cc/2MZ6-WU88>] (calling for the “end of the war on Black women” including the decriminalization of “involvement in the sex trades”).

203. *Id.*

been used to criminalize women of color and deny them protection from sexual and other forms of violence.<sup>204</sup> Moreover, MBL understands that because women of color sex workers are disproportionately policed and “saddled” with prostitution convictions, they are further driven into poverty by losing access to “housing, employment, health care, reproductive rights, family and community.”<sup>205</sup> MBL also acknowledges that the criminalization of sex work serves as a basis for exclusion and deportation from the U.S. for immigrant sex workers and calls for the abolishment of the “ban on entry and immigration for individuals who have engaged in prostitution.”<sup>206</sup> As a result, MBL “prioritizes, promotes, and protect the safety, agency, and self-determination” of those impacted by intersecting systems of oppression within their call for the decriminalization of sex work.<sup>207</sup> Moreover, MBL calls for “non-criminalizing and non-coercive, voluntary, accessible, harm reduction-based and trauma-informed responses” to their involvement in the sex work.<sup>208</sup>

A number of transnational migrant sex worker organizations similarly integrate principles of critical race feminism into their calls for the decriminalization of sex work. For example, Red Canary Song (Red Canary)—a grassroots collective of Asian and migrant sex workers based in New York City—advocates for the decriminalization of sex work as part of its investment in migrant sex workers “who experience the most surveillance and policing and don’t have legal protections.”<sup>209</sup> Red Canary recognizes how migrant sex workers are uniquely harmed and made vulnerable by anti-trafficking initiatives that, while claiming to speak for migrant sex workers, promote increased criminalization of sex work through increased policing and immigration control.<sup>210</sup> Therefore, Red Canary believes that full decriminalization of sex work is necessary, calls for an end to police raids and deportations, and centers transformative strategies of base building and mutual aid.<sup>211</sup>

Finally, the Canada-based Butterfly Asian and Migrant Sex Workers Support Network (Butterfly)<sup>212</sup> is yet another anti-carceral feminist organization that integrates principles of critical race feminism into their call for the decriminalization of sex work.<sup>213</sup> Butterfly is an organization built upon anti-

---

204. *A Vision for Black Lives*, MOVEMENT FOR BLACK LIVES, 1 (2020), <https://m4bl.org/wp-content/uploads/2020/05/Decrim-Drugs-Sex-Work-with-reparations-Policy-Brief.pdf> [<https://perma.cc/2KDS-CBFM>].

205. *Id.*

206. *Id.*

207. *End the War on Black Women*, *supra* note 202.

208. *Id.*

209. *Our Work*, RED CANARY SONG, <https://www.redcanarysong.net/ourwork> [<https://perma.cc/36EX-PP6F>].

210. *About Us*, RED CANARY SONG, <https://www.redcanarysong.net/about-us> [<https://perma.cc/BG9N-UC39>].

211. RED CANARY SONG, <https://www.redcanarysong.net/> [<https://perma.cc/L94A-3H2M>].

212. BUTTERFLY ASIAN AND MIGRANT SEX WORKERS SUPPORT NETWORK, <https://www.butterflysw.org/home> [<https://perma.cc/JY5G-L9PH>].

213. Elene Lam, *Understanding Migrant Sex Workers*, BUTTERFLY ASIAN AND MIGRANT SEX

essentialism and intersectionality by recognizing the “unique and diverse” systems of oppression that affect the living and working conditions of migrant sex workers including lack of immigration status, language barriers, social isolation, racism, racial profiling, over-policing, discrimination, stigmatization, and the “widespread climate of hatred towards migrant sex workers.”<sup>214</sup> Butterfly also recognizes that these systems of oppression intersect with globalization, patriarchy, racism, and imperialist constructions of borders and citizenship.<sup>215</sup> Similar to MBL, Butterfly realizes that migrant sex workers are disproportionately targeted by surveillance and raids which obstruct migrant sex workers’ access to safety, protection, and support, increasing their vulnerability to violence and exploitation.<sup>216</sup> Accordingly, Butterfly advocates for the decriminalization of sex work and the abolishment of the immigration prohibition of sex work.<sup>217</sup>

By connecting the critique of INA § 212(a)(2)(D)(i) to the platforms and strategies of these anti-carceral feminist organizations, this Article seeks to inspire immigration and critical race scholars to move theory to practice by advancing strategies for law reform that are in alignment with principles of critical race feminism. Immigration and critical race scholars can draw inspiration from this movement to call for the abolishment of INA § 212(a)(2)(D)(i) on the distinct grounds that it disproportionately impacts women of color sex workers who experience multiple intersecting systems of oppression.

### CONCLUSION

Angela Harris explains that “the centrality of transformation” means that every incident of personal violence must be understood in a “larger context of structural violence.”<sup>218</sup> Similarly, Andrea Smith argues that gender violence cannot be addressed without dealing with larger structures of violence, such as “militarism, attacks on immigrants and Indian treaty rights, police brutality, the proliferation of prisons, economic neo-colonialism, and institutional racism.”<sup>219</sup> And in the immigration context, Sherally Munshi argues that to critique the violence of the U.S. border regime, we must confront the ways in which settler colonialism and “hemispheric domination” have both shaped and obscured the ongoing violence of “contemporary racial geographies and legal institutions” that

---

WORKERS SUPPORT NETWORK, 7 (2018), [https://www.butterflysw.org/\\_files/ugd/5bd754\\_5826c5ca074f408988ee248d5f614219.pdf](https://www.butterflysw.org/_files/ugd/5bd754_5826c5ca074f408988ee248d5f614219.pdf) [<https://perma.cc/R9HA-PYUN>].

214. *Id.* at 2.

215. *Id.* at 3.

216. *Id.* at 4.

217. *Id.* at 7.

218. Harris, *Heteropatriarchy*, *supra* note 65 at 58.

219. Andrea Smith, *Colors of Violence*, COLORLINES (Dec. 15, 2000) [<https://perma.cc/7RRP-FHBP>].

serve to naturalize and legitimate the border.<sup>220</sup>

Therefore, to bring the call for the abolishment of INA § 212(a)(2)(D)(i) into alignment with a transformative justice approach, we must move beyond abolishing individual exclusionary immigration laws and move towards a more “revolutionary project” of expanded abolishment of a system of immigration laws built upon racism and white supremacy.<sup>221</sup> Doing so can open up pathways to alternative forms of coexistence built upon a respect for human life and a commitment to collective survival, to forms of citizenship not reducible to legal status or entitlement, and to a refusal to be confined by illegitimate borders.<sup>222</sup> Doing so can help us move from theory to praxis.

---

220. Sherally Munshi, *Unsettling the Border*, 67 UCLA L. REV. 1720, 1720, 1724 (2021).

221. Harris, *Heteropatriarchy*, *supra* note 65 at 64-65 (discussing the liberatory potential of a transformative justice approach to gender violence).

222. *See* Munshi, *supra* note 220 at 1761-63 (discussing the 2018 caravan “movement” in the U.S. as an example of “collective acts of waymaking” among Indigenous and immigrant activists “who recognize in their shared experience a common grievance against settler colonialism and the potential to reimagine the terms of coexistence.”)