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Immigrating While Trans: The Disproportionate Impact of the Prostitution Ground of Inadmissibility and Other Provisions of the Immigration and Nationality Act on Transgender Women

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ARTICLES

IMMIGRATING WHILE TRANS: THE DISPROPORTIONATE IMPACT OF THE PROSTITUTION GROUND OF INADMISSIBILITY AND OTHER PROVISIONS OF THE IMMIGRATION AND NATIONALITY ACT ON TRANSGENDER WOMEN

LUIS MEDINA*

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* St. Mary's University School of Law, J.D., 2017; St. Mary's University, M.B.A., 2015; The University of Texas at San Antonio, Bachelor of Business Administration, Marketing, and International Management, 2009. Special thanks to my parents, Luis and Asucena Medina, who immigrated to this country many years ago to give me and my siblings an opportunity for a better life and who always encouraged me in my educational pursuits, and to Professor Lee J. Terán for sharing her years of experience and wisdom with me throughout my time in law school and beyond. I dedicate this Article to all LGBT immigrants, past, present, and future—your sacrifices, strength, courage, and beauty inspire me to be a better person and a better lawyer.

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I. INTRODUCTION

Sandy is a Mexican transgender¹ woman who came to the United States in her twenties.² In her home country, Sandy suffered greatly.³ She was regularly beaten and ridiculed for who she was.⁴ She yearned to escape to a better life in the United States, but lacking money and famil-

1. Because this Article seeks to inform the general public and the legal community about issues that the reader may not have familiarity with, I include a brief discussion here about proper terminology. The term “transgender” is an “umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth.” *GLAAD Media Reference Guide – Transgender Issues*, GLAAD, <http://www.glaad.org/reference/transgender> [<https://perma.cc/2C3X-36A8>] (last visited Apr. 30, 2017). “People under the transgender umbrella may describe themselves using one or more of a wide variety of terms - including *transgender*.” *Id.* One should always use the “descriptive term preferred by the individual.” *Id.* Further, when describing a person who identifies as transgender, it is generally incorrect to say “transgendered person”; instead, it is better to use the term as an adjective, i.e., “transgender person.” *Id.* “Transsexual” is “an older term that originated in the medical and psychological communities . . . [s]till preferred by some people who have permanently changed - or seek to change - their bodies through medical interventions” *Id.* This Article uses the term “trans” as shorthand “to be inclusive of a wide variety of identities under the transgender umbrella.” *Id.* Finally, this Article may occasionally reference the gender an individual was “assigned at birth” which is the preferred term over terms such as “biologically male,” “biologically female,” “born a man” or “born a woman.” *Id.*

2. Crystal DeBoise, *Human Trafficking of Immigrant Transgender Women: Hidden in the Shadows*, GLOBAL HUM. TRAFFICKING WATCH (Jan. 11, 2012), <http://globantihuman-traffickwatch.blogspot.com/2012/01/human-trafficking-of-immigrant.html> [<https://perma.cc/ZA5T-C55F>].

3. *Id.*

4. *Id.*

ial support, she had little hope for reaching the safety and acceptance she so strongly desired.⁵ Her dreams of making it to the United States, however, became a reality when she met a man who earned her trust and convinced her to go back with him to New York City to be his girlfriend.⁶ But Sandy's new home was far from safe.⁷ The man "quickly used violence and threats to force her into prostitution," taking the money she earned.⁸

Bamby Salcedo is another transgender immigrant who came to the United States in the 1980s.⁹ She fled from her home country of Mexico because she was relentlessly persecuted due to her gender identity.¹⁰ Indeed, Bamby regularly suffered from physical and sexual abuse and was even incarcerated for being transgender.¹¹ After she fled to the United States at the age of seventeen, she submitted an asylum petition for fear of being returned to Mexico and facing further persecution.¹² Once in the United States, she was placed in detention while she waited for her asylum claim to be adjudicated.¹³ Unfortunately, the immigration officials failed to recognize Bamby's gender identity and placed her in a male detention facility.¹⁴ There, Bamby was recurrently mistreated, ridiculed, and harassed by other detainees.¹⁵ Even bathing was a nightmare for Bamby, who described the task as "embarrassing, degrading, and scary" because she was forced to shower alongside groups of men who laughed and made sexual remarks.¹⁶ On one occasion, she was physically assaulted in the bathroom, resulting in a fractured nose.¹⁷

5. *Id.*

6. *Id.*

7. *See id.* (detailing the constant abuse Sandy suffered for a year at the hands of her supposed boyfriend).

8. *Id.*

9. CROSBY BURNS ET AL., *CTR. FOR AM. PROGRESS, LIVING IN DUAL SHADOWS: LGBT UNDOCUMENTED IMMIGRANTS 20* (2013), <https://cdn.americanprogress.org/wp-content/uploads/2013/03/LGBTUndocumentedReport-6.pdf> [<https://perma.cc/Q5VE-XGNV>].

10. *Id.*

11. *Id.*

12. *Id.* For an individual to qualify for a grant of asylum, they must meet the definition of "refugee" as set out in the Immigration and Nationality Act (INA). INA § 208(c), 8 U.S.C. § 1158(c) (2012). This requires the individual seeking protection under the asylum statute establish a well-founded fear of persecution on account of a protected ground. *Id.* § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

13. BURNS ET AL., *supra* note 9.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

Due to such constant harassment, immigration officials placed Bamby in “administrative segregation,” which, in the immigration context, is the equivalent of solitary confinement.¹⁸

Vivi Lozoya has a “wide scar that runs the length of [her] abdomen.”¹⁹ As a transgender prostitute, she was abused and held captive by a pimp in Los Angeles.²⁰ The scar is a constant reminder of the vicious attack she experienced when she least expected it—she was out with friends one day when several men stabbed her in the stomach.²¹ However, Vivi was no stranger to violence; she experienced abuse as a gay, pre-teen boy living in Mexico, often at the hands of her own family members.²² At the age of nineteen, Vivi fled to the United States and began to transition²³ using the money she made from prostitution.²⁴

All three of these women are transgender and all have suffered greatly in their home countries, during their journeys to the United States, and

18. *Id.* Although Immigration & Customs Enforcement’s (ICE) detention standards emphasize that Administrative Segregation is a “non-punitive” form of separation from the general population of detainees for safety reasons, ICE’s own policy guidelines frequently refer to those units as “cells,” and is recognized by immigrant advocates as being more akin to solitary confinement. IMMIGR. & CUSTOMS ENF’T, INS DETENTION STANDARD: SPECIAL MANAGEMENT UNIT 1 (2000), http://www.ice.gov/doclib/dro/detention-standards/pdf/smu_adm.pdf [<https://perma.cc/AH77-LC42>]; *see, e.g., Conditions of Detention*, IMMIGR. EQUAL. USA, <http://www.immigrationequality.org/get-legal-help/our-legal-resources/detention-deportation/conditions-of-detention> [<https://perma.cc/KU6M-VQFH>] (last visited Feb. 13, 2017) [hereinafter *Conditions of Detention*] (“LGBT detainees who fear sexual or physical violence in detention are commonly placed in a form of solitary confinement known as “administrative segregation”); Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (Mar. 23, 2013), <http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html> [<https://perma.cc/3F46-LBX5>] (reporting on the use of solitary confinement in immigration detention).

19. Adrian Florido, *A Push to End Violence Against Transgender Immigrants*, KPCC (May 21, 2015), <http://www.scpr.org/news/2015/05/21/51818/immigrant-groups-stepping-up-activism-against-tran> [<https://perma.cc/46VK-MLZV>].

20. *Id.*

21. *Id.*

22. *Id.*

23. “Transitioning” is the process by which a transgender person begins presenting themselves as the gender they identify with instead of the gender they were assigned at birth. *Transgender Terminology*, NAT’L CTR. FOR TRANSGENDER EQUAL., http://www.transequality.org/sites/default/files/docs/resources/TransTerminology_2014.pdf [<https://perma.cc/CA53-WM74>] (last updated Jan. 2014). Transitioning can include taking both formal or legal, and informal steps, to reflect one’s gender identity. *Id.* This includes using a new name, dressing differently, seeking a change in identity documents like driver’s licenses and birth certificates, medical procedures or treatments such as taking hormones and having surgery. *Id.*

24. Florido, *supra* note 19.

while in the custody of the United States government.²⁵ The stories of women like Sandy, Bamby, and Vivi are just three of thousands of others about trans women who have experienced similar abuse both at home and in the United States.²⁶ Unfortunately, their stories are not unique.²⁷ In the United States, women like them, and others within the Lesbian, Gay, Bisexual, Transgender (LGBT) community, “face unique hardships and often insurmountable obstacles” when encountering our immigration system.²⁸

Of the approximately eleven million undocumented immigrants currently in the United States, roughly 270,000 are LGBT adults.²⁹ Moreover, of those roughly 270,000 individuals, researchers estimate that anywhere from 15,000 to 50,000 are transgender.³⁰ Anyone seeking to immigrate legally to the United States faces an uphill battle.³¹ LGBT

25. See BURNS ET AL., *supra* note 9 (detailing Bamby’s experience with abuse); DeBoise, *supra* note 2 (describing Sandy’s experience as a victim of human trafficking); Florido, *supra* note 19 (documenting Vivi’s abusive encounter with a pimp who held her captive).

26. See generally J. JEANTY & H.J. TOBIN, NAT’L CTR. FOR TRANSGENDER EQUAL., OUR MOMENT FOR REFORM: IMMIGRATION AND TRANSGENDER PEOPLE 6 (2013), http://www.transequality.org/sites/default/files/docs/resources/OurMoment_CIR_en.pdf [<https://perma.cc/54WD-RF9J>] (indicating many transgender immigrants migrate to the United States to escape life threatening persecution, while others flee from poverty).

27. See, e.g., JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2, NAT’L CTR. FOR TRANSGENDER EQUALITY & NAT’LD GAY AND LESBIAN TASK FORCE (2011), http://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf [<https://perma.cc/NKL4-8B6M>] (summarizing findings of a national discrimination survey of transgender individuals in key facets such as home life, education, health care, housing, employment, and in the justice system); JEANTY & TOBIN, *supra* note 26 (estimating there are between 15,000 and 50,000 transgender undocumented adults, between 7,500 and 25,000 partners of undocumented trans individuals, and between 9,000 and 30,000 children of undocumented trans individuals in the United States); Shuka Kalantari, *Transgender Iranian Refugees are Struggling to Outrun Prostitution and Violence*, VICE NEWS (Apr. 10, 2015, 11:40 AM), <https://news.vice.com/article/transgender-iranian-refugees-are-struggling-to-outrun-prostitution-and-violence> [<https://perma.cc/DM8S-LUCR>] (illustrating further the abysmal living conditions of transgender women abroad); Elton Lugay, *Transgender Filipinos Confront the Stigma of Prostitution*, FEET IN 2 WORLDS (Mar. 20, 2012), <http://www.fi2w.org/2012/03/20/transgender-filipinos-confront-the-stigma-of-prostitution> [<https://perma.cc/NFB8-CC5H>] (recounting the experiences of undocumented transgender Filipino in the United States).

28. BURNS ET AL., *supra* note 9.

29. *Id.* at iv.

30. JEANTY & TOBIN, *supra* note 26.

31. E.g., *Why Don’t They Just Get in Line?*, AM. IMMIGR. COUNCIL (Aug. 12, 2016), <https://www.americanimmigrationcouncil.org/research/why-don-t-they-just-get-line> [<https://perma.cc/N6TA-PNG4>] (concluding that most people who want to immigrate into the United States legally are not eligible for the traditional paths toward gaining permanent resident status and, even when they are, the waiting time can be prohibitive).

individuals, however, face even greater challenges, which render them a more vulnerable population in many regards.³²

Recently, the LGBT community celebrated an equal rights victory when the Supreme Court ruled that bans on same-sex marriage are unconstitutional.³³ Nevertheless, discrimination against LGBT people continues in a multitude of ways both domestically and abroad.³⁴ This Article explores the ways in which the transgender immigrant experience is inherently different from that of any other immigrant, how current laws are inadequate to give them the protection they deserve, and how minor changes in our laws can drastically improve the outcome of their cases.³⁵

Part I tells the stories of transgender immigrants and their experiences at home and in immigrating to the United States. Part II provides a his-

32. See BURNS ET AL., *supra* note 9 (reinforcing that undocumented LGBT immigrants are at the intersection of two marginalized groups). See generally SHARITA GRUBERG, DIGNITY DENIED: LGBT IMMIGRANTS IN U.S. IMMIGRATION DETENTION 1, CTR. FOR AM. PROGRESS, (Nov. 2013), <https://www.americanprogress.org/wp-content/uploads/2013/11/ImmigrationEnforcement.pdf> [<https://perma.cc/4AX6-FW4Y>] (shedding light on the increased risk of LGBT immigrants in detention).

33. See *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584, 2585 (2015) (holding that same-sex marriage is a fundamental right under the United States Constitution).

34. Hillary Clinton addressed the issue in 2011:

Today, I want to talk about the work we have left to do to protect one group of people whose human rights are still denied in too many parts of the world today. In many ways, they are an invisible minority. They are arrested, beaten, terrorized, even executed. Many are treated with contempt and violence by their fellow citizens while authorities . . . look the other way or, too often, even join in the abuse. They are denied opportunities to work and learn, driven from their homes and countries, and forced to suppress or deny who they are to protect themselves from harm. I am talking about gay, lesbian, bisexual, and transgender people, human beings born free and given bestowed equality and dignity, who have a right to claim that, which is now one of the remaining human rights challenges of our time[.]

Hillary Clinton on Gay Rights Abroad: Secretary of State Delivers Historic LGBT Speech in Geneva, HUFFINGTON POST (Dec. 6, 2011), http://www.huffingtonpost.com/2011/12/06/hillary-clinton-gay-rights-speech-geneva_n_1132392.html?ref=mostpopular [<https://perma.cc/4J8F-JPEF>]; see also GRANT ET AL., *supra* note 27 (declaring the insurmountable degree of discrimination the trans community face domestically); Kalantari, *supra* note 27 (documenting the Iranian immigrant transgender experience in Turkey); Lugay, *supra* note 27 (documenting the Filipino immigrant transgender experience in the United States).

35. This Article relates the stories specifically of transgender women, individuals who were assigned to be male at birth but identify as female, because they are twice as likely as transgender men to have participated in the sex trade. See ERIN FITZGERALD ET AL., MEANINGFUL WORK: TRANSGENDER EXPERIENCES IN THE SEX TRADE 4, 13 NAT'L CTR. FOR TRANSGENDER EQUALITY (2015), http://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf [<https://perma.cc/3S2T-DX98>] (reporting that "transfeminine respondents," a term describing both transgender women and gender-nonconforming people who identify as more female than male, were twice as likely as transmasculine respondents to participate in the sex trade).

tory and background of our nation's immigration system. It also briefly explores the history of LGBT discrimination within our immigration system and demonstrates how our laws still need to change. More specifically, it discusses the disproportionate impact of section 212 of the Immigration and Nationality Act (INA),³⁶ which governs the ground of inadmissibility for engaging in prostitution, on individuals like Sandy.³⁷

Part III explores the history of criminalization of prostitution in the United States and its effect on transgender women. It further addresses how current immigration laws do not adequately protect transgender women. Part IV concludes by explaining potential forms of relief for those with prostitution convictions and for sex trafficking victims and proposes sensible changes to the INA to alleviate burdens presented to transgender immigrants and to give them a better opportunity at legal and successful immigration.

II. THE U.S. IMMIGRATION SYSTEM AND HOW IT HAS HISTORICALLY DISCRIMINATED AGAINST THE LGBT COMMUNITY

A. *A Brief History of U.S. Immigration Law*

To better understand the legal framework within which the prostitution inadmissibility ground operates, it is worth exploring our country's history on immigration legislation. Aside from the Alien and Sedition Act of 1798, the United States did not have immigration laws until 1875.³⁸ In 1875, Congress began imposing various immigration regulations by creating classes of excludable and deportable aliens.³⁹ Among the classes of excludable aliens established during that era were “[p]rostitutes, certain

36. INA §§ 212(a)(1)–(a)(10), 8 U.S.C. §§ 1182(a)(1)–(a)(10) (2012).

37. *See id.* § 212 (a), 8 U.S.C. § 1182 (a)(2)(D) (stating any alien who incidentally engages in prostitution or “has engaged in prostitution within 10 years of the date of application for visa, admission, or adjustment of status . . . is inadmissible”). Section 212(a)'s inadmissibility bar prevents certain individuals from successfully immigrating to the United States and severely limits the relief available to LGBT immigrants, especially transgender individuals. CROSBY BURNS ET AL., *supra* note 9, at 20. Further, section 212(a) occupies just one fragment of a larger statutory scheme that continuously and systematically denies members of the LGBT community and their families in the United States a number of opportunities and unfairly burdens this already vulnerable group with more difficult hurdles that are often unsurmountable. *Id.* This Article attempts to shed light on the inequities that affect transgender and gender nonconforming people, a group that has largely been invisible not just in the context of immigration reform, but also within the broader context of our history's numerous movements for LGBT equality.

38. MICHAEL A. SCAPERLANDA, *IMMIGRATION LAW: A PRIMER 2* (Fed. Jud. Ctr. 2009); *see also* Alien and Sedition Act of 1798, ch. 58, §§ 1–2, 1 Stat. 570, 570–72 (1798) (giving the President of the United States the power to remove any alien from the United States).

39. SCAPERLANDA, *supra* note 38.

convicts, idiots, lunatics, the feeble-minded, the insane, paupers, polygamists, epileptics, those suffering from certain contagious diseases, and persons likely to become public charges”⁴⁰ Moreover, Congress added to the list of excludable groups in response to current events; for example, after the assassination of President McKinley, Congress deemed anarchists an excludable class.⁴¹

Although the Supreme Court has interpreted the Commerce Clause of the United States Constitution as one source of Congress’s power to regulate immigration,⁴² there is no provision in the Constitution that explicitly gives power to the legislative or executive branch to control the entry of foreigners.⁴³ Nevertheless, in a line of cases known as the “Chinese Exclusion Cases,” the Supreme Court has established the power to regulate immigration as an inherent exercise of the country’s sovereignty.⁴⁴

The main source of our immigration law today is the INA, which is codified in Title 8 of the United States Code and forms the structure of our immigration system.⁴⁵ A number of agencies administer immigration laws and promulgate regulations to implement the provisions of the INA.⁴⁶ These regulations are also incorporated into the Code of Federal Regulations.⁴⁷ In response to the terrorist attacks of September 11, 2001, Congress enacted the Homeland Security Act of 2002, which dramatically changed immigration laws by transferring enforcement and adjudication

40. *Id.*; see also Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214, 214 (1882) (requiring the examining officers to prohibit entry to those found to be a “convict, lunatic, idiot,” and persons likely to become a public charge); The Page Act of 1875, ch. 141, § 5, 18 Stat. 477, 477 (1875) (prohibiting aliens from Asia who are convicts in their home country and women imported for the purpose of engaging in prostitution from immigrating into the United States); Law of March 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084 (1891) (excluding paupers, persons suffering from a “loathsome or a dangerous contagious disease,” persons convicted of felonies or misdemeanors involving moral turpitude, and polygamists); Act of Feb. 5, 1917, Pub. L. No. 64–301, ch. 29, § 3, 39 Stat. 874, 875 (1917) (excluding the epileptic, feeble-minded, and persons of “constitutional psychopathic inferiority” from immigrating to the United States).

41. SCAPERLANDA, *supra* note 38; see also Act of Feb. 5, 1917, Pub. L. No. 64–301, ch. 29, § 3, 39 Stat. 874, 875 (1917) (excluding anarchists or persons who believe or advocate overthrowing the government by force or violence).

42. *Ekiu v. U.S.*, 142 U.S. 651, 659, 664 (1892).

43. STEPHEN W. YALE-LOEHR, *BASIC IMMIGRATION LAW* 14 (2004). *But see* U.S. CONST. art. 1 § 8, cl. 4 (granting Congress the power to establish a “uniform Rule of Naturalization”).

44. Matthew Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. REV. 1, 40 (2010). The “Chinese Exclusion Cases” include the three Supreme Court decisions in *Heong v. U.S.*, 112 U.S. 536 (1884); *Ping v. U.S.*, 130 U.S. 581 (1889); *Ting v. U.S.*, 149 U.S. 698 (1893).

45. YALE-LOEHR, *supra* note 43, at 14–15.

46. SCAPERLANDA, *supra* note 38, at 5.

47. YALE-LOEHR, *supra* note 43, at 16.

functions from Immigration and Nationality Services (INS) to the Department of Homeland Security (DHS).⁴⁸ DHS houses United States Citizen and Immigration Services (USCIS), Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE), all of which play a distinct role in the immigration system.⁴⁹

USCIS is provides a range of immigration services.⁵⁰ For instance, it “adjudicates immigrant petitions, naturalization petitions, and asylum petitions. . . . [.]”⁵¹ CBP and ICE serve as the enforcement arms; CBP is responsible for control of the nation’s borders, while ICE takes on “interior investigation and enforcement.”⁵²

Further, the Department of Justice (DOJ) houses the Executive Office for Immigration Review (EOIR), which consists of immigration courts and judges, and the Board of Immigration Appeals (BIA).⁵³ Immigration judges within the EOIR “conduct formal removal hearings” and adjudicate applications for relief in removal proceedings.⁵⁴ The BIA is the appellate body within EOIR and reviews the decisions of immigration judges and some USCIS decisions.⁵⁵ BIA decisions issue guidance on the interpretation of the INA and are binding on all DHS officers and immigration judges.⁵⁶

B. *An Overview of LGBT Discrimination in Immigration Law*

LGBT individuals have historically been excluded from obtaining immigration benefits in various ways.⁵⁷ Prior to the enactment of the INA, the Immigration Act of 1917 effectively excluded homosexuals and other individuals on the basis of a “constitutional psychopathic inferiority” or by otherwise being certified by a doctor as “mentally defective.”⁵⁸ Although the McCarran-Walter Act of 1952 repealed the Immigration Act

48. *Judging the Impact: A Post 9-11 America*, NPR (July 15, 2004), http://www.npr.org/911hearings/security_measures.html#homeland, [<https://perma.cc/5RFQ-DBVX>] (last visited May 1, 2017).

49. SCAPERLANDA, *supra* note 38, at 5.

50. *Id.*

51. *Id.*

52. *Id.*

53. YALE-LOEHR, *supra* note 43, at 17.

54. SCAPERLANDA, *supra* note 38, at 6.

55. *Id.*

56. *Id.*

57. JEANTY & TOBIN, *supra* note 26, at 6–7 (listing barriers transgender immigrants face in obtaining housing, healthcare, employment, and avoiding violence).

58. *Lesbian/Gay Freedom Day Comm., Inc. v. U.S. Immigr. and Naturalization Serv.*, 541 F. Supp. 569, 572 (N.D. Cal. 1982); *see also* *Matter of LaRochelle*, 11 I. & N. Dec. 436, 441 (B.I.A. 1965) (holding that homosexuals fit within the term “constitutional psychopathic inferiority”); Tracy J. Davis, Note, *Opening the Doors of Immigration: Sexual Orien-*

of 1917, it continued to exclude homosexuals on the basis of having a “psychopathic personality.”⁵⁹ The now-defunct INS used similar language to define homosexuals, thus effectively banning people who disclosed their sexuality.⁶⁰

With the enactment of the INA in 1952, and subsequent amendments in 1965, Congress continued its discriminatory application of immigration law to LGBT immigrants by including “sexual deviation” as a “medical ground for denying prospective immigrants entry into the United States.”⁶¹ This came in response to *Fleuti v. Rosenberg*,⁶² a case in which the U.S. Court of Appeals for the Ninth Circuit held the term “psychopathic personality” as applied to homosexuals by the McCarran-Walter Act was unconstitutionally vague.⁶³ The practice of excluding homosexual immigrants on medical grounds continued despite an announcement by the Surgeon General of the United States in 1979 and further challenges to the law.⁶⁴ Indeed, as recently as 2008, immigration officials continued to exclude homosexual immigrants effectively by including HIV on the list of “communicable diseases of public health significance” that serve as a ground for medical inadmissibility.⁶⁵ It was not until the Immigration Act of 1990⁶⁶—which removed any term alluding to “mental defect[s]” or “sexual deviation”—that immigration officials finally discontinued excluding homosexuals on those bases.⁶⁷

LGBT discrimination has also manifested itself in the overlap between family law and immigration.⁶⁸ Under the INA, for example, LGBT U.S.

tation and Asylum in the United States, 6 HUM. RTS. BR. 19, 19 (1999) (pointing out historical LGBT discrimination in immigration laws).

59. *Lesbian/Gay Freedom Day Comm., Inc. v. U.S. Immigr. and Naturalization Servs.*, 541 F. Supp. 569, 572 (N.D. Cal. 1982).

60. Davis, *supra* note 58.

61. *Id.*

62. 302 F.2d 652 (9th Cir. 1962), *vacated on other grounds*, 374 U.S. 449 (1963).

63. See Christopher S. Hargis, *Queer Reasoning: Immigration Policy*, Baker v. State of Vermont, and the (Non)Recognition of Same-Gender Relationships, 10 LAW & SEX. 211, 218 (2001) (claiming the issue was addressed when a Fifth Circuit decision held that inclusion of homosexuals in the term “psychopathic personality” was Congressional intent).

64. See *id.* at 220–21 (“[T]he Attorney General suggested that the INS develop its own procedure for exclusion . . .”).

65. Jesse Goldstein, *HIV No Longer Grounds for Inadmissibility to the U.S.*, 20 No. 12 MICH. EMP. L. LETTER 7 (2010). In 2010, HIV was finally removed from the list of communicable diseases and HIV-positive individuals are no longer inadmissible. *Id.*

66. Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978.

67. Hargis, *supra* note 62, at 221.

68. See Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 582 (2010) (noting same-sex couples could not stay in the United States “together on the basis of their relationship”).

citizens and Lawful Permanent Residents (LPRs) were unable to sponsor their same-sex spouses for immigration benefits like their heterosexual counterparts because the INA did not define “marriage.”⁶⁹ However, the 1996 enactment of the Defense of Marriage Act (DOMA) defined “marriage” as the “legal union between one man and one woman as husband and wife,”⁷⁰ thereby effectively foreclosing the possibility of reuniting same-sex families in the United States.⁷¹

It took seventeen years for the Supreme Court to repeal this discriminatory law in *U.S. v. Windsor*.⁷² In *Windsor*, the Court held DOMA violated individual liberty interests protected by the Fifth Amendment’s Due Process Clause and the Equal Protection clauses of the Fifth and Fourteenth Amendments.⁷³ Although the regulations discussed thus far demonstrate overt discrimination in the immigration system, there are many more subtle issues yet to be addressed.⁷⁴

C. *The Prostitution Inadmissibility Ground and Its Impact on Immigration Benefits*

The current section 212 of the INA lists, in a number of subsections, every ground that renders an individual “inadmissible” to the United States.⁷⁵ The grounds of inadmissibility play a major role in the adjudication of petitions, affirmative applications for relief, and defensive applications for relief from removal (or deportation, as it was formerly called).⁷⁶

69. *Id.*

70. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, §§ 1738C, 110 Stat. 2419, § 3(a)(7) (1996) (codified at 1 U.S.C. § 7 (2000) & 28 U.S.C. § 1738C (2000), *invalidated by* *U.S. v. Windsor*, 570 U.S. ____ (2013), 133 S.Ct. 2675 (2013)).

71. Titshaw, *supra* note 69, at 593.

72. 570 U.S. ____ (2013), 133 S.Ct. 2675, 2695 (2013).

73. *Id.*

74. See BURNS ET AL., *supra* note 9, at 24–25 (criticizing our immigration system for denying asylum applications of eligible LGBT refugees because they fail to conform to stereotypes); JEANTY & TOBIN, *supra* note 26, at 15 (stressing the fact that our asylum laws are inadequate in protecting trans immigrants particularly because of the one-year filing deadline, which many LGBT refugees have unique difficulties in meeting); DeBoise, *supra* note 2 (indicating many of this organization’s trans clients met the legal definition of a “victim” of human trafficking, yet were not screened or identified despite numerous unjustified arrests for prostitution).

75. INA §§ 212 (a)(1)–(a)(10), 8 U.S.C. §§ 1182 (a)(1)–(a)(10) (2012).

76. See *id.* § 240A(b)(1)(C), 8 U.S.C. § 229b(b)(1)(C) (rendering individuals who are inadmissible due to the prostitution or commercialized vice ground of inadmissibility ineligible for cancellation of removal); see also *id.* § 240A(b)(2)(A)(iv), 8 U.S.C. § 229b(b)(2)(A)(iv) (excluding individuals, who would otherwise be eligible for cancellation of removal under the special rule for battered spouses or children, if inadmissible under the prostitution inadmissibility ground); *Id.* § 245(a)(2), 8 U.S.C. § 1255(a)(2) (requiring the applicant be eligible for an immigrant visa and be admissible to the United

Section 212(a)(2)(D)(i) of the INA renders an individual inadmissible not only for immigrating to the United States with the intent to engage in prostitution or a commercialized vice, but also punishes those who have engaged in prostitution within ten years of their application.⁷⁷ Such a ground of inadmissibility creates several limitations for transgender immigrants.⁷⁸ For example, it affects whether one can gain admission into the United States,⁷⁹ whether an individual is eligible to apply for LPR status,⁸⁰ and the relief available in removal proceedings.⁸¹

States); 8 C.F.R. § 235.1(a) (2015) (implementing the procedure for aliens seeking lawful entry into the United States); *Id.* § 245 (regulating the adjustment of status procedures); U.S. Customs & Border Protection, *Applying for Admission into United States*, <http://www.cbp.gov/travel/international-visitors/applying-admission-united-states> [<https://perma.cc/6VM4-4T6A>] (last updated Mar. 10, 2015) (explaining all persons seeking lawful entry into the United States are subject to inspection of a U.S. Customs and Border Patrol officer and must establish their section 212(a) admissibility); U.S. CITIZENSHIP & IMMIGR. SERVS., ADJUSTMENT OF STATUS, <http://www.uscis.gov/green-card/green-card-processes-and-procedures/adjustment-status> [<https://perma.cc/ZW5J-79C5>] (last updated July 14, 2015) (explaining the INA allows an individual's immigration status to change, while in the United States, if they meet the requirements for a green card).

77. The provision states: “Any alien 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 . . . is inadmissible.” INA § 212(a)(2)(D)(i), 8 U.S.C. § 1182 (a)(2)(D)(i) (2012) (emphasis added). The Code of Federal Regulations (CFR) contains the regulations related to the enforcement or application of this section of the statute. The relevant section of the CFR defines “prostitution” as

engaging in promiscuous sexual intercourse for hire. A finding that an alien has “engaged” in prostitution must be based on elements of continuity and regularity, indicating a pattern of behavior or deliberate course of conduct entered into primarily for financial gain or other considerations of material value as distinguished from the commission of casual or isolated acts.

22 C.F.R. § 40.24 (2015).

78. INA § 212 (a)(2)(D)(i), 8 U.S.C. § 1182 (a)(2)(D)(i) (2012).

79. *Id.*; see also 8 C.F.R. § 235.1(f)(iv)(D)(2) (2015) (stating any alien who seeks entry into the United States is subject to the provisions of INA 212(a), which prohibit those with a history of prostitution); U.S. Customs & Border Protection, *supra* note 76 (indicating all persons seeking to enter the United States lawfully are subject to inspection by U.S. Customs and Border Protection (CBP) officers and must comply with INA § 212(a) to establish admissibility).

80. INA § 245(a)(2), 8 U.S.C. § 1255(a)(2) (2012); 8 C.F.R. § 245.1(a) (2016).

81. See INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (2012) (rendering ineligible for cancellation of removal those who are considered inadmissible due to the prostitution or commercialized vice ground of inadmissibility); *Id.* § 240b(b)(2)(A)(i)(I)–(II), 8 U.S.C. § 1229b(b)(2)(A)(iv)(I)–(II) (excluding individuals who would otherwise be eligible for cancellation of removal under the special rule for battered spouses or children if the alien is inadmissible under 8 U.S.C. § 1182(a)(2), which includes the prostitution inadmissibility ground).

An individual who has engaged in prostitution as contemplated by the statute is not admissible to the United States unless they receive a waiver from the Attorney General (AG).⁸² Section 212(h) of the INA sets out the requirements for obtaining a waiver of inadmissibility.⁸³ It gives the AG sole discretion to waive application of the inadmissibility ground if the following is established: (1) the individual is inadmissible only under § 212(a)(2)(D)(i), or the activities rendering the individual inadmissible occurred more than fifteen years prior to the date of their application for a visa, admission, or adjustment of status; (2) the individual's admission to the United States would not be contrary to the national welfare, safety, or security of the United States; and (3) the individual has been "rehabilitated."⁸⁴

Unfortunately, individuals found inadmissible under the prostitution ground are unlikely to receive any other immigration protections for which they apply.⁸⁵ For example, to obtain LPR status section 245 of the INA requires, *inter alia*, that the applicant be otherwise admissible to the United States.⁸⁶ Further, if an individual is in removal proceedings and is inadmissible under the prostitution ground, they do not qualify for Cancellation of Removal (a form of relief which, if granted, allows the individual to remain in the United States and obtain LPR status).⁸⁷

Section 245 of the INA occupies just one fragment of a larger statutory scheme that continuously and systematically denies members of the LGBT community and their families in the United States a number of opportunities, and unfairly burdens this already vulnerable group with hurdles that are often unsurmountable.

82. See *Nivonram v. Gonzales*, No. 05-60643, 2006 WL 2092497, at *1 (5th Cir. 2006) (upholding the BIA's decision to find the applicant inadmissible because it was supported by substantial evidence and the applicant had not received a waiver of the prostitution ground of inadmissibility).

83. INA § 212(h), 8 U.S.C. § 1182(h) (2012).

84. *Id.* § 212(h)(1)(A)(i)–(iii), 8 U.S.C. § 1182(h)(1)(A)(i)–(iii).

85. See *id.* § 212 (a)(2)(D)(i), 8 U.S.C. § 1182 (a)(2)(D)(i) (listing the grounds for inadmissibility for any alien who has engaged in prostitution within ten years of filing for admission); see also *id.* § 245(a)(2), 8 U.S.C. § 1255(a)(2) (requiring an applicant to meet the eligibility requirements for admission before obtaining an immigrant visa). See generally 8 C.F.R. § 235.1(a) (2015) (governing the procedure for lawful entry into the United States); U.S. Customs & Border Protection, *supra* note 76 (establishing the process for admissibility into the United States).

86. INA § 245(a)(2), 8 U.S.C. § 1255(a)(2)(2012).

87. *Id.* § 240A (b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C).

III. HOW THE CRIMINALIZATION OF PROSTITUTION NEGATIVELY AFFECTS TRANSGENDER IMMIGRANT WOMEN AND WHY CURRENT IMMIGRATION LAWS ARE INADEQUATE TO PROTECT THEM

A. *The Criminalization of Prostitution in the United States*

Prostitution was not a distinct criminal offense between early colonial times and the late-1800s.⁸⁸ However, prostitutes were nevertheless seen as a “disgrace” to society, and “men and women who committed chastity offenses were punished under lewdness or nightwalking statutes.”⁸⁹ Later in our nation’s history, prostitution was associated with the idea of a “fallen woman.”⁹⁰ Writer William Acton describes the “fallen woman” as follows:

[A] woman with half the woman gone, and that half containing all that elevates her nature, leaving her a mere instrument of impurity; degraded and fallen she extracts from the sin of others the means of living, corrupt and dependent on corruption, and therefore interested directly in the increase in immorality—a social pest carrying contamination and foulness of every quarter.⁹¹

During the 1800s, when this narrative dominated the discourse on prostitution, prosecution was still not criminal in nature but instead “took the form of unofficial harassment.”⁹² Brothels were often the target of violence and were largely kept in check through public nuisance laws.⁹³

88. Elizabeth M. Johnson, Note, *Buyers Without Remorse: Ending Discriminatory Enforcement of Prostitution Laws*, 92 TEX. L. REV. 717, 720–21 (2014); Ann M. Lucas, *Race, Class, Gender, And Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN'S L.J. 47, 50 (1995).

89. Johnson, *supra* note 88. “Chaste” or “chastity” refer to pure or virtuous sexual intercourse. *Chastity*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/chastity> [<https://perma.cc/9ZMP-MEV2>] (last visited Feb. 3, 2017). In the context of religion, committing a chastity offense meant having extramarital sex, adultery, fornication, and prostitution. *Chastity*, NEW ADVENT, <http://www.newadvent.org/cathen/03637d.htm> [<https://perma.cc/57S4-9BF6>] (last visited Feb. 3, 2017); Dawn Eden, *10 1/2 Reasons to be Chaste*, CATHOLIC NEWS AGENCY, <http://www.catholicnewsagency.com/resources/life-and-family/abstinence-and-chastity/10-12-reasons-to-be-chaste> [<https://perma.cc/5FMY-4PZ3>] (last visited Feb. 3, 2017). “Nightwalker” statutes were creatures of English common law that gave peace officers “virtually limitless warrantless nighttime arrest power” to apprehend any suspicious person wandering around at night. *Atwater v. City of Lago Vista*, 532 U.S. 318, 333 (2001).

90. Johnson, *supra* note 88, at 721.

91. *Id.*

92. *Id.* at 721–22.

93. Lucas, *supra* note 88. See generally Johnson, *supra* note 88, at 721–22 (observing the violence directed at brothels).

During the late 1800s and early 1900s, the discussion shifted toward a fear of “white slavery.”⁹⁴ Reformers during this era created the image of the new fallen woman—a “victim of white slavery,” a “young, innocent girl who was tricked or physically coerced into prostitution.”⁹⁵ This narrative, coupled with society’s historical association of prostitution with venereal disease and filth, promoted the fear that women who turned to prostitution were irreversibly corrupted and a hazard to society.⁹⁶ In response, Congress passed the Mann Act of 1910 and the Standard Vice Repression Law of 1919—the former criminalizing the importation of women for the purpose of prostitution and the latter effectively criminalizing all prostitution.⁹⁷

Such early criminalization efforts came during a time when, due to urbanization and the growth of capitalism, women were seen as capable of destroying social order.⁹⁸ The patriarchy particularly feared the growing independence of women and supported these laws as part of a “desperate attempt to enforce norms of marriage, chastity,” and to keep women to their roles in the “private sphere of home and family.”⁹⁹ The Victorian idea that sexually deviant women were permanently corrupted and the strengthening of capitalism during the Industrial Era led many to believe prostitution undermined the virtuousness of the social fabric and came to symbolize social evil.¹⁰⁰

The further vilification of prostitutes or of anyone thought to be involved in prostitution was borne in large part by working-class, racial, and immigrant minorities.¹⁰¹ Indeed, immigrants in poor neighborhoods often operated brothels.¹⁰² As such, mainstream society viewed immigrant women and women of color as not only promiscuous and uncivilized, but also depraved and likely engaged in prostitution.¹⁰³ The assumption that women from these communities were “sexually available to white men” further reinforced supremacist attitudes towards minority and immigrant women.¹⁰⁴ By 1925, every state in the Union had criminalized prostitution in some way.¹⁰⁵

94. Johnson, *supra* note 88, at 722–23.

95. *Id.* at 722.

96. *Id.* at 723.

97. *Id.*

98. Lucas, *supra* note 88.

99. *Id.*

100. *Id.* at 51.

101. *Id.* at 56–58.

102. *Id.* at 56.

103. *Id.*

104. *Id.* at 57.

105. Johnson, *supra* note 88, at 723.

Today, the extent to which prostitution and sex work¹⁰⁶ are criminalized depends on the jurisdiction.¹⁰⁷ Generally, prostitution is the exchange of sex for money or for non-monetary things such as a place to stay or food to eat.¹⁰⁸ With the exception of certain areas of Nevada, all U.S. states criminalize this activity.¹⁰⁹

B. *Transgender Women and Prostitution*

Transgender individuals immigrate to the United States for many reasons, and, unfortunately, some end up with prostitution convictions that affect their immigration cases.¹¹⁰ The desire to seek better opportunities not only to survive but to thrive serves as a pull factor for many such individuals, but the push factors, which compel them to flee their home countries in the first place, are even more significant.¹¹¹ A great majority of transgender people come here escaping a life of abuse, harassment, and discrimination in their home countries even at the hands of their own family.¹¹² They view immigrating to the United States as their only means of survival, as an opportunity to live a new life true to themselves and free of abuse.¹¹³

The Diagnostic and Statistical Manual (DSM-5),¹¹⁴ which is published by the American Psychiatric Association (APA), uses the term “gender

106. Both terms describe the exchange of sex or sexual activity for money or other consideration. Some engage in sex work legally, for example, by performing in adult films or working as an exotic dancer. LEIGH TOMPERT ET AL., PUBLIC HEALTH CRISIS: THE IMPACT OF USING CONDOMS AS EVIDENCE OF PROSTITUTION IN NEW YORK CITY 6, n.1, SEX WORKERS PROJECT (2012), <http://sexworkersproject.org/downloads/2012/20120417-public-health-crisis.pdf> [<https://perma.cc/ULQ8-KX6M>]. In this Article, the term “sex work” does not include these legal working conditions.

107. FITZGERALD ET AL., *supra* note 35, at 7.

108. *Id.* at 8.

109. *Id.* at 7; *see also* TOMPERT ET AL., *supra* note 106, at 2 (“Prostitution . . . is illegal in 49 states . . .”).

110. *See, e.g.*, JEANTY & TOBIN, *supra* note 26 (listing fleeing poverty, gender-based discrimination, and persecution as reasons for immigrating to the United States).

111. *See, e.g.*, JEANTY & TOBIN, *supra* note 26 (“Many transgender immigrants came to the US to escape severe and often life-threatening persecution because of who they are.”).

112. *Id.*

113. *Cf. id.* (pointing out that transgender immigrants’ dreams of starting a new life in the United States are often shattered upon arrival, as they are not warmly greeted but placed in immigration detention and stripped of their rights).

114. *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, AM. PSYCHIATRIC ASS’N, <http://www.dsm5.org/about/Pages/Default.aspx> [<https://perma.cc/3XTA-LT28>] (last visited Mar. 30, 2017). “The Diagnostic and Statistical Manual of Mental Disorders (DSM) is the standard classification of mental disorders used by mental health professionals in the United States and contains a listing of diagnostic criteria for every psychiatric disorder recognized by the U.S. healthcare system.” *Id.* Although the DSM is a manual of

dysphoria” to describe the experience of transgender individuals.¹¹⁵ It defines “gender dysphoria” as the “marked incongruence between one’s experienced/expressed gender and assigned gender.”¹¹⁶ Transgender women generally experience strong desires to be women, to be treated as such, and to be rid of their “primary and/or secondary sex characteristics because of [the] marked incongruence with [their] experienced/expressed gender”¹¹⁷ This marked incongruence may lead to a number of issues for transgender women—further driving their need to obtain transition treatment.¹¹⁸ Trans adult women sometimes develop an aversion toward their own genitals, which constrains sexual activity with their partners because they prefer their genitals not be seen or touched.¹¹⁹ In addition to sexual relationship problems, some trans women experience depression, anxiety, substance abuse, negative self-concept, increased rates of mental disorders, and suicide.¹²⁰ Such problems are compounded in individuals from “resource-poor family backgrounds,” like transgender immigrant women.¹²¹ In addition, structural barriers in the medical community often limit trans women’s access to health services.¹²² Living life with an aversion toward one’s own body because it does not match the way one experiences their gender would certainly motivate anyone to make it right. Our gender identities are fundamental, and many transgender women experience extreme distress when unable to obtain treatment due to the high cost.¹²³ For many transgender women having access

mental disorders, the APA emphasizes gender nonconformity is not in itself a mental disorder. *What is Gender Dysphoria?* AM. PSYCHIATRIC ASS’N (last updated Feb. 2016) <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/GKA8-YFNP>] [hereinafter *Gender Dysphoria*].

115. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM: 5 452 (5th ed. 2013) [hereinafter DSM-5]; *Gender Dysphoria*, *supra* note 114.

116. DSM-5, *supra* note 115; *Gender Dysphoria*, *supra* note 114.

117. DSM-5, *supra* note 115, at 454.

118. *Id.*

119. *Id.*

120. *Id.* at 458.

121. *Id.*

122. *Id.*

123. *See id.* (noting immense hardships those living in poverty face when seeking access to medical services); Elizabeth Schepel, A Comparative Study of Adult Transgender and Female Prostitution 12 (Apr. 2011) (unpublished M.S.W. thesis, Arizona State University) (on file with the Arizona State University Library), http://repository.asu.edu/attachments/56451/content/Schepel_asu_0010N_10422.pdf [<https://perma.cc/73G3-KWBV>] (reporting transgender individuals are tempted to “depend on prostitution for the necessary and costly hormone and surgery expenses”); Russell Goldman, *Making Change: The Cost of Being Transgender*, ABC NEWS (May 10, 2007), <http://abcnews.go.com/Health/story?id=3156598&page=1> [<https://perma.cc/RMQ2-UELP>] (admitting many trans women “sell their bodies” to afford the necessary medical treatments).

to hormones, sex reassignment procedures, and other non-medical resources to live true to their own identities is just as important as the need for food, water, and shelter.¹²⁴ Thus, the lack of economic opportunities is an impediment to what in many cases may be life-saving treatment.¹²⁵

Many trans individuals reluctantly choose to become prostitutes because they have no other way to make a living.¹²⁶ Transgender women usually lack support from friends and family, and face extreme poverty; consequently, they are left with no choice other than to sell their bodies for survival.¹²⁷

Unfortunately, others fare far worse because being transgender, a person of color, and an immigrant place them among the most marginalized members of society.¹²⁸ Moreover, their vulnerability makes them an easy target for human traffickers who wish to force them into prostitution.¹²⁹ The dialogue surrounding human trafficking rarely includes transgender individuals, but human trafficking is blind to gender or gender identity.¹³⁰ Lastly, although some transgender people are fortunate enough to avoid turning to prostitution to put food on their tables or to obtain treatment, pervasive discrimination and police profiling often lead to baseless pros-

124. Cf. DSM-5, *supra* note 115, at 455 (recognizing the ability to identify as trans is paramount to trans women).

125. See, e.g., Goldman, *supra* note 123 (quoting a transgender youth in a New York homeless shelter as stating, “Honestly . . . I have to pull a trick to pay for hormones.”); DSM-5, *supra* note 115, at 454 (explaining that individuals with gender dysphoria before gender reassignment have a higher risk for “suicidal ideation, suicide attempts, and suicides”).

126. Goldman, *supra* note 123.

127. See Juliet Jacques, *No Wonder Many Transsexual People End Up in Sex Work*, GUARDIAN (Aug. 25, 2010), <https://www.theguardian.com/lifeandstyle/2010/aug/25/transsexual-people-sex-work> [<https://perma.cc/MML6-576K>] (suggesting transgender individuals end up in sex work because “fetishisation of the pre-operative male-to-female body” operates to their financial advantage); see also Goldman, *supra* note 123 (emphasizing that transgender individuals who have been expunged and shunned from their homes find the streets the only option to make a living).

128. See Rabia Muqadda et al., *Broken Dreams: How Enforcement-Only Bills in the House of Representatives Threaten to Further Marginalize the LGBT Undocumented*, 6, QUEER UNDOCUMENTED IMMGR. PROJECT (2013), <http://www.lawschool.cornell.edu/Clinical-Programs/lgbtclinic/upload/QUIP-REPORT-Final.pdf> [<https://perma.cc/7C6W-MTHD>] (emphasizing LGBT undocumented immigrants are more likely to face physical and psychological abuse, and discrimination as a result of their gender and sexual identity).

129. See DeBoise, *supra* note 2 (claiming transgender women lacking social and political protections in their home countries are targets for traffickers seeking to profit from hopelessness).

130. *Id.*

titution charges merely for walking down the street with a condom in their purse.¹³¹

The relationship the LGBT community has with the police helps explain how transgender immigrants end up unfairly trapped in immigration detention, deportation, and criminal justice systems.¹³² As will be discussed further in this Article, the nature of the relationship immigrant trans women have with government officials and police also affects whether they qualify for certain immigration benefits.¹³³

Statistics illustrate the disturbing national trend that transgender people are 3.1 times more likely to be victims of violence at the hands of police than non-transgender people and 6.2 times more likely to experience physical violence from police.¹³⁴ Further, trans people of color were 2.5 times more likely to suffer police violence than white transgender people.¹³⁵ According to the National Coalition of Anti-Violence Programs' 2015 report, many LGBT people who had interactions with police reported threats, insults, intimidation, slurs, and sexual violence.¹³⁶

The reality is not all transgender women who are arrested for prostitution actually engage in sex work.¹³⁷ For example, Milan Nicole was a

131. *See id.* (discussing instances of police misconduct involving transgender women); *see also* *Hearing RE: [The Fair Chance Act] Before the New York City Council Committee on Civil Rights* (Dec. 3, 2014) (testimony of Robin Richardson, Esq., Equal Justice Works Fellow, Sex Workers Project Urban Justice Center) <http://sexworkersproject.org/downloads/2014/20141203-testimony-robin-richardson-fair-chance.pdf> [<https://perma.cc/T7B4-NF9R>] [hereinafter Richardson Testimony] (pointing out false accusations by police towards the transgender community); HUM. RTS. WATCH, *SEX WORKERS AT RISK: CONDOMS AS EVIDENCE OF PROSTITUTION IN FOUR US CITIES 1* (2012), http://www.hrw.org/sites/default/files/reports/us0712ForUpload_1.pdf [<https://perma.cc/7ELT-NFAD>] (reporting several stories of sex workers charged with prostitution for having condoms in their possession).

132. DeBoise, *supra* note 2; *LGBT Victims of Violence: 'Going to the Cops Will Only Make It Worse'*, TAKEPART, <http://www.takepart.com/article/2013/06/06/lgbt-victims-cops-make-it-worse> [<https://perma.cc/3GXH-LZ4C>] (last visited Apr. 30, 2017) [hereinafter *LGBT Victims*].

133. *See* Nat'l Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2014*, at 44 (2015), http://www.ebony.com/wp-content/uploads/2016/06/2014_HV_Report-Final.pdf [<https://perma.cc/WK6H-228F>] (explaining that close to half the survivors of hate violence did not report it to police, which indicates continued distrust between the LGBTQ community and police proves to be a substantial barrier to understanding the true number of crimes committed against the LGBTQ community).

134. *Id.* at 56; *see also* *LGBT Victims*, *supra* note 132 (finding in 2012, there were 2,016 incidents of anti-LGBT violence and twenty-five documented homicides).

135. *LGBT Victims*, *supra* note 132.

136. NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS, *supra* note 133.

137. *See e.g.*, *LGBT Victims*, *supra* note 132 (discussing how a transgender person' simply accepted an offer to go drink with a man and was arrested for prostitution); *see also*

sixteen-year-old transgender girl of color who experienced the type of police profiling common among transgender women.¹³⁸ Just moments after going out for a walk in her New Orleans neighborhood, Milan was approached by a man who invited her to his apartment for drinks.¹³⁹ The man was actually an undercover police officer, and when she accepted the offer, she was immediately arrested for prostitution and charged with a “crime against nature.”¹⁴⁰ Milan’s experience thus underscores the bias police have toward transgender women and exemplifies the statistics reported by the National Coalition for Anti-Violence Programs.¹⁴¹

Robin Richardson, an attorney with the Sex Worker’s Project at the Urban Justice Center in New York, testified before the New York City Council Committee on Civil Rights that many of her transgender clients have been falsely profiled and arrested for prostitution for doing nothing more than walking down the street.¹⁴² Unfortunately, due to a “culture of plea agreements,” her clients often plead guilty despite not actually engaging in any illegal activities.¹⁴³

This type of profiling occurs in a number of cities across the United States.¹⁴⁴ A Human Rights Watch report indicates that transgender respondents in New York, Washington, D.C., and Los Angeles reported they were often targeted, stopped, and searched by police “walking home from school, going to the grocery store, [or] waiting for the bus.”¹⁴⁵ Often, these stops were not the result of any illegal activity observed by

Joint Statement to the UN, SEXWORKERS PROJECT (Mar. 1, 2011), <http://sexworkersproject.org/downloads/2011/20110301-un-doc-a-hrc-16-ngo-126.pdf> [<https://perma.cc/S8ZM-MVZP>] (claiming that due to stigma and criminalization, immigrant trans women of color are profiled as sex workers and barred from necessary services).

138. *LGBT Victims*, *supra* note 132.

139. *Id.*

140. *Id.*

141. *Id.*; *see also* NAT’L COALITION OF ANTI-VIOLENCE PROGRAMS, *supra* note 133, at 46 (criticizing those that prosecute transgender women for failing to classify police misconduct as hate crimes).

142. Richardson Testimony, *supra* note 131.

143. *Id.*; *see also* TOMPERT ET AL., *supra* note 106 (exposing the trap some New York trans residents fall into when police use condoms as evidence to support prostitution convictions).

144. *See* TOMPERT ET AL., *supra* note 106, at 1 (reporting New York City, Los Angeles, San Francisco, and Washington, D.C. are the four major cities exposed for wrongful stop and seizures by law enforcement); *see also id.* (detailing the impact of imposing false prostitution offenses on individuals in New York); Chase Strangio, *Arrested for Walking While Trans: An Interview with Monica Jones*, AM. CIV. LIBERTIES UNION, (Apr. 2, 2014, 11:19 AM), <https://www.aclu.org/blog/arrested-walking-while-trans-interview-monica-jones> [<https://perma.cc/WY22-HL9C>] (citing a story of a transgender woman who challenged the constitutionality of a local ordinance in Arizona used to demean transgender women in public).

145. TOMPERT ET AL., *supra* note 106, at 2.

the police, but rather resulted from the police profiling certain individuals as prostitutes because of who they are, the clothes they are wearing, or simply where they are walking.¹⁴⁶

In Phoenix, Arizona, police can arrest a transgender woman for repeatedly stopping and engaging a passerby in conversation because police view such conduct as evidence of the person's intent to engage in prostitution—regardless if such a person is merely going about their daily routine and not engaging in any kind of sex work.¹⁴⁷ Interestingly, the same conduct is viewed as ordinary and innocent when exhibited by a cisgender woman.¹⁴⁸

“Walking while trans” is a term used within the trans community that refers to the phenomenon of police profiling and discrimination of trans women.¹⁴⁹ In New York, for example, police officers can and do arrest people for “Loitering for the Purposes of Engaging in Prostitution” based solely on circumstantial evidence.¹⁵⁰ The NYPD's Patrol Guide instructs officers to document where the suspect was found, what clothes they were wearing, and perceived conversations.¹⁵¹ Arrest reports related to this “offense” often state that the defendant was in a known prostitution area, the officer knows they have engaged in past prostitution, or the officer has arrested them before.¹⁵² Unsurprisingly, most of these cases result in plea agreements and those arrested rarely have the opportunity to challenge the probable cause determination.¹⁵³ The high number of lawsuits filed against NYPD for “unconstitutional searches, false arrests, assault, battery, false imprisonment, and other civil rights violations” is indicative of the level of profiling that occurs, especially considering many LGBT people never report police misconduct.¹⁵⁴

Another disturbing law enforcement trend documented in at least four U.S. cities is the use of one's possession of condoms as evidence of prostitution.¹⁵⁵ From a policy standpoint, this practice directly contradicts government efforts to curb the spread of HIV because it discourages people from carrying condoms.¹⁵⁶ Consequently, transgender immigrant women who have not engaged in or intended to engage in prostitution, using the

146. *Id.*

147. Strangio, *supra* note 144.

148. *Id.*

149. *Id.*

150. TOMPERT ET AL., *supra* note 106, at 10.

151. *Id.* at 12.

152. *Id.*

153. *Id.* at 10–12.

154. *Id.* at 13.

155. HUM. RTS. WATCH, *supra* note 131, at 2; TOMPERT ET AL., *supra* note 106, at 7.

156. TOMPERT ET AL., *supra* note 106, at 6.

possession of condoms against them in this way exposes them to false allegations by police and undermines their efforts to protect themselves.¹⁵⁷ Finally, this practice also imperils the health of trans women who are victims of human trafficking because it encourages traffickers to refuse access to condoms so as to avoid risking the victim's arrest.¹⁵⁸

While transgender immigrants are hopeful for improved economic opportunities upon arriving in the U.S., the sad truth is that even though the LGBT community in the U.S. has gained broader rights in recent history, such progress has not translated into less discrimination or equal opportunities.¹⁵⁹ In particular, members of the transgender community continue to face extreme difficulties in everyday life, such as employment discrimination, homelessness, economic hardship, and lack of access to education and healthcare.¹⁶⁰

Courts have long acknowledged the pervasive history of employment discrimination LGBT workers face.¹⁶¹ Although Title VII of the Civil Rights Act of 1964's prohibition of sex discrimination protects LGBT people in some ways, ninety percent of transgender respondents to the National Discrimination Survey reported widespread harassment and mistreatment in employment.¹⁶² Almost half of respondents reported they were denied a promotion or fired from a job because of their gender identity.¹⁶³ Those who have lost their jobs because of their gender identity were four times as likely to become homeless.¹⁶⁴ As such, it comes as no surprise that the unemployment rate among transgender individuals is

157. *Id.*

158. *Hearing on Resolution Calling on the New York Legislature to Pass and the Governor to Sign [No Condoms as Evidence Law] Before the New York City Council Committee on Immigration and Committee on Civil Rights*, (June 18, 2013) (testimony of Lynly Egyes, Esq., Staff Attorney, Sex Workers Project Urban Justice Center), <http://sexworkerproject.org/downloads/2013/20130618-city-council-testimony.pdf> [<https://perma.cc/6VRP-DXSP>].

159. DeBoise, *supra* note 2.

160. FITZGERALD ET AL., *supra* note 35; GRANT ET AL., *supra* note 27, at 2–6; TERESA RAINEY & ELLIOT E. IMSE, *QUALIFIED AND TRANSGENDER: A REPORT ON RESULTS OF RESUME TESTING FOR EMPLOYMENT DISCRIMINATION BASED ON GENDER IDENTITY 5*, OFF. OF HUM. RTS. D.C. (2015), https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender_FullReport_1.pdf [<https://perma.cc/F9PT-DUF2>]; Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 *LOY. L.A. L. REV.* 715, 719 (2012).

161. Pizer et al., *supra* note 160.

162. GRANT ET AL., *supra* note 27, at 3.

163. *Id.*

164. *Id.*

double that of the general population and four times as high for transgender women of color.¹⁶⁵

Of the states with their own employment non-discrimination statutes, very few include gender identity as a protected class.¹⁶⁶ Notwithstanding the protections offered in the few states with express anti-discrimination provisions protecting transgender women, studies show that employers nevertheless frequently ignore such laws when making employment decisions.¹⁶⁷

Washington, D.C. is one example of a jurisdiction that has explicit protections for transgender employees.¹⁶⁸ The D.C. Office of Human Rights measured employment discrimination against transgender people by comparing and analyzing employers' responses to applicants perceived as transgender and applicants perceived to be cisgender.¹⁶⁹ The results of that study suggest high rates of employment discrimination.¹⁷⁰ Employers who reviewed resumes with markers indicating the applicant was transgender often preferred to offer interviews to less qualified cisgender applicants before contacting the transgender applicant, if at all.¹⁷¹

With almost non-existent job security and widespread unemployment and workplace discrimination, transgender persons have a high risk of living in extreme poverty.¹⁷² After all, aside from living expenses, transgender women frequently have the added burden of paying for expensive treatments, which, as previously discussed, most trans women view as fundamental.¹⁷³ The costs associated with the hormones, treatments, and surgical procedures can be astronomical given the barriers to accessing affordable healthcare.¹⁷⁴ The difficulty trans women face in finding and keeping employment in the formal economy leaves many with little

165. *Id.*; Pizer et al., *supra* note 160, at 738.

166. *Id.* at 743.

167. *See* RAINEY & IMSE, *supra* note 160, at 6 (claiming less qualified cisgender applicants continue to be hired over qualified transgender applicants).

168. *Id.* at 7.

169. *Id.* at 6.

170. *Id.*

171. *See id.* at 14 (finding thirty-three percent of employers did not offer to interview the transgender applicants).

172. GRANT ET AL., *supra* note 27, at 3 (reporting respondents were “nearly four times more likely to have a household income of less than \$10,000/year compared to the general population”).

173. Goldman, *supra* note 123; Jacques, *supra* note 127.

174. *See* Jacques, *supra* note 127 (illuminating the heavy expense transgender individuals face without the stability of a full-time job); MUQADDA ET AL., *supra* note 128, at 11 (recounting the story of Trina Vasquez, a trans woman who struggles to survive and receive appropriate transgender medical care).

choice but to seek employment in unlawful job markets.¹⁷⁵ In turn, the “underground” nature of these jobs renders trans women “fertile for abuse and exploitation.”¹⁷⁶ According to attorney Robin Richardson, her transgender clients engage in prostitution as part of a transitional period—a means for them to support themselves until they can “get on their feet,” escape an abuser, or save money for a safety net when they have no one else on whom to rely.¹⁷⁷ However, many of them end up forced into prostitution as trafficking victims.¹⁷⁸

The Trafficking Victims Protection Act (TVPA) was enacted in 2000 and reauthorized in 2013 by the Violence Against Women Reauthorization Act (VAWA) to protect victims and prosecute traffickers.¹⁷⁹ However, critics claim the law has effectively and significantly increased the policing of sex workers.¹⁸⁰ TVPA incentivizes local governments and nongovernmental organizations alike to participate in federal efforts to stop sex trafficking and to further criminalize prostitution by awarding multimillion dollar block grants.¹⁸¹

A startling number of transgender women arrested for prostitution meet the legal definition of “trafficking victims” and understandably so because their vulnerability and lack of economic support makes them an easy target for traffickers.¹⁸² The Sex Workers Project interviewed many trans women in New York and found that officers neither asked if the women were forced into prostitution nor took steps to identify if the women were trafficking victims.¹⁸³

Some states have “safe harbor” laws that grant immunity to minors found to engage in prostitution and such minors are automatically consid-

175. E-mail from Clement Lee, Staff Attorney, Immigr. Equal., to author (Mar. 2, 2015, 8:53 EST) (on file with The Scholar); see, e.g., DeBoise, *supra* note 2 (stating the only jobs available to trans women often render them invisible to society and place them in abusive environments); Jacques, *supra* note 127 (explaining the large majority of unemployed transgender individuals are bullied out of job opportunities).

176. DeBoise, *supra* note 2.

177. Richardson Testimony, *supra* note 131.

178. *Id.*

179. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, § 7101 (2000); Violence Against Women Reauthorization Act of 2013, 42 U.S.C. § 13925 (2013); Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill The Promise of The Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 338 (2007).

180. FITZGERALD ET AL., *supra* note 35, at 8; Krishna de la Cruz, Comment, *Exploring the Conflicts Within Carceral Feminism: A Call to Revocalize the Women Who Continue to Suffer*, 19 SCHOLAR 79, 89–90 (2017).

181. FITZGERALD ET AL., *supra* note 35, at 8.

182. DeBoise, *supra* note 2; Haynes, *supra* note 179, at 356.

183. DeBoise, *supra* note 2.

ered victims of trafficking under both state and federal law.¹⁸⁴ However, there are instances where minors, including transgender girls, have been arrested and charged with prostitution or related offenses despite their protected status under safe harbor laws.¹⁸⁵ In New York, for example, despite the passage of the TVPA and New York's Safe Harbor for Exploited Children Act of 2008,¹⁸⁶ the conviction rate for sixteen- and seventeen-year-old girls remained unchanged.¹⁸⁷

Unfortunately, most states do not have safe harbor laws, and child victims of sex trafficking continue to be treated as criminals.¹⁸⁸ The failure to identify victims of trafficking and their treatment as criminals instead, also occurs in the immigration context, which jeopardizes a victim's ability to obtain immigration benefits.¹⁸⁹ Thus, beyond being too focused on criminalizing sex workers, the TVPA has also been criticized for failing to identify or protect victims of trafficking effectively.¹⁹⁰ Consequently, even when transgender women exhibit typical signs of human trafficking victimization, it is unlikely officials will identify her as a victim and grant her protections available under the laws; instead, she will face mandatory detention, and deportation.¹⁹¹

Undoubtedly, many transgender women have been coerced into prostitution, but, because police misconduct sows distrust and hinders victims' willingness to tell their story, we cannot expect trafficking victims to self-identify.¹⁹² Thus, many women in this scenario end up with prostitution

184. Michelle Madden Dempsey, *Decriminalizing Victims of Sex Trafficking*, 52 AM. CRIM. L. REV. 207, 211 (2015).

185. Cf. *LGBT Victims*, *supra* note 132 (criticizing law enforcement for falsely arresting transgender persons for prostitution); DeBoise, *supra* note 2 (illustrating how law enforcement failed to protect several transgender women who were sex trafficking victims).

186. N.Y. SOC. SERV. LAW § 447-B (West 2016).

187. Dempsey, *supra* note 184, at 224.

188. *Id.* at 211.

189. Haynes, *supra* note 179, at 354.

190. See de la Cruz, *supra* note 180, at 92 (criticizing TVPA's failure to protect victims of trafficking, particularly trafficked children); FITZGERALD ET AL., *supra* note 35, at 8 (conflating the terms sex trafficking and prostitution has prevented legislators from protecting trafficking victims); Haynes, *supra* note 179, at 338–39 (indicating U.S. officials are working contrary to TVPA).

191. Haynes, *supra* note 179, at 338–39.

192. See Dempsey, *supra* note 184, at 225 (explaining victims may be afraid to identify themselves as victims due to prior interactions with police, and because some believe they are in a committed relationship with their pimps and thus do not recognize when they are being trafficked); DeBoise, *supra* note 2 (discounting the effectiveness of law enforcement because victims of sex trafficking often go undetected in an industry filled with abuse and violence).

convictions and are denied the very protections intended for them as trafficking victims.¹⁹³

Whether by choice or by coercion, the vast majority of trans women do not wish to engage in prostitution, and even those who *are* engaged in sex work have expressed a desire to leave.¹⁹⁴ Indeed, one study showed that seventy-three percent of transgender women surveyed expressed their desire to leave sex work.¹⁹⁵ Of course, very few transgender women would willingly choose to enter into an illicit job market in which they are ostracized by non-transgender prostitutes, occupy the lowest status within the industry, make the least money, and experience “significant physical and emotional violence,” even at the hands of police.¹⁹⁶ For this reason, prostitution has been characterized as “the choice made by those who have no choice” and a decision society essentially forced upon trans women by subjecting them to discrimination, mistreatment, or otherwise denying them equal opportunity.¹⁹⁷

The economic insecurity transgender women experience also decreases their “ability to make self-determined choices,” and the punishment they face in the criminal justice system is disproportionate to their blameworthiness.¹⁹⁸ Those who are unfairly profiled and charged with a crime when they have done nothing wrong are particularly undeserving of punishment and the severe consequences such punishment has on their immigration status.¹⁹⁹

C. *Inadmissible and Deportable: The Negative Impact of Prostitution and Other Conduct on Trans Women Who Wish to Immigrate to the United States*

i. The Removal Process

Any non-citizen present in the United States is deportable if in present violation of the INA or if inadmissible at the time of entry or adjustment

193. MELISSA DITMORE, THE USE OF RAIDS TO FIGHT TRAFFICKING IN PERSONS 8, SEXWORKERS PROJECT (2009), <http://sexworkersproject.org/downloads/swp-2009-raids-and-trafficking-report.pdf> [<https://perma.cc/BT87-UAB2>] (reporting sixty percent of the women who experienced a raid were arrested and law enforcement did not effectively follow up on the women’s willingness to cooperate or provide necessary support for application to adjust status and for benefits and assistance).

194. Schepel, *supra* note 123, at 13 (emphasis added).

195. *Id.*

196. *Id.* at 21.

197. Melissa Farley, *Prostitution, Trafficking and Cultural Amnesia: What we Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J. OF L. & FEMINISM 109, 110, 118 (2006); Schepel, *supra* note 123.

198. FITZGERALD ET AL., *supra* note 35, at 7; Dempsey, *supra* note 184, at 221–22.

199. DeBoise, *supra* note 2.

of status, unless they qualify for some type of relief from removal under the statute.²⁰⁰ In some circumstances, non-citizens may be subject to mandatory detention by ICE without bond.²⁰¹ Individuals may be subject to removal on one or more grounds of inadmissibility, including criminal conduct and convictions.²⁰² The removal process varies depending on the circumstances of each case.²⁰³

Certain people are subject to removal without a hearing before an immigration judge (IJ).²⁰⁴ For example, arriving aliens who are inadmissible due to misrepresentation or because they lack the proper documents are subject to expedited removal.²⁰⁵ Conversely, if one does not fall within the classes of people subject to removal without a full hearing, they are entitled to an “on-the-record” proceeding before an IJ.²⁰⁶

In an IJ proceeding, the issue is whether the person is entitled to remain in the United States.²⁰⁷ The IJ has authority to grant applications for relief and protection from removal.²⁰⁸ Moreover, following inspection by an immigration officer, a non-citizen in the United States may be charged as removable for a number of reasons under section 237 of the INA.²⁰⁹ The filing of the charging document, the Notice to Appear (NTA), initiates removal proceedings.²¹⁰ In response, the individual has the burden of proving they are entitled to admission and the statutory eligibility for any relief or benefit sought.²¹¹ They must also persuade the IJ that they are entitled to a favorable exercise of discretion.²¹²

ii. Inadmissibility and Removability Without Convictions

Transgender women may be deemed inadmissible or subject to removal regardless of whether they have a conviction for prostitution or related

200. INA § 237(a)(1), 8 U.S.C. § 1227(a)(1) (2012).

201. *Id.* § 236(c), 8 U.S.C. § 1226(c). Section 236(c) of the INA states in part that the AG “shall take into custody any alien,” when released, who is inadmissible for committing any offense in section 212(a)(2), or any alien who is deportable for having two or more CIMT’s not arising out of a single scheme of conduct. *Id.* § 236(c), 8 U.S.C. § 1226(c) (emphasis added).

202. U.S. DEP’T OF JUSTICE, OFFICE OF IMMIGR. LITIG., IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS: PADILLA V. KENTUCKY 7 (2010).

203. *Id.* at 1.

204. *Id.* at 5.

205. INA § 235(b), 8 U.S.C. § 1225(b) (2012); 8 C.F.R. § 235.3(b) (2015); *see also* 8 C.F.R. § 1.2 (2015) (defining “arriving alien”).

206. U.S. DEP’T OF JUSTICE, *supra* note 202, at 1.

207. *Id.* at 2.

208. *Id.*

209. INA § 237(a), 8 U.S.C. § 1227(a) (2012).

210. 8 C.F.R. § 1239.1(a) (2015).

211. INA § 240A(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B) (2012);

212. *Id.*; *Id.* § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A).

offenses.²¹³ While some INA provisions require a conviction to trigger inadmissibility or removal,²¹⁴ others only require that the individual has *admitted to engaging* or *plans to engage* in certain conduct to be triggered.²¹⁵

Section 212(a)(2)(D)(i) of the INA, does not require a conviction because it renders inadmissible any person coming to the United States with the aim of engaging in prostitution or those who have engaged in prostitution within the previous ten years of the person's application for a visa, admission, or adjustment of status.²¹⁶ A non-citizen alien whose conduct satisfies the regulatory definition of prostitution is inadmissible unless the AG grants them a waiver.²¹⁷

The BIA has held that to “engage in prostitution” means to “carry on over a period of time the type of conduct, pattern of behavior, or form of activity in which sale of the body for carnal intercourse is an integral part It does not include a single isolated act of prostitution.”²¹⁸ Further, the IJ makes such determination on a case-by-by-case basis, and the evidence must show that the acts were “substantial, continuous, and regular.”²¹⁹

An IJ could look for evidence of substantial, continuous, and regular acts of promiscuous sexual intercourse for hire in documents such as police reports, office narratives, transcripts from interviews or interroga-

213. See, e.g., *id.* § 212 (a)(2)(D), 8 U.S.C. § 1182 (a)(2)(D) (instilling prostitution as a triggering event point to deny admissibility).

214. See, e.g., *id.* § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (requiring removal when an alien has been convicted of a crime involving moral turpitude within the preceding five years).

215. See, e.g., *id.* § 212 (a)(2)(A)(i)(I), 8 U.S.C. § 1182 (a)(2)(A)(i)(I) (triggering inadmissibility when a non-citizen alien *admits* they have committed criminal acts involving moral turpitude, regardless if they were convicted) (emphasis added); *Id.* § 212 (a)(2)(D), 8 U.S.C. § 1182 (a)(2)(D) (providing that any non-citizen coming to the United States to engage in prostitution is inadmissible, making this section a conduct-based inadmissibility ground) (emphasis added).

216. *Id.* § 212 (a)(2)(D)(i), 8 U.S.C. § 1182 (a)(2)(D)(i). The relevant section of the CFR defines prostitution as

engaging in promiscuous sexual intercourse for hire. A finding that an alien has “engaged” in prostitution must be based on elements of continuity and regularity, indicating a pattern of behavior or deliberate course of conduct entered into primarily for financial gain or other considerations of material value as distinguished from the commission of casual or isolated acts.

22 C.F.R. § 40.24 (2015); see also *Matter of T-*, 6 I. & N. Dec. 474, 477 (B.I.A. 1954) (analyzing the language of the statute and the meaning of “engaging in” as contemplated by Congress).

217. *Nivonram v. Gonzales*, No. 05-60643, 2006 WL 2092497, at *1 (5th Cir. 2006).

218. *Matter of T-*, 6 I. & N. Dec. 474, 477 (B.I.A. 1954).

219. *Id.*

tions, and statements made by the non-citizen alien.²²⁰ According to advocates, it is highly likely that a transgender immigrant who has had contact with law enforcement will have multiple arrests for prostitution and at least one guilty plea and conviction on their record.²²¹

Furthermore, section 212(a)(2)(A)(i)(I) also does not require a conviction for removal; it only requires that the non-citizen alien admit to having committed or committing the essential elements of a CIMT.²²² The BIA has noted that moral turpitude is a “nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one’s fellow man or society in general Where knowing or intentional conduct is an element of an offense,” the BIA has found it to involve moral turpitude.²²³ In some jurisdictions, a prostitution offense is considered a CIMT.²²⁴ Thus, if a transgender immigrant woman has been arrested for prostitution or sufficient evidence otherwise exists indicating a continuing practice of prostitution, she would be rendered inadmissible unless she obtains a waiver.²²⁵

iii. Inadmissibility and Removability with Convictions

The INA defines what constitutes a “conviction” for immigration purposes.²²⁶ Those relevant here are convictions for CIMT’s and prostitution, which, as we have seen, are considered a CIMT in some jurisdictions.²²⁷

Section 212(a)(2)(A)(i)(I) states that any non-citizen alien either convicted of, admitting to having committed acts constituting the essential elements a CIMT is inadmissible.²²⁸ There are two exceptions to the

220. *See* Nivonram, 2006 WL 2092497, at *1 (denying petition for review because the individual admitted to working as a prostitute); *cf.* In Re: [Information Redacted], Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the INA (USCIS Jul. 1, 2009) (acknowledging the applicant’s single guilty plea and conviction for patronizing a prostitution under Delaware Code § 1343 was insufficient for a finding of inadmissibility).

221. *See, e.g.,* Florido, *supra* note 19 (stating that trans women immigrants are very likely to engage in prostitution to survive).

222. INA § 212 (a)(2)(A)(i)(I), 8 U.S.C. § 1182 (a)(2)(A)(i)(I) (2012).

223. *Matter of Perez-Contreras*, 20 I. & N. Dec. 615, 617–18 (B.I.A. 1992).

224. *E.g., Holgin v. State*, 480 S.W.2d 405, 408 (Tex. Crim. App. 1972).

225. INA § 212 (a)(2)(D), 8 U.S.C. § 1182 (a)(2)(D) (2012).

226. *Id.* § 101(a)(48), 8 U.S.C. § 1101(a)(48); *Id.* § 212 (a)(2), 8 U.S.C. § 1182 (a)(2).

227. *Id.* § 212 (a)(2)(A)(i)(I) & (D), 8 U.S.C. § 1182 (a)(2)(A)(i)(I) & (D); *see, e.g., Holgin*, 480 S.W.2d at 408 (holding prostitution is a crime involving moral turpitude).

228. INA § 212 (a)(2)(A)(i)(I) 8 U.S.C. § 1182 (a)(2)(A)(i)(I) (2012).

CIMT ground of inadmissibility: the “juvenile” and “petty offense” exceptions.²²⁹

The juvenile exception states that the CIMT ground of inadmissibility ground does not apply if the non-citizen alien committed the CIMT when they were under eighteen-years-old, and the crime was committed more than five years prior to their application for a visa or admission.²³⁰ The petty offense exception applies when the offense has a maximum term of imprisonment of one year or less, and the non-citizen alien was not sentenced to more than six months in prison.²³¹ If neither exception applies, the non-citizen may apply for a waiver under INA § 212(h), which gives the AG sole discretion to grant a waiver under certain circumstances.²³²

Second, the prostitution ground of inadmissibility, set out in section 212 (a)(2)(D) of the INA, is also applicable here.²³³ Section 212(a)(2)(D) does not require a conviction to establish inadmissibility; instead, it only requires evidence that the non-citizen alien engaged in the specific conduct listed in that section, regardless of the existence of a prior conviction.²³⁴ Nevertheless, when the government presents evidence regarding a non-citizen alien’s prostitution conviction, the court must determine whether “the full range of conduct would qualify as a crime of prostitution” under the INA.²³⁵

229. *Id.* § 212 (a)(2)(A)(ii)(I)–(II), 8 U.S.C. § 1182 (a)(2)(A)(ii)(I)–(II).

230. *Id.* § 212 (a)(2)(A)(ii)(I), 8 U.S.C. § 1182 (a)(2)(A)(ii)(I).

231. *Id.* § 212 (a)(2)(A)(ii)(II), 8 U.S.C. § 1182 (a)(2)(A)(ii)(II).

232. *Id.* § 212 (h), 8 U.S.C. § 1182(h). This waiver will be discussed further below. *See infra* section III.D.

233. *Id.* § 212 (a)(2)(D), 8 U.S.C. § 1182 (a)(2)(D). For the purposes of this analysis, the author references the Texas Penal Code’s prostitution statute. TEX. PENAL CODE ANN. § 43.02 (West 2015). “Sexual conduct,” includes deviate sexual intercourse, sexual contact, and sexual intercourse. *Id.* “Deviate sexual intercourse” means any contact between the genitals of one person and the mouth or anus of another person. *Id.* “Sexual contact” means any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person. *Id.*

234. INA § 212 (a)(2)(D), 8 U.S.C. § 1182 (a)(2)(D) (2012); U.S. DEP’T OF JUSTICE, *supra* note 202, at 13.

235. *Matter of Oscar Gonzalez-Zoquiapan*, 24 I. & N. Dec. 549, 551 (B.I.A. 2008). This is known as the “categorical approach,” which focuses narrowly on the elements of the crime as laid out in the relevant state statute. *Kepilino v. Gonzales*, 454 F.3d 1057, 1060 (9th Cir. 2006). Where the state statute provides broader conviction terms and criminalizes conduct not necessarily contemplated by the federal statutory definition of the crime, the court must apply the “modified categorical approach” and look to a specific documents in the conviction record to determine which part applies to the non-citizen alien. *Id.* at 1062–63. These documents must unequivocally establish the non-citizen was convicted of the crime in question and can include “the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings.” *Id.* at 1062.

In *Kepilino v. Gonzales*,²³⁶ the U.S. Court of Appeals for the Ninth Circuit analyzed a Hawaii statute similar to the Texas prostitution statute.²³⁷ There, the court held the petitioner was not rendered inadmissible under Section 212(a)(2)(D) because the only evidence the government provided was of the conviction itself, and the record failed to establish the particular sexual conduct for which the petitioner was convicted.²³⁸ Consequently, the IJ held that the government failed to establish that the non-citizen alien's conduct fell within the INA definition.²³⁹

However, on appeal, the Administrative Appeals Office held that the applicant was inadmissible under section 212(a)(2)(D)(i) because they had been convicted of a single act of prostitution and denied her U-Visa application on that ground.²⁴⁰ The Texas Penal Code (TPC) contains a defense to prostitution charges that requires the defendant to prove they were a victim of trafficking or compelled prostitution.²⁴¹ (However, there is a lack of Texas case law showing that individuals charged with prostitution asserted this defense successfully or if they asserted it at all, which likely means people typically charged with prostitution in Texas likely do not have the resources to raise such a defense.

With regard to transgender women, many do not get far enough in the legal process to assert this defense for several reasons. First, most fear the police and thus are unlikely to seek their help. Second, most accept pleas because they want to minimize the amount of time they would be out of work and do not want to risk angering traffickers and thereby subjecting themselves to further abuse.²⁴²

236. 454 F.3d 1057 (9th Cir. 2006).

237. *Id.* at 1058.

238. *Id.* at 1062–63.

239. *Id.*

240. In Re Petitioner [Identifying Information Redacted by Agency], Petition for Nonimmigrant Classification as a Victim of Qualifying Criminal Activity Pursuant to 101(a)(15)(U), 2012 WL 9161775, at *2 (INS 2012). The applicant's record in this case reflected a conviction for "knowingly offering to engage in . . . sexual intercourse[] for a fee in violation of section 43.02(a) of the Texas Penal Code . . .," which supports the idea that a transgender person's conviction record may include information sufficient for a finding under the modified categorical approach that they were convicted of a crime as contemplated by the INA. *Id.*

241. See TEX. PENAL CODE ANN. § 43.2(d) (West 2015) ("It is a defense to prosecution for [prostitution] that the actor engaged in the conduct that constitutes the offense because the actor was the victim of conduct that constitutes an offense under Section 20A.02 [Trafficking of Persons] or 43.05 [Compelling Prostitution].").

242. Cf. Richardson Testimony, *supra* note 131 (explaining frustration trans women feel towards the legal process and police department and their willingness to plead guilty to crimes they didn't commit); see also HUM. RTS. WATCH, *supra* note 131, at 2 (reporting many women do not seek assistance from law enforcement for fear of being arrested).

D. *Relief from Removal*

Even after an IJ establishes removability, a non-citizen alien may nevertheless be eligible for relief from removal.²⁴³ This includes seeking to obtain cancellation of removal, asylum, withholding of removal, Convention Against Torture (CAT) protections, and T and U visas, all of which are discussed below.

i. Cancellation of Removal

Cancellation of removal is available for non-citizen aliens deemed inadmissible or deportable if they meet the stringent requirements set forth in § 240A(b)(1) of the INA.²⁴⁴ Once obtained, a cancellation of removal prevents the government from removing the non-citizen alien and grants them LPR status.²⁴⁵ It requires the non-citizen alien to establish ten years of continuous presence, a period of ten years of good moral character, and exceptional and extremely unusual hardship to the non-citizen alien's spouse, parent, or child that is a U.S. citizen or LPR.²⁴⁶

However, the applicant must also prove they have not been convicted of an offense under sections 212(a)(2) or 237(a)(2) of the INA and that they are not a threat to national security.²⁴⁷ And, while the AG has discretion to determine whether the applicant has the required "good moral character," a conviction for either prostitution or CIMT may preclude a finding of good moral character, regardless of its effect on the applicant's admissibility.²⁴⁸ As a result, the impact the prostitution ground of inadmissibility has on transgender immigrants is clear: they become effectively barred from seeking a cancellation of removal.

While section 212(h) of the INA, grants the AG discretion to waive, *inter alia*, the prostitution and CIMT grounds of inadmissibility, an IJ also has the power to grant or deny the waiver.²⁴⁹ In making the waiver determination, the IJ "must balance the adverse factors evidencing an alien's undesirability . . . with the social and humane considerations presented on his behalf" to determine whether the discretionary grant of the waiver

243. See U.S. DEP'T OF JUSTICE, *supra* note 202, at 27–28 (detailing available discretionary relief).

244. INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (2012). U.S. DEP'T OF JUSTICE, *supra* note 202, at 27–29.

245. INA § 240A(b), 8 U.S.C. § 1229b(b) (2012).

246. *Id.* § 240A(b)(1), 8 U.S.C. § 1229b(b)(1).

247. *Id.* § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C). The criminal conviction grounds of inadmissibility are discussed in Part III(C)(iii) *supra*.

248. *Id.* § 212 (a)(2)(D)(i), 8 U.S.C. § 1182 (a)(2)(D)(i).

249. *Id.* § 212(h), 8 U.S.C. § 1182(h); see also *In re Mendez-Moralez*, 21 I. & N. Dec. 296, 297 (B.I.A. 1996) (upholding the IJ's decision to deny the applicant's 212(h) waiver).

was in the country's best interest.²⁵⁰ That said, it is unlikely a transgender woman with a recent prostitution conviction would be eligible for this waiver because she is still be subject to the CIMT inadmissibility ground, which requires a gap of at least fifteen years from the time of conviction to the date of application for admission.²⁵¹

Given the issues above, if a transgender woman wants to obtain an inadmissibility waiver, her best option is to seek a waiver under section 212(h)(1)(b), which allows for a waiver if the applicant can establish that her deportation would cause "extreme hardship" to a family member who is a U.S. citizen.²⁵² Whether an "extreme hardship" exists depends on the facts and circumstances of each case and requires the AG or IJ to weigh several factors: (1) the presence of LPR or U.S. citizen family ties; (2) the qualifying relative's family ties outside the United States; (3) the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties to such countries; (4) the financial impact of departure from this country; and (5) significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.²⁵³ The AG or IJ will also consider any family ties the applicant has to the United States, the existence of a long period of residence, the hardship to family members if the applicant is removed, employment history, property or business ownership, evidence of rehabilitation, and other evidence of good moral character.²⁵⁴ Conversely, the AG or IJ will also consider negative factors such as the applicant's criminal history, the circumstances that triggered inadmissibility, and any other evidence of bad character.²⁵⁵

Even if this "extreme hardship" waiver is available, obtaining it would still prove difficult for most transgender immigrants because they are frequently abandoned by their family and often come to the United States alone.²⁵⁶ Moreover, beyond having a qualifying family member and showing the requisite hardship, she must also overcome any negative factors—including the circumstances that led her to apply for a waiver in the

250. *Id.* at 300.

251. *See id.* § 212 (h)(1)(a)(i), 8 U.S.C. § 1182 (h)(1)(A)(i) (outlining the waiver of inadmissibility requirements); *see also* *In re Mendez-Morales*, 21 I. & N. Dec. at 301 (detailing the effects of having a criminal record or having bad character on the determination of eligibility status).

252. INA § 212 (h)(1)(B), 8 U.S.C. § 1182 (h)(1)(B) (2012).

253. *In re Cervantes-Gonzalez*, 22 I. & N. Dec. 560, 570–71 (B.I.A. 1999).

254. *In re Mendez-Morales*, 21 I. & N. Dec. at 300.

255. *Id.* at 301.

256. *See JEANTY & TOBIN, supra* note 26, at 8, 15 (emphasizing that many trans individuals deal with family rejection and flee their home countries out of a fear of violent persecution on behalf of family members and the government).

first place—that may cause the AG or IJ to deny her the waiver anyhow.²⁵⁷

ii. Asylum

Asylum is a discretionary form of relief from removal that can lead to LPR status.²⁵⁸ Additionally, while being rendered inadmissible based on the prostitution ground of inadmissibility is itself not an absolute bar to asylum, the AG or other immigration officials may deny asylum in the exercise of their discretion.²⁵⁹ At the outset, to establish eligibility for asylum, an applicant must show they meet the definition of “refugee” under Section 101(a)(42) of the INA.²⁶⁰

Under the INA, a refugee is someone who has fled their home country and is unable or unwilling to return because of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.²⁶¹ If the non-citizen alien meets their burden and is granted asylum, they are allowed to remain in the United States and receive work authorization.²⁶² Further, those seeking asylum generally must apply within one year of their arrival, but they may apply later if they can demonstrate changed circumstances materially affecting eligibility or extraordinary circumstances relating to the delay in filing.²⁶³

A transgender woman seeking asylum would most likely attempt to establish persecution on account of membership in a particular social group.²⁶⁴ “Particular social group” is not defined in the INA, but the BIA has interpreted “persecution on account of membership in a particu-

257. See *In re Mendez-Morales*, 21 I. & N. Dec. at 301 (reiterating that establishing extreme hardship alone is insufficient to obtain the waiver).

258. INA § 209, 8 U.S.C. § 1159 (2012). An asylee can apply to adjust status to that of a LPR one year after a grant of asylum if they can establish they are not inadmissible, or if they obtain a waiver of inadmissibility applicable only to asylees. *Id.*

259. See *id.* § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (“The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied . . .”) (emphasis added).

260. *Id.* § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i).

261. *Id.* § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

262. INA § 208(c), 8 U.S.C. § 1158(c) (2012).

263. *Id.* § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D). There are certain circumstances that may bar an applicant’s eligibility for asylum, but they are beyond the scope of this Article. See, e.g., *id.* § 208(b)(2)(A), 8 U.S.C. § 1158(b)(2)(A) (listing the bases, including engaging in the very type of persecution giving rise to an asylum claim or being a potential danger to national security, that render an applicant ineligible for asylum).

264. See *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) (involving a “social group” claim for asylum by an applicant who feared persecution in his home country because he was a homosexual).

lar social group” as meaning persecution of an individual who belongs to a group of persons “all of whom share a common, immutable characteristic.”²⁶⁵ This determination, of course, is done on a case-by-case basis, but the BIA explained that the shared characteristic among the group may be innate or it could also be a shared past experience.²⁶⁶ The common characteristic must be one the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences.²⁶⁷ In *Karouni v. Gonzales*,²⁶⁸ the Ninth Circuit Court of Appeals recognized that sexual orientation and gender identity are fundamental and immutable and held that the homosexual appellant was a member of a particular social group.²⁶⁹ Hence, to establish that the persecution an asylum applicant experienced was on account of their membership in a particular social group, they must present evidence that their gender identity motivated the persecutor to engage in violence against them.²⁷⁰

According to the National Center for Transgender Equality, many transgender people easily meet the statutory requirements for asylum because of the widespread persecution they experience around the world.²⁷¹ However, trans asylum applicants continue to face unique challenges.²⁷²

First, although the Refugee, Asylum, and International Operations Directorate (RAIO) of USCIS provides specific officer training related to adjudicating LGBT refugee and asylum claims, as recently as September 2015 the Ninth Circuit remanded a BIA decision denying relief to a transgender applicant.²⁷³ In so doing, the Ninth Circuit reasoned that the BIA “failed to recognize the difference between gender identity and sexual orientation.”²⁷⁴ Such a failure is significant because it evidences the type of bias transgender women must overcome when engaged with the

265. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

266. *Id.*

267. *Id.*

268. 399 F.3d 1163 (9th Cir. 2005).

269. *Id.* at 1173.

270. *INS v. Elias-Zacarias*, 502 U.S. 478, 481, 483 (1992).

271. JEANTY & TOBIN, *supra* note 26, at 15.

272. *See id.* (noting that many trans asylum-seekers avoid revealing why they were persecuted in their home country for fear that they will be subjected to the same discrimination and violence in the United States).

273. *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1075 (9th Cir. 2015).

274. *Id.*; *see also* U.S. CITIZENSHIP & IMMIGR. SERVS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS 12 (2011), <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf> [<https://perma.cc/3WWP-CLZJ>] (detailing training procedures for analyzing LGBTQ claims).

immigration system.²⁷⁵ Moreover, the BIA in that case also mistakenly assumed Mexican anti-discrimination laws made life easier for transgender people and denied asylum to the applicant partly on that basis— notwithstanding the fact that transgender women in Mexico are often the target of violence despite the existence of those anti-discrimination laws.²⁷⁶

Second, the one-year filing deadline for asylum seekers makes it very difficult for trans applicants to obtain relief.²⁷⁷ Indeed, many undocumented trans people are unaware they can seek asylum based on gender identity because they do not have counsel and therefore typically miss the deadline.²⁷⁸ In 2010, for example, in forty-six percent of cases in which the one-year deadline was at issue, missing the deadline was “the *only* reason cited for denying asylum.”²⁷⁹

Ultimately, transgender immigrants have the burden—even after establishing statutory eligibility for relief from removal—to persuade the IJ to exercise discretion in their favor.²⁸⁰ With regard to a transgender woman who has a prostitution inadmissibility issue, establishing a claim for asylum is the most promising option for relief thus far.²⁸¹ What is more, after a year of physical presence in the United States as a refugee, a trans immigrant granted asylum can apply for adjustment of status to become a LPR if she continues to be a refugee within the meaning of the statute, has not firmly resettled in another country, and is admissible at the time of the application.²⁸² Importantly, under section 209(c) of the INA,

275. In one case, the Ninth Circuit reviewed the IJ's denial of asylum and withholding of removal. *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1087 (9th Cir. 2000). The IJ characterized the appellant's particular social group as “homosexual men who wish to dress as a woman” and therefore found that the appellant's gender identity was not immutable. *Id.* at 1089. This occurred despite testimony by the appellant and an expert that showed the appellant was part of a distinguishable, particular social group in Mexico: gay men with female sexual identities. *Id.* at 1088. The appellant did not identify as transgender, but assumed a female sexual identity and took hormones. *Id.* at 1095. The IJ denied his claims for protection and even went so far as to deny voluntary departure in the exercise of discretion. *Id.* at 1089.

276. *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1075 (9th Cir. 2015).

277. *JEANTY & TOBIN*, *supra* note 26, at 15; *see, e.g.*, *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1055 (9th Cir. 2006) (stating the respondent applied for asylum based on his female sexual identity, and the IJ held the respondent was ineligible because they failed to show exceptional circumstances for late filing of their application for asylum).

278. *JEANTY & TOBIN*, *supra* note 26, at 15.

279. *Id.* (emphasis in original).

280. *See In Re Jose Mendez-Moralez*, 21 I. & N. Dec. 296, 296 (B.I.A. 1996) (describing an IJ who used a balancing test to determine whether to exercise discretion).

281. *See JEANTY & TOBIN*, *supra* note 15 (identifying asylum protection to those who fear persecution from their former home country for gender orientation).

282. INA § 209(b), 8 U.S.C. § 1159(b) (2012).

asylees are able to apply for a waiver of the prostitution inadmissibility ground for “humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.”²⁸³

The circumstances unique to transgender women, and the challenges they face as a result of past prostitution offenses or convictions, present substantial hurdles for trans immigrants to obtain the foregoing forms of relief from removal. Without the assistance of pro bono counsel or a non-profit immigrant assistance organization that understands the issues transgender women face, surmounting these hurdles may be impossible due to the considerable expense involved.²⁸⁴

There are two forms of relief, however, that are mandatory and not discretionary:—withholding of removal, and protection under the Convention Against Torture (CAT). Although obtaining either prevents a transgender woman from being sent back to a country where her life or freedom are in peril, or where she may be subjected to torture, these options do not necessarily provide non-citizen aliens with lawful status while they remain in the United States.²⁸⁵

iii. Withholding of Removal

Withholding of removal pursuant to section 241(B)(3)(a) of the INA prohibits removal if the AG decides that removing the non-citizen alien will result in the alien’s life or freedom being threatened in their home country due to their race, religion, nationality, membership in a particular social group, or political opinion.²⁸⁶ To be eligible, a non-citizen alien must objectively establish a clear probability they will be persecuted in the country to which the government seeks removal.²⁸⁷ Further, such persecution can be perpetuated by the government of that country, or by someone the government is unable or unwilling to control.²⁸⁸ If the non-citizen alien can show past persecution on account of one of the enumerated grounds, she is entitled to a presumption that there is a threat to her

283. *Id.* § 209(c), 8 U.S.C. § 1159(c).

284. *See* JEANTY & TOBIN, *supra* note 26, at 15 (claiming lack of economic security and knowledge is an obstacle for transgender immigrants to obtain asylum).

285. U.S. DEP’T OF JUSTICE, *supra* note 202, at 37–38.

286. INA § 241(b)(3)(a), 8 U.S.C. § 1231(b)(3)(a) (2012). Like asylum claims, there are some circumstances in which a claim for withholding of removal will be barred. *See, e.g., id.* § 241(b)(3)(a), 8 U.S.C. § 1231(b)(3)(a) (barring withholding of removal if, *inter alia*, the non-citizen alien has been involved in persecuting another based on race, religion, nationality, membership in a particular social group, or political opinion).

287. *Majd v. Gonzales*, 446 F.3d 590, 595 (5th Cir. 2006).

288. *Tesfamichael v. Gonzales*, 469 F.3d 109, 113 (5th Cir. 2006).

life or liberty if returned.²⁸⁹ Evidence to meet the burden can take the form of credible and persuasive testimony.²⁹⁰

The burden for a withholding claim is higher than for asylum.²⁹¹ Therefore, if a transgender woman fails to establish an asylum claim, she will be unable to obtain withholding from removal.²⁹² She will also face the same types of challenges as she did in attempting to establish an asylum claim, such as establishing persecution due to membership in a particular social group.²⁹³

iv. Convention Against Torture (CAT) Protections

CAT protections stem from the United States' obligations under Article 3 of the United Nations Convention Against Torture.²⁹⁴ Withholding of removal under CAT prohibits "refouler," or removal of a non-citizen alien to their home country if they establish they would more likely than not suffer torture if removed.²⁹⁵

Evidence of past torture—including past human rights abuses that occurred in the non-citizen alien's home country and the alien's inability to relocate elsewhere in that country safely—may be used along with other relevant evidence to show the likelihood of being tortured upon removal.²⁹⁶ Because CAT relief is a mandatory, nondiscretionary protection, a transgender woman with a prostitution inadmissibility issue is not precluded from obtaining this type of relief.²⁹⁷ However, meeting the "more likely than not" standard will be difficult for transgender women

289. 8 C.F.R. § 208.16(b)(1)(i) (2015).

290. *Id.* § 208.16(b).

291. *Majd v. Gonzales*, 446 F.3d 590, 595 (5th Cir. 2006); *U.S. Immigr. and Naturalization Servs. v. Stevic*, 267 U.S. 407, 430 (1984).

292. *Majd*, 446 F.3d at 595.

293. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481, 483 (1992) (requiring an asylum applicant to prove that the violent persecution they fear at home is due to their gender identity).

294. United Nations Convention Against Torture, Dec. 10, 1984, 1465 (U.N.T.S. 85).

295. 8 C.F.R. § 1208.16(c) (2015). Torture is defined as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Id.

296. *Majd v. Gonzales*, 446 F.3d 590, 595 (5th Cir. 2006); 8 C.F.R. § 208.16(c)(3) (2015).

297. *See* 8 C.F.R. § 208.16(c)(3) (2015) (explaining that CAT relief is not discretionary).

who are unable to provide credible evidence to support their claim due to a lack of resources or familial support.²⁹⁸ Still, the burden is somewhat lower than a withholding claim, as the applicant does not need not establish persecution on account of any particular ground.²⁹⁹

v. T and U Visas

The TVPA is intended to assist victims of human trafficking.³⁰⁰ To do so, the TVPA created a new visa category, the “T visa.”³⁰¹

A transgender immigrant may be eligible for a T visa if they fulfill the following requirements: (1) they were a victim of trafficking; (2) they are in the United States because of trafficking; (3) they complied with reasonable requests from law enforcement for assistance in the investigation or prosecution of human trafficking; (4) they establish they would suffer an extreme hardship involving unusual and severe harm if removed; and (5) they are otherwise admissible.³⁰² If any inadmissibility grounds apply, they must obtain an “advance parole” or obtain a waiver of the inadmissibility.³⁰³

The U visa is also available for transgender victims of certain crimes that occurred in the United States, if the victim suffered substantial physical or mental abuse as a result, has information about the criminal activity, and was helpful or likely to be helpful in the investigation or prosecution.³⁰⁴

Several issues arise in the context of applying for and obtaining these nonimmigrant visas. First, most immigrants do not know the TVPA provides protections and assistance, including the availability of these

298. See, e.g., *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1076–77 (9th Cir. 2015) (stating that the applicant was subjected to harassment by her family and the IJ denied the applicant’s claim for CAT relief because she failed to provide evidence that she would most likely be tortured if she was removed, to which her family could have attested).

299. See generally *U.S. Immigr. and Naturalization Servs. v. Stevic*, 267 U.S. 407, 430 (1984) (distinguishing the differences in the two standards).

300. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466, § 102(a) (2000).

301. INA § 101(a)(42)(15)(T)(i), 8 U.S.C. § 1101(a)(42)(15)(T)(i) (2012).

302. U.S. CITIZENSHIP & IMMIGR. SERVS., VICTIMS OF CRIMINAL ACTIVITY: U NON-IMMIGRANT STATUS, <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> [<https://perma.cc/3QRD-QNNW>] (last updated Jan. 28, 2016). An “advance parole” allows those in the process of obtaining asylum the ability to re-enter the United States after traveling internationally. Nataliya Rymer, *The Trump Administration Contemplates an Executive Order Affecting Advance Parole*, NAT’L L. REV. (Feb. 16, 2017), <http://www.natlawreview.com/article/trump-administration-contemplates-executive-order-affecting-advance-parole> [<https://perma.cc/25MQ-7SNU>].

303. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 302.

304. *Id.*

visas.³⁰⁵ Second, to apply for TVPA relief officials must identify the applicant as a victim or officials must certify the applicant's status as a victim if the applicant self-identifies as such.³⁰⁶ This is problematic because law enforcement officials often do not adequately identify victims and instead prosecute them as criminals.³⁰⁷ Furthermore, immigrant victims are generally fearful of facing any possible negative consequences regarding their immigration status and transgender women are particularly fearful of interacting with law enforcement because of their history of treating transgender people negatively.³⁰⁸

Even if a trans woman is identified as a victim, or is courageous enough to report the crime to police, three other factors present significant obstacles to obtaining TVPA benefits: (1) a prostitution charge or conviction triggering the inadmissibility ground requiring a waiver;³⁰⁹ (2) if she is placed in removal proceedings, she may be removed while application is pending (except when an administrative stay or equivalent is granted);³¹⁰ and (3) the visas are discretionary in nature implicating the aforementioned biases that will make it that much more difficult to successfully obtain these visas.³¹¹ Unfortunately, these visas are vastly underutilized considering the number of estimated annual flow of trafficking victims.³¹²

IV. CONCLUSION AND RECOMMENDATIONS

President Obama stated that “[T]he struggle to end discrimination against . . . transgender . . . persons is a global challenge, and one that is

305. DITMORE, *supra* note 193, at 7.

306. *Id.* at 6.

307. *Id.* at 7; de la Cruz, *supra* note 180, at 101–02.

308. See DITMORE, *supra* note 193, at 7–8 (reporting sixty percent of women identified as victims in law enforcement raids have been arrested, and immigrant women have been held in detentions for weeks before police have identified them as victims of sex trafficking); see also DeBoise, *supra* note 2 (speaking out for immigrant transgender women who constantly battle law enforcement discrimination and violence); Haynes, *supra* note 179, at 366–67 (exploiting law enforcement for its unwillingness to adequately identify immigrant women as victims of sex trafficking); Dempsey, *supra* note 184, at 212–13 (criticizing the few states that actually require police training on identifying and certifying victims of sex trafficking).

309. 8 C.F.R. § 214.11(j) (2015). The waivers available in this context are INA §§ 212(h), 212(d)(3), and 212(d)(13). These provisions are discretionary and allow the AG to waive the inadmissibility ground if the applicant is seeking a T visa or, if the activities rendering the non-citizen alien inadmissible resulted from victimization by a severe form of trafficking, if the AG believes the granting the waiver in the national interest to do so. *Id.* § 212.16(b).

310. *Id.* § 214.11(d)(8).

311. See U.S. Customs & Border Protection, *supra* note 76 (stating an officer has sole discretion to withdraw an immigrant's application for admission).

312. Haynes, *supra* note 179, at 344.

central to the United States' commitment to promoting human rights."³¹³ Indeed, the climate that brews the inequitable treatment of transgender women undoubtedly must be addressed, and there are small steps we can take to significantly improve it.

The obstacles transgender women face are abundant due to their vulnerability in society, the high rates of discrimination they experience, the high rates of trafficking victimization, and their subsequent involvement—no matter how small—with the criminal justice system. Our inadequate laws further place these women at a significant disadvantage when attempting to obtain relief from removal or other immigration benefits. More importantly, such failures have devastating consequences for transgender women, including potential mandatory detention, deportation to a country where she could be persecuted, tortured, or killed, or putting her back into the hands of traffickers.³¹⁴

The prostitution ground of inadmissibility is an outdated and ineffective provision in the INA that must be overhauled. Congress's main concern with enacting and expanding on the prostitution inadmissibility ground was excluding and removing non-citizen aliens involved in the "business of prostitution."³¹⁵ This purpose, although laudable in certain respects, is founded upon faulty logic and prejudiced ideals. Modern discourse on prostitution has evolved and includes a growing recognition among scholars,³¹⁶ social workers,³¹⁷ and law enforcement³¹⁸ that anti-prostitution laws are not only ineffective at curbing human trafficking, they disproportionately affect women.³¹⁹ Undeniably, our prostitution laws have held on to archaic notions of the "fallen woman," and, rather

313. Memorandum from President Barack Obama for the Heads of Executive Departments and Agencies on International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons (Dec. 6, 2011), <https://www.whitehouse.gov/the-press-office/2011/12/06/presidential-memorandum-international-initiatives-advance-human-rights-1> [<https://perma.cc/CDK5-355V>].

314. HUM. RTS. WATCH, *supra* note 131, at 22; JEANTY & TOBIN, *supra* note 26, at 19–20; MUQADDA ET AL., *supra* note 128, at 16; *Conditions of Detention*, *supra* note 18; Esther Yu Hsi Lee, *A Transgender Immigrant's Asylum Petition was Just Denied. What Awaits Her in Mexico?*, THINKPROGRESS (July 9, 2015), <https://thinkprogress.org/a-transgender-immigrants-asylum-petition-was-just-denied-what-awaits-her-in-mexico-f8f50a1ee36d#.gqw4czlb3> [<https://perma.cc/362K-QKPS>].

315. *Matter of Oscar Gonzalez-Zoquiapan*, 24 I. & N. Dec. 549, 552 (B.I.A. 2008).

316. *See* Dempsey, *supra* note 184, at 208 (highlighting the importance of abandoning the view that victims of sex trafficking are criminals); Johnson, *supra* note 88, at 717–18 (urging courts to take a stronger approach on assessing "discriminatory enforcement claims").

317. DITMORE, *supra* note 193, at 9.

318. *Id.*

319. *See id.* at 6 (finding a "victim-centered" approach as a more appropriate way to handle sex trafficking).

than address the problems associated with prostitution, such as health and safety, they more accurately resemble attempts at regulating morality in society.³²⁰ This discriminatory application of the law is glaringly evident, for example, in the fact that the inadmissibility ground does not apply to “Johns” who procure prostitutes for themselves.³²¹ By eliminating the inadmissibility ground, we could follow the modern approach of decriminalizing sex workers, who are most often either victims of trafficking³²² or in such a poor economic state that they are effectively forced into prostitution as a means of survival.³²³ Instead, the focus should rest squarely on those who elicit prostitution—the “Johns”—and those who exploit women and transgender women to satisfy the demand for paid sex—traffickers.³²⁴

Absent a full repeal of the prostitution inadmissibility provision applicable to solicitors of sex, providing an exception for trafficking victims would lessen the burden on transgender women by eliminating the need to seek discretionary waivers. Further, reducing the number of discretionary decisions made before a transgender woman can obtain relief will also reduce the risk of her experiencing bias and discrimination on behalf of adjudicators during the application or petition process. Such a change would be consistent with congressional findings made pursuant to the TVPA that existing laws fail to protect undocumented victims and these victims face unintended obstacles in the process of securing needed assistance and admission to the United States.³²⁵

State legislatures should also decriminalize sex workers engaged in the immigration system. Because of police profiling, the culture of plea agreements, and transgender women’s lack of access to competent repre-

320. Charles H. Whitebread, “*Us*” and “*Them*” and the Nature of Moral Regulation, 74 S. CAL. L. REV. 361, 367 (2001).

321. Matter of Oscar Gonzalez-Zoquiapan, 24 I. & N. Dec. 549, 552–54 (B.I.A. 2008). See In Re: [Information Redacted], Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the INA at *3 (USCIS Jul. 1, 2009) (applying the holding in *Matter of Oscar Gonzalez-Zoquiapan* to find that the applicant was not inadmissible under § 212(a)(2)(D)(ii) and that his solicitation convictions were not CIMT’s); Johnson, *supra* note 88, at 745–46 (revealing the ability of “Johns” to harm prostitutes).

322. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 § 102(b)(17), (19) (2000).

323. Dempsey, *supra* note 184, at 212–13 (claiming coercion and inducement procures prostitution among victims of sex trafficking).

324. See *id.* (emphasizing the “unjust prosecution of victims” and the “missed opportunities to prosecute their traffickers”); see also Johnson, *supra* note 88, at 745–46 (depicting “Johns” as criminals who should be subject to prosecution).

325. DITMORE, *supra* note 193, at 8.

sensation, merely providing for a defense to victims of trafficking in prostitution statutes is inadequate.³²⁶

Criminal statutes should not be so broad as to criminalize innocent behavior like engaging people in conversation while walking on the street. Further, law enforcement agencies must end discriminatory profiling of transgender women—including using the possession of condoms as evidence of prostitution or establishing suspicion based on the clothes she is wearing or the neighborhood in which she is walking. These policies further marginalize a vulnerable group that has a pre-existing mistrust of police.

Changing the relationship law enforcement has with the LGBT community is in the public interest because doing so will encourage members of the LGBT community to report crimes and assist police in the investigation and prosecution of those crimes. In turn, it is more likely that transgender women who are victims of crimes will report them to the police, which makes it more likely that they will be eligible for immigration benefits that require certification. Of course, rehabilitating public trust in the police will take time, but state legislatures can enact statutes such as section 17 of the Uniform Act on Prevention of and Remedies for Human Trafficking by the National Conference of Commissioners on Uniform State Laws to give victims a chance to have a court vacate or expunge convictions resulting from victimization.³²⁷

The status of LGBT people continues to improve both domestically and abroad, but transgender people have historically been excluded from our conversations about equality. Our nation's prostitution ground of inadmissibility and the interplay with state criminal statutes and procedures illustrates the potential we have to better the lives of some of the most vulnerable people in our society. As Emmy-nominated actress and transgender rights advocate Laverne Cox once said, "Each and every one of us has the capacity to be an oppressor. I want to encourage each and every one of us to interrogate how we might be an oppressor, and how we might be able to become liberators for ourselves and each other."³²⁸

326. HUM. RTS. WATCH, *supra* note 131, at 2.

327. UNIF. ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING § 17 (NAT'L CONFERENCE OF COMM'RS ON UNIF. ST. L., Proposed Draft 2013).

328. Randi Newton, *Laverne Cox Transforms the Audience at the GLAAD Awards*, NEWSWEEK (April 14, 2014 5:08 PM), <http://www.newsweek.com/laverne-cox-transforms-audience-glaad-awards-246169> [<https://perma.cc/QLY2-FSJF>].