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## **Decitizenizing Asian Pacific American Women**

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# DECITIZENIZING ASIAN PACIFIC AMERICAN WOMEN

SHOBA SIVAPRASAD WADHIA\* & MARGARET HU†

*The Page Act of 1875 excluded Asian women immigrants from entering the United States, presuming they were prostitutes. This presumption was tragically replicated in the 2021 Atlanta Massacre of six Asian and Asian American women, reinforcing the same harmful prejudices. This Article seeks to illuminate how the Atlanta Massacre is symbolic of larger forms of discrimination, including the harms of decitizenship. These harms include limited access to full citizenship rights due to legal barriers, restricted cultural and political power, and a lack of belonging. The Article concludes that these harms result from the structure of past and present immigration laws and enforcement policies that, though initially targeting Asian women, now result in discrimination more broadly against Asian Pacific American (APA) women. The marginalization of this community, and the degrading stereotypes integrated within this marginalization, are designed to decitizenize. This Article illustrates how decitizenizing processes that are uniquely aimed at APA women can lead to the justification and excusal of legal and social discrimination.*

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## INTRODUCTION

This Article contends that a careful examination of immigration exclusion laws in the United States, especially the Page Act of 1875, is critical to contextualize the concept of decitizenizing Asian Pacific American (APA) women in the United States.<sup>1</sup> “Decitizenship” can be understood as the limitation or removal of either full citizenship rights or access to communities of citizens and social realms.<sup>2</sup> Decitizenizing is distinct from

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1. In this Article, we use the phrases “Asian American,” “Asian American and Pacific American,” “Asian American and Pacific Islander,” “AAPI,” and “APA” women intentionally. The focus of this Article is on a narrow subset of the APA community: Asian American women. However, we believe that it represents a wider phenomenon that encompasses all APA women. Although the types of harms uniquely faced by Pacific Islander women fall outside the scope of this Article, we reserve for future research this important topic.

2. Many important works have explored Asian American narratives that give texture and depth to the phenomenon of decitizenship, even if it is not explicitly named as such. *See, e.g.*, CATHY PARK HONG, *MINOR FEELINGS: AN ASIAN AMERICAN RECKONING* (2020); LISA LOWE, *IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS* (1996); GOOD GIRLS MARRY DOCTORS: SOUTH ASIAN AMERICAN DAUGHTERS ON OBEDIENCE AND REBELLION (Piyali Bhattacharya ed. 2016); HELEN ZIA, *ASIAN AMERICAN DREAMS: THE EMERGENCE OF AN AMERICAN PEOPLE* (2001); *see also infra* III.A; Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1314–15 n.381 (1993) (noting that an Asian American legal scholarship will give “the opportunity to speak our oppression into existence. By doing so, we then have an opportunity to erase this oppression”) (citing Barbara Johnson, *Thresholds*

denaturalization. While decitizenizing processes strip an individual of full and substantive citizenship rights, denaturalization strips an individual of formal citizenship rights. For example, decitizenship includes the use of surveillance, where “acts of citizenship can be constrained, regulated, and observed.”<sup>3</sup> Decitizenizing processes can stem from a variety of sources, including limiting access to full citizenship from legal barriers and cultural and political restrictions to power and belonging.

The mass murder of six women of Asian descent on March 16, 2021, in Atlanta sheds light on how the decitizenizing of APA women can operate.<sup>4</sup> From a historical standpoint, more than a century earlier, the Page Act of 1875 barred entry of Asian women immigrants on the premise that they were lewd, immoral, and undesirable.<sup>5</sup> Conversations about these stereotypes and the Page Act resurfaced in the wake of the Atlanta shootings.<sup>6</sup> How the Page Act excluded Asian women from

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*of Difference: Structures of Address in Zora Neale Hurston*, in “RACE,” WRITING, AND DIFFERENCE 317, 323 (Henry L. Gates, Jr. ed., 1986)).

3. Marc Owen Jones, *Digital De-Citizenship: The Rise of the Digital Denizen in Bahrain*, 52 INT’L J. MIDDLE E. STUD. 740, 743–44 (2020).

4. Regina Kim, *Atlanta Spa Shootings: What Korean-Language Media Told Us that the Mainstream Media Didn’t*, ROLLING STONE (Mar. 31, 2021, 3:21 PM), <https://www.rollingstone.com/culture/culture-news/atlanta-shootings-what-korean-language-media-told-us-that-the-mainstream-media-didnt-1149698> [<https://perma.cc/T8HW-MQ4W>].

5. Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 643 (2005).

6. See, e.g., Rachel Ramirez, *The History of Fetishizing Asian Women*, VOX (Mar. 19, 2021, 4:00 PM), <https://www.vox.com/22338807/asian-fetish-racism-atlanta-shooting> [<https://perma.cc/B3JX-ABGP>]; Mari Uyehara, *The Roots of the Atlanta Shooting Go Back to the First Law Restricting Immigration*, NATION (Mar. 22, 2021), <https://www.thenation.com/article/society/atlanta-shooting-history> [<https://perma.cc/SM9F-PSPP>]; *Responding to the Atlanta Shootings*, CHINESE HIST. SOC’Y AM. (Mar. 18, 2021), <https://chsa.org/2021/03/responding-to-the-atlanta-shootings> [<https://perma.cc/6ZDS-VMYP>]; Anuka Mohanpuhr, *Experts Say Atlanta Shooting Reflects the Fetishization of Asian Women*, STAN. DAILY (Mar. 29, 2021), <https://www.stanforddaily.com/2021/03/29/experts-say-atlanta-shooting-reflects-the-fetishization-of-asian-women> [<https://perma.cc/LB9V-X4KN>]; Sara Li, *Violence Against Asian Women Won’t End Until You Stop Fetishizing Us*, COSMOPOLITAN (Mar. 18, 2021), <https://www.cosmopolitan.com/politics/a35867699/atlanta-shooting-asian-women-fetish-violence> [<https://perma.cc/98TQ-N945>]; Jiayang Fan, *The Atlanta Shooting and the Dehumanizing of Asian Women*, NEW YORKER (Mar. 19, 2021), <https://www.newyorker.com/news/daily-comment/the-atlanta-shooting-and-the-dehumanizing-of-asian-women> [<https://perma.cc/2XZF-6UAH>]; Shaila Dewan, *How Racism and Sexism Intertwine to Torment Asian-American Women*, N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2021/03/18/us/racism-sexism-atlanta-spa-shooting.html> [<https://perma.cc/9AMF-Q2QM>].

immigration and citizenship based on presumed immorality has both legal and extralegal significance. The historic stain left by the Page Act has continued stigmatizing APA women through a hybrid form of exclusion that incorporates elements of legal, cultural, socioeconomic, and political marginalization.

Part I presents the background for the Atlanta Massacre. It summarizes how the wave of recent attacks against the APA community results from a confluence of circumstances, including an extreme immigration enforcement climate, rising xenophobia exacerbated by the global pandemic, and disinformation campaigns that underscored racial and economic tensions. The pandemic and these other factors, however, do not fully explain the disproportionate brunt of the attacks borne by APA women.<sup>7</sup>

Part II argues that APA women are disproportionately represented in the recent spike of hate crimes because of the entrenchment of highly gendered prejudices—prejudices embedded within the earliest origins of U.S. immigration enforcement policy and immigration exclusion laws. By failing to connect the history of immigration law to modern-day violence against APA communities, we risk forfeiting an understanding of this relationship and, consequently, incorrectly dismissing the violence as only random, isolated incidents. Historical and legal contextualization establishes the recent surge of APA hate crimes as part of a greater pattern of interwoven legal and racially motivated injustices.

Part III contends that the processes of decitizenizing APAs generally, and APA women in particular, are largely invisible and deprives APA women of full and substantive citizenship rights, even for those who are technically U.S. citizens. Civil rights laws and other antidiscrimination remedies prohibit certain categories of discrimination that do not adequately capture discrimination based on foreignness—a type of discrimination that widely affects APA women. Moreover, these laws are particularly impotent when the APA community is not viewed as one that faces social injustice and when APA women are not considered a subset that is particularly vulnerable to discrimination.

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7. See *infra* I.C; Jill Cowan, *A Tense Lunar New Year for the Bay Area After Attacks on Asian-Americans*, N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2021/02/12/us/asian-american-racism.html> [https://perma.cc/H5TB-V2NR].

This Article concludes that the marginalization of APA women is the result of past and present immigration laws and enforcement policies, and the degrading stereotypes integrated within such policies that are designed to decitizenize women of Asian descent. The massacre of Asian and APA women in Atlanta on March 16, 2021, illuminates that the combination of legal marginalization and cultural stigmatization can be fatal. It critiques how decitizenizing processes lead to the justification and excusal of forms of legal and social discrimination that are uniquely aimed at Asian and APA women. Reversing the decitizenizing process can start with analyzing the historical genesis of the discrimination, as well as acknowledging how an extreme immigration enforcement climate exacerbates exclusion from full citizenship.

## I. BACKGROUND

### A. *Massacre in Atlanta*

On March 16, 2021, Robert Aaron Long, a twenty-one-year-old White man, bought a nine-millimeter handgun from a firearms store outside of Atlanta.<sup>8</sup> He later drove to Young's Asian Massage, where he began firing and shot five people.<sup>9</sup> Four died, and one was injured.<sup>10</sup> Next, he drove thirty miles to Gold Massage Spa, killing an additional three victims before heading across the street to Aromatherapy Spa and shooting another.<sup>11</sup> In less than two hours, eight lives were taken: Delaina Ashley Yaun, Paul Andre Michels, Xiaojie Tan, Daoyou Feng, Hyun

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8. Alexis Stevens & Shaddi Abusaid, 'A Crime Against Us All.' *Outrage, Grief After Deadly Spa Shootings*, ATLANTA J.-CONST. (Mar. 17, 2021), <https://www.ajc.com/news/exclusive-spa-shooting-suspect-bought-gun-hours-before-deadly-spree/FEURWVYBEFBMJP7GLOQ6AQJ27A> [<https://perma.cc/B9FP-P7R4>].

9. Bill Chappell et al., *Official Who Said Atlanta Shooting Suspect Was Having a 'Bad Day' Faces Criticism*, NPR (Mar. 18, 2021, 5:01 AM), <https://www.npr.org/2021/03/17/978141138/atlanta-shooting-suspect-is-believed-to-have-visited-spas-he-targeted> [<https://perma.cc/5VZP-GPKJ>].

10. *Id.*

11. Richard Fausset & Neil Vigdor, *8 People Killed in Atlanta-Area Massage Parlor Shootings*, N.Y. TIMES (Mar. 19, 2021), <https://www.nytimes.com/2021/03/16/us/atlanta-shootings-massage-parlor.html> [<https://perma.cc/H6YG-FMG2>].

Jung Grant, Suncha Kim, Soon Chung Park, and Yong Ae Yue.<sup>12</sup> Six out of the eight victims were women of Asian descent.<sup>13</sup> Four were of Korean ethnicity.<sup>14</sup> Two were of Chinese ethnicity.<sup>15</sup>

Police soon identified, apprehended, and arrested Long.<sup>16</sup> His family attended an evangelical church.<sup>17</sup> Long enrolled in college but dropped out after one year.<sup>18</sup> He had self-identified as a sex addict with a pornography addiction and a tendency to procure sexual services. This created conflict between his conservative religious values and sexual activity.<sup>19</sup> Long sought treatment through spiritual counseling, including from HopeQuest Ministry Group, which specialized in sex and pornography addictions.<sup>20</sup> According to one anonymous caller to the police, Long was kicked out of his parents' house the night before the shooting, and a former co-worker claimed he was furloughed from his job.<sup>21</sup>

On May 11, 2021, Long was charged with multiple counts of murder, felony murder, assault with a deadly weapon, related charges, and one count of domestic terrorism.<sup>22</sup> The prosecutor, Fulton County District Attorney Fani Willis, also announced

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12. *Id.*; *Atlanta Spa Shootings: Who Are the Victims?*, BBC (Mar. 22, 2021), <https://www.bbc.com/news/world-us-canada-56446771> [https://perma.cc/ZRB5-D8HJ].

13. Meg Wagner et al., *8 Killed in Shootings at Atlanta-Area Spas*, CNN (Mar. 18, 2021, 9:47 AM), <https://www.cnn.com/us/live-news/atlanta-area-shootings-03-17-21/index.html> [https://perma.cc/3Q3C-HN3Y].

14. *Id.*

15. *Atlanta Spa Shootings: Who Are the Victims?*, *supra* note 12; Emily Feng, *In China, Atlanta Shooting Victim's Kin Struggle to Understand Her—And Her Death*, NPR (Apr. 28, 2021, 4:06 PM), <https://www.npr.org/2021/04/28/990956942/in-china-atlanta-shooting-victims-kin-struggle-to-understand-her-and-her-death> [https://perma.cc/5JTT-QUPG].

16. Mark Berman et al., *The Atlanta Spa Shooting Suspect's Life Before Attacks*, WASH. POST (Mar. 19, 2021, 8:41 PM), [https://www.washingtonpost.com/national/atlanta-shooting-suspect-robert-aaron-long/2021/03/19/9397cdca-87fe-11eb-8a8b-5cf82c3dffe4\\_story.html](https://www.washingtonpost.com/national/atlanta-shooting-suspect-robert-aaron-long/2021/03/19/9397cdca-87fe-11eb-8a8b-5cf82c3dffe4_story.html) [https://perma.cc/933X-BEEN]; *see also* Elliott C. McLaughlin et al., *What We Know About Robert Aaron Long, the Suspect in Atlanta Spa Shootings*, CNN, <https://www.cnn.com/2021/03/17/us/robert-aaron-long-suspected-shooter/index.html> [https://perma.cc/F6C6-JVDH] (Mar. 18, 2021, 11:11 AM).

17. Berman et al., *supra* note 16.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Kate Brumback, *Prosecutor Plans to Seek Death Penalty in Spa Shootings*, AP NEWS (May 11, 2021), <https://apnews.com/article/lifestyle-spas-massage-business-shootings-shootings-8b4fa8d0217180eef6f02111d5354345> [https://perma.cc/WVX9-9H98].

that she intended to seek hate crime charges and the death penalty.<sup>23</sup> Under Georgia's hate crime laws, once a defendant is convicted, a jury can determine whether the underlying crime constitutes a hate crime, which results in additional penalties.<sup>24</sup>

After his arrest, Long claimed that he viewed the spa businesses as a temptation.<sup>25</sup> Over social media, rumors spread implying that the Asian and APA victims were prostitutes rather than licensed massage therapists and other workers.<sup>26</sup> Further, Cherokee County Sheriff Captain Jay Baker denied that the attack was motivated by race and focused instead on Long's sexual addiction: "He was pretty much fed up and had been kind of at the end of his rope. . . . Yesterday was a really bad day for him, and this is what he did."<sup>27</sup> As reported by one news source, "The man charged in the shooting deaths of eight people in three massage parlors Tuesday told officials about a 'temptation for him that he wanted to eliminate,' and that the killings were not racially motivated."<sup>28</sup>

23. *Id.*

24. *Id.*; H.R. 426, 2019-20 Leg., Reg. Sess. (Ga. 2020). For a thoughtful discussion on the potential inefficacies of hate-crime enhancements and the need to consider restorative justice, see Shirin Sinnar & Beth A. Colgan, *Revisiting Hate Crimes Enhancements in the Shadow of Mass Incarceration*, 95 N.Y.U. L. REV. ONLINE 149 (2020), <https://www.nyulawreview.org/wp-content/uploads/2020/09/NYULawReview-Volume-95-Beth-A.-Colgan-Shirin-Sinnar.pdf> [<https://perma.cc/RE32-DTAF>].

25. Elisha Fieldstadt, *Suspect in Deadly Atlanta-Area Spa Shootings Charged with 8 Counts of Murder*, NBC NEWS (Mar. 18, 2021, 3:03 AM), <https://www.nbcnews.com/news/us-news/suspect-deadly-atlanta-area-spa-shootings-says-he-was-motivated-n1261299> [<https://perma.cc/F9E6-H3Z6>].

26. See e.g., @Lingzi\_W, TWITTER (Apr. 15, 2021, 9:43 PM), [https://twitter.com/Lingzi\\_W/status/1382902544880443394](https://twitter.com/Lingzi_W/status/1382902544880443394) [<https://perma.cc/2ZZB-UZCX>]; Lindsey Ellefson & Rosemary Rossi, *There's No Evidence Atlanta Spa Victims Were Sex Workers—So Why Is that Part of the Narrative?*, WRAP (Mar. 23, 2021, 4:41 PM), <https://www.thewrap.com/atlanta-spa-victims-sex-workers-stereotypes> [<https://perma.cc/MKN3-3PGY>]; Karissa Chen, *The Identities of the Women Killed in Atlanta Have Begun to Belie the Suspect's Stated Motive*, NBC NEWS (Mar. 19, 2021, 3:22 PM), <https://www.nbcnews.com/think/opinion/identities-women-killed-atlanta-have-begun-belie-suspect-s-stated-ncna1261575> [<https://perma.cc/6KB8-N927>]; Kate Brumback & Jeffrey Collins, *Attacked Spas Had Been Targeted by Prostitution Stings*, ABC NEWS (Mar. 20, 2021, 9:57 AM), <https://abcnews.go.com/Politics/wireStory/spa-shooting-victims-idd-biden-harris-head-atlanta-76560038> [<https://perma.cc/2UH2-PNAJ>].

27. Neil Vigdor et al., *An Officer Criticized for His Remarks Is No Longer a Spokesman on the Case*, N.Y. TIMES (Apr. 16, 2021), <https://www.nytimes.com/live/2021/03/19/us/atlanta-shootings-massage-spa/bad-day-captain-jay-baker-atlanta> [<https://perma.cc/NXY9-UWQL>].

28. Ellen Eldridge, *Police: Suspect Charged in Massage Parlor Deaths Planned to Kill More*, GPB NEWS (Mar. 17, 2021, 4:22 PM),



Contrastingly, the Executive Director of the National Asian Pacific American Women's Forum, Sung Yeon Choimorrow, stated that the killings resulted from hypersexualization and other stereotypes that objectify Asian and APA women<sup>29</sup>: "This [was] racially motivated sexual violence against women. . . . They were murdered because they were Asian American women."<sup>30</sup> Building on this idea, Asian Americans Advancing Justice said in a statement, "The hypersexualization of Asian American women and the broad normalization of violence against women of color, immigrant women, and poor women make Asian American women particularly vulnerable."<sup>31</sup>

Sheriff Baker's focus on Long's sexual motivation for the attacks failed to recognize that the violence appeared to be inextricably tied to the race and gender of the victims, as well as the stereotypes surrounding their identities and their place of profession. Social media comments made in the wake of the shooting emphasized stereotypes associating massage parlors and Asian women with degrading portrayals of sexual activity.<sup>32</sup> Thus, the reliance on harmful stereotypes appeared to excuse Long's violent shooting by both providing Long with a justification for the killings and attributing fault to the victims.<sup>33</sup>

This unfair justification falls within a history of entrenched prejudices and a long line of anti-APA violence.<sup>34</sup> Anti-Asian

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<https://www.gpb.org/news/2021/03/17/police-suspect-charged-in-massage-parlor-deaths-planned-kill-more> [<https://perma.cc/7LUD-FD87>].

29. Marlene Lenthang, *Atlanta Shooting and the Legacy of Misogyny and Racism Against Asian Women*, ABC NEWS (Mar. 21, 2021, 7:28 AM), <https://abcnews.go.com/US/atlanta-shooting-legacy-misogyny-racism-asian-women/story?id=76533776> [<https://perma.cc/6VFM-645A>].

30. *Id.*

31. *A Community-Centered Response to Violence Against Asian American Communities*, ASIAN AMS. ADVANCING JUST., <https://www.advancingjustice-atlanta.org/aaajcommunitystatement> [<https://perma.cc/5SVZ-D55F>].

32. Anne Anlin Cheng, *The Dehumanizing Logic of All the 'Happy Ending' Jokes*, ATLANTIC (Mar. 23, 2021), <https://www.theatlantic.com/culture/archive/2021/03/atlanta-shootings-racist-hatred-doesnt-preclude-desire/618361> [<https://perma.cc/R763-YX5N>].

33. *See id.*

34. Thomas Fuller, *Violent Attacks Against Asian-Americans Persist in the Bay Area*, N.Y. TIMES (Mar. 26, 2021), <https://www.nytimes.com/2021/03/19/us/san-francisco-attacks-Asians.html> [<https://perma.cc/ASM7-QWP8>]; *see, e.g.*, Chang, *supra* note 2, at 1314 ("I can try to insulate or distance myself from this by calling them isolated incidents. But because anti-Asian violence and sentiments exist and to the extent that non-Asians have difficulty differentiating among Asians, any efforts to rationalize away racism only create rational lies."). For a thorough discussion on implicit bias and cognitive processes surrounding racial stereotyping and

sentiment and stereotypes have underpinned U.S. law and policy for over 150 years.<sup>35</sup> Reducing the Atlanta killings to a single motivator—sex addiction—perpetuates a long history of discriminatory laws and negative pop-culture representation that commodifies and objectifies Asian women.<sup>36</sup>

### B. *Hypersexualization and Other Prejudicial Stereotypes*

The stereotypes and discriminatory treatment of Asian and APA women are pernicious and persistent and often involve hypersexualization. Beyond cultural stereotypes that hypersexualize Asian women, the unique types of discrimination that singularly target Asian and APA women flow from the history and structure of immigration exclusion laws, and racist and nativist immigration enforcement policies. Past justifications for exclusionary anti-Asian immigration bans like the Page Act have been sustained over time. These stereotypes persisted throughout the enactment of nineteenth-century immigration exclusion laws and still exist today, furthered by continuous prejudiced perceptions creating a unique type of discrimination that is borne by APA women. As documented in a recent report by Stop AAPI Hate and the National Asian Pacific American's Women's Forum, "AAPI women are continuously fetishized, exoticized, and objectified through hyper-sexualization, and this affects the racialized, gendered, and sexualized violence AAPI women have experienced, historically and now."<sup>37</sup>

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prejudice, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1506–14 (2005).

35. See, e.g., ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943*, at 28 (2003); MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 15–21 (William Chafe et al. eds., 2d ed. 2014).

36. See, e.g., LEE, *supra* note 35, at 89; CELINE PARREÑAS SHIMIZU, *THE HYPERSEXUALITY OF RACE: PERFORMING ASIAN/AMERICAN WOMEN ON SCREEN AND SCENE* (2007); Connie S. Chan, *Asian-American Women: Psychological Responses to Sexual Exploitation and Cultural Stereotypes*, in 6 *WOMEN & THERAPY* 33 (Lenora Fulani ed., 1987); Yén L. Espiritu, *Race, Gender, Class in the Lives of Asian American*, in 4 *RACE, GENDER & CLASS* 12 (1997).

37. DRISHTI PILLAI ET AL., *STOP AAPI HATE & NAT'L ASIAN PAC. AM. WOMEN'S F., THE RISING TIDE OF VIOLENCE AND DISCRIMINATION AGAINST ASIAN AMERICAN AND PACIFIC ISLANDER WOMEN AND GIRLS* 2 (2021), [https://stopaapihate.org/wp-content/uploads/2021/05/Stop-AAPI-Hate\\_NAPAWF\\_Whitepaper.pdf](https://stopaapihate.org/wp-content/uploads/2021/05/Stop-AAPI-Hate_NAPAWF_Whitepaper.pdf) [<https://perma.cc/22TL-LDLS>].

The hypersexualization of APA women has been analyzed by many scholars.<sup>38</sup> When examining relationships between Asian American women and White American men, Kumiko Nemoto found, “When white men fetishize ‘Asian’ women as their love objects, their objectification of the race and culture of the ‘other’ can cause a sense of emotional tension and racial alienation for Asian American women.”<sup>39</sup> When asked to identify the stereotypes of APA women, Nancy Wang Yuen told NPR, “I think submissive. And I’ve actually gotten—this is, you know, really personal, but I’ve actually been asked if my anatomy is different. So a kind of very fetishized, exoticized—that we’re somehow even physiologically different from other women.”<sup>40</sup>

Another study found that “Asian women are depicted as the objects of sexual desire but rarely as the subjects or agents of that desire.”<sup>41</sup> In its results, the study identified six themes: (1) APA “women are perceived to be exotic and are overtly sexualized,” (2) APA “women are expected to be passive,” (3) APA “men are perceived to be weak and asexual,” (4) APA “men and women are the objects of racialized violence and sexual harassment,” (5) “[q]ueer [APAs] have unique experiences of sexualized harassment and violence,” and (6) APAs “are the subjects of neocolonialist attitudes.”<sup>42</sup>

APA women also experience high levels of physical and sexual violence. As reported by the Asian Pacific Institute on Gender Based Violence, “23% [of APA women] experienced some

38. See sources cited *supra* note 36; see also Esther Ngan-Ling Chow, *The Feminist Movement: Where Are All the Asian American Women?*, 2 U.S.-JAPAN WOMEN’S J. 96 (1992); Chao-Ju Chen, *The Difference that Differences Make: Asian Feminism and the Politics of Difference*, 13 ASIAN J. WOMEN’S STUD. 7 (2007).

39. Kumiko Nemoto, *Intimacy, Desire, and the Construction of Self in Relationships Between Asian American Women and White American Men*, 9 J. ASIAN AM. STUD. 27, 31 (2006).

40. All Things Considered, *A Sociologist’s View on the Hyper-Sexualization of Asian Women in American Society*, NPR, at 01:58 (Mar. 19, 2021, 4:06 PM), <https://www.npr.org/2021/03/19/979340013/a-sociologists-view-on-the-hyper-sexualization-of-asian-women-in-american-society> [<https://perma.cc/NP8Q-K7J6>] (“[T]he Asian prostitute—and that’s a very common stereotype. And the kind of, I think, propositions that Asian women get in public all surround ‘Full Metal Jacket’ quotes. And they’re horrible, and everyone knows them even though the movie is rather old. But it’s now part of society or culture in general, like life imitating art and imitating kind of an imagined life, right?”). For a longer account about the hypersexuality of women in film and media, see SHIMIZU, *supra* note 36.

41. Sameena Azhar et al., “You’re So Exotic Looking”: *An Intersectional Analysis of Asian American and Pacific Islander Stereotypes*, 36 AFFILIA: J. WOMEN & SOC. WORK 282, 285 (2021); accord sources cited *supra* note 36.

42. Azhar et al., *supra* note 41, at 289.

form of contact sexual violence, 10% experienced completed or attempted rape, and 21% had non-contact unwanted sexual experiences during their lifetime.”<sup>43</sup> The trend of hypersexualizing APA women is well documented and supported by statistics regarding elevated rates of sexual violence endured by the APA community. This trend illustrates the vulnerability of the community to hate crimes.

### C. *Escalation of Anti-APA Hate Crimes*

An extreme confluence of events has recently contributed to a spike in discrimination against the APA community. Anti-Chinese rhetoric has ramped up under the increased pressures caused by the pandemic and a tragically high death toll.<sup>44</sup> Asian Americans in general, and Chinese Americans in particular, have been blamed for some of the most severe social effects of COVID-19, including stay-at-home orders, the economic downturn, and other measures taken to end the pandemic.<sup>45</sup>

In recent decades, China has been presented as a superpower rival.<sup>46</sup> Tensions surrounding the recession of the 1980s led to the murder of Vincent Chin, a Chinese American attacked by autoworkers who blamed Asian involvement in the industry for their job loss.<sup>47</sup> The global pandemic of 2020 and the

43. *Statistics on Violence Against API Women*, ASIAN PAC. INST. ON GENDER-BASED VIOLENCE, <https://www.api-gbv.org/about-gbv/statistics-violence-against-api-women> [https://perma.cc/6F98-L4BH] (citing SHARON G. SMITH ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010–2012 STATE REPORT 3, 20–21 (2017), <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf> [https://perma.cc/JU3F-XM3R]).

44. Sam Cabral, *COVID ‘Hate Crimes’ Against Asian Americans on Rise*, BBC (May 21, 2021), <https://www.bbc.com/news/world-us-canada-56218684> [https://perma.cc/HL2A-XUA6].

45. Hannah Tessler et al., *The Anxiety of Being Asian American: Hate Crimes and Negative Biases During the COVID-19 Pandemic*, 45 AM. J. CRIM. JUST. 636, 637, 641–42 (2020).

46. See, e.g., FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (2003); see also Viet Thanh Nguyen & Janelle Wong, *Bipartisan Political Rhetoric About Asia Leads to Anti-Asian Violence Here*, WASH. POST (Mar. 19, 2021, 6:12 PM), [https://www.washingtonpost.com/outlook/atlanta-shooting-political-rhetoric-violence/2021/03/19/f882f8e8-88b9-11eb-8a8b-5cf82c3dffe4\\_story.html](https://www.washingtonpost.com/outlook/atlanta-shooting-political-rhetoric-violence/2021/03/19/f882f8e8-88b9-11eb-8a8b-5cf82c3dffe4_story.html) [https://perma.cc/8XAB-QS95].

47. See, e.g., Frances Kai-Hwa Wang, *Who Is Vincent Chin? The History and Relevance of a 1982 Killing*, NBC NEWS (June 15, 2017, 6:43 AM), <https://www.nbcnews.com/news/asian-america/who-vincent-chin-history-relevance-1982-killing-n771291> [https://perma.cc/548P-RYXP].

resulting economic downturn appeared to join with other trends, including a growing movement of right-wing extremism and White nationalism,<sup>48</sup> increased xenophobia, and conspiracy theories.<sup>49</sup> The disinformation campaigns included, for example, accusations spread over social media that COVID-19 was a bioterrorist weapon designed by China.<sup>50</sup>

According to Stop AAPI Hate, over 6,600 hate incidents were reported between March 2020 and March 2021, and hate incidents against AAPI women and girls were reported at a rate of 2.2 times more often than AAPI men.<sup>51</sup> Further, the study found that “[o]verall, East Asian women were the most likely to report having experienced any form of violence or discrimination, followed by Southeast Asian, Multiracial/Multiethnic Asian, and South Asian women, respectively.”<sup>52</sup>

Ultimately, the violence in Atlanta has forced a deeper conversation about the intersection of gender, race, and violence.<sup>53</sup> Scholars have examined the intersection of these elements through multiple theoretical frameworks to better understand the interrelationship of APA racism and sexism.<sup>54</sup> Kimberlé Crenshaw has examined many dimensions of intersectionality, including the convergence of race, class, and gender in the context of violence against women and the vulnerability faced by immigrant women.<sup>55</sup> As applied to Asian American women,

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48. Rebecca Ulam Weiner, *The Growing White Supremacist Menace: COVID-19 Has Been a Boon for Far-Right Extremists*, FOREIGN AFFS. (June 23, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-06-23/growing-white-supremacist-menace> [<https://perma.cc/S32S-5JLM>].

49. *Id.*

50. Jing-Bao Nie, *In the Shadow of Biological Warfare: Conspiracy Theories on the Origins of COVID-19 and Enhancing Global Governance of Biosafety as a Matter of Urgency*, 17 J. BIOETHICAL INQUIRY 567, 568 (2020).

51. PILLAI ET AL., *supra* note 37, at 2.

52. *Id.* at 3.

53. *See, e.g.*, Shaila Dewan, *How Racism and Sexism Intertwine to Torment Asian-American Women*, N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2021/03/18/us/racism-sexism-atlanta-spa-shooting.html> [<https://perma.cc/8HUY-828P>]; Hayes Brown, *The Atlanta Shootings Can Be Both an Anti-Asian Hate Crime and a Sexist One*, MSNBC (Mar. 17, 2021, 2:29 PM), <https://www.msnbc.com/opinion/atlanta-shooting-can-be-both-anti-asian-hate-crime-sexist-n1261327> [<https://perma.cc/RC3E-NNBN>].

54. *See, e.g.*, JENNIFER ANN HO, RACIAL AMBIGUITY IN ASIAN AMERICAN CULTURE 51 (2015); MARI MATSUDA, WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW (1996); *see also* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005).

55. Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in CRITICAL RACE THEORY:

Shruti Mukkamala and Karen L. Suyemoto have framed intersectionality to include the shared experiences of racism or sexism, the effects of these shared experiences, and the uniquely intersectional identities of Asian American women.<sup>56</sup>

## II. THE INTERSECTION OF EXCLUSION LAWS AND STIGMATIZING ASIAN WOMEN

While there has been a significant rise in discrimination against the Asian community since the start of the pandemic, anti-Asian racism is deeply intertwined with immigration law and history.<sup>57</sup> The history of Asian exclusion traces back to the nineteenth century, which this Part examines. Section II.A reviews how Chinese slavery began with the importation of Chinese indentured servants, which eventually led to early legislation hostile to Asian immigrants. Section II.B discusses the Page Act of 1875 specifically, which banned women from “China, Japan, or any Oriental country” from entering the United States if they sought entry “for lewd and immoral purposes.”<sup>58</sup> It specifically forbade the “importation of women into the United States for the purposes of prostitution.”<sup>59</sup> Thus, the Page Act is largely viewed as a law that was anti-prostitution and anti-Chinese.<sup>60</sup> Kerry Abrams argues that the Page Act was used not only to restrict prostitutes but to restrict Chinese women more

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THE KEY WRITINGS THAT FORMED THE MOVEMENT 357, 358–59 (Kimberlé Crenshaw et al. eds., 1995).

56. See, e.g., Shruti Mukkamala & Karen L. Suyemoto, *Racialized Sexism / Sexualized Racism: A Multimethod Study of Intersectional Experiences of Discrimination for Asian American Women*, 9 ASIAN AM. J. PSYCH. 32, 32–33 (2018).

57. See generally MAE NGAI, *THE CHINESE QUESTION: THE GOLD RUSHES AND GLOBAL POLITICS* (2021); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Kevin R. Johnson, *Bringing Racial Justice to Immigration Law*, 116 NW. U. L. REV. ONLINE 1, 9–10 (2021); ELLEN D. WU, *THE COLOR OF SUCCESS: ASIAN AMERICANS AND THE ORIGINS OF THE MODEL MINORITY* (2015).

58. Page Act of 1875, ch. 141, § 1, 18 Stat. 477, 477 (repealed 1974), see also Uyehara, *supra* note 6.

59. § 3, 18 Stat. at 477.

60. See Abrams, *supra* note 5, at 641; GEORGE ANTHONY PEPPER, *IF THEY DON’T BRING THEIR WOMEN HERE: CHINESE FEMALE IMMIGRATION BEFORE EXCLUSION* 33–38 (1999), but see Ming M. Zhu, *The Page Act of 1875: In the Name of Morality* 24 (Mar. 23, 2010) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1577213](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577213) [https://perma.cc/Z73Q-TQ5W] (“In other words, though the Page Act may have been worded as a prostitution and moral-based immigration restriction, the greater impacts of Chinese labor in general were more accurately the heart of the issue.”).

broadly.<sup>61</sup> She contends that “[a]nimus toward the unorthodox Chinese practices of polygamy and prostitution was an important factor animating the federalization of immigration law.”<sup>62</sup> Finally, Section II.C reviews the subsequently enacted Chinese Exclusion Act and other anti-Asian legislation. It concludes by examining the lasting impact of these exclusionary laws, often justified on national security grounds, including the implementation of mass Japanese American incarceration through Japanese internment camps during World War II and the Muslim ban during the Trump Administration.

A. *The Birth of Chinese Slavery and Early Anti-Chinese Legislation*

The importation of indentured Asian labor commenced after African slavery was outlawed by Great Britain through the Slave Trade Act of 1807 and by the United States through the Act Prohibiting Importation of Slaves of 1808.<sup>63</sup> “As British ships stopped the trade in African slaves, Latin American landowners and others with requirements for large, cheap labor forces turned to Asia for their needs.”<sup>64</sup> From 1847 to 1874, over 250,000 Chinese indentured servants were estimated to have been imported to the Caribbean and South America.<sup>65</sup> The post-emancipation period in the United States incentivized the search for inexpensive labor, including through indentured servitude. By the late nineteenth century, some referred to the exploitation of Chinese laborers in the United States as a new form of slavery.<sup>66</sup>

Prior to the Civil War, in 1852, the *New York Times* encouraged the importation of “coolies,” Chinese indentured servants,

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61. See Abrams, *supra* note 5, at 641.

62. *Id.* at 642.

63. Devi Hardeen, *The Brown Atlantic: Re-thinking Post-Slavery*, BLACK ATL. RES. DEBATE 1, 3 (July 10, 2012), <https://www.liverpool.ac.uk/media/livacuk/csis/blackatlantic/BARD-Essay-1-1.pdf> [<https://perma.cc/4U8X-RLNV>].

64. *19th Century*, DARTMOUTH, <https://www.dartmouth.edu/~hist32/History/19th%20Century.htm> [<https://perma.cc/J43T-LW6D>].

65. ARNOLD J. MEAGHER, THE COOLIE TRADE: THE TRAFFIC IN CHINESE LABORERS TO LATIN AMERICA 1847–1874, at 24 (2008); see also Moon-Ho Jung, *Outlawing “Coolies”: Race, Nation, and Empire in the Age of Emancipation*, 57 AM. Q. 677, 682 (2005) (stating that 125,000 Chinese laborers arrived to work in Cuba subject to slavery-like work conditions between 1847 and 1874).

66. See generally Charles Frederick Holder, *Chinese Slavery in America*, 165 N. AM. REV. 288 (1897).

“as a ‘happy medium’ between ‘forced and voluntary labor.’”<sup>67</sup> Indeed, in 1856, for example, the U.S. commissioner to China, Peter Parker, drew comparisons between the Atlantic slave trade and the importation of Chinese labor.<sup>68</sup> Parker observed that Chinese human trafficking was “‘only another form of the slave trade’ which had been banned decades before.”<sup>69</sup> Some historians note that the parallels between African and Chinese slavery in the United States may be even more pronounced in that it was unclear whether Chinese laborers, in some instances in California, were able to resolve debt contracts.<sup>70</sup> “[I]ndentures for immigrants were not illegal in the United States when the Chinese migration to California first began in the 1850s, and indentures remained legal within some limits until 1885.”<sup>71</sup>

Even as the demand for imported labor increased in the United States, certain laws—including the California Immigration Exclusion law—began targeting Chinese immigrants in the 1850s.<sup>72</sup> The discrimination against Chinese immigrants was rooted in economic and xenophobic origins. The common view accused them of working too hard for too little, not contributing

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67. Ariel Ron & Dael Norwood, *America Cannot Bear to Bring Back Indentured Servitude*, ATLANTIC (Mar. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/03/american-immigration-service-slavery/555824>

[<https://perma.cc/H4WZ-KCSQ>]; see also Jung, *supra* note 65, at 683. See generally JEAN PFAELZER, *DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS* 24–29 (2007). During the California Gold Rush, “White miners clung to the myth that all Chinese were coolies, a derelict species of slave.” *Id.* at 26.

68. Ron & Norwood, *supra* note 67 (“In 1856, the U.S. commissioner to China, Peter Parker, declared that the traffic was so replete with illegalities, immoralities, and revolting and inhuman atrocities, that its cruelty at times exceeded the horrors of the middle passage.” (internal quotations omitted)); see also PFAELZER, *supra* note 67, at 27 (“Chinese slave mutinies arose in 10 percent of American voyages.”).

69. Ron & Norwood, *supra* note 67 (citing J. SMITH HOMANS & J. SMITH HOMANS JR., *A CYCLOPEDIA OF COMMERCE AND COMMERCIAL NAVIGATION* 1729 (1858)); see also H.R. REP. NO. 443, at 6 (1860).

70. See David W. Galenson, *The Rise and Fall of Indentured Servitude in the Americas: An Economic Analysis*, 44 J. ECON. HIST. 1 (1984); PFAELZER, *supra* note 67, at 27–29 (“In the 1850s it is likely that some Chinese immigrants to California had signed misleading contracts and unwittingly locked themselves into forms of bondage lasting up to seven years; some were kidnapped; some were sold by their clans to brokers; and some, desperately poor, sold themselves off in a voluntary form of indentured servitude.”); Patricia Cloud & David W. Galenson, *Chinese Immigration and Contract Labor in the Late Nineteenth Century*, 24 EXPLS. ECON. HIST. 22, 37–38 (1987).

71. Galenson, *supra* note 70, at 23.

72. See generally Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850–1870*, 72 CALIF. L. REV. 529 (1984).



to the economy, and looking and behaving differently.<sup>73</sup> Early laws targeting Chinese immigrants and workers imposed a capitation tax on Chinese and Japanese natives entering California,<sup>74</sup> and a licensing tax on foreign miners.<sup>75</sup> Furthermore, the California Supreme Court construed Chinese people and other Asians as falling within the limits of a California criminal statute prohibiting Blacks, Mulattos, and Indians from testifying against White citizens.<sup>76</sup>

The power of the federal government to control immigration was not settled for most of the nineteenth century, giving states leeway to construct their own immigration regimes.<sup>77</sup> Eventually, many of California's attempts to limit Chinese immigration were held to be unconstitutional infringements on the federal government's power to regulate immigration and foreign commerce.<sup>78</sup> The Supreme Court took steps to establish federal power over immigration through the *Passenger Cases* in 1849 but did not cement this power until the 1870s.<sup>79</sup> California found more success in excluding Chinese immigrants by raising public morality issues and targeting prostitution, which could be argued as a valid exercise of state police powers given the uncertain scope of federal authority regarding immigration.<sup>80</sup> The 1870 Anti-Kidnapping Act, which predated the Page Act by half a decade, banned the kidnapping and importation of Asian women "for criminal or demoralizing purposes" and required women to prove they came voluntarily and were of good morals.<sup>81</sup> An anti-coolie act was passed the same year, and the Anti-Kidnapping Act was broadened in 1874, requiring boat captains to post a bond for any "lewd or debauched women" who were

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73. *Id.* at 535.

74. *Id.* at 544. A capitation tax—also known as a poll tax—is a "fixed tax levied on each person within a jurisdiction." *Poll Tax*, BLACK'S LAW DICTIONARY (11th ed. 2019). In this case, it was levied only on Chinese and Japanese individuals in the jurisdiction. McClain, Jr., *supra* note 72, at 544.

75. McClain, Jr., *supra* note 72, at 539.

76. *People v. Hall*, 4 Cal. 399, 402–04 (1854).

77. *Abrams*, *supra* note 5, at 664–65.

78. Stewart Chang, *Feminism in Yellowface*, 38 HARV. J.L. & GENDER 235, 240 (2015).

79. *Abrams*, *supra* note 5, at 667 (citing *Smith v. Turner (Passenger Cases)*, 48 U.S. (7 How.) 283, 283–86 (1849); *Chy Lung v. Freeman*, 92 U.S. 275 (1876)).

80. Chang, *supra* note 78, at 240–41.

81. *Id.* at 241 (citing Act of Mar. 18, 1870, ch. 230, 1870 Cal. Stat. 330, *overruled by Chy Lung*, 92 U.S. 275).

passengers on their ships when they docked in the United States.<sup>82</sup> Such a label was extremely broad and vague and, therefore, made it difficult for Asian women to disembark and successfully enter the country.<sup>83</sup>

Increasing attempts to use law to police morality helped drive a national strategy to exclude prostitutes and then over-enforce those laws to effectively exclude Chinese women.<sup>84</sup> Doubtful statistics showed that a majority of Chinese women in California were employed as prostitutes, strengthening the stereotype that Chinese women were disproportionately represented as prostitutes.<sup>85</sup> Even though only 6 percent of prostitutes in California were Chinese, they were still singled out by at least eight laws passed that “aimed at restricting the importation of Chinese women for prostitution and the suppression of Chinese brothels.”<sup>86</sup> Furthermore, Chinese culture, with the perceived docility of Chinese women and the practice of polygamy, was believed to be harmful to American culture and marriage values.<sup>87</sup> Overall, Chinese social dynamics differed from Western traditions.<sup>88</sup> Abrams describes the choice to target Chinese women as a fear of Chinese culture and a threat that could be perpetuated by Chinese immigrants and children.<sup>89</sup> These divergent cultures and norms regarding sexuality and family contributed to the stereotypes of the Asian woman prostitute.<sup>90</sup>

Not all legislation targeting the Chinese in this period was aimed at exclusion. The Burlingame Treaty of 1868 recognized the “mutual advantage of free migration and emigration” and provided that Chinese subjects in the United States would be

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82. Abrams, *supra* note 5, at 676–77 (quoting Act of Mar. 30, 1874, ch. 610, §70, Acts Amendatory of the Codes of Cal., 39, *invalidated by Chy Lung*, 92 U.S. at 277–80).

83. *Id.* at 676–77 (“The amendment may have been an attempt to disguise the law’s racial targeting of Chinese women or to step up regulation of all prostitution, although in practice, it was still Chinese women who were targeted.”).

84. *Id.* at 653.

85. Chang, *supra* note 78, at 240; *see also* Abrams, *supra* note 5, at 654 n.56 (raising doubts over the accuracy of the 1870 census records stating 70 percent of Chinese women were prostitutes as likely an overcount).

86. Lucie Cheng Hirata, *Free, Indentured, Enslaved: Chinese Prostitutes in Nineteenth-Century America*, 5 SIGNS 3, 27 (1979).

87. Abrams, *supra* note 5, at 659.

88. *Id.* at 656–57, 659.

89. *Id.* at 664.

90. *See id.* at 653; Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 186–88 (1997).

extended the same “privileges, immunities, and exemptions in respect to travel or residence” of other citizens.<sup>91</sup> The Civil Rights Act of 1870 similarly extended basic civil rights to all persons, targeting and removing the taxes levied against the Chinese in the United States.<sup>92</sup> The courts also protected Chinese laborers and immigrants for a time from many of the state-mandated taxes and immigration restrictions.<sup>93</sup> One successful argument against discriminatory state laws was that the laws infringed on the federal domain of foreign commerce.<sup>94</sup> *In re Ah Fong* established that “a state’s power to exclude foreigners was much more limited than previously supposed,” and that if the state desired to curtail Chinese immigration, it had to seek recourse from the “federal government, where the whole power over this subject lies.”<sup>95</sup>

### B. *The Page Act*

The Page Act of 1875 was motivated by stereotypes that framed Chinese women as prostitutes who were a moral threat to American society.<sup>96</sup> California congressman Horace Page, namesake of the bill, justified the legislation with these prejudicial fears of Chinese workers and Chinese women.<sup>97</sup> Page, known for his anti-Chinese advocacy, introduced multiple anti-Asian bills and sought the renegotiation of the Burlingame Treaty, which promoted trade between the United States and China.<sup>98</sup> As described by Natsu Taylor Saito, “Anxious to open up trade with China, the United States entered into the 1868 Burlingame Treaty, a provision of which touted the ‘inherent and inalienable right of man to change his home and allegiance, and . . . the mutual advantage of . . . free migration.’”<sup>99</sup> President

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91. Treaty of July 28, 1868, U.S.-China, 16 Stat. 739, 740 [hereinafter Burlingame Treaty]; McClain, Jr., *supra* note 72, at 562–63.

92. McClain, Jr., *supra* note 72, at 566–67.

93. *Id.* at 553–60.

94. *Id.* at 555–56 (citing *Lin Sing v. Washburn*, 20 Cal. 534 (1862)).

95. See Abrams, *supra* note 5, at 687–90 (quoting *In re Ah Fong*, 1 F. Cas. 213, 217 (C.C.D. Cal. 1874)).

96. Chang, *supra* note 78, at 240–42.

97. See generally George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women Under the Page Law, 1875–1882*, 6 J. AM. ETHNIC HIST. 28 (1986).

98. See Abrams, *supra* note 5, at 690–92.

99. Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The Plenary Power Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 14 (2003) (quoting Burlingame Treaty, *supra* note 91, at 740).

Ulysses S. Grant further encouraged immigration exclusion in 1874 as a way to address the “Chinese problem” in the United States.<sup>100</sup>

Cultural anxieties and social paranoia that underscored negative Chinese stereotypes were the foundation of Congressional testimony in favor of the Page Act.<sup>101</sup> Page painted Chinese women as almost always prostitutes or polygamists that were no more than slaves, part of a culture antithetical to American free labor.<sup>102</sup> According to Page, China was not sending its best, most respectable workers; rather, it was sending coolies and prostitutes that would hurt America.<sup>103</sup>

The Page Act amended the first federal law that regulated immigration: the Coolie Trade Prohibition Act of 1862.<sup>104</sup> The 1862 law prohibited the “coolie trade,” targeting the immigration of Chinese subjects on American vessels by assuming they were indentured servants.<sup>105</sup> The Page Act strengthened the 1862 law with a fine of up to \$2,000 and a maximum jail sentence of one year.<sup>106</sup> It also added a second, heavier punishment directed at the immigration of Chinese prostitutes.<sup>107</sup>

U.S. consular officials in Hong Kong responsible for the examination of Chinese immigrants exerted great effort enforcing this law.<sup>108</sup> However, there were no specific evidentiary standards for determining whether a woman was a prostitute.<sup>109</sup> Rather, immigration officials could deny women necessary paperwork as long as they ascertained that a prospective Chinese

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100. See Chang, *supra* note 78, at 241–42.

101. See Abrams, *supra* note 5, at 692.

102. See *id.*

103. See *id.* at 694.

104. Renee C. Redman, *From Importation of Slaves to Migration of Laborers: The Struggle to Outlaw American Participation in the Chinese Coolie Trade and the Seeds of United States Immigration Law*, 3 ALB. GOV'T L. REV. 1, 2 (2010).

105. *Id.* at 2–4.

106. Page Act of 1875, ch. 141, § 2, 18 Stat. 477, 477 (repealed 1974).

107. Peffer, *supra* note 97, at 28–29. (“[T]he importation into the United States of women for the purpose of prostitution is hereby forbidden; and all contracts and agreements in relation thereto, made in advance or in pursuance of such illegal importation and purposes, are hereby declared void; and whoever shall knowingly and willfully import, or cause any importation of, women into the United States for the purposes of prostitution, or shall knowingly or willfully hold, or attempt to hold, any woman to such purposes, in pursuance of such illegal importation and contract or agreement, shall be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned not exceeding five years and pay a fine not exceeding five thousand dollars.” (citing Page Act § 3.)).

108. See generally Peffer, *supra* note 97.

109. Abrams, *supra* note 5, at 699 (citing Peffer, *supra* note 97, at 47).

woman migrant had made a contract for “lewd or immoral purposes.”<sup>110</sup> This ambiguous standard, mirroring prior California laws, broadly allowed immigration officials to restrict Chinese women from immigrating to the United States.<sup>111</sup>

Indeed, immigration of Chinese women decreased substantially after the passage of the Page Act, with the population of Chinese women in the Chinese community within the United States dropping from 6.4 to 4.6 percent between the 1870 and 1880 censuses.<sup>112</sup> So powerfully deterrent were the stringent standards and thorough interrogations employed by the consular officials that many Chinese women refrained from even attempting to emigrate.<sup>113</sup>

In 1875 and 1876, immigration regulation shifted from state-based immigration regulation to a federal immigration authority regime. The 1874 California Immigration Law prohibiting the importation of “lewd or debauched” women into the state was struck down in *Chy Lung v. Freeman*.<sup>114</sup> While the discriminatory state immigration law was found to be unconstitutional in light of the federal authority to address foreign affairs, the decision ultimately paved the way for Congress to enact more severe and discriminatory laws.<sup>115</sup>

### C. Chinese Exclusion Act and Its Aftermath

Seven years after the Page Act, Congress passed the Chinese Exclusion Act in 1882, which blocked the entry of Chinese laborers into the United States for ten years and prohibited Chinese nationals living in the United States from becoming naturalized citizens.<sup>116</sup> Chinese workers already residing in the United States could depart the United States and return if they obtained a certificate.<sup>117</sup> Eventually, the Scott Act prohibited all Chinese laborers from entering, even with certificates.<sup>118</sup>

The Chinese Exclusion Act became the subject of a legal challenge by Chae Chan Ping, who lived in the United States for

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110. *Id.*

111. *Id.* at 699–700.

112. Peffer, *supra* note 97, at 29.

113. *See* Abrams, *supra* note 5, at 699–700.

114. *Id.* at 703 (citing *Chy Lung v. Freeman*, 92 U.S. 275 (1876)).

115. *See id.* at 703–06.

116. Chinese Exclusion Act, ch. 126, §§ 1, 14, 22 Stat. 58, 58–59, 61 (1882) (repealed 1943).

117. *Id.* § 4.

118. Scott Act, ch. 1064, 25 Stat. 504 (1888) (repealed 1943).

twelve years, obtained a certificate, left for China, and was excluded when he attempted to return to the United States.<sup>119</sup> The Supreme Court focused on federal authority over immigration and unanimously upheld the power of Congress to exclude noncitizens.<sup>120</sup> The Court's own fears of Chinese immigration were evident in its opinion: "It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us."<sup>121</sup>

In 1892, the Chinese Exclusion Act was extended for ten years by the Geary Act.<sup>122</sup> The Geary Act also created a registration system and required all Chinese workers in the United States to obtain a certificate of residence within one year.<sup>123</sup> The Geary Act mandated that Chinese people carry their registration certificates at all times, a first when no other foreigners were required to register.<sup>124</sup> Registration certificates also included physical descriptions and, later, photographs.<sup>125</sup> For Chinese laborers unable to obtain a certificate, the Geary Act required them to "procure his certificate," which necessitated endorsement by a "white witness."<sup>126</sup> Chinese nationals who were not lawfully permitted in the United States were imprisoned for up to one year and then removed from the country.<sup>127</sup> The Geary Act enabled the deportation of thousands of Chinese nationals from the United States, though limited resources were given for the enforcement of the Geary Act—a mere \$25,000 against an estimated \$10 million required for full enforcement—

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119. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 582 (1889).

120. *Id.* at 603.

121. *Id.* at 606.

122. Geary Act, ch. 60, § 1, 27 Stat. 25 (1892).

123. *Id.* § 6.

124. See, e.g., Margaret Hu, *Crimmigration-Counterterrorism*, 2017 WIS. L. REV. 955, 967 nn. 70–73 (2017) (citing Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882–1910*, 25 L. & SOC. INQUIRY 1, 20–21, 21 n.15 (2000)).

125. *Id.* at 967 (citing Calavita, *supra* note 124, at 21–23).

126. Geary Act § 6; HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 34 (2006).

127. Geary Act § 4; Shoba Sivaprasad Wadhia, *Discretion and Disobedience in the Chinese Exclusion Era*, ASIAN AM. L.J. (forthcoming 2022) (manuscript at 7), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3923937](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923937) [<https://perma.cc/9LR7-NNCV>].

which led to far less action taken through the authorities' prosecutorial discretion.<sup>128</sup>

In *Fong Yue Ting v. United States*, the Supreme Court upheld the constitutionality of the Geary Act, concluding that “[t]he question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the Government.”<sup>129</sup> The Court further held that the right to deport noncitizens is “an inherent and inalienable right of every sovereign and independent nation.”<sup>130</sup> The “Plenary Power” doctrine arose out of the Chinese Exclusion cases and refers to the power of Congress or the executive branch to control immigration without interference from the judiciary.<sup>131</sup> The origins of the Chinese exclusion era are complex, but race played a crucial role. As described by one historian, “It legitimized racism as a national policy.”<sup>132</sup>

Andrew Gyory notes, “Much like the Fugitive Slave Act of the antebellum era, the Chinese Exclusion Act proved to be the most tragic, most regrettable, and most racist legislation of its era.”<sup>133</sup> The Court upheld these rules and, in doing so, revealed the role race played both in the creation and perpetuation of these exclusionary laws. Erika Lee has also shown how the racialized nature of Chinese exclusion has informed immigration policy more broadly: “Race consistently played a crucial role in distinguishing between ‘desirable,’ ‘undesirable,’ and ‘excludable’ immigrants. In doing so, gatekeeping helped to establish a framework for understanding race and racial categories and reflected, reinforced, and reproduced the existing racial hierarchy in the country.”<sup>134</sup> The Geary Act was explicitly racial in that it penalized only Chinese nationals and built in a requirement for

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128. See Wadhia, *supra* note 127, at 10–13.

129. *Fong Yue Ting v. United States*, 149 U.S. 698, 731 (1893).

130. *Id.* at 711.

131. See *Boutilier v. Immigr. & Naturalization Serv.*, 387 U.S. 118, 123–24 (1967); see also Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485, 1524–28 (2010).

132. Wendy W. Cheung, *The Chinese American Psyche: The Unspoken Voice of Exclusion* 59 (Aug. 8, 2016) (Ph.D. dissertation, Pacifica Graduate Institute) (ProQuest); accord ANDREW GYORY, *CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT* 16 (1998).

133. GYORY, *supra* note 132, at 1.

134. Erika Lee, *The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 1882–1924*, 21 J. AM. ETHNIC HIST. 36, 40 (2002).

at least one White credible witness as a condition for explaining why a certification was not obtained in a timely way.<sup>135</sup>

The role of anti-Asian racism, and race generally, in immigration law persisted in the twentieth century. The 1917 Immigration Act significantly expanded the reasons a noncitizen could be excluded from the United States.<sup>136</sup> Over the veto of President Woodrow Wilson, the 1917 Act included a literacy test that required persons over the age of sixteen to demonstrate “basic reading comprehension in any language.”<sup>137</sup> The 1917 legislation also built on the Chinese Exclusion Act by banning immigrants from the “Asiatic Barred Zone”—the zone ranging from the Middle East to Southeast Asia—from entering the United States.<sup>138</sup> The 1917 legislation also created exclusions for the following:

All idiots, imbeciles, feeble-minded persons, epileptics, insane persons: persons who have had one or more attacks of insanity at any time previously; persons of constitutional psychopathic inferiority; persons with chronic alcoholism; paupers . . . persons afflicted with tuberculosis in any form or with a loathsome or dangerous contagious disease; persons . . . mentally or physically defective . . .<sup>139</sup>

One of the most significant immigration exclusions based on nationality and race occurred when Congress created a national-origin quota system with the Johnson-Reed Act, which was signed into law by President Calvin Coolidge on May 26, 1924.<sup>140</sup>

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135. Geary Act, § 6, 27 Stat. 25, 25–26 (1892) (“And it shall be the duty of all Chinese laborers within the limits of the United States, at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence . . . unless he shall establish clearly to the satisfaction of said judge, that by reason of accident, sickness or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, *and by at least one credible white witness*, that he was a resident of the United States at the time of the passage of this act. . . .” (emphasis added)).

136. *Immigration Act of 1917 (Barred Zone Act)*, IMMIGR. HIST., <https://immigrationhistory.org/item/1917-barred-zone-act> [<https://perma.cc/J6ZM-PQSL>].

137. CAROLINE B. BRETTELL, *GENDER AND MIGRATION* 44 (2016).

138. Chang, *supra* note 78, at 243; *Immigration Act of 1917 (Barred Zone Act)*, *supra* note 136.

139. *Immigration Act of 1917 (Barred Zone Act)*, *supra* note 136.

140. *The Immigration Act of 1924 (The Johnson-Reed Act)*, U.S. DEPT OF STATE: ARCHIVE, <https://2001-2009.state.gov/r/pa/ho/time/id/87718.htm> [<https://perma.cc/NH38-RJQF>]; Act of May 26, 1924 (Immigration Act of 1924), ch. 190, § 11, 43 Stat. 153, 159 (repealed 1952).



The legislation was officially titled “An act to limit the immigration of aliens into the United States, and for other purposes.”<sup>141</sup> This Act “also included a provision excluding from entry any alien who by virtue of race or nationality was ineligible for citizenship,” which, as a practical matter, included all individuals of Asian lineage.<sup>142</sup> Thus, it is also known as the Asian Exclusion Act and National Origins Act of 1924 or the Immigration Act of 1924. The implications of these exclusionary immigration laws were understood by lawmakers, such as Senator David A. Reed of Pennsylvania, co-sponsor of the Johnson-Reed Act, who penned “America of the Melting Pot Comes to End” for the *New York Times* with the remarks:

In my opinion, no law passed by Congress within the last half century compares with [the Johnson-Reed Act] in its importance upon the future development of our nation . . . . It will mean a more homogenous nation, more self-reliant, more independent and more closely knit by common purpose and common ideas.<sup>143</sup>

This vision of Americanness was shaped by immigration laws like the Johnson-Reed Act that aimed to be exclusionary and protect Whiteness, and to define outgroups and ingroups.

The national origin quotas of the Johnson-Reed Act did not last indefinitely, as the civil rights movement attempted to turn the tide on the discriminatory impact of U.S. immigration law. Forty years later, on the heels of the landmark Civil Rights Act of 1964 and Voting Rights Act of 1965, President Lyndon B. Johnson signed into law the Immigration and Nationality Act of 1965 and, through its enactment, dismantled the national origin quotas. President Johnson, having inherited the late President

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141. Immigration Act of 1924 § 1.

142. *The Immigration Act of 1924 (The Johnson-Reed Act)*, *supra* note 140. Preceding the Johnson-Reed Act, the Geary Act (the law that extended the Chinese Exclusion Act of 1882) was referred to as the “Dog Tag Law” and enforced exclusion through tagging protocols. *See, e.g.*, Hu, *supra* note 124, at 965–66. As Illinois Representative Robert R. Hitt explained, the Geary Act evoked “old slavery days returned,” and he decried exclusion protocols that resulted in “tagging a man like a dog to be caught by the police and examined, and if his tag or collar is not all right, taken to the pound or drowned or shot . . . .” *Id.* at 965 (internal citation omitted).

143. JIA LYNN YANG, ONE MIGHTY AND IRRESISTIBLE TIDE: THE EPIC STRUGGLE OVER AMERICAN IMMIGRATION, 1924–1965, at 38–40 (2020); David A. Reed, *America of the Melting Pot Comes to End*, N.Y. TIMES, Apr. 27, 1924, at 3; Immigration and Nationality (Hart-Celler) Act of 1965, Pub. L. No. 89-236, 79 Stat. 911.

John F. Kennedy's civil rights agenda upon Kennedy's assassination, stated in his State of the Union message on January 8, 1964:

We must lift by legislation the bar of discrimination against those who seek entry into our country, particularly those with much-needed skills and those joining their families. In establishing preferences, a nation that was built by the immigrants of all lands can ask those who now seek admission: "What can you do for your country?" But we should not be asking: "In what country were you born?"<sup>144</sup>

Even with the dismantling of the national origin quotas, however, fifty years later, national security justifications used to exclude Asian immigrants at the turn of the twentieth century<sup>145</sup> and incarcerate Japanese American citizens during World War II were revisited by proponents of the Muslim ban during the Trump Administration. Then-presidential candidate Trump and other campaign surrogates appeared to justify the Muslim ban using the legal precedent set by *Korematsu v. United States*.<sup>146</sup> "What I'm doing is no different than FDR,"

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144. Edward M. Kennedy, *The Immigration Act of 1965*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 141 (1966) (quoting President Lyndon B. Johnson, State of the Union Address (Jan. 8, 1964) (internal citation omitted)).

145. See, e.g., Michael Kagan, *Is the Chinese Exclusion Case Still Good Law? (The President Is Trying to Find Out)*, 1 NEV. L.J.F. 80, 80–81 (2017) (pointing out the parallels between the Chinese Exclusion Case and travel ban litigation); see also Kat Chow, *As Chinese Exclusion Act Turns 135, Experts Point to Parallels Today*, NPR (May 5, 2017, 6:06 PM), <http://www.npr.org/sections/codeswitch/2017/05/05/527091890/the-135-year-bridge-between-the-chinese-exclusion-act-and-a-proposed-travel-ban> [<https://perma.cc/F3GR-2SDG>]; David W. Dunlap, *135 Years Ago, Another Travel Ban Was in the News*, N.Y. TIMES (Mar. 17, 2017), <https://www.nytimes.com/2017/03/17/insider/chinese-exclusion-act-travel-ban.html?mcubz=1> [<https://perma.cc/N74M-3KB5>]; Chris Fuchs, *The Parallel Between Trump's Immigration Ban and Past U.S. Anti-Asian Policies*, NBC NEWS (Jan. 30, 2017, 10:25 AM), <http://www.nbcnews.com/news/asianamerica/some-trump-s-immigration-ban-parallels-past-anti-asian-policies-n714091> [<https://perma.cc/6KZA-FULG>].

146. Exec. Order No. 9066, 3 C.F.R. §§ 1092–93 (1942); *Korematsu v. United States*, 323 U.S. 214, 219 (1944); Derek Hawkins, *Japanese American Internment Is 'Precedent' for National Muslim Registry, Prominent Trump Backer Says*, WASH. POST (Nov. 17, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/11/17/japanese-internment-is-precedent-for-national-muslim-registry-prominent-trump-backersays/?utm\\_term=.76ecd8dcec4a](https://www.washingtonpost.com/news/morning-mix/wp/2016/11/17/japanese-internment-is-precedent-for-national-muslim-registry-prominent-trump-backersays/?utm_term=.76ecd8dcec4a) [<https://perma.cc/2APA-87VU>]. For a history of mass Japanese American incarceration through internment, see ERIC K. YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2d ed. 2013).

Trump said in an interview on ABC in 2015.<sup>147</sup> Carl Higbie, a former spokesman for the Great America Political Action Committee, claimed that a Muslim database registry would be legally defensible under *Korematsu* and that it would “hold constitutional muster.”<sup>148</sup>

The Muslim ban, therefore, inherits legal precedent and a problematic past from a judicial genealogy passed down from the Chinese Exclusion Act cases and Japanese internment cases, where the Court reasoned that foreign cultures threatened American culture and posed national security threats.<sup>149</sup> For example, congressional hearings espoused that Chinese laborers were a threat to American communities in the prelude to the Chinese Exclusion Act.<sup>150</sup> Supporters of mass Japanese American incarceration argued that internment camps were necessary during World War II to provide “every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities.”<sup>151</sup> Similar to exclusionary actions, Executive Orders

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147. Meghan Keneally, *Donald Trump Cites These FDR Policies to Defend Muslim Ban*, ABC NEWS (Dec. 8, 2015, 1:01 PM), <http://abcnews.go.com/Politics/donald-trump-cites-fdr-policies-defend-muslimban/story?id=35648128> [<https://perma.cc/VP79-7LTB>].

148. Hawkins, *supra* note 146.

149. See, e.g., Hu, *supra* note 124, at 994. Of note, in *Trump v. Hawaii*, Chief Justice Roberts distinguished the Muslim ban from mass Japanese American incarceration and Japanese internment, stating that the *Korematsu* decision was overturned. 138 S. Ct. 2392, 2423 (2018). Despite this assertion by Chief Justice Roberts, commentators argue that *Korematsu*'s logic is still operative and that the case was not truly overturned. See, e.g., Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L.J.F. 641, 643 (2019) (“[I]t was not hard for Chief Justice Roberts in *Hawaii* to overrule *Korematsu* in name, since he merely recreated its reasoning under a different appellation. The Court still has the same tool in its toolkit—it’s just that the case now begins with a *T*.”); Lorraine Bannai, *Korematsu Overruled? Far From It: The Supreme Court Reloads the Loaded Weapon*, 16 SEATTLE J. SOC. JUST. 897, 898 (“[T]he Court’s purported overruling of *Korematsu* is hollow when, in the same breath, it affirmed a presidential proclamation born of branding a whole group of people as terrorists based on unfounded religious stereotypes.”); Margaret Hu, *Digital Internment*, 98 TEX. L. REV. ONLINE 174, 175, 183 (2020) (observing that Chief Justice Roberts states that *Korematsu* “has been overruled in the court of history” but argues that *Trump v. Hawaii* invites an argument that, in order to overrule *Korematsu*, “[w]e now need a test that is not dependent upon the verdict of history”).

150. Chinese Exclusion Act, 22 Stat. 58 (1882) (repealed 1943) (“Whereas in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof.”); see, e.g., H.R. DOC. NO. 5, at 253–267 (1879) (testimony of Loring Pickering); see also *supra* Section II.A.

151. Exec. Order No. 9066, 3 C.F.R. §§ 1092–93 (1942).

13,769 and 13,780 were issued in the name of national security to “protect its citizens from terrorist attacks, including those committed by foreign nationals . . . [and] to improve the screening and vetting protocols and procedures associated with the visa-issuance process and the USRAP [United States Refugee Admissions Program].”<sup>152</sup> Consequently, the 2018 upholding of the Muslim ban in *Trump v. Hawaii* demonstrated the Court’s consistently generous deference for national security rationales, relying on similar rationales that justified the Chinese Exclusion Act and Japanese Internment Order of the past.<sup>153</sup>

### III. DECITIZENIZING

Full and substantive citizenship rights have been stripped from APA women. This process of decitizenizing finds its roots in past immigration law. It goes largely unnoticed because it involves depriving privileges of belonging, political access, and cultural power—pre- and post-naturalization rights that may extend beyond the formal citizenship rights codified in statute.<sup>154</sup>

In this Part, the Article will explore how immigration laws, and the enforcement of those laws, can work to withhold citizenship rights that are not formal in nature. Specifically, the exoticization and foreignness stereotyping of the APA community, and the hypersexualization of APA women, are forms of discrimination that fall outside of civil rights laws. Thus, these elements combine to quietly decitizenize APA women of fully belonging in the United States. This process can, and should, be reversed.

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152. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). The first Executive Order, on January 27, 2017, also used similar language. See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

153. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); see also *Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010); *Fong Yue Ting v. United States*, 149 U.S. 698, 707, 712–14, 737 (1893); *Korematsu v. United States*, 323 U.S. 214, 217–19 (1944); Gabriel J. Chin, Chae Chan Ping and Fong Yue Ting: *The Origins of Plenary Power*, in *IMMIGRATION STORIES* 7 (David A. Martin & Peter Schuck eds., 2005); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 112–22 (2002).

154. See, e.g., MOTOMURA, *AMERICANS IN WAITING*, *supra* note 126, at 151–73 (discussing the relationship between immigration law and exclusion based on social and racial discrimination). “If new lawful immigrants are not treated with the expectation of naturalization, an important opportunity is lost to make them feel safe, to reach outside their immigrant enclaves, and to integrate into American society.” *Id.* at 173.

Section III.A draws the distinction between formal citizenship and full citizenship. Section III.B notes that U.S. antidiscrimination law leaves a gap for foreignness discrimination. It considers, however, the antidiscrimination provisions of the Immigration and Nationality Act that strive to address this type of discrimination in immigration-related employment discrimination. Finally, Section III.C recognizes the complexity of reversing APA women's decitizenship and offers considerations that must be accounted for during the process of decitizenizing.

A. *Formal Citizen v. Full Citizen*

The deadly attacks in Atlanta that targeted women of Asian descent raised questions of whether and how U.S. immigration laws and cultural prejudices prevent APA women from obtaining full or substantive citizenship, even if they possess formal citizenship. Six of the seven women slain in Atlanta were born in Asia.<sup>155</sup> Four women were U.S. citizens: Suncha Kim,<sup>156</sup> Xiaojie Tan,<sup>157</sup> Yong Ae Yue,<sup>158</sup> and Hyun Jung Grant.<sup>159</sup> One, Soon Chung Park, was a lawful permanent resident.<sup>160</sup> Only one of the victims, Daoyou Feng, was a Chinese national who may not have had permanent residence or U.S. citizenship.<sup>161</sup>

Citizenship can be divided into separate realms according to Ming Hsu Chen. In *Pursuing Citizenship in the Enforcement Era*, Chen explains that formal legal immigration status

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155. Esther Fung et al., *For Atlanta Shooting Victims, American Life Was Often a Lonely Struggle*, WALL ST. J. (Mar. 28, 2021, 12:08 PM), <https://www.wsj.com/articles/atlanta-shooting-victims-anti-asian-violence-11616947628> [<https://perma.cc/N3WG-MPYY>].

156. Michelle Ye Hee Lee, *America Was Always Where She Felt She Belonged*, WASH. POST (Apr. 20, 2021), <https://www.washingtonpost.com/nation/2021/04/20/suncha-kim-atlanta-spa-shooting> [<https://perma.cc/6EJ8-V39X>].

157. Minyvonne Burke, *Victims in Atlanta-Area Spa Shootings Include Recently Married Mother, Army Veteran*, NBC NEWS (Mar. 22, 2021, 3:14 PM), <https://www.nbcnews.com/news/us-news/victims-atlanta-area-spa-shootings-include-recently-married-mother-army-n1261430> [<https://perma.cc/BNG8-KVYQ>].

158. *Id.*

159. See Rachel Treisman, *What We Know About the Victims of the Atlanta-Area Shootings*, NPR (Mar. 24, 2021, 10:18 AM), <https://www.npr.org/2021/03/18/978742409/what-we-know-about-the-victims-of-the-atlanta-area-shootings> [<https://perma.cc/XT4D-7C2N>].

160. See Hanna Park, *Soon Chung Park Worked Long Days as Single Mom to Bring 5 Kids from Korea to U.S.*, NBC NEWS (Mar. 26, 2021, 8:09 AM), <https://www.nbcnews.com/news/asian-america/soon-chung-park-worked-long-days-single-mom-bring-5-kids-korea-us-rcna514> [<https://perma.cc/8Q3E-C2VE>].

161. Fung et al., *supra* note 155; Feng, *supra* note 15.

through naturalized citizenship allows an immigrant to reap the rights and benefits granted by the state and can be understood as the rights of “formal citizenship.”<sup>162</sup> At the same time, Chen observes that formal citizenship is a necessary condition of citizenship; however, it may not be a sufficient condition of citizenship.<sup>163</sup> Consequently, she encourages us to examine the importance of the informal claims to social belonging and acceptance that could be characterized as “full citizenship” or substantive citizenship.<sup>164</sup>

The Founders considered the role of citizenship in the formation of the democratic republic, “fearing that group differences would tend to undermine commitment to the general interest.”<sup>165</sup> They considered whether exclusionary treatment of different groups was necessary to maintain a robust homogeneous polity that could reinforce a unified vision of a democracy.<sup>166</sup> The desire for homogeneity translated into dehumanization and fear of women “outside the domestic realm [who] were wanton and avaricious” and of other marginalized groups that fell outside of what was perceived to be the political or cultural norm.<sup>167</sup>

A more contemporary concept of citizenship as “transcend[ing] particularity and difference” to grant “everyone the same status as peers in the political public” demonstrated the country’s shift to more liberal expectations of an increasingly pluralistic composition of the United States.<sup>168</sup> The concept of universal citizenship, therefore, champions an inclusive vision of extending equal rights of citizenship to all groups. Consequently, U.S. immigration law, as reformed by the 1965 amendments to the Immigration and Nationality Act, ended the overt racism borne out of the Chinese exclusion laws and national-origin quotas.<sup>169</sup>

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162. MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA 5 (2020).

163. *Id.*

164. *Id.*; see also MOTOMURA, AMERICANS IN WAITING, *supra* note 126, at 164–67 (contending that prenatalization rights of belonging can precede formal citizenship and marginalization of immigrants permanently is “inconsistent with America’s commitment to equality.”).

165. See, e.g., Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 255–56 (1989).

166. *Id.* at 254–56.

167. See *id.* at 255–57.

168. See *id.* at 250.

169. See Chin, *supra* note 57, at 15–16 (claiming that the potential for discriminatory immigration enforcement remains due to the entrenched Supreme Court

The differences experienced by naturalized citizens who only enjoy formal citizenship, compared to those born in the United States who enjoy full citizenship, create a gap between the two groups.<sup>170</sup> This gap is exacerbated by a punitive immigration enforcement climate.<sup>171</sup> At historical moments where U.S. immigration policy emphasized the otherization of immigrants and foreign-born citizens, immigration enforcement embraced strict protocols for border security, immigration raids and roundups, and mass immigration detention and deportation.<sup>172</sup> Under a punitive enforcement regime, there is an increased need to pursue formal citizenship for added protection, pushing it

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immigration jurisprudence through plenary power). *See generally* Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163 (2010). Experts increasingly note there is a disconnect between the promise of universal citizenship in theory and in law, and the reality of partial citizenship rights that are extended to certain communities deemed to be unworthy of full citizenship rights or construed as dangerous to the republic. *See, e.g.*, CHEN, *supra* note 162, at 5–7. Even with the legal reforms in the 1960s that concluded formal exclusion in immigration laws, the question is whether policymakers still embrace the theory that exclusionary treatment of different groups through immigration policy and enforcement priorities is necessary for a homogenous vision of democracy. Despite the amendments to the Immigration and Nationality Act of 1965 that repealed the bar against Asian immigration in the United States, the concern that remains is the extent to which the philosophy of exclusion can remain vibrant through extreme and punitive immigration enforcement policies. *See, e.g.*, Catherine Y. Kim & Amy Semet, *Presidential Ideology and Immigrant Detention*, 69 DUKE L.J. 1855, 1886 (2020) (noting that, under the Trump administration, the median bond amount for detained immigrants was \$10,000); DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007) (discussing how the threat of deportation has plagued immigrants throughout American history); HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* (2014); Keith Aoki & John Shuford, *Welcome to Amerizona—Immigrants Out!: Assessing “Dystopian Dreams” and “Usable Futures” of Immigration Reform, and Considering Whether “Immigration Regionalism” Is an Idea Whose Time Has Come*, 38 FORDHAM URB. L.J. 1 (2010); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL’Y & L. 606 (2011); Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257 (2014); Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-“Alien” Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905 (2011); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U.L. REV. 367, 367 (2006).

170. CHEN, *supra* note 162, at 5–7.

171. *See id.*

172. *See, e.g.*, Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 645 (2005); Tanya Golash-Bozja, *The Immigration Industrial Complex: Why We Enforce Immigration Policies Destined to Fail*, 3 SOCIO. COMPASS, 295, 303–04 (2009).

from a decision to seek meaningful ties to a nation to a more transactional decision.<sup>173</sup> Chen contends that this diminishes the sense of belonging of immigrants and increases the risk of discrimination.<sup>174</sup> Immigration law itself constructs racial groups to be unassimilable and, therefore, excluded from full citizenship and cultural, political, and economic benefits. Further, exclusionary immigration policies presume criminality and immorality, which impose perpetual foreigner status on those racial groups.<sup>175</sup> Even after the first anti-Asian exclusionary laws were repealed and removed, new forms of legal discrimination have emerged, which disproportionately affect Asians and other minorities. The long-term effects of institutional discrimination have challenged the political power of Asians.<sup>176</sup> Overall, APA women—even those who are formal citizens—are at high risk of lacking full citizenship through societal and political marginalization.

### *B. The Blindspots of Antidiscrimination Laws*

Antidiscrimination laws often fail to prevent discrimination against immigrant communities when the discrimination derives from foreignness perceptions and the nuanced overlap of nonprotected statuses. While assumptions about discrimination connected to immigration status and foreigner status might flow from improper racial profiling, foreignness itself does not fall within the protected classifications under the law, meaning that this type of discrimination is not necessarily proscribed by these antidiscrimination laws.

The type of foreignness discrimination experienced by Asian Americans generally—and the type of hypersexualization, exoticization, and subordination experienced by APA women specifically—falls outside of the formally protected classifications under civil rights laws. Thus, as Natsu Taylor Saito asks, “How

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173. CHEN, *supra* note 162, at 6.

174. *Id.* at 5–7.

175. ROGER WALDINGER & MICHAEL I. LICHTER, *HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR*, 141–80 (2003) (ebook).

176. *See, e.g.*, Chin, *supra* note 57, at 41 (“Asian Americans are disadvantaged because the bloc from which they may expect support has been kept artificially small . . . [P]oliticians have less reason to be responsive to them.”); Chow, *supra* note 38, at 103.



does the law regarding alienage affect discrimination based on a presumption of foreignness?"<sup>177</sup>

Recognition of immigration-status discrimination under the law is complicated. Civil rights laws protect against discrimination on the basis of race, national origin, ethnicity, color, and in some instances, citizenship status.<sup>178</sup> But the type of discrimination suffered on the basis of foreigner status or recent naturalization status is different. At times, the law might be able to encompass perception of foreigner status as a form of discrimination on the basis of race, national origin, ethnicity, color, and citizenship status—all of which are protected characteristics under civil rights laws.<sup>179</sup> In other instances, these types of discrimination cannot be addressed by preexisting laws.<sup>180</sup>

Hypersexualization through racial stereotypes, for example, is not currently recognized as a basis for a complaint of gender discrimination on the basis of sex.<sup>181</sup> Assumptions of limited language ability and presumptions regarding a lack of access to cultural and political capital are also not considered actionable forms of discrimination.<sup>182</sup> Attempts to terrorize classes of individuals into perpetual paranoia and to relegate them into a constant state of foreignness are also not recognized under the law as civil rights violations.

The existing parts of federal law that could be interpreted as preventing foreignness discrimination are sparse, according to Saito.<sup>183</sup> The Fourteenth Amendment's equal protection jurisprudence may make it impossible to claim discrimination on the

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177. Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 335 (1997).

178. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

179. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); see also *infra* note 192 (discussing document abuse protection and other civil rights protections under the antidiscrimination provision of the INA under 8 U.S.C. § 1324b(a)(6)).

180. See Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 138–40 (2011) (arguing that the factors used for defining suspect classes are inconsistent and often fail to classify minority groups).

181. See Katherine E. Leung, *Microaggressions and Sexual Harassment: How the Severe or Pervasive Standard Fails Women of Color*, 23 TEX. J. ON CIV. LIBERTIES & CIV. RTS. 79, 86–88 (2017).

182. See, e.g., D. Wendy Greene, *Categorically Black, White, or Wrong: "Mis-perception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 100–03 (2013) (explaining that an implicit actuality requirement in Title VII cases precludes misperception discrimination cases from succeeding).

183. Saito, *supra* note 177, at 317–20.

basis of foreignness without evidence of an intent to discriminate on the basis of a recognized suspect classification, such as race.<sup>184</sup> Definitions of race are often fraught with requirements to define a suspect class of race or ethnicity, often involving variables that are not easily measurable.<sup>185</sup> Discrimination based on national origin lacks consistency and requires ethnically different Americans to claim otherness in order to fit within the bounds of a national origin discrimination claim.<sup>186</sup> Therefore, these missing pieces in antidiscrimination law create a blind spot for redressing foreignness discrimination.

Discrimination based on alienage or citizenship status is protected within employment law. With the passage of the Immigration Reform and Control Act of 1986, Congress, for the first time, shifted immigration enforcement responsibilities to private actors—namely, employers.<sup>187</sup> Pursuant to this comprehensive immigration reform legislation, employers face civil and criminal sanctions for employing undocumented workers.<sup>188</sup> However, the legislation’s House Conference Report reflected Congressional concern that individuals who present a “foreign” appearance would face a high likelihood of discrimination.<sup>189</sup> Because employers would be penalized for hiring immigrants not authorized to work in the United States, the House Report stated that “there is some concern that some employers may decide not to hire ‘foreign’ appearing individuals to avoid sanctions.”<sup>190</sup> Concerns over how these sanctions might result in a

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184. *Id.*

185. *Id.* at 320–22.

186. *Id.* at 328–29.

187. See, e.g., Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 779 (2008) (“[P]rivate parties are obligated to insure that they provide their goods and services only to those who are legally present in the United States (or in the case of employers, that employees they hire are legally present and authorized to work.)”); Kati L. Griffith, *Discovering “Immigration” Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL’Y REV. 389, 397 (2011); see also Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1123 (2009).

188. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); 8 U.S.C. § 1324a (2018).

189. H.R. REP. NO. 99-1000, at 87 (1986) (Conf. Rep).

190. *Id.* (“The antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in this context. The bill broadens the Title VII protections against national origin discrimination, while not broadening the other Title VII protections, because of the concern of some Members that people of ‘foreign’ appearance might be made more vulnerable by the imposition of sanctions. While the bill is not discriminatory, there is some concern that some employers may decide not to hire ‘foreign’ appearing individuals to avoid sanctions.”).

sort of “foreignness” discrimination in employment led to legislative action protecting immigrant workers, or those employees perceived to be immigrants, from immigration-related employment discrimination.<sup>191</sup>

These concerns led to the addition of antidiscrimination provisions in the Immigration and Nationality Act (INA), amended by the passage of the Immigration Reform and Control Act of 1986, that included protection from discrimination on the basis of national origin, citizenship status, and document abuse.<sup>192</sup> “Representative Robert Garcia testified that ‘as a shorthand for a fair identification process, employers would turn away those who appear ‘foreign,’ whether by name, race or accent.’”<sup>193</sup> For the first time in civil rights law, the antidiscrimination provisions of the INA allowed for a claim of discrimination on the basis of foreignness or a perception of foreignness. The antidiscrimination provision of the INA rejected discriminatory treatment of U.S. citizens, lawful permanent residents, and documented individuals who may be perceived to be foreign and may suffer from employment discrimination consequences. It also prohibited discrimination against noncitizens who are authorized to work in the United States and provided redress for foreignness discrimination.

The antidiscrimination provision of the INA recognized that certain actions motivated by foreignness animus “may not be based on legitimate considerations of members of the national

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191. *Id.*

192. “Document abuse” is prohibited under the antidiscrimination provision of the INA, 8 U.S.C. § 1324b(a)(6) (2018), which prohibits unfair immigration-related employment practices. Specifically, the provision’s definition states, “[T]he basis of the alleged unfair immigration-related employment practice is discrimination based on national origin, citizenship status, or both; or involves intimidation or retaliation; or involves unfair documentary practices. . . .” 28 C.F.R. § 44.101 (2021). Document abuse or “unfair documentary practices” might include rejecting without basis documents presented to establish employment eligibility under the DHS Form I-9 process, whereby employment authorization documents are presented to establish that an employee is authorized for employment in the U.S. *Types of Employment Discrimination Prohibited Under the INA*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 27, 2020), <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/100-unlawful-discrimination-and-penalties-for-prohibited-practices/102-types-of-employment-discrimination-prohibited-under-the-ina> [https://perma.cc/4D3M-V84K].

193. H.R. REP. NO. 99-682(I), at 68 (1986) (citing *Anti-Discrimination Provision of H.R. 3080: Joint Hearing on H.R. 3080 Before the H. Comm. on the Judiciary, H. Subcomm. on Immigr., Refugees, & Int’l Law, the S. Comm. on the Judiciary & the S. Subcomm. on Immigr. & Refugee Pol’y*, 99th Cong. 111 (1985) [hereinafter *1985 Joint Hearings*]).

polity, but may be masking racism, nativism, or other legally unacceptable motivations.”<sup>194</sup> Consequently, the antidiscrimination provision of the INA should serve as a source of inspiration for the expansion of civil rights laws in other contexts, such as voting, lending, housing, and other protections.

### C. *Reversing Decitizenship*

Decitizenizing AAPI women is a multifaceted problem linked to the origins of immigration and sociopolitical disenfranchisement. Any solution to decitizenizing must be complex enough to resolve the intersectional issues associated with it. Reversing the process can start with analyzing the historical genesis of the discrimination as well as acknowledging how an extreme immigration enforcement climate exacerbates the exclusion from full citizenship.

Kimberlé Crenshaw has pointed out that civil rights law fails to accommodate individuals who fall within an intersection of identities that, together, form the basis of the discrimination.<sup>195</sup> In other words, by separating classifications of identity and only protecting each individually, those that share multiple protected classifications at once are disadvantaged by the binary system of forcing individuals into one classification or another. The act of inviting an individual to produce evidence of discrimination on the basis of race and gender separately diminishes the ability to recognize instances where an individual is simultaneously experiencing discrimination on the basis of both race and gender combined.<sup>196</sup>

In the instance of APA women, the question of intersectionality becomes even more complicated. When an APA woman is experiencing discrimination on the basis of race, national origin, gender, ethnicity, color, or citizenship, she may be simultaneously combating discrimination on the basis of cultural hegemony, hypersexualization, immigration status, assumptions of powerlessness, and a longstanding history of U.S. immigration laws that presumed class-wide debauchery and immorality. These complex and multidimensional historical, political,

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194. Saito, *supra* note 177, at 335.

195. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

196. See *id.* at 149; MARI MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 111–16 (1993).

cultural, and economic influences make it difficult to identify the source of the discrimination faced by AAPI women. As antidiscrimination law is not currently structured to offer redress for intersectionality, this type of discrimination defies classification and remediation.

Ming Hsu Chen revisits the concepts of formal and informal citizenship in the current climate, where intensive enforcement is a burden on immigrants seeking both kinds of citizenship.<sup>197</sup> The joint legal and social benefits of full citizenship include integration and a sense of belonging. Exclusionary immigration laws reinforce xenophobia and the harms of perpetual foreignness.<sup>198</sup> Chen suggests both improving pathways to achieving formal and informal citizenship rights and government-supported integration to support full, substantive citizenship.<sup>199</sup>

The social inclusion required for full citizenship is also heavily affected by the exclusionary environment immigrants enter. For APA women and other groups that have faced exclusionary environments, the immigration climate contributes to a positive feedback loop in which negative stereotypes and attitudes encourage exclusionary legal policies that restrain integration and facilitate those negative attitudes.

Reversing decitizenship means reversing the loop of exclusion and legal barriers. The structure of immigration exclusion, combined with processes of decitizenizing that strip a sense of national belonging from communities of color that are readily identified by sight as “other,” has historically forced excluded groups to build communities together.<sup>200</sup> When this occurs, other barriers to political and social access prevent assimilation or acceptance.<sup>201</sup> This sets the stage for reinforcing the negative stereotypes that pigeonhole minority communities in place, away from types of power that are incident to Americanness and U.S. citizenship.<sup>202</sup> This, once again, leads to accusations that

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197. CHEN, *supra* note 162, at 113–14.

198. *See id.* at 114–15.

199. *See id.* at 118–26.

200. *See, e.g.,* Saito, *supra* note 177, at 307–10.

201. *See, e.g.,* PFAELZER, *supra* note 67, at 81–85 (“In many towns a ban on owning land [prior to the Chinese Exclusion Act] made the Chinese, like blacks, particularly vulnerable to expulsion.”); CHEN, *supra* note 162, at 5–7 (“Legal status becomes a social construct, as the experiences of different groups of noncitizens consolidate around feelings of insecurity across the citizenship spectrum.”).

202. *See* Saito, *supra* note 177, at 290–92.

minority groups are not assimilable, are resistant to assimilation, or are more tribal.<sup>203</sup>

The conceptualization of “Americanness” can involve cognitive and symbolic boundaries. Some experts identify a link between a sense of national identity and characteristics like U.S. ancestry derived from European heritage, native-born status, or long-term residency in the United States.<sup>204</sup> Immigration law and heightened enforcement policies can exacerbate the importance of native-born features as defining boundaries of what qualifies as inclusion within American identity, limiting full attainment of American identity to a certain few. For this reason, the proximity to Americanness can incorporate constructions of Whiteness. This racial exclusion within the classification of who qualifies as a standard American is then combined with what characteristics a “good immigrant” might have. The result is a socially constructed characteristic, such as race, used to define who is an “American.” It also constructs who belongs to the out-group, such as APA women.

Consequently, exclusion from the “ingroup” is considered a natural order of social and interpersonal dynamics. The access to cultural or social capital thus becomes restricted through exclusionary immigration laws and punitive immigration enforcement policies. As with many immigrant communities, unspoken rules used to navigate White American privilege often require time and occasion to learn and internalize and may involve decisions on whether to reject or accept the customs of American Whiteness. Identification with Whiteness and Americanness may be further restricted because of recent immigration status. Symbols attached to the recency of arrival to the United States, such as foreign accents and retained cultural customs, often affect first-generation and second-generation immigrants. In this way, foreignness discrimination may be intertwined with discrimination on the basis of protected classifications like race, national origin, ethnicity, and citizenship status. At the same time,

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203. See generally George A. Martinez, *Immigration: Deportation and the Pseudo-Science of Unassimilable Peoples*, 61 SMU L. REV. 7 (2008).

204. See Raul S. Casarez, *This Land Is (Not) Your Land: Race and Ascribed Americanness in the Formation of Attitudes About Immigrants*, SOCIO. Q., Dec. 1, 2020, at 1, 2 (citing Kristina B. Simonsen, *How the Host Nation’s Boundary Drawing Affects Immigrants’ Belonging*, 42 J. ETHNIC & MIGRATION STUD. 1153, 1158 (2016)).

foreignness discrimination involves the harm of being excluded from a sense of national belonging.<sup>205</sup>

The Atlanta Massacre provides an example of this exclusion from Americanness and, potentially, the sense of national belonging. The Asian and Asian American women at the Atlanta spas were hypersexualized and made hypervulnerable due to a combination of characteristics. These characteristics fell within the intersection of race, gender, class, and immigration status; that is, intersectionality may be interwoven into the harms of decitizenizing them. These characteristics may lead to exclusionary limitations on employment opportunities and economic access that restrict Asian women to specific avenues of businesses and occupations that group Asians together, creating an easy target for mistreatment by others. Indeed, the creation of Chinatowns was historically the outgrowth and result of hostility faced by Chinese Americans. The prevalence of a stereotypic Asian business, like an Asian spa, is reinforced by the political, social, and cultural expectations placed upon Asians and Asian Americans, who consequently may find themselves tracked cyclically into predetermined professional opportunities.

In short, those who must live with the consequences of a legal structure of exclusion may feel compelled to adapt to the realities of the exclusion. In the instance of Asian and APA women in the United States, part of that attempt to capitalize on the exclusion may be to exploit and commodify stereotypes. Capitalizing upon stereotypes and preexisting prejudices may, in some instances, serve as a gateway for inclusion within an ecosystem of exclusion.

The decitizenizing of Asian and APA women in the U.S. may, in part, help to illuminate why some may believe they must abide by the stereotypes that play into their exclusion to make their presence less threatening and more palatable. The high number of Asian spas within a specific geographic region in the Atlanta suburbs and, subsequently, easily targeted in the

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205. See Chang, *supra* note 2, at 1299 (“As an immigrant, I entered this country in the historical context which I have set forth. To an extent, I inherited that legacy of discrimination. I am bound by the still-present stereotype of Asian Americans as ‘aliens,’ those who do not belong here and whose presence here is not desired.”); DAVID G. GUTIÉRREZ, WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY 7–8 (1995); NGAI, *supra* note 35; Saito, *supra* note 177, at 281–84, 306–11. See generally Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689 (2000).

Atlanta Massacre, is noteworthy. The birth of Chinatowns in the U.S. at the turn of the century was not a geographic coincidence but rather the result of geographic ostracism that stemmed from other forms of exclusion.<sup>206</sup> Thus, Asian spas similarly clustered in Atlanta suburbs may be the result of a process of decitizenizing Asian and APA women rather than a geographic coincidence. Through sex- and race-based immigration exclusion, the women who died in Atlanta should be understood as not only victims of a single gunman but also victims of the longstanding consequences of an official policy of discrimination against Asian and APA women.

### CONCLUSION

According to the 2019 U.S. Census statistics, AAPI women were comprised of 11.9 million Asian women and 803,000 Native Hawaiian or other Pacific Islander women.<sup>207</sup> Together, AAPI women represent almost 3.9 percent of the U.S. population and approximately 7.62 percent of the total population of women in the United States.<sup>208</sup> Black women form 12.9 percent of the total population of women in the United States, while Hispanic or Latina women form 18 percent of the total population of women in the United States.<sup>209</sup> Government data from 2020 also show significant growth in Asian populations.<sup>210</sup> Given that Asian Americans are easy to physically identify and are now among the highest-growth population for recent immigrants, the dynamics of exclusion remain acute for this group. The legal structure of exclusion means that Asians became the group least likely to be

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206. See, e.g., Mary Szto, *From Exclusion to Exclusivity: Chinese American Property Ownership and Discrimination in Historical Perspective*, 25 J. TRANSNAT'L L. & POL'Y 33, 66–74 (2016); Saito, *supra* note 177, at 281–82 (“Yet Chinese citizens in the United States found themselves segregated in both their private and public lives. Often they were only allowed to live in isolated ‘Chinatowns.’ They were lynched and run out of towns.”).

207. *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States: April 1, 2010 to July 1, 2019*, U.S. CENSUS BUREAU, <https://www2.census.gov/programs-surveys/popest/tables/2010-2019/national/asrh/nc-est2019-asr5h.xlsx> [<https://perma.cc/82FB-MR8G>].

208. See *id.*

209. See *id.*

210. Sabrina Tavernise & Robert Gebeloff, *A Rise in Hispanic and Asian Population Fuels U.S. Growth*, N.Y. TIMES (Aug. 12, 2021), <https://www.nytimes.com/live/2021/08/12/us/census-results-data#demographics-asian-hispanic> [<https://perma.cc/C2B7-YB2C>].



able to form a critical mass within the U.S. population.<sup>211</sup> Had there not been an artificial depression in immigration from Asian exclusion laws, the number of Asians in the United States would be far higher.<sup>212</sup>

In other words, for almost a century, Asians faced an artificially constructed barrier to immigration to the United States. Chinese exclusion laws, national origin quotas, and other laws blocked Asian access to durable status, including U.S. citizenship, until 1965. It was not until the amendments to the Immigration and Nationality Act of 1965, a part of the historic legislation passed in the wake of the civil rights movement of the 1960s, that the overtly racialized immigration laws were repealed.

Anti-Chinese sentiment is often conflated with, or used as a proxy for, broader anti-Asian sentiment. That is, historically and today, anti-Chinese stereotypes and policies have the effect of creating more expansive anti-Asian attitudes and prejudices. The hypersexualization of Chinese women embedded within the Page Act of 1875, for instance, is then projected onto and synonymized with APA women generally.

Civil rights laws in the United States do not account for many of the types of discrimination harms that the women victims in Atlanta seemed to suffer. For these victims, those harms were rooted in the fact that the murderer associated sexual immorality with the population of innocent Asian and APA women. The women, targeted by their murderer by their race and gender, were involuntarily defined by the stigma of hypersexualization, which can be traced not only to cultural stereotypes but also the historical stigma embedded within U.S. immigration law.

Antidiscrimination law currently includes only one statute that specifically defines immigration-related foreignness

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211. See Chin, *supra* note 57, at 42–44 (noting that limited Asian American populations in the United States has led to less effective representation, mandatory congregations in particular occupations and geographic areas, and difficulty developing Asian American literature); PFAELZER, *supra* note 67, at 10 (“The low number of Chinese women probably made the Chinese communities in America particularly vulnerable to persecution. Chinese women would have foretold family, civilization, and permanence, and their very presence would have stood as a barrier to the idea that the Chinese had come to the United States as ‘sojourners’—temporary and enduringly foreign.”).

212. See, e.g., Chin, *supra* note 57, at 40 (“No one knows what the Asian-American population would be today if Asians had been allowed to immigrate on the same basis as members of other racial groups.”).

discrimination as a legally cognizable harm.<sup>213</sup> The antidiscrimination provision of the Immigration and Nationality Act, section 1324b, recognizes that a perception of foreignness can lead to employment-based discrimination.<sup>214</sup> However, this statute is limited in scope, as it only applies to immigration-related employment discrimination.<sup>215</sup> Further, other antidiscrimination laws, such as the Civil Rights Act of 1964, do not extend to intersectionality theories.

Overall, there is limited legal recourse to protect against many types of discrimination and decitizenizing harms suffered by Asian and APA women in the United States. To address this, at the very least, antidiscrimination law should be expanded to encompass the concept of foreignness discrimination. Additionally, decitizenizing processes should be contextualized within broader lines of inquiry: pretextual national security justifications for targeting Asian and APA communities historically; relationships between race and citizenship, and immigration exclusion; and intersectionality theories of discrimination. By starting with the Page Act of 1875 as a frame for analyzing the Atlanta Massacre, one can better understand why Asian and APA women in the United States may fall outside the social, cultural, and political bounds of those who may secure the privileges of full citizenship.

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213. 8 U.S.C. § 1324b (2018).

214. *Id.*

215. *Id.*