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# Distilling Americans: The Legacy of Prohibition on U.S. Immigration Law

Jayesh Rathod



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# ARTICLE

## DISTILLING AMERICANS: THE LEGACY OF PROHIBITION ON U.S. IMMIGRATION LAW

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### ABSTRACT

Since the early twentieth century, federal immigration law has targeted noncitizens believed to engage in excessive alcohol consumption by prohibiting their entry or limiting their ability to obtain citizenship and other benefits. The first specific mention of alcohol-related behavior appeared in the Immigration Act of 1917, which called for the exclusion of “persons with chronic alcoholism” seeking to enter the United States. Several decades later, the Immigration and Nationality Act of 1952 specified that any noncitizen who “is or was . . . a habitual drunkard” was per se lacking in good moral character, and hence ineligible for naturalization. Although the “chronic alcoholism” provision was eventually removed from the grounds of exclusion, the habitual drunkard clause remains part of the statute, vexing both scholars and practitioners, and casting a shadow over many different forms of relief.

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This Article uncovers the complex history of the habitual drunkard clause and similar alcohol-related norms in U.S. immigration law. In so doing, the Article explores a more transcendent question: How do we explain the preoccupation with noncitizen drunkenness in U.S. immigration law and in the immigration system at large? To guide both inquiries, the Article describes changing perceptions of alcohol use in U.S. history, from colonial times, to the Prohibition Era, to the present. To accompany this historical overview, the Article describes the legal regulation of drunkenness and alcohol-related behavior, uncovering its muddled normative foundations. The Article argues that different iterations of alcohol-related regulation since the nation's founding—including, most notably, the Prohibition Era—have operated as forms of social, economic, or political control over noncitizens. Indeed, a complex set of factors has fueled these laws, including entrenched fears and stereotypes about immigrants, the desire to advance particular values and a vision of society, race- and class-based animus, and the simple preservation of power. These subterranean concerns continue to nourish narratives about immigrant alcohol use and its resulting ills—narratives that have captured the public consciousness but are often untethered from empirical reality.

Having detailed the history and complexity of alcohol-related norms in U.S. immigration law, the Article examines the present-day utility of the habitual drunkard clause, a provision that has endured for more than six decades. The Article urges the elimination of the clause in light of contemporary understandings of alcohol use and complementary provisions in immigration law that screen for alcohol dependence and related conduct. This legislative fix, while important, is an initial step in curbing the broader legacy of Prohibition, which persists today in the exercise of discretion in immigration enforcement, adjudication in immigration courts, and in recurring legislative proposals targeting immigrant alcohol use.

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## I. INTRODUCTION

Since the early twentieth century, federal immigration law has included provisions targeted at noncitizens believed to engage in excessive alcohol consumption. The first specific mention of alcohol-related behavior appeared in the Immigration Act of 1917, which called for the exclusion of “persons with chronic alcoholism” who sought to enter the United States.<sup>1</sup> Several decades later, when Congress enacted the Immigration

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1. Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, *repealed by* Immigration and Nationality Act (INA), Pub. L. No. 82-414, § 403(a)(13), 66 Stat. 163, 279 (1952).

and Nationality Act (INA) in 1952, it specified categories of noncitizens who, due to past behaviors or attributes, were per se lacking in good moral character and hence ineligible for naturalization.<sup>2</sup> Included on this list was any noncitizen who “is or was . . . a habitual drunkard.”<sup>3</sup> Although the “chronic alcoholism” language eventually was excised from the INA, the habitual drunkard clause remains part of the statute to this day and surfaces in different adjudicative processes.<sup>4</sup> Indeed, in recent decades, “good moral character” has become a requirement for several newly created forms of immigration relief, thereby expanding the significance of the habitual drunkard clause.<sup>5</sup> Despite its ubiquity in immigration law, the clause has vexed scholars and practitioners, who have struggled to make sense of a provision with few known contours.<sup>6</sup>

This Article uncovers the complex history of the habitual drunkard clause and similar alcohol-related norms in U.S. immigration law which can be traced to the years leading up to the Prohibition Era. In so doing, the Article explores a larger, more transcendent question: How do we explain the preoccupation with noncitizen drunkenness in U.S. immigration law and in the immigration system at large? Immigrants can, of course, engage in a wide range of misconduct, but alcohol use triggers particular concern and is uniquely resonant in the collective consciousness. For this reason, alcohol offenses by immigrants—especially acts of driving under the influence

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2. INA § 101(f) (codified as amended at 8 U.S.C. § 1101(f) (2012)).

3. *Id.* § 101(f)(1) (codified as amended at 8 U.S.C. § 1101(f)(1)).

4. *Id.* The habitual drunkard clause is potentially relevant in any proceeding where the adjudicator must assess the “good moral character” of the applicant. Traditionally, the good moral character requirement was most salient in the naturalization context. See generally Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1584–93 (2012). Good moral character is also a requirement for Cancellation of Removal for Certain Nonpermanent Residents, a form of relief available to some persons in removal proceedings. See Act of Sept. 30, 1996, Pub. L. No. 104-208, § 240A(b)(1)(B), 110 Stat. 3009, 3594 (codified as amended at 8 U.S.C. § 1229b(b)(1)(B)); see also *Application for Cancellation of Removal . . . for Certain Nonpermanent Residents Form EOIR-42B 6*, U.S. DEP’T OF JUST., EXEC. OFFICE FOR IMMIGR. REV., <http://www.justice.gov/eoir/eoirforms/eoir42b.pdf> (last visited Feb. 6, 2014) [hereinafter *Application for Cancellation of Removal*] (asking applicants to respond to a question about habitual drunkenness).

5. See, e.g., 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb) (requiring that VAWA self-petitioners be persons of good moral character); Nicaraguan and Central American Relief Act (NACARA), Pub. L. No. 105-100, § 203(f)(1)(A)(iv), 111 Stat. 2160, 2198 (1997) (requiring good moral character for NACARA eligibility); 8 C.F.R. § 1240.65(b)(2) (2013).

6. See, e.g., Lapp, *supra* note 4, at 1589–90 (commenting on the vagueness of standards in U.S. immigration law relating to good moral character, including habitual drunkenness); L.S. Tao, *Criminal Drunkenness and the Law*, 54 IOWA L. REV. 1059, 1075 (1969) (discussing the difficulty in defining the vague term “habitual drunkenness”).

(DUI)—are positioned by some as a significant threat to society.<sup>7</sup> Moreover, the “drunken immigrant” narrative has seeped from the text of the INA into other legal spheres, including immigration agencies, courts, and even the halls of Congress, where legislators have issued harsh tirades about alcohol-related crimes.<sup>8</sup>

To guide the inquiry into these norms and associations, the Article first describes changing perceptions of alcohol use in U.S. history, from colonial times to the present. The Article then follows the same historical arc, charting the legal regulation of drunkenness and alcohol-related behavior, with a particular focus on the Prohibition Era. The late nineteenth and early twentieth centuries were especially notable for noncitizens; immigrant communities became closely associated with alcohol consumption, due to a combination of cultural practices, involvement in alcohol-related businesses and industries, and characterizations in the press and in society at large. Ultimately, the United States witnessed the passage of the Eighteenth Amendment and experienced thirteen years of Prohibition,<sup>9</sup> further entrenching anti-drinking and anti-immigrant norms.

Over the decades, diverse reasons have been advanced to justify different laws and regulations relating to alcohol and drunkenness—everything from promoting public safety, to rehabilitating offenders, to protecting wives from inebriated husbands.<sup>10</sup> The mix of motives invites questions about the specific normative foundations underlying alcohol-related provisions in *immigration* law, including the “chronic alcoholism” language of the 1917 Act and the habitual drunkard clause.

Given the malleable policy rationales, the Article looks beyond the surface, arguing that different iterations of alcohol-related regulation since the nation’s founding—including, of course, the Prohibition Era—have operated as forms of social,

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7. See, e.g., *Drunk and Dangerous: DUI Illegals Behind the Wheel*, WORLD NET DAILY (June 1, 2007), <http://www.wnd.com/2007/06/41869/> [hereinafter *Drunk and Dangerous*] (profiling noncitizens involved in drunk driving incidents, under the subheading “Aliens under the influence of alcohol turning U.S. citizens into roadkill”).

8. See, e.g., 108 CONG. REC. 18,426, 18,429–31 (2003) (statement of Rep. Tom Tancredo) [hereinafter Tancredo Statement] (describing “people who have been victimized by violent crime,” including murder and rape, and interspersing the story of Tricia Taylor of Detroit, who was severely injured when Jose Carcamo, an undocumented immigrant, crashed into her while intoxicated). See *infra* Part V.A for a discussion of how these concerns affect the work of immigration enforcement agencies and the immigration courts.

9. U.S. CONST. amend. XVIII, *repealed* by U.S. CONST. amend. XXI; MARK EDWARD LENDER & JAMES KIRBY MARTIN, *DRINKING IN AMERICA: A HISTORY* 129, 131 (1982).

10. See *infra* Part II.B.

economic, or political control over noncitizens. Indeed, a complex set of factors has fueled these laws including entrenched fears and stereotypes about immigrants, the desire to advance particular values and a vision of society, race- and class-based animus, and the simple preservation of power.<sup>11</sup> These subterranean concerns continue to nourish narratives about immigrant alcohol use—narratives that have captured the public consciousness but are often untethered from empirical reality.

Having detailed the history and complexity of alcohol-related norms in U.S. immigration law, the Article examines the utility of the habitual drunkard clause, one of the most enduring provisions. The Article urges the elimination of the clause, in light of both contemporary understandings of alcohol use and existing provisions in immigration law that screen for alcohol dependence and related conduct in a more nuanced way. While this legislative fix would be an important first step, it will not curb the broader legacy of Prohibition, which remains visible in the day-to-day work of immigration officials, judges, and lawmakers.

Consistent with the frame described above, I open the Article with a brief history of changing perceptions of alcohol use in the United States and of laws designed to regulate alcohol production and consumption—including, of course, the Eighteenth Amendment and the Volstead Act, which jointly ushered in the Prohibition Era.<sup>12</sup> In Part II, I also highlight how Native Americans, slaves, and eventually immigrants were positioned vis-à-vis alcohol consumption, fueling narratives relating to civil unrest, reduced economic productivity, and other societal ills. In Part III, I explore how legal norms relating to drunkenness, buoyed by stereotypes about immigrants, gave shape to immigration law provisions regarding alcohol. In this Part, I describe the public and legislative debates relating to these enactments, including the “chronic alcoholism” language from 1917, the habitual drunkard clause of the 1952 Act, and other congressional proposals from the first half of the twentieth century. In Part IV, I question the present-day utility of the most enduring provision, the habitual drunkard clause, by examining the history and purpose of the clause, subsequent developments in U.S. immigration law, and present-day understandings about

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11. See Genevieve M. Ames, *American Beliefs About Alcoholism: Historical Perspectives on the Medical-Moral Controversy*, in *THE AMERICAN EXPERIENCE WITH ALCOHOL: CONTRASTING CULTURAL PERSPECTIVES* 23, 29–31 (Linda A. Bennett & Genevieve M. Ames eds., 1985).

12. U.S. CONST. amend. XVIII (repealed 1933); National Prohibition Act (also known as the Volstead Act), Pub. L. No. 66-66, 41 Stat. 305 (1919).

alcohol use. Finally, in Part V, I suggest that the legacy of Prohibition on immigration law extends far beyond explicit textual references and can be seen in the exercise of immigration enforcement authority, adjudication in immigration proceedings, and in recurring legislative proposals targeting immigrant alcohol use.

## II. EVOLVING PERCEPTIONS OF ALCOHOL USE AND GOVERNMENT REGULATION OF ALCOHOL-RELATED BEHAVIOR

The immigration law provisions that are the focus of this Article reflect specific historical and political moments, but they also form part of a lengthy history of alcohol-related regulation on the North American continent. The nature and scope of this regulation has varied over the decades and reached its apex during the Prohibition Era in the United States from 1920 to 1933.<sup>13</sup> These laws and regulations, which have waxed and waned over the years, have been guided by evolving societal perceptions and scientific understandings of alcohol use.<sup>14</sup> Relevant to this inquiry, unique views about the consumption of alcohol by Native Americans, slaves, and immigrants have also given life to legislative enactments.<sup>15</sup> Any analysis of the alcohol-related provisions in U.S. immigration law must countenance the specific ways in which immigrants and other minorities have been positioned vis-à-vis alcohol use and abuse and consider the race and class dynamics that may have fueled the enactment of the provisions.

In the Subparts that follow, I first chart the evolving societal perceptions of alcohol use in the United States from colonial times to the present. Next, I offer a brief parallel history of the regulation of alcohol consumption and drunkenness at both the state and federal levels. Finally, I present a third layer of legal-historical analysis highlighting alcohol-related regulations targeted at immigrants and other minority groups. For this tertiary analysis, I also expose the troublesome normative foundations undergirding those regulations.

### A. *Evolving Perceptions of Alcohol Use in the United States*

Attitudes towards alcohol use have shifted considerably from colonial times to the present. Although the prevailing view today

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13. Tao, *supra* note 6, at 1063.

14. See Sana Loue, *The Criminalization of the Addictions: Toward a Unified Approach*, 24 J. LEGAL MED. 281, 292–93 (2003) (describing the changing views of alcohol use based on the scientific understanding of the time).

15. See *infra* Part II.C.1; Part II.C.2.



is that alcoholism is a disease—for which total abstinence is the best remedy<sup>16</sup>—earlier generations of Americans held a radically different view.<sup>17</sup> During the seventeenth and eighteenth centuries, the consumption of alcohol was seen a choice and not something beyond an individual's control.<sup>18</sup> As sociologist Harry Gene Levine has written, “colonial Americans did not use a vocabulary of compulsion with regard to alcoholic beverages.”<sup>19</sup> In fact, given concerns about the cleanliness of water, many colonists saw alcohol as the safer beverage choice.<sup>20</sup> For these reasons, alcohol was a prominent feature at most social events including funerals, holidays, community meetings, and even at polling places;<sup>21</sup> additionally, alcohol was used as a cure for a range of medical ailments.<sup>22</sup> While alcohol consumption did not encounter broad public opprobrium, some prominent religious and political figures of that time, including Increase Mather, and later, John Adams and Benjamin Franklin, did warn of its vices.<sup>23</sup>

By the late eighteenth and early nineteenth century, Americans began to understand alcohol as an addictive substance.<sup>24</sup> Dr. Benjamin Rush, one of the leading thinkers on the topic at that time, wrote of how spirits gradually led to an

16. See Harry Gene Levine, *The Discovery of Addiction: Changing Conceptions of Habitual Drunkenness in America*, 39 J. STUDIES ON ALCOHOL 143, 143–44 (1978) (discussing the rediscovery of alcoholism as a disease and abstinence as a treatment method).

17. *Id.* at 144.

18. *Id.*

19. *Id.*

20. LENDER & MARTIN, *supra* note 9, at 2.

21. KAREN BLUMENTHAL, *BOOTLEG: MURDER, MOONSHINE, AND THE LAWLESS YEARS OF PROHIBITION* 14 (2011).

22. Levine, *supra* note 16, at 145. As Lender and Martin write, at the time many believed that “[a] stiff drink warmed a person on cold nights and kept off chills and fevers; a few glasses made hard work easier to bear, aided digestion, and in general helped sustain the constitution.” LENDER & MARTIN, *supra* note 9, at 2.

23. Increase Mather, a Puritan minister and political figure from Massachusetts, wrote and published a sermon, entitled *Wo to Drunkards*. In that sermon, Mather warned,

When Drunkards are in their Cups, they care not what they say, nor of whom: They will Lie, Swear, Revile, Scoff, Blaspheme, so as some of them, when in a sober mood, would be loath to do. . . . [W]hen wine or strong drink hath raised their spirits, they will fall to babbling, and quarrelling, they know not about what, and words will bring on blows, and these will make wounds when there is no just cause for it.

INCREASE MATHER, *WO TO DRUNKARDS: TWO SERMONS TESTIFYING AGAINST THE SIN OF DRUNKENNESS* 13 (1673). Later in the colonial era, both John Adams and Benjamin Franklin expressed concern about drunkenness. Levine, *supra* note 16, at 146.

24. *Id.* at 144.

uncontrollable addiction.<sup>25</sup> Dr. Rush and some of his contemporaries recommended abstinence as the best way to avoid the perils of alcohol.<sup>26</sup> In addition to the health concerns relating to alcohol, leaders at the time also linked alcohol consumption with diminished labor productivity.<sup>27</sup> In the midst of these changing views and various concerns, a temperance movement gradually grew in strength in the United States.<sup>28</sup> In 1874, the Woman's Christian Temperance Union (WCTU) was founded in Cleveland, Ohio.<sup>29</sup> In the decades to follow, the WCTU would have a significant impact on public debates relating to alcohol and drinking.<sup>30</sup> In 1893, Howard Russell founded the Anti-Saloon League (ASL), which would likewise emerge as a prominent national temperance organization.<sup>31</sup>

Notably, most leaders in the temperance movement initially laid blame with the *alcohol* itself and not the individual psychological or physiological attributes that might orient a person towards addictive behavior.<sup>32</sup> Increased consumption was

25. See generally BENJAMIN RUSH, AN INQUIRY INTO THE EFFECTS OF SPIRITUOUS LIQUORS ON THE HUMAN BODY 3–5 (1790). Rush tried to dispel commonly held views about alcohol, insisting that “[t]here cannot be a greater error [sic] than to suppose that spirituous liquors lessen the effects of cold upon the body. On the contrary I maintain they always render the body more liable to be affected and injured by cold.” *Id.* at 5; see also BLUMENTHAL, *supra* note 21, at 14 (describing how Rush “published a famous pamphlet in 1784 warning of serious troubles that hard liquor caused drinkers”).

26. RUSH, *supra* note 25, at 11 (“If the facts that have been stated, should produce in any of my readers who have suffered from the use of spirituous liquors, a resolution to abstain from them hereafter, I must beg leave to inform them that they must leave them off *suddenly* and *entirely*. No man was ever *gradually* reformed from drinking spirits.”); Michael deHaven Newsom, *Some Kind of Religious Freedom: National Prohibition and the Volstead Act's Exemption for the Religious Use of Wine*, 70 BROOK. L. REV. 739, 766 (commenting on the views of 19th century thinkers on abstinence from drinking distilled liquors).

27. EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA 24 (2011).

28. BLUMENTHAL, *supra* note 21, at 19. Temperance narratives also began to filter into popular culture and American literature. Walt Whitman penned a novel about the effects of alcohol addiction, and the novel *Ten Nights in a Bar Room* by T.S. Arthur enjoyed huge popularity as a written work and as a temperance play. *Id.* at 20.

29. LENDER & MARTIN, *supra* note 9, at 91–92.

30. *Id.*; Erin M. Masson, *The Women's Christian Temperance Union 1874–1898: Combatting Domestic Violence*, 3 WM. & MARY J. WOMEN & L. 163, 163, 183–84 (1997).

31. BLUMENTHAL, *supra* note 21, at 43; Sidney J. Spaeth, *The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CALIF. L. REV. 161, 170 (1991).

32. See Levine, *supra* note 16, at 145 (describing nineteenth century thought that the source of addiction was in the alcohol, not the person). Some writers of the time explicitly referred to drunkenness as a “physical” disease. For example, Samuel B. Woodward wrote that the “appetite” for alcohol “is wholly physical, depending on a condition of the stomach and nervous system, which transcends all ordinary motives of abstinence.” *Id.* at 155 (quoting SAMUEL B. WOODWARD, ESSAYS ON ASYLUMS FOR INEBRIATES 2 (1838)).

seen as allowing alcohol to strengthen its hold on an individual victim; for this reason, particular attention was paid to casual drinkers who were susceptible to falling deeper into the vice.<sup>33</sup> Casual drinkers were indeed commonplace in the early nineteenth century—by one estimate, each American drank, on average, nine gallons of hard liquor each year.<sup>34</sup>

In the nineteenth century, views about alcoholics began to change with more blame placed on the individuals themselves. Puritans, for example, perceived drunkards as “weak, self-indulgent, [and] profoundly flawed individuals.”<sup>35</sup> Towards the end of the nineteenth century, the goals of temperance advocates also began to shift as the movement turned its focus to outright Prohibition.<sup>36</sup> The change was driven, in part, by the broader society ills occasioned by alcohol including “[l]iquor’s role in industrial and train accidents; its effect on business and worker efficiency; its cost to workers and their families; the power and wealth of the ‘liquor trust’; and especially the role of the saloon as a breeding place for crime, immorality, labor unrest and corrupt politics.”<sup>37</sup> Consequently, an alcohol addict “came to be viewed less and less as a victim, and more and more as simply a pest and menace.”<sup>38</sup> These views held strong in the lead up to Prohibition and were propagated by “dry” advocates during the Prohibition years of 1920–1933.<sup>39</sup>

In the 1930s and 1940s, as the nation emerged from the era of Prohibition, views on alcohol consumption were decidedly mixed.<sup>40</sup> Despite the repeal of the Eighteenth Amendment, the temperance movement had permanently altered the habits of many Americans.<sup>41</sup> The 1940s also marked a period of “[a]mbivalence and indifference toward alcohol-related problems,” given the preoccupation with World War II and economic challenges in the country.<sup>42</sup> Fortunately, Alcoholics Anonymous had emerged in the late 1930s and provided support

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33. Levine, *supra* note 16, at 159.

34. BLUMENTHAL, *supra* note 21, at 18.

35. BEHR, *supra* note 27, at 26.

36. *Id.* at 48; Levine, *supra* note 16, at 161.

37. Levine, *supra* note 16, at 161.

38. *Id.*

39. *Id.*

40. See LENDER & MARTIN, *supra* note 9, at 177 (describing drinking habits of Americans after Prohibition).

41. *Id.* (“[T]here are many indications that after repeal great numbers of citizens, actuated by temperance convictions, religious beliefs, or other reasons, never went back to the bottle.... An estimated 25 to 30 percent of the adult population... remained abstainers... according to post-repeal consumption data.”).

42. *Id.* at 181.

to those struggling with addiction.<sup>43</sup> At the same time, alcoholism came to be understood in more scientific terms as a disease. Instead of simply vilifying the substance, scholars took the view that unknown attributes in an individual made him or her more likely to become addicted to alcohol.<sup>44</sup>

In the 1940s and 1950s, alcoholism began to be squarely considered a disease.<sup>45</sup> The Yale Center of Alcohol Studies and one of its affiliates, E.M. Jellinek, are credited with advancing this modern conception of alcoholism as a disease.<sup>46</sup> As the conception took hold and society began to understand alcoholism as a physical or psychological disorder, attitudes towards alcoholics began to soften; still, some controversy existed about the best way to treat alcohol addiction.<sup>47</sup> In 1956, the American Medical Association officially stated that “alcoholism must be regarded as within the purview of medical practice.”<sup>48</sup>

In the 1960s and beyond, mixed views about alcohol have been the norm.<sup>49</sup> The disease conception of alcohol dominates the scientific understanding of alcoholism and has gained substantial acceptance in society at large.<sup>50</sup> A majority of Americans report that they consume alcohol although the exact percentage has fluctuated in recent decades.<sup>51</sup> Social, health, and religious considerations continue to inform drinking choices, and some advocacy groups remain strong—particularly those that focus on underage drinking and drunk driving.<sup>52</sup>

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43. *Id.* at 182–83.

44. Levine, *supra* note 16, at 162.

45. LENDER & MARTIN, *supra* note 9, at 187.

46. See *id.* at 186–87; Joseph W. Schneider, *Deviant Drinking as Disease: Alcoholism as a Social Accomplishment*, in DRUGS, ALCOHOL, AND SOCIAL PROBLEMS 26 (James D. Orcutt & David R. Rudy eds., 2003) (describing how Jellinek conducted a study in collaboration with Alcoholics Anonymous and published findings describing a five-phase progression of the disease).

47. Tao, *supra* note 6, at 1063–64.

48. *Report of American Medical Association Comm. on Legislation*, 162 JAMA 749, 759 (1956).

49. See LENDER & MARTIN, *supra* note 9, at 180–81 (reviewing Americans’ perception of alcohol use, post-Volstead).

50. Tao, *supra* note 6, at 1064.

51. Will Morton, *Two-Thirds of Americans Drink, but Tastes Vary by Region*, USA TODAY (Nov. 17, 2011), <http://usatoday30.usatoday.com/news/health/story/health/story/2011-11-16/US-drinking-up-but-tastes-norms-vary-from-state-to-state/51248776/1> (reporting Gallup survey data that 64% of Americans in 2011 said they drank, as compared to 67% in 2010 and 71% in the late 1970s).

52. See LENDER & MARTIN, *supra* note 9, at 170–71, 178–79 (reviewing factors that influence alcohol choice, including religion, gender, and social considerations). Mothers Against Drunk Driving (MADD) is one of the most prominent organizations working on these issues. Wendy J. Hamilton, *Mothers Against Drunk Driving—MADD in the USA*, 6 INJ. PREVENTION 90, 90–91 (2000) (“[F]ew [organizations] are as widely recognized,

*B. Government Regulation of Alcohol Use and "Drunkenness"*

Broadly writ, government regulation of alcohol has addressed matters including manufacturing, importation, advertising, sale, consumption, and more.<sup>53</sup> Coverage of all forms of alcohol regulation is beyond the scope of this Article; rather, my primary focus in this Subpart is on how the law has treated individual inebriety—both stand-alone incidents of drunkenness and more chronic conditions. Just as societal views about alcohol use evolved over time, so too has the regulation of alcohol consumption and drunkenness by federal and state authorities in the United States. One defining feature of these laws, throughout U.S. history, has been the consistent use of vague terms and standards. Over the years, state and federal courts have assigned a broad range of definitions to the terms "drunk," "drunkard," "drunkenness," "intoxicated," and "under the influence."<sup>54</sup>

Colonial America followed in the footsteps of the English legal system, which had sought to curb the effects of drunkenness as early as 1606.<sup>55</sup> The colonies criminalized drunkenness, imposing penalties such as jail time, fines, time in the stocks, and even corporal punishment.<sup>56</sup> Many of these enactments were not structured to simply penalize the drunkenness itself but also to mitigate the harm to others that might flow from the offender's inebriety.<sup>57</sup> For this reason, colonial authorities kept

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powerful, and enduring as Mothers Against Drunk Driving (MADD). . . . MADD has changed the public's attitude about drinking and driving . . .").

53. See Spaeth, *supra* note 31, at 191 (discussing an Oklahoma law that limits the advertisement of alcohol); Todd Zywicki & Asheesh Agarwal, *Wine, Commerce and the Constitution*, 1 N.Y.U. J.L. & LIBERTY 609, 618, 620–21 (2005) (describing various state and federal regulations of use, manufacture, and sale of liquor).

54. See, e.g., Mike Faulk, *One Too Many*, 43 TENN. B.J., May 2007, at 12, 13 (2007) (questioning the definition of "obviously intoxicated" under Tennessee law); Jerome Hall, *Drunkenness as a Criminal Offense*, 32 J. CRIM. L. & CRIMINOLOGY 297, 300 (1941) ("The laws themselves are extraordinarily ambiguous."); Tao, *supra* note 6, at 1071 ("The most troublesome question would perhaps seem to be the most simple of all, namely, the meaning of drunkenness."); Note, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660, 1665 (1981) (noting the breadth of "public intoxication" statutes in the United States). One of the earliest definitions in the common law came from Blackstone, who defined drunkenness as "artificial, voluntarily contracted madness . . . which, depriving men of their reason, puts them in a temporary phrenzy." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 25 (1769).

55. A 1606 English statute bemoaned that "the loathsom and odious sin of drunkenness is of late grown into common use within this real, being the root and foundation of many other enormous sins, as bloodshed, stabbing, murder, swearing, fornication, adultery, and such like." 4 JACOB'S CHANCERY REPORTS I, c. 5 (Eng. 1606). According to Blackstone, the statute allowed for two forms of punishment: a fine of five shillings or six hours in the stocks. 4 BLACKSTONE, *supra* note 54, at 64.

56. LENDER & MARTIN, *supra* note 9, at 17.

57. *Id.* at 18–19; Hall, *supra* note 54, at 297–98.

watch over behavior in taverns, and Massachusetts even forbade drinking in homes.<sup>58</sup>

Beginning the middle of the nineteenth century, some states addressed drunkenness by adopting prohibition laws, which broadly forbade the manufacturing, sale, and public consumption of alcohol.<sup>59</sup> And across the country, public intoxication (or “public drunkenness”) laws continued to proliferate. Echoing concerns that drove colonial-era regulations, these public drunkenness laws were influenced heavily by the concepts of vagrancy and criminal nuisance.<sup>60</sup> Indeed, the laws sometimes equated public intoxication with vagrancy by listing a “common drunkard” or “habitual drunkard” as a *per se* vagrant.<sup>61</sup> Other public drunkenness laws contemplated some kind of nuisance or disturbance to the community.<sup>62</sup>

The specific terms “common drunkard” and “habitual drunkard” had surfaced in most state statutes by the late nineteenth or early twentieth century.<sup>63</sup> The precise meaning of the term “habitual drunkard” varied from state to state and also depended on the underlying purpose of the statute.<sup>64</sup> Although some normative content could be discerned from the statutory context, commentators have criticized the vagueness of “habitual drunkard” and similar terms given that they were deployed in broadly divergent statutes.<sup>65</sup> For example, laws emerged to prohibit bars and other establishments from selling liquor to “habitual drunkards.”<sup>66</sup> Other laws required that persons deemed

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58. LENDER & MARTIN, *supra* note 9, at 16–17.

59. Loue, *supra* note 14, at 290–91.

60. Raymond T. Nimmer, *Public Drunkenness: Criminal Law Reform*, 4 VAL. U. L. REV. 85, 98–99 (1969); William C. Carriger, Comment, *The Law of Public Drunkenness*, 34 TENN. L. REV. 490, 491 (1967).

61. See, e.g., CONN. GEN. STAT. § 8644 (1949); LA. REV. STAT. ANN. § 14:107 note (2004) (Reporter’s Comment—1950); OKLA. STAT. ANN. tit. 37, § 8 (1949). A similar statute in California was struck down for being unconstitutionally vague. *In re Newbern*, 350 P.2d 116, 123–24 (1960).

62. See, e.g., *Moser v. Fulk*, 74 S.E.2d 729, 731–32 (N.C. 1953) (discussing the English common law’s treatment of public drunkenness).

63. Hall, *supra* note 54, at 302–03. These likely inspired analogs in England, where “habitual drunkenness” had emerged as a legal concept. See, e.g., A. Herbert Safford, *Habitual Drunkenness*, 30 LAW MAG. & L. REV. Q.J. JURISPRUDENCE 108, 108 (1871).

64. Hall, *supra* note 54, at 303.

65. See Tao, *supra* note 6, at 1073 (“The terms habitual drunkenness and common drunkenness cannot be sensibly distinguished. In short, the use of the terms is so confusing and varied that one does not know either the exact meaning ascribed to them or any rational distinctions between them.”); see also Hall, *supra* note 54, at 302–03 (describing the inconsistency between court interpretations of “habitual drunkard” depending on jurisdiction).

66. See, e.g., CONN. GEN. STAT. § 4293 (1949); IND. CODE ANN. § 7.1-5-10-14 (LexisNexis 1973); KY. REV. STAT. § 244.080(3) (West 1942).

to be "habitual drunkards" be committed to an institution for treatment.<sup>67</sup> These laws contemplated "a person who, as a result of drinking intoxicating liquor, [wa]s incapable of taking care of himself or his property."<sup>68</sup> The laws conceived of habitual drunkenness as a disease akin to insanity—a treatable ailment that required the state to intervene, offer care to the afflicted individual, and thereby protect others from harm.<sup>69</sup> Additionally, multiple statutes emerged to impose penalties upon a "common drunkard" or "habitual drunkard" who sought to carry out their professional duties, notwithstanding bouts with inebriety.<sup>70</sup>

"Habitual drunkenness" also entered family law statutes as a specific ground for divorce.<sup>71</sup> In interpreting these statutes, some state courts held that in order to be labeled a "habitual drunkard," a spouse must be unable to control his or her consumption of alcohol.<sup>72</sup> For example, in *Hereid v. Hereid*, the Minnesota Supreme Court interpreted the phrase to effectively mean "one who, by frequent, periodic indulgence in liquor to excess, has lost the power or desire to resist alcoholic opportunity with the result that intoxication becomes habitual rather than occasional."<sup>73</sup> Other state courts endorsed a definition with substantially similar elements.<sup>74</sup> Interestingly, courts in other

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67. See, e.g., R.I. GEN. LAWS ANN. § 23-1.10-12(a) (West 1956) ("A person may be committed to the custody of the department by the district court upon the [filing of a] petition . . . . The petition shall allege that the person is an alcoholic who habitually lacks self-control as to the use of alcoholic beverages. . . ."); VT. STAT. ANN. tit. 18, § 2902 (1959) ("If [the probate court] finds him to be an habitual drunkard . . . [it] shall order him committed to the care, custody, and control of some suitable person for [six months].").

68. Hall, *supra* note 54, at 303.

69. See, e.g., *Leavitt v. City of Morris*, 117 N.W. 393, 395 (Minn. 1908) ("The trend . . . of legislation is to treat habitual drunkenness as a disease of mind and body, analogous to insanity, and to put in motion the power of the state, as the guardian of all of its citizens, to save the inebriate . . . from the dire consequences of his pernicious habit."); see also Hall, *supra* note 54, at 303 (citing *Leavitt*, 117 N.W. at 395).

70. See Hall, *supra* note 54, at 299 (writing in 1941 that "[m]any states have statutes dealing with intoxication (usually 'habitual') by dentists, nurses, optometrists, pharmacists, lawyers, osteopaths, chiropractors, administrators, executors, guardians, barbers, jurors, architects, prison officers, and others; these provide for either temporary or permanent revocation of license, or discharge from employment"). Even as early as the late nineteenth century, judges expressed concern about the effects of drunkenness on professional work and commerce. See, e.g., *The Anna*, 47 F. 525, 526-27 (D.S.C. 1891) (determining seaworthiness of vessels based on whether the vessel master was a habitual drunkard).

71. See, e.g., KIRBY'S ARK. STAT. § 2672 (1904); FLA. STAT. § 1928.6 (1906); MASON'S MINN. STAT. § 8585.6 (1927).

72. See, e.g., *Garrett v. Garrett*, 96 N.E. 882 (Ill. 1911); *Hereid v. Hereid*, 297 N.W. 97 (Minn. 1941).

73. *Hereid*, 297 N.W. at 97, 98 ("What is essential [for determining whether an individual is a habitual drunkard under the statute] is the existence of a frequent, periodic manifestation of an uncontrolled appetite for alcoholics.").

74. See, e.g., *O'Kane v. O'Kane*, 147 S.W. 73, 74 (Ark. 1912) ("To be a habitual drunkard . . . [i]t is sufficient if [the person] has a fixed habit of frequently and

states simply required that the spouse have a habit of getting drunk and did not read lack of control into the statute.<sup>75</sup> In *Tarrant v. Tarrant*, for instance, a Missouri court held that a “habitual drunkard” need not be constantly drunk nor necessarily incapacitated from transacting his business.<sup>76</sup> “He may be an habitual drunkard and yet be sober during business hours.”<sup>77</sup>

These invocations of the terms “habitual drunkard” and “habitual drunkenness” reflect the broad, often inconsistent uses of the term in state laws. At a minimum, all of the references contemplated consumption of significant amounts of alcohol, with some regularity.<sup>78</sup> Beyond this obvious baseline, the laws imputed differing requirements and were driven by a range of motivations.<sup>79</sup> The ability to control one’s consumption, behavior, or both was not a requirement built into all divorce statutes, yet it seemed to be the core motivation behind civil commitment laws.<sup>80</sup> These varying definitions of “habitual drunkard” reflect the evolving—and arguably confused—view of

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repeatedly getting drunk when the opportunity presents itself, or has lost the will power to resist temptation in that respect.”); *Lecates v. Lecates*, 190 A. 294, 296 (Del. Super. Ct. 1937) (“‘Habitual drunkenness,’ as a statutory ground for divorce, means such fixed, irresistible custom of frequent indulgence in intoxicating liquor with consequent drunkenness as to evidence a confirmed habit and inability to control the appetite for intoxicants.”); *Kennedy v. Kennedy*, 134 So. 201, 204 (Fla. 1931) (providing “habitual intemperance” as a ground for divorce); *Garrett*, 96 N.E. at 885–86 (“‘Habitual drunkenness,’ as the phrase is used in our statutes, has been defined to be an irresistible habit of getting drunk . . . . [The evidence] does show conclusively, in our judgment, that [the wife] was not guilty of habitual drunkenness . . . .”).

75. See, e.g., *Lester v. Sampson*, 180 S.W. 419, 421 (Mo. Ct. App. 1915) (“We do not assent to the proposition that to be an habitual drunkard one must have lost the will power to control his appetite for intoxicants . . . . By its terminology, the words ‘habitual drunkard’ simply mean one whose getting drunk is a habit . . . .”); see also *Page v. Page*, 86 P. 582, 584 (Wash. 1906) (“One is a habitual drunkard, in the meaning of the divorce laws, who has a fixed habit of frequently getting drunk.”).

76. *Tarrant v. Tarrant*, 137 S.W. 56, 57 (Mo. Ct. App. 1911).

77. *Id.* Missouri courts adopted a similar definition of “habitual drunkard” when interpreting its criminal laws. See *Lester*, 180 S.W. at 421.

78. *O’Kane*, 147 S.W. at 74; *Lecates*, 190 A. at 296; *Kennedy*, 134 So. at 204; *Garrett*, 96 N.E. at 885; *Hereid*, 297 N.W. at 98; *Lester*, 180 S.W. at 421; *Tarrant*, 137 S.W. at 57; *Page*, 86 P. at 584.

79. Compare *Lecates*, 190 A. at 296 (noting that it is “difficult to formulate any statement which, in every case, will dictate clearly what is deemed to be habitual drunkenness,” and imputing a requirement that the evidence used to prove habitual drunkenness comes from a source other than the friends or family of the complainant), with *Garrett*, 96 N.E. at 885–86 (requiring merely that the individual “formed [a] habit and inability to control the appetite” for intoxicating liquors and discussing balancing the behaviors of the parties and the degree of extreme and repeated cruelty in assessing the right to a divorce).

80. Joseph M. Livermore, Carl P. Malmquist & Paul E. Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 78–79 (1968) (noting that a common factor in civil commitment laws is aberrance, which includes inebriety).



alcohol use in the late nineteenth and early twentieth centuries.<sup>81</sup>

Of course, government regulation of alcohol use reached an apex during the Prohibition Era, which lasted from 1920 to 1933.<sup>82</sup> The temperance movements spoke of the grave social ills that flowed from alcohol consumption including harm to the family, decreased economic productivity, and increased crime.<sup>83</sup> As noted above, the years leading up to national Prohibition saw the enactment of similar laws at the local and state level, which paved the way for the passage of the Eighteenth Amendment.<sup>84</sup>

Although Prohibition was repealed with the passage of the Twenty-first Amendment, anti-drinking norms remained entrenched in society.<sup>85</sup> The criminal drunkenness statutes that had long been on the books gained renewed importance.<sup>86</sup> Yet as views on the nature of alcohol addiction evolved, some courts adopted a more forgiving posture. In *Driver v. Hinnant*, the U.S. Court of Appeals for the Fourth Circuit reversed a district court decision that had upheld the public intoxication conviction of a chronic alcoholic.<sup>87</sup> Referencing the growing acceptance of the disease concept of alcoholism, the court observed that “the State cannot stamp an unpretending chronic alcoholic as a criminal if his drunken public display is involuntary as the result of a disease.”<sup>88</sup> Similarly, in *Easter v. District of Columbia*, a federal appeals court reversed the high court of the District of Columbia, holding that chronic alcoholism is, in fact, a defense to public

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81. Carriger, *supra* note 60, at 491 (“The specific purpose of present day public drunkenness law is not clear. To punish a sin, to protect other individuals, to prevent a nuisance, or to control undesirables could be the purpose.”).

82. See Zywicki & Agarwal, *supra* note 53, at 621 (noting that the Eighteenth Amendment gave the federal government the power to impose strict regulations on the local manufacturing and sale of intoxicating liquors that would otherwise have fallen outside Congress’s jurisdiction).

83. LENDER & MARTIN, *supra* note 9, at 66–74.

84. See, e.g., *id.* at 42 (describing the passage of a prohibition law in Maine in 1851); Mark Thornton, *Alcohol Prohibition Was a Failure*, CATO INST. (July 17, 1991), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa157.pdf> (discussing local laws seeking to prevent or discourage the sale of alcohol).

85. U.S. CONST. amend. XXI, § 1; see LENDER & MARTIN, *supra* note 9, at 177 (“The rebirth of the beverage alcohol industry [post-Prohibition] reflected an overwhelming American acceptance of drinking as normal social conduct. Yet there were important legacies of the Noble Experiment, and these clearly exerted an influence on post-repeal drinking behavior.”).

86. See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 238, 244 & n.109 (2007) (noting that some states enacted post-Prohibition “blue laws,” which restricted alcohol sales and assessed low-level criminal penalties for violations, while others continued in state-based Prohibition following the Twenty-first Amendment).

87. *Driver v. Hinnant*, 356 F.2d 761, 765 (4th Cir. 1966).

88. *Id.* at 764–65.

intoxication.<sup>89</sup> Consistent with these rulings, in 1967 a Presidential Commission on Law Enforcement and Administration of Justice suggested that “[d]runkenness should not in itself be a criminal offense.”<sup>90</sup> Soon thereafter, however, in *Powell v. Texas*, the U.S. Supreme Court upheld the constitutionality of criminal drunkenness statutes, even when the offender was afflicted with chronic alcoholism.<sup>91</sup> The Court noted that criminal provisions retain social value, given the paucity of rehabilitative programs for alcoholics.<sup>92</sup>

While the courts continued to grapple with the implications of chronic alcoholism for criminal responsibility, the federal government introduced other mechanisms for addressing alcoholism in a more holistic way. In 1970, Congress enacted the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act, which established the National Institute on Alcohol Abuse and Alcoholism (NIAAA).<sup>93</sup> The NIAAA, which exists to this day, supports research relating to the health effects of alcohol, prevention, and treatment.<sup>94</sup> On the heels of the 1970 Act, the National Conference of Commissioners on Uniform State Laws approved in 1971 the Uniform Alcoholism and Intoxication Treatment Act (the Uniform Treatment Act).<sup>95</sup> The Uniform Treatment Act established state-level guidelines for addressing alcoholism.<sup>96</sup> While these enactments reflected a more refined government attitude towards alcohol dependence, criminal drunkenness and habitual drunkard provisions remained on the books. Even to this day, there are hundreds of provisions of state law that reference the words “drunken,” “drunkenness” and “drunkard.”<sup>97</sup>

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89. *Easter v. Dist. of Columbia*, 361 F.2d 50, 55–56 (D.C. Cir. 1966). In reaching this conclusion, the court cited to a range of scientific definitions and expert views. *Id.* at 53–54.

90. PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 236 (1967).

91. *Powell v. Texas*, 392 U.S. 514, 530, 536–37 (1968).

92. *Id.* at 530.

93. Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, Pub. L. 91-616, § 101(a), 84 Stat. 1848, 1848.

94. *About NIAAA*, NAT’L INST. OF ALCOHOL ABUSE & ALCOHOLISM, <http://www.niaaa.nih.gov/about-niaaa> (last visited Feb. 6, 2014).

95. UNIF. ALCOHOLISM & INTOXICATION TREATMENT ACT (1971), *available at* <http://www.uniformlaws.org/shared/docs/Alcoholism%20and%20Intoxication%20Treatment/Alcoholism%201971.pdf>.

96. *Id.*; Christine C. Wellington, Note, *Why Do We Still Lock Up Drunks? Examining the Protective Custody Provision of the Alcoholism Treatment and Rehabilitation Law of Massachusetts*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 371, 376–77 (1991).

97. The Author conducted a search of state statutes, trying to determine whether these terms were still used in state law, or had been replaced with more contemporary

### C. Regulation of Alcohol Use by Minority Groups

The societal perceptions of alcohol use and the accompanying trends in regulation offer useful frames to understand the emergence of alcohol-related norms in immigration law. A third layer of analysis, however, sheds important light on the origins of these norms. Specifically, alcohol-related regulation was often driven by perceptions of, and assumptions regarding, alcohol consumption by minority groups including Native Americans, slaves, and immigrants. I use the term “minority” in the broadest sense to distinguish these groups from the Anglo-Saxon Protestants who occupied most positions of economic and political influence during the time periods relevant to this Article.

This dimension of the history can be subdivided into two parts: the early history of alcohol regulation, targeting Native Americans and slaves; and the lead-up to the Prohibition Era and Prohibition itself, during which immigrant alcohol consumption captured the nation’s attention.

1. *Early History: Regulating Alcohol Consumption by Native Americans and Slaves.* The early history of alcohol control, directed towards Native American communities and slaves, informs our analysis of later attitudes and practices vis-à-vis immigrants.<sup>98</sup> In early American history, European settlers controlled the provision of alcohol to these groups and were driven by a range of motivations. In the late eighteenth century, authorities frequently banned the sale of liquor to Native Americans or forbade its use as a commodity to be bartered.<sup>99</sup> Economic concerns were at the root of these restrictions—specifically, a fear that alcohol addiction would curb the tribes’ interest in trapping animals.<sup>100</sup> Concerns about social unrest among Native Americans also played a role.<sup>101</sup>

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terms, such as “intoxication.” The search revealed hundreds of statutes, covering different areas of law. Search results are on file with the Author.

98. See, e.g., Robert F. Castro, *XENOMORPH!! Indians, Latinas/os, and the Alien Morphology of Arizona Senate Bill 1070*, 46 HARV. C.R.-C.L. L. REV. AMICUS \*1, \*2 (2011) (arguing that the “Latina/o Threat narrative has its origins in anti-Indian sentiments which are themselves grounded in a deep-seated fear of a savage alien); Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 163, 163 (2010) (positing that “state and local anti-immigrant laws lead to the segregation, exclusion, and degradation of Latinos from American society in the same way that Jim Crow laws excluded African Americans from membership in social, political, and economic institutions”).

99. BEHR, *supra* note 27, at 17.

100. See *id.* (“Earlier traders bartered cheap rum for valuable otter furs, and witnessed the consequences: Indian tribes became so addicted that their interest in trapping animals waned.”).

101. See LENDER & MARTIN, *supra* note 9, at 21–24 (describing the colonial settlers’ rationale for enacting codes regulating the sale of liquor to Native Americans).

Despite the prevalent narratives and stereotypes regarding alcohol use by Native Americans, the work of historians reveals a more complex picture. Some have portrayed alcohol as an unknown agent, introduced to Native Americans by European settlers, which led to uncontrolled use and devastation of native communities.<sup>102</sup> Studies have revealed, however, that tribes were sufficiently knowledgeable of botanic pharmacology to mitigate the effects of substances, and certain tribes had specifically used fermented substances in the past.<sup>103</sup> Research also indicates that early native drinking was characterized by moderation and even suspicion of alcohol, and not the widespread drunkenness that has emerged as a common narrative.<sup>104</sup> A set of beliefs—known as the “firewater myths”—reinforced views that Native Americans were physiologically sensitive to alcohol, susceptible to addiction, violent when intoxicated, and unable to resolve alcohol-related concerns on their own.<sup>105</sup> Research over the decades has found many of these claims to be exaggerated, with significant variations among native communities on questions of alcohol use and abuse.<sup>106</sup> Indeed, historians continue to express a range of views about the prevalence of alcohol addiction among native communities at that time.<sup>107</sup> While some individuals did certainly succumb to addiction, their use of alcohol is now viewed in the context of disease, conquest, and the accompanying pressures.<sup>108</sup>

The firewater myths, which fueled (and arguably, continue to fuel) the stereotype of the “drunken Indian,” reinforced the

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102. BEHR, *supra* note 27, at 17–18; see also Teresa Milbrodt, *Breaking the Cycle of Alcohol Problems Among Native Americans: Culturally-Sensitive Treatment in the Lakota Community*, 20 ALCOHOLISM TREATMENT Q., no. 1, 2002, at 19, 23–24.

103. Don Coyhis & William White, *Alcohol Problems in Native America: Changing Paradigms and Clinical Practices*, 20 ALCOHOLISM TREATMENT Q., no. 4, 2002, at 157, 158.

104. *Id.*

105. LENDER & MARTIN, *supra* note 9, at 23; Coyhis & White, *supra* note 103, at 159.

106. ALCOHOL AND TEMPERANCE IN MODERN HISTORY: A GLOBAL ENCYCLOPEDIA 446 (Jack S. Blocker, Jr., David M. Fahey & Ian R. Tyrrell eds., 2003) (“In short, there was and is no single style of drinking for Indians generically—rather, the experience of alcohol was and is one that is culturally and historically specific.”).

107. Edward Behr describes the combination of “liquor addiction” and “mortal disease” as a “holocaust” that “wiped out” some Indian tribes. BEHR, *supra* note 27, at 18. Behr also cites Edwin Lemert for the proposition that “Indians drank until they dropped.” *Id.* Lender and Martin take a more nuanced view towards alcohol use among Native Americans. See generally LENDER & MARTIN, *supra* note 9, at 21–26. They acknowledge that “[s]ome Indian groups today do have unusually high rates of alcoholism, while others do not.” *Id.* at 23. They add, “There is no positive evidence indicating a greater physiological propensity to alcoholism in Indians than in whites, nor is it absolutely clear how cultural conditioning factors may have distinguished Indian drinking reactions from those of other groups.” *Id.*

108. ALCOHOL AND TEMPERANCE IN MODERN HISTORY: A GLOBAL ENCYCLOPEDIA, *supra* note 106, at 447.

subordination of native communities to European settlers and served the material and ideological interests of those settlers.<sup>109</sup> These myths positioned Indians as biologically inferior and allowed Europeans to assert a set of values and practices ostensibly designed to save the Native Americans from their own flawed bodies and minds.<sup>110</sup> These practices, of course, deepened the economic and political subjugation of native communities. This treatment of native communities foreshadowed, in many ways, the positioning of immigrants vis-à-vis alcohol consumption.

Paralleling the practices towards Native Americans, whites typically kept alcohol away from slaves during colonial times and through the antebellum years, given their importance to the agricultural economy.<sup>111</sup> From the perspective of the slaveholders, a slave who consumed alcohol would perform less work and therefore was of less value for the owner.<sup>112</sup> Along these lines, slave owners also feared that drinking might lead to the injury or death of the slave, and hence, to a financial loss for the owner.<sup>113</sup> Additionally, given that slaves lived adjacent to whites, drinking-related unrest and violence was of particular concern.<sup>114</sup> These concerns were reflected in the Slave Codes, which typically prohibited the purchase and consumption of alcohol by slaves, unless authorized by the owners. The South Carolina Slave Code of 1740, for example, prohibited the sale of any alcoholic beverage to a slave without the consent of the owner.<sup>115</sup> The Missouri Slave Code prohibited the sale, barter, or delivery of liquor to a slave and similarly imposed penalties on slaves who sold or delivered alcohol to fellow slaves.<sup>116</sup>

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109. Coyhis & White, *supra* note 103, at 159–60.

110. See *id.* at 159 (“The ‘drunken Indian’ stereotype, and the ‘firewater myths’ that undergird it, have long served to sustain ‘systems of subordination and domination.’”); Patrick J. Abbott, *American Indian and Alaska Native Aboriginal Use of Alcohol in the United States*, 7 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RES., no. 2, 1996, at 1, 7 (noting that the firewater myths caused numerous attempts to halt the sale of alcohol to Native Americans).

111. See LENDER & MARTIN, *supra* note 9, at 27 (recognizing that colonial governments tended to monitor slave drinking because slaves provided back-breaking labor).

112. *Id.*

113. William White & Mark Sanders, *Addiction and Recovery Among African Americans Before 1900*, 3 COUNSELOR 64, 64 (2002).

114. LENDER & MARTIN, *supra* note 9, at 27; White & Sanders, *supra* note 113, at 64.

115. An Act for the Better Ordering and Governing Negroes & Other Slaves in This Province § 32 (1740), in 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 397, 408 (David J. McCord ed., 1840) [hereinafter 1740 Slave Code].

116. *Missouri's Early Slave Laws: A History in Documents*, MO. DIGITAL HERITAGE, <http://www.sos.mo.gov/archives/education/aahi/earlyslavelaws/slavelaws.asp> (last visited Feb. 6, 2014).

In some northern states, there were even laws on the books that prohibited the sale of alcohol to blacks and punished blacks caught purchasing alcohol.<sup>117</sup> These laws persisted even as some states outlawed slavery, imposing fines for the sale of alcohol to blacks, whether they were free or slave.<sup>118</sup> Lender and Martin encapsulate the concern motivating these restrictions, observing that the "laws reflected deep-seated white fears that blacks . . . were especially prone to violence when intoxicated" and were driven by fears of "slave insubordination or rebellion."<sup>119</sup>

Some thinkers have offered a different view of alcohol regulation among slaves, suggesting that slave owners purposefully intoxicated their slaves on certain holidays as a way to channel any rebellious energy—and to quell insurrection.<sup>120</sup> Frederick Douglass, writing in 1857, suggested:

These holidays are conductors or safety valves to carry off the explosive elements inseparable from the human mind . . . .

. . . .

. . . When a slave is drunk, the slaveholder has no fear that he will plan an insurrection . . . . It is the sober, thinking slave who is dangerous, and needs the vigilance of his master, to keep him a slave.<sup>121</sup>

Although seemingly contrary to the Slave Code prohibitions, these practices reflect yet another way that owners exercised control over slaves by regulating the consumption of alcohol.

As with the Native American community, the control of alcohol consumption by slaves served to reinforce the economic and political interests of slave owners, while further subordinating the slaves. The regulation was also fueled by racialized fears of violence committed by intoxicated slaves—a fear that had, at best, anecdotal evidence to support it.<sup>122</sup> Some of the Slave Code provisions reflect the view that slaves, left to

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117. LENDER & MARTIN, *supra* note 9, at 27. Lender and Martin describe a Connecticut law, enacted in 1703, that "called for the flogging of slaves, indentured servants, and apprentices caught in taverns without their masters' permission." *Id.*

118. *Id.*

119. *Id.* at 28.

120. See, e.g., FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 254, 256 (1857); Denise Herd, *The Paradox of Temperance: Blacks and the Alcohol Question in Nineteenth-Century America*, in DRINKING: BEHAVIOR AND BELIEF IN MODERN HISTORY 354, 356 (Susanna Barrows & Robin Room eds., 1991).

121. DOUGLASS, *supra* note 120, at 254–56.

122. LENDER & MARTIN, *supra* note 9, at 27–28.

their own devices, would be susceptible to alcohol abuse. The South Carolina Slave Code, for example, subtly rebuked the practice of allowing slaves to work where they pleased, noting it had "occasioned such slaves to pilfer and steal . . . as well as to maintain themselves in drunkenness and evil courses."<sup>123</sup>

In retrospect, it appears that these early practices and laws were designed to maintain public order, subdue any insurrection or dissent, and also ensure that the labor force and economic systems were unimpaired. Whether these groups actually posed a viable threat to public order is unclear; it is even more speculative to suggest that the consumption of alcohol by these groups would have materially affected the social order or impaired their role in economic production. Nevertheless, these perceptions about persons of color resonated among European settlers, and some even became codified in law. As described in the next Subpart, the use of alcohol regulation as a form of social and economic control over minority groups would once again surface in the Prohibition years.

2. *The Lead-Up to Prohibition and the Prohibition Years: A Focus on Immigrant Alcohol Consumption.* To understand the emergence of alcohol-related norms in immigration law, careful study of the Prohibition Era is essential. During these decades, powerful societal views about immigrants and alcohol consumption emerged and were solidified through propagation in social and political discourse. The influx of European immigrants, with their unfamiliar cultural practices, economic strength, and growing political clout, posed a threat to established interests.<sup>124</sup> Indeed, the production, sale, and consumption of alcohol by immigrants linked together these various concerns.<sup>125</sup> For this reason, some historians have argued that Prohibition was driven, in part, by a ruling class of Anglo-Saxon Protestants who were struggling to retain power and privilege in the face of an influx of immigrants.<sup>126</sup> Similarly, others have framed Prohibition as an attempt to codify (and impose onto others) a specific, elite lifestyle choice—and its accompanying morals and values.<sup>127</sup> Throughout these years,

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123. 1740 Slave Code, *supra* note 115, § 32, at 408.

124. See BEHR, *supra* note 27, at 3.

125. See *id.*; W.J. Rorabaugh, *Reexamining the Prohibition Amendment*, 8 YALE J.L. & HUMAN. 285, 288 (1996) (reviewing RICHARD F. HAMM, *SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880–1920* (1995)).

126. BEHR, *supra* note 27, at 3.

127. See Nicola Beisel, *Class, Culture, and Campaigns Against Vice in Three American Cities, 1872–1892*, 55 AM. SOC. REV. 44, 45 (1990).

xenophobic and nativist elements also drew attention to the dangers that flowed from immigrants and alcohol.

These social forces were put into motion, of course, by the remarkable levels of immigration at the time, and the accompanying demographic shifts within the United States. In the latter part of the nineteenth century and the early twentieth century, the United States experienced a significant influx of European immigrants. Between 1860 and 1920, the population of the United States grew from 30 million to 105 million, and between 1850 and 1920 the proportion of foreign-born residents increased from 9.7% to 13.2%.<sup>128</sup> A large portion of the immigrants hailed from Ireland and Germany.<sup>129</sup> "The Irish were the largest single group of pre-Civil War immigrants," and, in the Protestant United States, they suffered from social discrimination and anti-Catholic bias.<sup>130</sup> Between 1820 and 1930, approximately 4.5 million Irish immigrated to the United States.<sup>131</sup> Germans also arrived in significant numbers; between 1820 and 1924, about 5.9 million Germans immigrated to the United States.<sup>132</sup> Italian immigration was also pronounced in this time period, especially after 1860. Between 1876 and 1924, approximately 4.5 million Italians immigrated to the United States.<sup>133</sup>

*a. Immigrants and Alcohol: A Cultural, Economic, and Political Threat.* European immigrants represented a cultural, economic, and political threat to established interests in the United States. Their association with alcohol linked together these concerns in the public consciousness. Culturally, the waves of immigrants from Germany, Ireland, Italy, and elsewhere represented a threat to the Protestant, Anglo-Saxon way of life.<sup>134</sup> One aspect of this threat, which was magnified in popular discourse, was the distinct cultural practices relating to the consumption of beer or wine.<sup>135</sup> One government

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128. ROGER DANIELS, *COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE* 125 (2d ed. 2002).

129. LENDER & MARTIN, *supra* note 9, at 58, 61.

130. *Id.* at 58.

131. DANIELS, *supra* note 128, at 127, 129.

132. *Id.* at 146. This migration was especially pronounced in Cincinnati, Ohio, where Germans grew from 5% of the population to 35% between 1820 and 1917. BEHR, *supra* note 27, at 64.

133. JOHN POWELL, *ENCYCLOPEDIA OF NORTH AMERICAN IMMIGRATION* 156 (2005).

134. BEHR, *supra* note 27, at 3.

135. LENDER & MARTIN, *supra* note 9, at 58–63; see BLUMENTHAL, *supra* note 21, at 23 ("German immigrants brought both a deep affection for beer and a boom in the number of brewers in many cities, leading some to link the evils of drinking to immigration.").



report, later examining the effectiveness of Prohibition laws, spoke of "European immigrants who have brought with them their taste for liquor."<sup>136</sup> Irish immigrants were saddled with the stereotype of the drunken Irishman—loyal both to "King Alcohol" and the Pope—and incapable of being virtuous members of a republican society.<sup>137</sup> Germans were also saddled with stereotypes, particularly relating to beer-drinking.<sup>138</sup> In the media and popular culture, these culturally based drinking habits were attacked and often exaggerated.<sup>139</sup> In short, "Irish and German immigrants personified the dangers and moral laxity of alcohol consumption" and were easily scapegoated as enemies for their failure to embrace dominant practices and values.<sup>140</sup>

At times, the emphasis on cultural or national differences took on an overtly racist tone and reflected the ways in which certain European immigrants, notwithstanding their seeming "whiteness," were seen as racially inferior.<sup>141</sup> By way of example, one Quaker-temperance activist, Neal Dow, labeled the growing population of Irish Catholics as "a permanent threat to destroy law-abiding America."<sup>142</sup> At the beginning of the Civil War, Dow even organized a temperance regiment in Maine, drawing recruits who feared mixing with Scottish or Irish immigrants due to their "hard drinking and immoral ways."<sup>143</sup>

For the Irish immigrants in particular, who occupied positions in the urban underclass, the alcohol consumption stereotypes were linked to racialized views, including a perceived propensity for violence.<sup>144</sup> In the image below,

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136. NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, ENFORCEMENT OF THE PROHIBITION LAWS, S. DOC. NO. 71-307, at 49 (3d Sess. 1931).

137. MARNI DAVIS, *JEWS AND BOOZE: BECOMING AMERICAN IN THE AGE OF PROHIBITION* 63 (2012).

138. See LENDER & MARTIN, *supra* note 9, at 61–62 (suggesting that Germans were known and rebuked for their heavy drinking).

139. As Behr notes, although beer drinking was common among Germans, "[t]here was little drunkenness; it was a social phenomenon, part of the cultural scene." BEHR, *supra* note 27, at 65.

140. MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* 110–11 (2004).

141. See, e.g., Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882–1910*, 25 LAW & SOC. INQUIRY 1, 10–11 (2000) (describing the racial construction of Irish immigrants).

142. BEHR, *supra* note 27, at 29–30.

143. *Id.* at 31–32.

144. See LENDER & MARTIN, *supra* note 9, at 58 (noting that most Irish immigrants were impoverished); *Annual Reports of the Agent for Emigrants at Quebec, Printed by Order of the House of Commons, 1831 to 1836*, 3 DUBLIN REV. 455, 462 (1837) ("You will scarcely ever find an Irishman dabbling in counterfeit money, or breaking into houses, or stealing, or swindling; but if there is any fighting to be done,

published in the April 6, 1867, issue of *Harper's Weekly*, Irish immigrants are portrayed as ape-like and subhuman, engaged in a "brutal attack on police" on St. Patrick's Day. The words "BLOOD" and "RUM" frame the image, and a liquor bottle is holstered to the hip of one of the assailants in the right foreground. The image clearly illustrates how race-based fears animated views about immigrant alcohol consumption. Moreover, the violence and civil unrest that are depicted hearken to similar fears that whites harbored towards Native American communities and slaves.



In addition to stoking concerns about cultural and racial difference, the nexus of immigrants and alcohol posed a material threat to established interests. On one level, the sale of alcohol was a booming business, and immigrants held a significant stake in many of these enterprises. The influx of German, Irish, and Italian immigrants from the 1840s onward led to a growth in breweries, distilleries, and winemaking operations.<sup>145</sup> In Cincinnati and in other parts of Ohio, where many German immigrants had settled, German-born workers far outnumbered

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he is very apt to have a hand in it." (internal quotation marks omitted)); Jamie R. Abrams, *Enforcing Masculinities at the Borders*, 13 *NEV. L.J.* 564, 573 (2013) (noting that the Irish immigrant population was chastised for being "always drunk and fighting").

145. BEHR, *supra* note 27, at 47.

native workers in brewer and maltster positions.<sup>146</sup> At the national level, German-born brewers outnumbered American-born brewers by nearly three to one.<sup>147</sup>

As alcohol consumption grew, storefront saloons emerged as prominent economic and social institutions.<sup>148</sup> Many of the saloons, especially in urban settings, were owned by immigrants and welcomed immigrant patrons.<sup>149</sup> Apart from selling alcohol, these saloons often provided complimentary lunchtime meals to customers and offered a space for men to gather and socialize after work.<sup>150</sup> Saloons also served as hubs for networking, job opportunities, catching up on the day's news, and even recreation. As Edward Behr writes, "[t]here were newspapers, mailboxes, pencils, paper, bulletin boards advertising jobs, card tables, and sometimes bowling alleys and billiard tables."<sup>151</sup> Saloons were prevalent among immigrant groups and "bars in many urban settings became differentiated in ownership and patronage by ethnicity."<sup>152</sup> By one calculation, in the years before Prohibition, "there was a saloon for every three hundred Americans."<sup>153</sup>

In addition to the material threat posed by the emergence of immigrant entrepreneurs in the areas of alcohol production and sales, immigrants' association with alcohol posed an entirely different type of economic threat: the possibility of diminished productivity among immigrant laborers who drank frequently or suffered from alcohol addiction.<sup>154</sup> This concern mirrors the same concern held by slave owners who kept alcohol away from their slaves: alcohol use, in their view, would create less productive workers and hence reduce the value of their human capital.<sup>155</sup> Consistent with this thinking, in the decades before Prohibition, many industrialists actively supported temperance movements. In 1908, the Anti-Saloon League (ASL) established a department of industrial relations, hoping to harness the political and financial support of industrialists.<sup>156</sup> Automobile tycoon Henry

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146. TIMOTHY J. HOLIAN, *OVER THE BARREL: THE BREWING HISTORY AND BEER CULTURE OF CINCINNATI* 299 (2001).

147. *Id.*

148. BLUMENTHAL, *supra* note 21, at 23–24.

149. LENDER & MARTIN, *supra* note 9, at 58, 60, 65, 103–04.

150. *Id.* at 104; BLUMENTHAL, *supra* note 21, at 24.

151. BEHR, *supra* note 27, at 50.

152. LENDER & MARTIN, *supra* note 9, at 97.

153. BEHR, *supra* note 27, at 49.

154. LENDER & MARTIN, *supra* note 9, at 97–98, 107–08.

155. *Id.* at 27.

156. JOHN J. RUMBARGER, *PROFITS, POWER, AND PROHIBITION: ALCOHOL REFORM AND THE INDUSTRIALIZING OF AMERICA, 1800–1930*, at 149 (1989).

Ford emerged as a strong supporter of the ASL and spoke out about the evils of drinking and its impact on workers and industry.<sup>157</sup> In an opinion piece in the *Pictorial Review* he stated,

With booze in control we can count on only two or three effective days work a week in the factory—and that would destroy the short day and the five-day week which sober industry has introduced. When men were drunk two or three days a week, industry had to have a ten- or twelve-hour day and a seven-day week. With sobriety the working man can have an eight-hour day and a five-day week with the same or greater pay . . .<sup>158</sup>

Ford upheld an ideal that emerged during the nineteenth century as industrialization took hold, and the workplace became more complex. The ideal worker was steady, efficient, and a clear thinker,<sup>159</sup> and also someone who was “disciplined, orderly, hard-working, frugal, responsible, morally correct, and self-controlled.”<sup>160</sup> An inebriated worker could upset this ideal vision of the productive employee; even worse, such a worker could generate health and safety risks and interrupt the modes of production.<sup>161</sup> For these reasons, Ford insisted that his employees abstain from alcohol and fired workers who were caught twice purchasing liquor.<sup>162</sup> Many other industrial leaders expressed similar concerns about the effects of alcohol on workplace safety.<sup>163</sup>

The involvement of immigrants in the alcohol industry and the growth of saloons also fueled political concerns. In the decades leading up to Prohibition, immigrants ascended to leadership positions within urban governments, including in Boston and New York.<sup>164</sup> Many of these politicians derived power from their connection with saloons and other facets of the alcohol industry.<sup>165</sup> In most major cities, the saloons served political purposes as well—bosses used them as a base of

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157. BEHR, *supra* note 27, at 149–50.

158. *Id.* at 150 (quoting *Pictorial Review*).

159. LENDER & MARTIN, *supra* note 9, at 107–08.

160. RUMBARGER, *supra* note 156, at xiv.

161. Although many industrialists supported Prohibition, there were some in the labor movement that likewise opposed alcohol and the saloon culture. For example, the Industrial Workers of the World characterized saloons as a capitalist technique to sedate the proletariat. BEHR, *supra* note 27, at 47. Socialist leader John Spargo and black union organizer A. Philip Randolph also saw the virtues of Prohibition. DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 75–76 (2010).

162. BEHR, *supra* note 27, at 59.

163. RUMBARGER, *supra* note 156, at 148–49.

164. Beisel, *supra* note 127, at 46, 48.

165. BEHR, *supra* note 27, at 175–76.

operations.<sup>166</sup> In fact, voting sometimes took place at the saloons.<sup>167</sup>

The loss of political control in Boston, New York, and elsewhere fueled anti-vice movements.<sup>168</sup> As urban police forces fell under the control of immigrant politicians, upper class elites sought other means to control the vices of immigrants.<sup>169</sup> Apart from alcohol abuse, immigrants were accused of many transgressions, including obscenity and a love of gambling.<sup>170</sup> Saloons were positioned as an epicenter of these vices, as many ran gambling operations in addition to their liquor sales.<sup>171</sup> The propaganda cartoon below, entitled "The Modern Devil Fish," was first published in *The Defender* in 1904,<sup>172</sup> and it was republished in the *Chicago Tribune* in 1925. The image, commissioned by the Prohibition Party, reflects the vices associated with saloons, including "political corruption," "defiance of law," "traffic in girls," "partnership with thieves," and "gambling."<sup>173</sup> A vote for the Prohibition Party is depicted as the way to deal a fatal blow to saloons and their accompanying vices.<sup>174</sup> Although immigrants are not specifically mentioned in the cartoon, given their close association with saloons, anti-immigrant sentiment is unquestionably part of the subtext.

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166. LENDER & MARTIN, *supra* note 9, at 104.

167. BLUMENTHAL, *supra* note 21, at 24.

168. Beisel, *supra* note 127, at 46-48.

169. *Id.* at 48.

170. BLUMENTHAL, *supra* note 21, at 23; Beisel, *supra* note 127, at 49, 51.

171. BEHR, *supra* note 27, at 49-50; BLUMENTHAL, *supra* note 21, at 45; LENDER & MARTIN, *supra* note 9, at 103-04.

172. PROHIBITION CARTOONS (Donald Farquharson Stewart & Henry W. Wilbur eds., 1904).

173. *Id.*

174. *Id.*



*The Modern Devil Fish*  
 "The tentacles of the Devil Fish cannot be destroyed unless the HEAD, the source of their sustaining power, is destroyed."—Victor Hugo's "Billon of the Sun."

Echoing the sentiments reflected in the cartoon, temperance advocate Reverend Mark Matthews opined, "The saloon is the most fiendish, corrupt, hell-soaked institution that ever crawled out of the slime of the eternal pit. . . . It is the open sore of this land."<sup>175</sup> Regulation of alcohol at the state and federal levels was positioned as an antidote to corrupt immigrant politics in the nation's largest cities and its saloons, and it offered a way to stem the spread of dangerous vices.<sup>176</sup> In short, the growth of urban immigrant communities, and the political and moral challenge that growth posed to elites, played out in the regulation of alcohol.

*b. Alcohol, Xenophobia, and Nativism.* In addition to the cultural, racial, economic, and political interests served by alcohol regulation, rising xenophobia and nativism also fueled concerns about immigrants' relationship with alcohol. This was especially visible before and during World War I; the growth of anti-German sentiment only helped temperance advocates who played on nativist fears.<sup>177</sup> Across the country, anti-German feelings resulted in actions designed to rid the United States of any influence of Germany and the German culture.<sup>178</sup> These actions included the burning of German books, banning the performance of music by German composers, and substituting

175. BEHR, *supra* note 27, at 22.

176. LENDER & MARTIN, *supra* note 9, at 103–06, 109, 129.

177. *Id.* at 129–30.

178. OKRENT, *supra* note 161, at 101.

German words and phrases (such as "sauerkraut") with more socially acceptable terms ("liberty cabbage").<sup>179</sup> More formal measures were also enacted: In Iowa, Governor William L. Harding issued the infamous "Babel Proclamation" in 1918, which banned the use of non-English languages in public places.<sup>180</sup> That same state, along with Nebraska and Ohio, enacted prohibitions against teaching German in schools.<sup>181</sup> During the years that anti-German sentiment remained strong and these measures were in effect, Prohibition advocates took full advantage of the political climate.

The ASL, the lead organization lobbying for Prohibition, and its allies deployed propaganda with anti-German messages.<sup>182</sup> Wisconsin politician John Strange linked the wartime enemy with German immigrant brewers in the United States, stating that "the worst of all our German enemies, the most treacherous, the most menacing, are Pabst, Schlitz, Blatz and Miller. They are the worst Germans who ever afflicted themselves on a long-suffering people."<sup>183</sup> Temperance leader Wayne Wheeler likewise emphasized the German dominance among breweries and the fact that brewers' meetings were conducted in the German language.<sup>184</sup> He wrote to the government, asking them to investigate Anheuser-Busch and other Milwaukee companies, citing a nefarious German influence.<sup>185</sup> Even after the war had ended and Prohibition was imminent, the Senate Judiciary Committee, in 1919, convened hearings on "brewing and liquor interests and German and Bolshevik propaganda."<sup>186</sup> A specific target for the investigation was the German-American Alliance, a civic organization closely linked to German-American brewers and an opponent of Prohibition.<sup>187</sup> The ASL's propaganda

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179. *Id.*

180. *Divided by a Common Language: The Babel Proclamation and Its Influence in Iowa History*, 39 HIST. TCHR. 59, 62 (2005).

181. See BILL PIATT, *¿ONLY ENGLISH? LAW AND LANGUAGE POLICY IN THE UNITED STATES* 38 (1990). The Nebraska law was challenged in the courts, and the case ultimately made its way to the U.S. Supreme Court. See *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Court held that the restriction against foreign language instruction constituted a deprivation of liberty and thus violated the Fourteenth Amendment. *Id.* at 396-400, 403.

182. BEHR, *supra* note 27, at 71.

183. MAUREEN OGLE, *AMBITIOUS BREW: THE STORY OF AMERICAN BEER* 172-73 (2006).

184. BEHR, *supra* note 27, at 67.

185. *Id.* at 69.

186. See generally STAFF OF S. SUBCOMM. ON THE JUDICIARY, *BREWING AND LIQUOR INTERESTS AND GERMAN AND BOLSHIEVİK PROPAGANDA*, S. DOC. NO. 65-61 (1st Sess. 1919).

187. OKRENT, *supra* note 161, at 100, 102. These hearings resulted in the subpoena of hundreds of pages of documents, which were used to paint the brewers in a negative

dovetailed with general anti-German sentiment during World War I, but the propaganda continued for many years thereafter, through the end of Prohibition.<sup>188</sup>

Prohibition also became a powerful vehicle for nativist organizations to advance their agendas. The Ku Klux Klan (KKK) was a strong supporter of Prohibition, capitalizing on anti-immigrant fears.<sup>189</sup> The modern KKK was officially founded in Georgia in 1915 in the weeks after Leo Frank, a Jewish-American factory manager, had been lynched.<sup>190</sup> Although the KKK is now associated primarily with its targeting of blacks, this earlier iteration of the Klan focused on Jews and Catholic immigrants.<sup>191</sup>

The KKK and the ASL coordinated efforts in support of Prohibition—at times openly, but more often tacitly.<sup>192</sup> ASL leaders publicly rejected the idea of any formal collaboration between the entities,<sup>193</sup> but their linkage was known to many. Attorney Clarence Darrow quipped that “the father and mother of the Ku Klux is the Anti-Saloon League. I would not say every Anti-Saloon Leaguer is a Ku Kluxer, but every Ku Kluxer is an Anti-Saloon Leaguer.”<sup>194</sup> The KKK and the ASL drew upon nativist sentiment, to different degrees, in mobilizing around the Prohibition effort.<sup>195</sup>

light. For example, the hearings revealed that the Busch family had purchased a million dollars in German war bonds (albeit prior to the United States' entry into the war) and that family members had cared for wounded German soldiers. *Id.* at 103; see also Margot Opdycke Lamme, *Tapping into War: Leveraging World War I in the Drive for a Dry Nation*, 21 AM. JOURNALISM 63, 80 (2004) (describing reportage focused on the disloyalty of German-American brewers).

188. BEHR, *supra* note 27, at 71.

189. OKRENT, *supra* note 161, at 86–87; Thomas R. Pegram, *Hoodwinked: The Anti-Saloon League and the Ku Klux Klan in 1920s Prohibition Enforcement*, 7 J. GILDED AGE & PROGRESSIVE ERA 89, 96 (2008).

190. OKRENT, *supra* note 161, at 86; THOMAS R. PEGRAM, *ONE HUNDRED PERCENT AMERICAN: THE REBIRTH AND DECLINE OF THE KU KLUX KLAN IN THE 1920S*, at 158 (2011).

191. OKRENT, *supra* note 161, at 86. Historian Thomas R. Pegram notes that the character of this generation of the Ku Klux Klan differed from its predecessor and the KKK that followed it. He writes that the

1920s Klan . . . was distinct from its violent, nightriding predecessor of the Reconstruction period and the bomb-planting terrorists and neo-Nazis of more recent times. It was, instead, a social movement of unusual, though evanescent, power that drew from American reform traditions as well as nativist patterns and attracted the short-term allegiance of several million otherwise ordinary white Protestants.

Pegram, *supra* note 189, at 94.

192. See generally *id.* at 110–12, 117–18.

193. See, e.g., *Anderson Talks on Ku Klux Klan: Anti-Saloon League Superintendent Says Tammany Fears Its Influence*, N.Y. TIMES, Sept. 9, 1923, at E1.

194. PEGRAM, *supra* note 190, at 141 (quoting *Darrow Says He Opposes Prohibition*, FIERY CROSS, Nov. 7, 1924, at 2).

195. Pegram, *supra* note 189, at 89, 113, 118.



After the passage of the Volstead Act, KKK members worked on the local level to ensure the law was being respected.<sup>196</sup> Some members of the ASL even joined the KKK in acts of vigilante enforcement.<sup>197</sup> The image below was produced as part of the KKK's propaganda campaign in support of Prohibition.<sup>198</sup> Originally published in *Klansmen: Guardians of Liberty*, the image labels the KKK as "The Defenders of the 18th Amendment."<sup>199</sup>



Hiram Evans, Imperial Wizard of the KKK, framed violations of the nation's dry laws as part of an "alien-driven crime wave" that threatened the nation's existence.<sup>200</sup> Evans directed the Klan's attention towards crime, particularly violations by noncitizens. He cited statistics suggesting the disproportionate commission of crimes by immigrants, including alcohol-related crimes: "In Arizona 85 per cent of the bootleggers were aliens; in Connecticut 90 per cent of arrests were of aliens; in California 85 per cent, mostly Italians and Greeks; in Colorado 52 per cent; Maryland 75; Illinois 90."<sup>201</sup> For Evans and his supporters, public corruption—itsself associated with immigrant communities—reinforced the need for the Klan to supplement law enforcement efforts and thereby assert the cultural and

196. PEGRAM, *supra* note 190, at 127–43 (describing the work of "hooded deputies" across the country in furtherance of Prohibition enforcement).

197. *Id.* at 143.

198. ALMA WHITE, *KLANSMEN: GUARDIANS OF LIBERTY* 95–103 (1926).

199. *Id.* at 103.

200. PEGRAM, *supra* note 190, at 126.

201. *Id.* at 127 (internal quotation marks omitted).

political supremacy of white, Protestant, native-born Americans.<sup>202</sup>

Although nativist groups focused on anti-immigrant rhetoric, Prohibition was also used as a vehicle to control black Americans. As the momentum on behalf of Prohibition grew, some whites in the South advocated for regulations to keep alcohol from blacks.<sup>203</sup> Throughout the Prohibition Era decades, some temperance advocates played on white fears of drunken blacks "getting out of control."<sup>204</sup>

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A broad range of concerns fueled the societal preoccupation with immigrants and alcohol. Different cultural practices relating to alcohol consumption were magnified to emphasize the otherness of immigrant groups, thus contributing to perceptions of racial inferiority. Immigrants' relationship with alcohol posed a class-based threat, given their influence within the alcohol industry and the possibility that alcohol consumption would impair the productivity of the immigrant working class. These concerns were heightened as immigrants gained political power, and established elites promoted anti-vice campaigns to curb their influence. Throughout this time, the xenophobic and nativist forces reinforced the dangerousness of the immigrant-alcohol relationship.

In some ways, the political, economic, and cultural threats described above were mutually reinforcing. The influx of immigrants with cultural practices linked to alcohol consumption spurred the growth of breweries and distilleries;<sup>205</sup> these industries then grew in strength to represent a material threat to the establishment, and they also supported saloons and immigrant political figures who were likewise a threat to the Protestant establishment.<sup>206</sup> While these various forces and concerns were linked in multiple, often subtle ways, they were eventually reduced to a crisper narrative: the vice of drinking was linked to immigration.<sup>207</sup> As historian Timothy Holian has written,

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202. *Id.* at 121, 127.

203. BLUMENTHAL, *supra* note 21, at 49. Despite the demonstrated history of using alcohol regulation as a form of social control over blacks, the politics of Prohibition led to unusual alliances. For example, the "wets" in the mid-nineteenth century, who opposed restrictions, also favored the maintenance of slavery; in their eyes, abolitionists and temperance activists were both extremists. BEHR, *supra* note 27, at 29.

204. LENDER & MARTIN, *supra* note 9, at 161 (internal quotation marks omitted).

205. BEHR, *supra* note 27, at 47.

206. See OKRENT, *supra* note 161, at 84–85, 102; see also BLUMENTHAL, *supra* note 21, at 23–24.

207. See OKRENT, *supra* note 161, at 84–85, 102; see also BLUMENTHAL, *supra* note 21, at 23–24.

Prohibition advocates "targeted the drinking immigrant as a primary source of crime and immoral behavior, and packaged the message in an effective mix of statistical information and impassioned rhetoric."<sup>208</sup>

The fact that Prohibition was being deployed to attack and control immigrants was not lost on the immigrants themselves. Some German immigrants, for example, viewed the rise in Prohibition as a direct threat to their liberty. At a 1907 gathering of the German-American Alliance in New York, attendees opined: "Our forefathers came to this country for freedom in religious and social practices and now the New Englander wishes to delegate to himself the right to establish his standard as the standard for all. To this not only the Germans but all lovers of freedom object."<sup>209</sup>

Immigrant advocates also noted that noncitizens were unfairly targeted in enforcement efforts during Prohibition. Representative Emanuel Celler, speaking before Congress in 1926 noted that

General [Lincoln C. Andrews, a Treasury Department official charged with enforcing Prohibition,] in a recent statement gave the impression that most of the liquor-law violators were aliens. It is only true that most of those caught are aliens. Otherwise, violation of the law is widespread and embraces aliens and nationals about equally. . . . The difference is that the alien is less likely to have the money and finesse to avoid arrest. It is easier to catch the ignorant and poor than the intelligent and rich.<sup>210</sup>

Celler's statement represents an important challenge, as it questions the empirical basis for linking immigrants with alcohol-related violations. As described in Part III below, similar concerns were raised in the context of proposed immigration legislation.

### III. ALCOHOL-RELATED NORMS IN U.S. IMMIGRATION LAW

The three layers of history presented above illustrate the complex forces that shaped the development of alcohol-related norms in U.S. immigration law. On one level, it is unsurprising

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208. HOLIAN, *supra* note 146, at 301.

209. *Id.* (citing July 21, 1907 meeting).

210. 69 CONG. REC. 11,339, 11,401 (1926). Along these lines, David Starr Jordan, then chancellor of Stanford University "noted that although San Mateo County was '9/10 Anglo-Saxon' . . . 'about one-half the arrests for speeding, hit-and-run driving, or worse, are all men with Italian names, mostly from Naples and Sicily.'" OKRENT, *supra* note 161, at 86.

that the ubiquitous laws and regulations relating to alcoholics, drunkards, and drunkenness eventually surfaced in U.S. immigration law. As noted above, in 1917, Congress established a bar to admission for those suffering from “chronic alcoholism.”<sup>211</sup> A few decades later, in 1952, Congress enacted the habitual drunkard clause, with the “chronic alcoholic” language remaining in effect.<sup>212</sup> Although the legislative history of these two laws does not speak explicitly to the alcohol-related provisions, there is strong indication that concern about immigrants and alcohol—which had taken shape and crystallized in the late nineteenth and early twentieth centuries—drove their passage. The legislative record, described more fully below, references anecdotes and studies about different immigrant groups, their relationship with alcohol, and their violation of liquor laws.

#### A. *Immigration Act of 1917*

The first explicit alcohol-related immigration provision appeared in the Immigration Act of 1917, a comprehensive law that increased the head tax for arriving immigrants, added new classes of excludable aliens, mandated a literacy test for adults seeking admission to the United States, and established the “barred zone,” which brought Asian immigration to a halt.<sup>213</sup> Section 3 of the Act specified the classes of aliens to be excluded from admission, including: “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; professional beggars; vagrants; [and many others] . . . .”<sup>214</sup>

As described above, the temperance movements experienced tremendous growth in the early twentieth century, achieving legislative successes first at the state and local levels and eventually nationwide with the passage of the Volstead Act in 1919.<sup>215</sup> Given the vigorous public debates relating to alcoholism in the first two decades of the twentieth century, it is unsurprising that some of the societal concern regarding alcohol

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211. See Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 875 (repealed 1952).

212. Immigration and Nationality Act, Pub. L. No. 82-414, § 212(f)(1), 66 Stat. 163, 172 (1952).

213. 1 THE HOME FRONT ENCYCLOPEDIA: UNITED STATES, BRITAIN, AND CANADA IN WORLD WAR I, at 331 (James D. Ciment & Thaddeus Russell eds., 2007).

214. Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 875 (repealed 1952) (emphasis added).

215. BLUMENTHAL, *supra* note 21, at 28, 54–57.

trickled into immigration laws, especially since so much of the "dry" rhetoric had a nativist tone.<sup>216</sup> Additionally, since the 1917 Act was passed in the midst of World War I, xenophobia, including anti-German sentiment, undoubtedly colored the legislative process.<sup>217</sup>

Discussions in Congress in the decades prior to the passage of this Act do shed some light on the motivations of the legislators. In 1891, the Select Committee on Immigration and Naturalization of the U.S. Senate published statements and testimony regarding immigration to the United States and the state of the immigration laws.<sup>218</sup> The Committee recommended that the law be amended to include four new exclusion categories, but chronic alcoholics was not among them.<sup>219</sup> Although the written record does not explicitly associate immigrants with alcohol dependence, occasional references to liquor and drinking appear in the text, suggesting a concern about immigrant alcohol consumption.<sup>220</sup> For example, the Committee Chairman questioned Mr. Lawson Fuller, a businessman, about the sobriety habits of Italians.<sup>221</sup> The Committee also questioned Orlando Norcross, another businessman, about the drinking habits of his workers, who hailed from the British Isles; the Committee inquired about what his workers drank and whether they drank during working hours.<sup>222</sup> Several witnesses affiliated with businesses that catered to immigrants were specifically asked if they operated a saloon on the premises.<sup>223</sup> A few other Congressional Reports from the years just before 1917 mention immigrants and alcohol

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216. See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1119 ("Racism, along with nativism, economic, and other social forces, has unquestionably influenced the evolution of immigration law and policy in the United States. It does not exist in a social and historical vacuum.").

217. See Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 338 (positioning the 1917 Act as part of a "legacy of xenophobia").

218. TESTIMONY TAKEN BY THE S. COMM. ON IMMIGRATION & THE H. SELECT COMM. ON IMMIGRATION & NATURALIZATION UNDER CONCURRENT RESOLUTION OF MARCH 12, 1890, H.R. REP. NO. 51-3472, at 1-3 (2d Sess. 1891).

219. *Id.* at IV. The four recommended exclusion categories were: a person likely to become a public charge, a person suffering from a loathsome disease, a polygamist, and persons whose passage is paid for by others, or is assisted by others, barring certain exceptions. *Id.*

220. *Id.* at 303-04, 496.

221. *Id.* at 455-56. Mr. Fuller responded, "Well, I have never seen, to my knowledge, an Italian drunk." *Id.* at 456.

222. *Id.* at 302-04.

223. *Id.* at 511, 513, 520, 536, and 538.

or drinking, but without calling for a related exclusion ground.<sup>224</sup> Nevertheless, the timing of the 1917 enactment coincides perfectly with the pre-Prohibition fervor, and the focus on immigrant communities as epicenters of vice.

*B. 1917–1952*

After the passage of the 1917 Immigration Act, members of Congress continued to express different views regarding immigrants and alcohol consumption. Such statements, particularly those made during the Prohibition Era, are unsurprising given how immigrants were positioned in public debates regarding alcohol. Among those who spoke out on behalf of immigrants was Rep. Emmanuel Celler of New York, who criticized a House bill that sought to impose immigration consequences on noncitizens who violated Prohibition. He stated,

Portions of a recent deportation bill which passed the House bear most heavily against the alien. . . . I do . . . want to stand between the alien and absolute oppression. . . . When it comes to prohibition, alien and native should be treated alike. . . .

. . . .

To deport a man for violation of a law for which most native judges, bank presidents, business and professional men have, in private, no respect is barbarous.<sup>225</sup>

Despite the views expressed by Celler, those who sought to link Prohibition violations with deportation continued to press their agenda. During a Senate debate in 1927 regarding Prohibition, Senator William Bruce of Maryland described a four-part platform advanced by Clarence True Wilson of the Methodist Board of Temperance, Prohibition, and Morals.<sup>226</sup> One of the planks of the platform was that “every alien who violates the Volstead Act is to be deported.”<sup>227</sup>

The Congressional Record contains spirited debates on these issues. By way of example, Rep. Jasper Tincher of Kansas,

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224. For examples of the limited mention of alcohol in connection to immigrants in Congressional Reports of the time, see COMMITTEE ON FOREIGN RELATIONS, FOURTEENTH INTERNATIONAL CONGRESS ON ALCOHOLISM, S. REP. NO. 63-41, at 7 (1st Sess. 1913) (mentioning that Congress had removed liquor sales from immigration stations); TO REGULATE INTERSTATE COMMERCE IN INTOXICATING LIQUORS, ETC., S. DOC. NO. 61-146, at 97–98 (1st Sess. 1909) (statement of Herman Badenhoop) (warning that Prohibition could drive away immigrants who have the means to live in areas without such laws).

225. 67 CONG. REC. 11,398, 11,401 (1926).

226. 68 CONG. REC. 5289, 5298–99 (1927).

227. *Id.* at 5299.

speaking before the U.S. House of Representatives in 1924, criticized discussions within New York State about a possible nullification of the Eighteenth Amendment.<sup>228</sup> Tincher commented about a parade that had been organized in Washington, D.C., expressing opposition to Prohibition while Congress debated the Volstead Act.<sup>229</sup> According to Tincher, newspapers reported that fewer than twenty percent of the participants spoke English.<sup>230</sup> Tincher stated unequivocally that "America is dry and she will never import enough of these immigrants to make it wet."<sup>231</sup> Notably, Rep. Adolph Sabath of Illinois accused Tincher of making a statement designed to "create resentment . . . against the foreign born" and cited liquor violation statistics from the State of Kansas, suggesting the native-born were violating the Eighteenth Amendment in greater numbers.<sup>232</sup> Rep. Ole Kvale of Minnesota similarly rejoined, "It is your native-born stock that flouts the eighteenth amendment at your fashionable dinners and banquets . . . . That is where they break the eighteenth amendment."<sup>233</sup>

### C. *Immigration and Nationality Act of 1952*

The next significant enactment relating to alcohol use was in the Immigration and Nationality Act of 1952 (INA). Specifically, the "good moral character" clause of the INA designates a "habitual drunkard" as someone who is per se lacking in good moral character and, therefore, ineligible for naturalization and other forms of relief.<sup>234</sup> Curiously, although many aspects of the 1952 law were controversial and generated congressional debate, the legislative history is silent as to the *specific* reasoning behind including the good moral character requirement.<sup>235</sup>

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228. 65 CONG. REC. 5793, 5917-18 (1924).

229. See *id.* at 5918 ("[The participants] had buttons and badges, and they said, 'No beer, no work.'").

230. See *id.* (noting that he had personally tried to talk to many participants who seemed unable to speak English).

231. *Id.*

232. *Id.* at 5919.

233. *Id.* at 5919-20.

234. Immigration and Nationality Act, Pub. L. No. 82-414, § 101(f)(1), 66 Stat. 163, 172 (1952) (codified as amended at 8 U.S.C. § 1101(f) (2012)).

235. See COMM. ON THE JUDICIARY OF THE SENATE, THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. REP. NO. 81-1515 (2d Sess. 1950), reprinted in 1 OSCAR M. TRELLES, II & JAMES F. BAILEY, III, IMMIGRATION AND NATIONALITY ACTS: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 1, 699-701 (1979) (discussing the inclusion of the good moral character clause and the difficulty in defining good moral character).

Nevertheless, the legislative history does indicate that concerns about inebriety among immigrants were present during the lead-up to the passage of the 1952 Act. For example, in the legislative history of President Truman's Commission on Immigration and Naturalization, included as an attachment is a report by Harvard University Professor Oscar Handlin.<sup>236</sup> Professor Handlin's report includes a brief section on "Alcoholism and Adjustment" in the U.S. immigrant community.<sup>237</sup> Although Handlin expressed concerns about the reliability of data, he did note that foreign-born individuals were committed to institutions for alcohol psychoses in disproportionately high rates, with Irish immigrants registering the highest rates.<sup>238</sup> In concluding the subsection, Handlin opines the following about immigrants and alcohol abuse: "[P]erhaps the most that can be said is that the immigrants as a whole do not add to the burden of the problem, although specific groups among them may."<sup>239</sup> Another witness before the Commission, representing the American Committee for Italian Migration, sought to reassure the commissioners that "contrary to the general impression, because of the common usage of wine as a beverage in Italy, [there were actually fewer Italian immigrants] in feeble-minded institutions due to drunkenness of any nationality in the United States."<sup>240</sup> These statements suggest that the narratives and counter-narratives that shaped the Prohibition debate just a few decades earlier continued to occupy the public consciousness.

Additionally, a report of the Senate Committee on the Judiciary, entitled "The Immigration and Naturalization Systems of the United States," catalogs the principal national origin groups that comprised the U.S. immigrant population at that time and provides a brief summary of data regarding criminal behavior among immigrants from each of the countries.<sup>241</sup> Unsurprisingly, these summaries routinely mention

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236. *Hearings Before the President's Comm. on Immigration and Naturalization*, 82d Cong. (1952), reprinted in 6 OSCAR M. TRELLES, II & JAMES F. BAILEY, III, *IMMIGRATION AND NATIONALITY ACTS: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 1667, 1860-61* (1979).

237. *Id.* at 1860.

238. *Id.* at 1860-61.

239. *Id.* at 1861. One other portion of the legislative history similarly notes—but in less tentative language—disproportionate criminality and drunkenness rates among Irish immigrants and other immigrant groups. *Id.* at 1851-52.

240. *Hearings Before the President's Comm. on Immigration and Naturalization*, 82d Cong. (1952), reprinted in 5 OSCAR M. TRELLES, II & JAMES F. BAILEY, III, *IMMIGRATION AND NATIONALITY ACTS: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 847, 914* (1979).

241. COMM. ON THE JUDICIARY OF THE SENATE, *supra* note 235, at 82-155.



"violation of liquor laws" as a category of offenses committed by immigrants.<sup>242</sup> This report confirmed that "the Irish led in commitments for drunkenness and vagrancy."<sup>243</sup> The subcommittee report also contained intriguing data about incarceration rates of immigrant groups. The report noted that in both 1910 and 1923 the commitment rate for foreign-born whites for "drunkenness" and "violation of the liquor laws" was disproportionately high, given their representation in the population as a whole.<sup>244</sup> Interestingly, in 1940, 1945, and 1946, foreign-born whites did not exceed their population ratio for any of the alcohol-related crimes.<sup>245</sup>

While these statements and reports are possible signals of Congressional intent, a contemporaneous commentary by the *Harvard Law Review* offers more direct insight into the purpose behind the "good moral character" provision of the INA and links it to laws in place at the time. It notes that:

These specific definitions of bad moral character can be justified as an attempt to achieve uniform treatment of crimes which are nearly universally condemned. And with regard to conduct of a questionable nature Congress may be thought of as more nearly representing a cross-section of the national community than a local court. But a legislature is unable to consider all the circumstances which surround individual cases, and, further, moral standards are apt to change. The 1952 Act recognizes this problem and accordingly limits its specific definitions to those areas where nation-wide sentiment is well established.<sup>246</sup>

Consistent with that analysis, public opinion polls from the 1940s and 1950s reveal that the anti-alcohol norms of the Prohibition Era had lingered for years afterwards.<sup>247</sup> Opinion surveys from the 1950s similarly found that the terms "drinker"

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242. *Id.* at 100, 105, 109, 117, 120.

243. *Id.* at 187.

244. *Id.* at 188.

245. *Id.* at 189.

246. Note, *Developments in the Law: Immigration and Nationality*, 66 HARV. L. REV. 643, 712 (1953) (footnote omitted).

247. See *Gallup Poll, Jul, 1943*, ROPER CTR. FOR PUB. OP. RESEARCH, UNIV. OF CONN., [http://www.ropercenter.uconn.edu/data\\_access/ipoll/ipoll.html](http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html) (last updated Oct. 21, 2013) (showing that more than one-third of pollees in 1943 would support nationwide prohibition on alcohol); *Gallup Poll, Dec, 1954*, ROPER CTR. FOR PUB. OP. RESEARCH, UNIV. OF CONN., [http://www.ropercenter.uconn.edu/data\\_access/ipoll/ipoll.html](http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html) (last updated Oct. 21, 2013) (showing that more than one-third of the pollees in 1954 would support a nationwide prohibition on alcohol).

and “drinking” evoked native images.<sup>248</sup> The decades of advocacy by the temperance movement had decidedly shaped attitudes and values, including about immigrants. Indeed, as the legislative record of the 1952 INA reflects, long-standing concerns about alcohol use among immigrants continued to inform public debates.

Further evidence of congressional intent might be gleaned by examining the habitual drunkard clause in its statutory context. Notably, while the provision was a new addition to the 1952 Act, it was not meant to be a replacement for the “chronic alcoholism” language from the 1917 law. The 1952 Act contained a similar provision, excluding from admission “[a]liens who are narcotic drug addicts or chronic alcoholics.”<sup>249</sup> The prior existence of the “chronic alcoholics” bar raises interesting questions about why Congress enacted a separate habitual drunkard clause. Procedurally, the two provisions were invoked in separate contexts: at the time, the “chronic alcoholics” exclusion ground applied to those seeking admission into the United States, whereas “good moral character” determinations applied primarily to applications for naturalization.<sup>250</sup> Even so, it is curious that Congress chose the vaguer—and arguably more expansive—term “habitual drunkard” instead of simply importing the phrase “chronic alcoholics” into a new context. It is likely that the proliferation of civil and criminal statutes relating to “habitual drunkards” and “drunkenness” at that time paved the way for its inclusion in the INA.

These civil and criminal laws also offer insight into the *policy* concerns that may have driven the enactment. In other words, what social objective was Congress trying to achieve with the habitual drunkard clause? In the context of naturalization, the good moral character bar might be seen as a condemnation of the innate depravity of an individual—namely, that the drinking habit makes him or her fundamentally unworthy of permanent inclusion in our society. Alternatively, the clause may reflect concerns about the conduct itself and resultant harms to others and to society at large. The eight subprovisions under Section 101(f) in the original Act do seem, on the whole, intended to protect other individuals or society from harm.<sup>251</sup> Indeed, the

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248. See LENDER & MARTIN, *supra* note 9, at 180.

249. Compare Immigration and Nationality Act, Pub. L. No. 82-414, § 212(a)(5), 66 Stat. 163, 182 (1952) (“Aliens who are narcotic drug addicts or chronic alcoholics . . .”), with Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 874–75 (“All . . . persons with chronic alcoholism . . .”).

250. INA § 212(a)(5); *id.* § 316(a)(3), (d), (e).

251. INA § 101(f) (excluding persons including those who committed adultery or

provisions relating to drinking, gambling, and adultery seem targeted towards male immigrants, whose bad habits could wreak havoc upon their wives, families, and communities.

While one would like to ascribe thoughtful policy objectives to the habitual drunkard clause, it may simply reflect xenophobia, racial animus, and class-based concerns that surfaced in the lead-up to Prohibition. Interestingly, several of the attributes listed in the original version of Section 101(f) were the same characteristics associated with putatively immoral and corrupt immigrant-led saloons of the early twentieth century: drinking, gambling, and adultery.<sup>252</sup> And although the clause is facially neutral, such provisions in U.S. immigration law are often found to have significant racial effects.<sup>253</sup> Moreover, provisions driven by a combination of race- and class-based animus have been a recurring feature in our immigration legislation.<sup>254</sup>

The early 1950s certainly provided the conditions for such concerns, however latent, to germinate. The 1952 INA was passed on the heels of World War II, and it was criticized at the time for being xenophobic, racist, and exclusionary.<sup>255</sup> As fears about national security and foreign influences grew, the nation's tolerance for immigrants was tested. It is notable that the 1952 INA was passed just two years before the Immigration and Naturalization Service launched the infamous Operation Wetback, which resulted in the expulsion of hundreds of thousands of Mexican laborers.<sup>256</sup> Operation Wetback was consistent with then-existing "U.S. public opinion, which blamed 'wetbacks' for the propagation of disease . . . subversive and

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murder, derived income from illegal gambling, or had been convicted of a gambling offense during relevant time periods).

252. See Part II.C.2.a (exploring the negative associations commonly attributed to saloons).

253. Kevin R. Johnson, *Race and the Immigration Laws: The Need for Critical Inquiry*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 187, 192–94 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002) (cataloging immigration law provisions that are facially neutral but have notable racial effects).

254. Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 L. & CONTEMP. PROBS., Fall 2009, at 1, 2 ("At bottom, U.S. immigration law historically has operated—and continues to operate—to prevent many poor and working noncitizens of color from migrating to, and harshly treating those living in, the United States.").

255. See *Cushing Condemns Immigration Law: He Is Joined by Jewish Leader and by Lodge and Kennedy in Attack at Boston*, N.Y. TIMES, Oct. 3, 1952, at 9.

256. See generally JUAN RAMON GARCÍA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954, at 169, 227–28 (1980) (describing the U.S. government's reasoning behind and implementation of the mass deportation of "illegal" workers in 1954).

communist infiltration, border crimes, [and more].”<sup>257</sup> Although the historical record provides no clear answer, these various forces likely enabled the emergence of the habitual drunkard clause.

#### IV. INTERPRETING THE HABITUAL DRUNKARD CLAUSE

More than six decades after its enactment in 1952, the habitual drunkard clause endures in the statute.<sup>258</sup> The history from the late nineteenth and early twentieth centuries, including the Prohibition Era, reveals the entrenchment of strong associations between immigrants and alcohol, and complex motives driving those associations. The history also evidences a proliferation of statutes relating to drunkenness and habitual drunkards, swimming in doctrinally murky waters, even as the scientific understanding around alcohol use continued to evolve. Finally, the history suggests that the habitual drunkard clause and its predecessors were shaped by troublesome socio-legal factors.

The complex history of the habitual drunkard clause triggers a series of important questions for present-day immigration scholars and practitioners. First, given the origins of the clause, how should it be interpreted and applied? How do subsequent developments (post-1952) in U.S. immigration law shape our view of the ongoing utility of the habitual drunkard clause? And what do we make of the dubious normative underpinnings of the clause?

In this Part, I first describe the present-day significance of “good moral character” in U.S. immigration law. Next, I review the limited agency guidance and case law interpreting the habitual drunkard clause. Then, I examine corollary provisions in immigration law relating to alcohol abuse and addiction, exclusion, and removal—provisions that have, in significant part, rendered the habitual drunkard clause obsolete. Finally, I address any remaining justifications for the clause and recommend deleting it from the statute, in favor of a more careful, objective approach to evaluating alcohol dependence.

##### A. *The Significance of “Good Moral Character” in Immigration Law Today*

“Good moral character” is one of the most enduring, yet elusive, concepts in U.S. immigration law. The concept dates

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257. Audrey J.S. Carrión & Matthew M. Somers, *A Case for the Undocumented Immigrant*, 44 MD. B.J., July/Aug. 2011, at 30, 34 (internal citations omitted).

258. See 8 U.S.C. § 1101(f)(1) (2012).

back to 1790, when Congress enacted the very first naturalization statute.<sup>259</sup> Applicants for naturalization under the 1790 law were required to demonstrate that they were “of good character”; five years later, Congress changed the phrase to add the word “moral.”<sup>260</sup> To this day, for a lawful permanent resident to be naturalized, the resident must establish that he or she “has been and still is a person of good moral character.”<sup>261</sup> Technically, the good moral character requirement applies to the five-year period prior to the application of naturalization.<sup>262</sup> However, immigration officers may reach beyond the five years if there is a nexus between prior acts and present-day concerns.<sup>263</sup>

Although the INA still does not name attributes that are *positive* indicia of good moral character, the 1952 Immigration Act introduced Section 101(f), a list of categories of individuals who “shall [not] be regarded as, or found to be, a person of good moral character.”<sup>264</sup> In its present form, the list includes “a habitual drunkard”; “one whose income is derived principally from illegal gambling activities”; “one who has given false testimony for the purpose of obtaining any benefits under [the INA]”; persons complicit in Nazi persecution, genocide, or torture; and persons convicted of, or who admit committing, one of a range of other offenses.<sup>265</sup> The list, however, is not exhaustive. Section 101(f) specifically provides that “[t]he fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.”<sup>266</sup>

Although “good moral character” is most often associated with naturalization, it has, over the years, become a requirement for a broad range of immigration benefits. In current practice, government decision-makers are frequently called upon to determine whether a noncitizen is a person of “good moral character.” This includes officers who review applications submitted to U.S. Citizenship and Immigration Services (USCIS),<sup>267</sup> and also immigration judges situated within the

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259. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103.

260. Act of Jan. 29, 1795, ch. 20, § 1, 1 Stat. 414, 414.

261. 8 U.S.C. § 1427(a)(3) (2012). The good moral character requirement also applies to naturalization through service in the armed forces. 8 U.S.C. § 1439(c), (e) (2012).

262. *Id.* § 1427(a)(1).

263. *See id.* § 1427(e); 8 C.F.R. § 316.10(a)(2) (2013).

264. Immigration and Nationality Act, Pub. L. No. 82-414, § 101(f), 66 Stat. 163, 172-73 (1952) (codified as amended at 8 U.S.C. § 1101(f) (2012)). The current statute lists nine clauses, but Section 101(f)(2) was repealed in 1981. 8 U.S.C. § 1101(f)(2).

265. *Id.* § 1101(f).

266. *Id.*

267. *See* Interoffice Memorandum from William R. Yates, Assoc. Dir. of Operations,

Executive Office for Immigration Review<sup>268</sup> within the U.S. Department of Justice.

For example, certain noncitizens who are applying for adjustment of status to lawful permanent residence must demonstrate their good moral character,<sup>269</sup> as must an applicant seeking protection under the Violence Against Women Act (VAWA).<sup>270</sup> Likewise, good moral character is also required to obtain “special rule cancellation” under the Nicaraguan Adjustment and Central American Relief Act (NACARA)<sup>271</sup> or permanent residence under the special registry provision.<sup>272</sup>

Some matters specifically within the jurisdiction of the Immigration Courts also require good moral character findings. For example, a nonlawful permanent resident who applies for Cancellation of Removal must establish, per the statute, his good moral character during the ten-year period preceding the date of the application.<sup>273</sup> Likewise, permanent residents must also establish good moral character to obtain cancellation of removal, per requirements that have evolved in case law.<sup>274</sup> Finally, a noncitizen who requests voluntary departure at the conclusion of her removal proceedings must establish good moral character for the five-year period preceding that request.<sup>275</sup>

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U.S. Citizenship & Immigration Servs., to Paul E. Novak, Dir., Vermont Serv. Center, Determinations of Good Moral Character in VAWA-Based Self-Petitions (Jan. 19, 2005), available at [http://www.uscis.gov/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2005/gmc\\_011905.pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/gmc_011905.pdf) [hereinafter Interoffice Memo] (instructing USCIS directors as to how to make good moral character findings).

268. 8 U.S.C. § 1229a (describing the scope of an Immigration Judge’s authority in conducting removal proceedings); see, e.g., *Mateen v. Holder*, 418 F. App’x 532, 533–34 (2011) (demonstrating the immigration judge’s authority to decide matters of good moral character).

269. For example, good moral character is a requirement for holders of A, G, or T visas, who wish to adjust their status to lawful permanent residence. 8 U.S.C. §§ 1255, 1375c.

270. For a discussion of the good moral character requirement for petitioners under the VAWA and instances where waiving the requirement is permissible, see Interoffice Memo, *supra* note 267.

271. 8 C.F.R. § 1240.66(b) (2013).

272. 8 U.S.C. § 1259.

273. *Id.* § 1229b(b)(1)(B).

274. See, e.g., *C-V-T-*, 22 I. & N. Dec. 7, 8–9, 13–15 (B.I.A. 1998) (overturning a deportation order against a lawful permanent resident who pled guilty to “simple possession of drugs” by relying on the respondent’s history before and after his immigration to show balancing factors to permit his staying in the United States); *Marin*, 16 I. & N. Dec. 581, 583–84 (B.I.A. 1978) (upholding the deportation of a lawful permanent resident who pled guilty to a felony charge of selling cocaine and who was unable to rebut his criminal record as evidence of his character).

275. 8 U.S.C. § 1229c.

### B. Agency Guidance and Case Law

Although the INA itself offers minimal guidance on the content of “good moral character,” regulations, case law, and agency memoranda have added more substance to the standard and offer suggestions on how it is to be applied today. Courts have held that the good moral character determination requires a fact-finder “to weigh and balance the favorable and unfavorable facts or factors, reasonably bearing on character, that are presented in evidence.”<sup>276</sup> In the context of naturalization, the Department of Homeland Security (DHS) has promulgated regulations clarifying that “the Service shall evaluate claims of good moral character on a case-by-case basis taking into account the elements enumerated in this section and the standards of the average citizen in the community of residence.”<sup>277</sup>

Cases interpreting the “good moral character” requirement have read additional requirements into the statute. Typically, failure to pay taxes, or court-ordered child support or alimony, will weigh against a finding of good moral character.<sup>278</sup> Conversely, factors supporting a good moral character finding include the applicant’s employment history, academic record, volunteer work, involvement in the community, rehabilitation, and more.<sup>279</sup> Additionally, a number of cases have sought to refine the evidentiary standards relating to good moral character.<sup>280</sup>

With regard to the habitual drunkard clause specifically, there is scant guidance from the government on how it should be interpreted. The manual for the Asylum Officer Basic Training Course suggests that “a doctor’s testimony or information indicating that an individual had been committed to an institution for a course of treatment for chronic alcoholism *could*

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276. *Torres-Guzman v. INS*, 804 F.2d 531, 533–34 (9th Cir. 1986) (deciding the case under 8 U.S.C. § 1254, which was repealed in 1996).

277. 8 C.F.R. § 316.10(a)(2) (2013).

278. *Faddah v. INS*, 553 F.2d 491, 496 (5th Cir. 1977) (holding that failure to file accurate federal tax return was one of the reasons the petitioner failed to prove good moral character); *Grunbaum v. Dist. Dir., CIS*, No. 10-10147, 2012 WL 2359966, at \*5–6 (E.D. Mich. May 21, 2012) (holding that a Petitioner’s failure to pay court ordered alimony and child support was evidence to show he lacked good moral character); *Locicero*, 11 I. & N. Dec. 805, 806 (B.I.A. 1966) (upholding that failure to file accurate federal income tax returns supported finding against good moral character).

279. See *C-V-T*, 22 I. & N. Dec. at 13–14; *Marin*, 16 I. & N. Dec. at 584–85.

280. See *United States v. Rebelo*, 358 F. Supp. 2d 400, 413 (D.N.J. 2005) (discussing the statute of limitations to be used in denaturalization case involving alleged lack of good moral character); *Marin*, 16 I. & N. Dec. at 585 (noting that examples of acceptable “evidence attesting to a respondent’s good character” are “affidavits from family, friends, and responsible community representatives”).

be evidence that *might* preclude a finding of good moral character.”<sup>281</sup> In slightly less equivocal language, the manual states that “[i]t would be reasonable to consider an alien’s good faith efforts at sobriety in determining whether the alien is a habitual drunkard.”<sup>282</sup>

The USCIS Adjudicator’s Field Manual offers more detail regarding the evidence that might support a finding that an applicant has been a habitual drunkard. This portion of the manual specifically addresses good moral character determinations in the context of naturalization applications. Written in the second person, the document encourages USCIS officers to

[e]xamine any divorce decrees, as well as other documents submitted for information that would lead you to believe that the applicant was a habitual drunkard. Some divorce decrees will state that the cause of the divorce was the applicant’s alcoholism. You might also consider any termination from employment or unexplained periods of unemployment as a possible indication that the applicant was unable to work because he or she was an habitual drunkard. The rap sheet may show arrests or convictions for public intoxication, or the motor vehicle bureau may report arrest for driving under the influence of alcohol/intoxication. Depending on the State in which the applicant resides, you may have to request this directly from the motor vehicle bureau.<sup>283</sup>

Apart from these brief observations, DHS has issued no other interpretive guidance for the habitual drunkard clause.

Case law applying the habitual drunkard clause offers equally limited direction.<sup>284</sup> Only a handful of reported decisions cite specifically to INA § 101(f)(1). The only published decision from the Board of Immigration Appeals that analyzes the clause is *Matter of H-*, a 1955 case involving a Hungarian national who was a permanent resident and who had been placed in deportation proceedings due to his criminal record.<sup>285</sup> The immigration officer concluded that the respondent was ineligible

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281. U.S. CITIZENSHIP AND IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE: NACARA SUSPENSION AND SPECIAL RULE CANCELLATION OF REMOVAL, 61 (2009), available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/NACARA-31aug10.pdf> (emphasis added).

282. *Id.*

283. U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR’S FIELD MANUAL § 74.2.

284. Mimi E. Tsankov, *Tipsy: A Sobering Look at the Effect of Alcohol-Related Incidents in Removal Proceedings*, FED. LAW., Sept. 2012, at 22, 25.

285. H-, 6 I. & N. Dec. 614, 614, 616 (B.I.A. 1955) (“[R]espondent has been convicted of two crimes involving moral turpitude . . .”).



for discretionary relief, as he could not establish good moral character “because he was a habitual drunkard.”<sup>286</sup> The BIA ultimately upheld this finding, citing a report from a hospital psychiatrist characterizing the applicant as both a “chronic alcoholic” and a “habitual drunkard.”<sup>287</sup> The Board specifically referenced hospital records indicating that the respondent had surreptitiously left a hospital treatment program on several occasions, in search of alcohol, and immediately resumed his pattern of heavy drinking.<sup>288</sup> The Board also noted that the respondent, through his attorney, had failed to offer additional evidence to rebut the record from the administrative proceeding.<sup>289</sup>

More recent cases suggest a more permissive standard, consistent with the training course and field manual. A 2000 case before the Administrative Appeals Office (AAO) involved a Mexican national who was seeking relief under VAWA, but whose application had been denied due to a finding that he lacked the required good moral character.<sup>290</sup> The adjudicator had concluded that the applicant was a habitual drunkard, due to three drunk driving convictions—two in 1980 and one in 1991.<sup>291</sup> The Administrative Appeals Office (AAO) noted that the relevant time period for good moral character determinations was the three-year period prior to filing of the petition; since the last conviction was more than eight years prior, the AAO concluded the applicant was, in fact, “a person of good moral character.”<sup>292</sup> The AAO also cited a provision in the regulations that applications should be “evaluated on a case-by-case-basis.”<sup>293</sup> In a similar case, decided in 2007, the AAO overturned a habitual drunkard finding, noting that the petitioner had stopped drinking more than four years before the application was filed, and there was no evidence of recent problems with alcohol.<sup>294</sup>

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286. *Id.* at 616.

287. *Id.*

288. *See id.* (“On the basis of this testimony, respondent clearly comes within section 101 (f) (1) and is thereby unable to prove good moral character and barred from relief.”).

289. *See id.* (noting that respondent did not rebut the resident psychiatrist’s statements or the hospital records).

290. AAU EAC 99 056 53383, 2000 WL 33539040, at \*1 (I.N.S. Jan. 21, 2000).

291. *Id.* at \*2.

292. *Id.* at \*3.

293. *Id.* at \*2 (citing 8 C.F.R. § 204.2(c)(1)(vii)).

294. AAU EAC 06 155 51404, 2007 WL 5315579, at \*8 (D.H.S. Feb 22, 2007). In a different AAO case, the office upheld the denial of an application for lawful permanent residence, finding that the applicant had insufficient positive equities to outweigh a prior criminal record (including several DUIs), even when some of the criminal record had been vacated. 1998 WL 1990154, at \*1–4 (I.N.S. July 14, 1998).

Other cases reference the clause but provide limited interpretive guidance. In *Ruiz v. INS*, the Sixth Circuit Court of Appeals affirmed a denial of voluntary departure, which was based on a determination made by a special inquiry officer and upheld by the Board of Immigration Appeals.<sup>295</sup> The petitioner, a Mexican national, had been convicted of murder in Mexico in addition to accruing a handful of arrests and convictions in Ohio for being drunk and disorderly.<sup>296</sup> While the Sixth Circuit panel cited to the habitual drunkard clause, it provided no written analysis of its applicability to the case at hand.<sup>297</sup> Similarly, in *Navarette v. Holder*, the district court made an oblique reference to Section 101(f)(1) in reviewing the denial of a naturalization application.<sup>298</sup> In that case, the applicant had twice been convicted of driving under the influence.<sup>299</sup> In *Yaqub v. Gonzalez*, the district court overturned the denial of a naturalization application, finding that the applicant did possess good moral character, notwithstanding a public intoxication and two DUI charges.<sup>300</sup> While the habitual drunkard clause is listed among the moral character provisions, the court did not specifically invoke it in the context of the respondent's case.<sup>301</sup>

Finally, in *Ragoonanan v. U.S. Citizenship & Immigration Services*, a noncitizen sought review of his naturalization application, which had been denied by a USCIS district office in Minnesota.<sup>302</sup> The USCIS district office found the applicant lacked the required good moral character, citing to his past conduct and the fact that he had been "drinking and driving . . . [and thereby] posed a threat to the property, safety, and welfare of others."<sup>303</sup> Interestingly, in presenting its case before the district court, USCIS did not contend that the

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295. *Ruiz v. INS*, 410 F.2d 382, 383 (6th Cir. 1969) (per curiam).

296. *Id.* at 382–83.

297. *See id.* at 383.

298. *Navarette v. Holder*, No. CV-F-09-1255, 2010 WL 1611141, at \*3 (E.D. Cal. Apr. 20, 2010). The case involved an analysis of a DUI conviction vis-à-vis good moral character. *Id.* at \*6. In outlining the relevant statute, the court made a parenthetical reference to the "habitual drunkard" provision but did not rely on the provision in its analysis. *Id.* at \*3, \*6.

299. *Id.* at \*2.

300. *Yaqub v. Gonzalez*, No. 1:05-CV-170, 2006 WL 1582440, at \*5 (S.D. Ohio June 6, 2006).

301. *Id.* at \*3–5 (suggesting that the petitioner's "lack of any further alcohol related incidents indicates that abuse of alcohol . . . [is] not [an] impediment[] to the finding of good moral character").

302. *Ragoonanan v. USCIS*, No. 07-3461, 2007 WL 4465208, at \*1 (D. Minn. Dec. 18, 2007) (stating that the petitioner was denied because of his DUI conviction and probation during the statutory period).

303. *Id.* at \*2.

applicant was a habitual drunkard but rather relied on the catch-all provision in INA § 101(f)(1).<sup>304</sup>

*C. Subsequent Developments in U.S. Immigration Law*

The paucity of interpretive guidance may be explained, in part, by the emergence of other provisions that address the concerns embedded in the habitual drunkard clause. As described above, the regulation of drunkenness reflected a broad range of motivations, including punishing the conduct itself, protecting others from harm, avoiding economic dependence on the government or other persons, and providing treatment and rehabilitation to the offender. Existing grounds of inadmissibility (exclusion) or deportability (expulsion) speak to virtually all of these concerns, as do other clauses within the good moral character provision itself. Finally, apart from these statutory guidelines, immigration officers and judges are granted considerable discretion when reviewing applications; this discretion, while concerning, would allow for consideration of unique circumstances involving alcohol-related behavior.

The grounds of inadmissibility of INA § 212 offer multiple tools to screen out persons whose alcohol dependence may pose a concern to United States society. The most directly relevant provision is the inadmissibility ground for physical or mental disorders, which has been interpreted to include alcohol abuse and dependence.<sup>305</sup> This specific inadmissibility ground renders a person inadmissible or ineligible to receive a visa when there is a harmful behavior associated with the disorder.<sup>306</sup> With respect to alcohol dependence, an internal DHS memorandum clarifies that “alcohol abuse/dependence resulting in alcohol-impaired driving may serve as the basis for a determination that an alien has mental disorder with associated harmful behavior.”<sup>307</sup> Additionally, for visa applicants who are overseas, and who have a single alcohol-related arrest or conviction within the past five years (or two within the last ten years), the Department of State refers such individuals to a physician to determine whether they should be admitted.<sup>308</sup> This assessment is performed in light of a

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304. *Id.* at \*3.

305. 8 U.S.C. § 1182(a)(1)(A)(iii) (2012). *See generally* Tsankov, *supra* note 284, at 56–57 (describing in detail how this health-related ground of inadmissibility has been interpreted and is applied in practice).

306. *See id.* § 1182(a)(1)(A)(iii)(I)–(II).

307. Memorandum from William R. Yates, Assoc. Dir. of Operations, U.S. Citizenship & Immigration Servs., U.S. Dep’t of Homeland Sec. (Jan. 16, 2004).

308. 9 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 40.11, note 11.2 (2012), available at <http://www.state.gov/documents/organization/86936.pdf>.

related exclusion ground, which bars drug abusers and addicts.<sup>309</sup> Notably, this inadmissibility ground reflects a more scientific understanding of alcohol dependence, which has increasingly been seen as a disease.<sup>310</sup>

As a complement to this health-related inadmissibility ground, the criminal inadmissibility provisions would capture many types of alcohol-induced criminal activity.<sup>311</sup> These inadmissibility grounds (and the analogous grounds of deportability) have been carefully interpreted by the courts to determine the immigration consequences of different alcohol-related crimes, including public drunkenness and driving while intoxicated.<sup>312</sup> Therefore, any alcohol related offense that is grave enough to trigger immigration consequences would be flagged by these grounds of exclusion.

To the extent that the United States immigration system is concerned about the noncriminal spillover effects of alcohol use, other provisions once again are able gap-fillers. The public charge inadmissibility ground, while not without its flaws, is meant to capture individuals who are unable to support themselves financially and instead rely upon government programs.<sup>313</sup> Again, individuals who are not able to provide for their own maintenance (due to alcohol abuse or any other reason) may be denied admission on the public charge grounds.

With the restructuring of immigration laws in 1996, these different inadmissibility grounds would also be applied to those seeking adjustment of status, or lawful permanent residence while in the United States.<sup>314</sup> For example, an individual on a temporary visa who wishes to apply for permanent residence will be screened for the health, crime, and public charge inadmissibility grounds described above. Most applicants for adjustment of status must undergo a medical examination by a certified civil surgeon; this examination includes an evaluation

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309. 8 U.S.C. § 1182(a)(1)(A)(iv).

310. Levine, *supra* note 16, at 148. The term “alcohol dependence” was coined to reflect the combination of physiological and psychological factors that lead to the excessive consumption of alcohol. Specifically, the term “dependence” was introduced in 1964 by the World Health Organization as a replacement for both “addiction” and “habituation.” Virginia Berridge & Sarah Mars, *History of Addictions*, 58 J. EPIDEMIOLOGY & COMMUNITY HEALTH 747, 748 (2004).

311. See generally criminal inadmissibility grounds at 8 U.S.C. § 1182(a)(2) (2012).

312. See, e.g., Torres-Varela, 23 I. & N. Dec. 78, 79, 86 (B.I.A. 2001) (en banc) (holding that simple DUI is not a crime involving moral turpitude); -Meza, 22 I. & N. Dec. 1188, 1194–95 (B.I.A. 1999) (DUI with knowledge of a revoked or suspended license is a crime involving moral turpitude).

313. 8 U.S.C. § 1182(a)(4)(D).

314. *Id.* § 1255(a).

for alcohol abuse and dependence.<sup>315</sup> Moreover, in assessing whether an adjustment application has become a public charge, DHS will examine any reliance on specific forms of cash assistance, such as Temporary Assistance for Needy Families.<sup>316</sup>

What about individuals who are already in the United States, either as lawful permanent residents or in a stable nonimmigrant status? In this context, the grounds of deportability, or expulsion, at INA § 237 would capture alcohol-related conduct and its sequelae.<sup>317</sup> Many scholars have written about the expansive grounds of criminal inadmissibility and the broad range of conduct that is captured.<sup>318</sup> Under these grounds of deportability, a lawful permanent resident can be deported for a relatively minor infraction.<sup>319</sup> Any alcohol-related conduct that ripens into a conviction for a deportable offense will jeopardize the immigration status of a noncitizen in the United States.<sup>320</sup> For example, domestic violence crimes involving alcohol use can lead to the deportability of the offender.<sup>321</sup> The deportability grounds also capture any noncitizen “who, within five years after the date of any entry, has become a public charge from causes not affirmatively shown to have arisen since entry.”<sup>322</sup>

Notably, the “good moral character” provision itself now incorporates several of the criminal inadmissibility and deportability grounds as per se bars to a good moral character finding.<sup>323</sup> Any relevant criminal activity could therefore lead an

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315. Tsankov, *supra* note 284, at 56–57 (describing the examination protocols, including the possibility of re-examination).

316. U.S. DEPT OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS., FACT SHEET: PUBLIC CHARGE (2009), [http://www.uscis.gov/USCIS/New%20Structure/Press%20Releases/2009%20Press%20Releases/Oct%202009/public\\_charge\\_fact\\_%20sheet\\_11\\_06\\_09.pdf](http://www.uscis.gov/USCIS/New%20Structure/Press%20Releases/2009%20Press%20Releases/Oct%202009/public_charge_fact_%20sheet_11_06_09.pdf).

317. See generally criminal deportability grounds at INA § 237(a)(2), 8 U.S.C. § 1227(a)(2).

318. See, e.g., Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 656–57 (2011) (naming a series of federal statutes enacted in the 1990s that significantly increased the number of crimes that could result in removal).

319. See Lapp, *supra* note 4, at 1594 (“A long list of convictions, from serious, violent felonies to minor misdemeanors like shoplifting, can lead to deportation.”).

320. Moreover, a naturalization applicant who is deportable on criminal grounds is likely to be referred to ICE upon filing the application. See *id.* at 1603–04.

321. 8 U.S.C. § 1227(a)(2)(E).

322. *Id.* § 1227(a)(5).

323. *Id.* § 1101(f)(3), (8) (determining that individuals who fall within inadmissibility grounds relating to crimes involving moral turpitude, controlled substance offenses, multiple criminal convictions, or trafficking in controlled substances, along with those who have been convicted at any time of an aggravated felony lack good moral character). See generally Lapp, *supra* note 4, for a thoughtful critique of these bars to good moral character.

adjudicator to deny an application on moral character grounds alone. And even if none of the above-mentioned statutory provisions came into play in a particular case, immigration officers and judges enjoy considerable discretion when reviewing applications. Many of the forms of relief that incorporate "good moral character" as a requirement also allow for denial of relief in the exercise of discretion.<sup>324</sup> Even the "good moral character" requirement itself calls for a discretionary assessment because the statute allows the adjudicator to consider matters outside of the enumerated grounds.<sup>325</sup> Taken together, all of these grounds call into question the present-day relevance of the habitual drunkard clause.

*D. A Vision for Interpreting the Habitual Drunkard Clause*

Given these developments in U.S. immigration law, the habitual drunkard clause is arguably obsolete. Some might contend, however, that the habitual drunkard clause targets individuals who are not necessarily criminals nor dependent upon the government—but simply a blight upon their families and societies and an annoyance and possible burden. Or that applicants for naturalization or other significant benefits should be held to a higher standard beyond the statutory grounds of exclusion and expulsion. According to such views, the good moral character assessment helps determine who is truly *worthy* of the benefit.

If the habitual drunkard clause is effectively about "worthiness," the history of the Prohibition Era suggests the need to view it with considerable skepticism.<sup>326</sup> Originally, the alcohol-related regulation targeted at immigrants was largely a form of social control—responding to the material, political, and cultural threats that specific groups of immigrants posed.<sup>327</sup> The multifaceted fears involving immigrants and alcohol, which crystallized during the Prohibition Era in the context of European immigrants, have now been mapped onto other communities. Today, alcohol use among Latinos and other immigrant communities of color generates some of the same discomfort among established interests.

As Steven Bender has written, Latinos and Latinas in the United States have suffered from accusations and stereotypes

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324. See, e.g., 8 U.S.C. §§ 1229b(b)(1), 1229c(a)(1) (addressing cancellation of removal for nonpermanent residents and voluntary departure).

325. See *id.* § 1101(f).

326. See generally Part II.C.2.

327. BEHR, *supra* note 27, at 3–4.

about laziness, which has included “the view and portrayal of Latinas/os as awash in alcohol.”<sup>328</sup> Just as industrialists quashed the use of alcohol among their workers,<sup>329</sup> immigrant laborers in the present—especially day laborers—are saddled with accusations and stereotypes regarding alcohol consumption and diminished productivity.<sup>330</sup> More generally, alcohol consumption among Latino immigrants, however innocuous, fuels narratives relating to drunkenness, criminality, unworthiness, and lack of belonging.<sup>331</sup> Particularly for undocumented immigrants, alcohol use somehow runs afoul of the implicit social contract that underlies their tenuous admission and stay in the United States.<sup>332</sup>

As a result of these perceptions, specific alcohol-related conduct among Latinos has captured the public imagination—especially driving under the influence.<sup>333</sup> This behavior invokes the long-standing fear of dangerousness that is associated with the consumption of alcohol by certain minority groups.<sup>334</sup> While driving under the influence is certainly cause for societal concern, it sparks an especially sharp response when the accused is an immigrant.<sup>335</sup> By engaging in that conduct, the individual

328. STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION 64–67 (2003).

329. *Id.* at 4; LENDER & MARTIN, *supra* note 9, at 98, 107–08.

330. ROB T. GUERETTE, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUSTICE, DISORDER AT DAY LABOR SITES 3 (2006), available at <http://www.cops.usdoj.gov/Publications/e09061311.pdf> (asserting, without support, that day laborers “may drink and sell or use illicit drugs in public”); Brenda M. Booth & Weiwei Feng, *The Impact of Drinking and Drinking Consequences on Short-Term Employment Outcomes in At-Risk Drinkers in Six Southern States*, 29 J. BEHAV. HEALTH SERVICES & RES. 157, 163–64 (2002).

331. See, e.g., HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 9–11 (2006) (concluding that U.S. immigration law fuels immigrant feelings of unworthiness and of not belonging); *Drunk and Dangerous*, *supra* note 7 (profiling Latino noncitizens involved in drunk driving incidents, under the subheading “Aliens under the influence of alcohol turning U.S. citizens into roadkill”).

332. MOTOMURA, *supra* note 331, at 9–11; see also Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 396–402 (2006) (using membership theory to characterize the relationship between immigrants and the state).

333. Ted Hesson, *How Drunk Driving Turned into an Immigration Issue*, ABC NEWS (July 3, 2013), [http://abcnews.go.com/ABC\\_Univision/Politics/drunk-driving-found-immigration-reform/story?id=19572093](http://abcnews.go.com/ABC_Univision/Politics/drunk-driving-found-immigration-reform/story?id=19572093) (providing an example of the public perception concerning immigrants who drive under the influence of alcohol).

334. *Id.*

335. Compare *Drunk and Dangerous*, *supra* note 7, with Bill McKelway & Brandon Shulleeta, *Hanover Mom’s Death Galvanizes Community*, RICHMOND TIMES-DISPATCH (Jan. 15, 2014), [http://www.timesdispatch.com/news/local/crime/hanover-mom-s-death-galvanizes-community/article\\_ff07a633-eeef-5c37-a00f-23b2b890a770.html](http://www.timesdispatch.com/news/local/crime/hanover-mom-s-death-galvanizes-community/article_ff07a633-eeef-5c37-a00f-23b2b890a770.html) (humanizing the Caucasian male offender in a DUI fatality incident by providing background about his

has transgressed the norms of social control that implicitly shape the relationship between noncitizens and society at large. These feelings and forces are powerfully resonant, even though studies indicate that immigrants are not more likely than the native-born to drive under the influence of alcohol.<sup>336</sup>

Moreover, the sheer vagueness of the clause runs up against the present-day view of alcoholism as a disease. L.S. Tao, writing in the late 1960s, signaled that the “distinction between habitual drunkenness and alcoholism poses a difficult problem for medical experts. . . . [T]he dividing line between habitual drunkenness and alcohol addiction is very hazy.”<sup>337</sup> Similarly, Harry Levine notes that the “modern reader translates the behavioral description of the habitual drunkard into modern terms—into the alcoholic.”<sup>338</sup> If “habitual drunkard” assessments are essentially assessments about alcoholism, a more scientific approach—such as the approach reflected in the health-related inadmissibility grounds<sup>339</sup>—is warranted. And since the assessment deals with an illness, one could argue that it should be removed entirely from the sphere of moral character determinations.

Indeed, our understanding of the history of Prohibition and the habitual drunkard clause suggests the need for a more empirical grounding of future adjudication and policy choices involving alcohol-related conduct. This invites an important set of questions: Is there any empirical basis for the link between immigrants and excessive alcohol consumption? What is the reality of alcohol abuse among immigrants, and how should our understanding of that reality shape the law?

As noted above, even the earliest associations between immigrants to the United States and alcohol consumption *did* have some real-life basis. Stereotypes linking immigrants with alcohol consumption were fueled, in part, by the cultural practices of German, Irish, Italian, and other immigrants for whom alcohol often played a more visible role in social gatherings and in family life.<sup>340</sup> Once these associations took hold, they continued to operate automatically in the collective

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life history). See also BENDER, *supra* note 328, at 93 (recounting a story involving a Latino who had been convicted of drunk driving and remind the reader that “both President George W. Bush and Vice-President Dick Cheney have been arrested for drunk driving”).

336. Hesson, *supra* note 333 (citing a 2008 study, which found that birthplace is not a factor related to drunk driving).

337. Tao, *supra* note 6, at 1075.

338. Levine, *supra* note 16, at 148.

339. 8 U.S.C. § 1182(a)(1)(A) (2012).

340. BEHR, *supra* note 27, at 47–49; LENDER & MARTIN, *supra* note 9, at 59–62.



consciousness of society, stoked by rhetoric, as well as real-life events.<sup>341</sup>

The research about drinking patterns among immigrants reveals a complex picture. For some immigrants, alcohol consumption is a result of their efforts to adapt to new, often difficult surroundings. A 2006 study of alcohol use among immigrant Latinos in the northeastern United States affirmed the link between drinking and adaptation to a new sociocultural environment.<sup>342</sup> The researchers identified specific reasons for drinking, including social isolation, boredom, the existence of language barriers, and even cold weather.<sup>343</sup> Among the survey participants, drinking also served as a proxy for social connections, given that family networks were often disrupted as a result of the migration experience.<sup>344</sup> Along these lines, social scientists have also found that elevated levels of alcohol consumption may occur as a result of "anxiety produced by acculturation," "anomie, resulting from the lack of legitimate means to achieve cultural goals" or "the stress of urban life, job dissatisfaction, and marginalization."<sup>345</sup> For example, in one study of Puerto Rican migrants, barriers to employment were found to lead to alcohol misuse.<sup>346</sup>

While alcohol use among immigrants is frequently linked with adjustment-related concerns, some studies have found immigrant alcohol use simply to be a form of social participation that does not always lead to abuse.<sup>347</sup> Moreover, while these studies have uncovered different reasons for alcohol use among immigrants, not all have found the alcohol use to be excessive, or cause for concern.<sup>348</sup>

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341. LENDER & MARTIN, *supra* note 9, at 59–62 (noting society's association between Irish and German immigrants with drinking).

342. Christina S. Lee et al., *Social Processes Underlying Acculturation: A Study of Drinking Behavior Among Immigrant Latinos in the Northeastern United States*, 33 CONTEMP. DRUG PROBLEMS 585, 597–98 (2006).

343. *Id.* at 597. A January 1992 study of migrant farm workers in New York State similarly revealed that social and physical isolation (coupled with long work hours) contributed to drinking among the immigrants. Peter S.K. Chi & Janet McClain, *Drinking, Farm and Camp Life: A Study of Drinking Behavior in Migrant Camps in New York State*, 8 J. RURAL HEALTH 41, 46 (1992); see also Watson et al., *Alcohol Use Among Migrant Laborers in Western New York*, 46 J. STUD. ALCOHOL 403 (1985).

344. Lee et al., *supra* note 342, at 597–98.

345. Carole Legge & Lesley Sherlock, *Perception of Alcohol Use and Misuse in Three Ethnic Communities: Implications for Prevention Programming*, 25 INT'L J. ADDICTIONS 629, 633 (1991).

346. Andrew J. Gordon, *Alcohol and Hispanics in the Northeast: A Study of Cultural Variability and Adaptation*, in THE AMERICAN EXPERIENCE WITH ALCOHOL 297, 308–09 (Linda A. Bennett & Genevieve M. Ames eds., 1985).

347. Chi & McClain, *supra* note 343, at 46.

348. See *id.*

This complex picture of alcohol use suggests several directives for the future of the habitual drunkard clause. First, at a minimum, the clause should be eliminated from the list of per se good moral character factors. (Indeed, some scholars have recommended eliminating the good moral character provision in its entirety.<sup>349</sup>) A record of alcohol dependence—and perhaps more specifically, unique circumstances involving the failure to acknowledge or address it—could perhaps be folded into an exercise of administrative discretion. Second, when evaluating alcohol use in the context of immigration adjudication, the need for objective, empirically based standards is paramount.<sup>350</sup> Finally, as a counter to the historical forces that sought to subordinate immigrants through alcohol-related regulation, some amount of contextual understanding and lenience is warranted.<sup>351</sup> Excessive alcohol use among immigrants is typically a sign of illness or difficulty adjusting to life in the United States, as opposed to a moral defect.

The implementation of these changes is essential, especially in the current political moment. Immigrants are increasingly associated with criminal activity, at least in the political rhetoric.<sup>352</sup> Moreover, with the spread of Secure Communities and other local enforcement tools, immigrants are more likely to come into contact with U.S. Immigration & Customs Enforcement (ICE) because of alcohol-related activity, including public drunkenness and driving while intoxicated. Local law enforcement officers may also be more scrutinous of alcohol-related behavior among immigrants precisely *because* of prevailing stereotypes. All of these considerations suggest that alcohol-related activity (including alcohol dependence) must be given appropriate, objective weight in the immigration context.

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349. See, e.g., Lapp, *supra* note 4, at 1630–31.

350. See Tsankov, *supra* note 284, at 58–59 (offering helpful suggestions for managing immigration cases involving alcohol-related offenses).

351. Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 203, 253 (2012) (noting the value of contextualizing a client's experience to avoid the pitfalls of a "bad immigrant" experience).

352. See Tancredio Statement, *supra* note 8, at 18,426, 18,429–31 (describing various accounts of illegal immigrants associated with criminal activities to a Congressional panel on Immigration Reform).

V. THE CONTINUING LEGACY OF PROHIBITION ON U.S.  
IMMIGRATION LAW

The “chronic alcoholism” provision from 1917 and the habitual drunkard clause from 1952 both serve as metaphors for the broader preoccupation with drunkenness in immigration law. This preoccupation continues to this day, and it manifests in various ways. Indeed, it is telling that when the U.S. Supreme Court in *Arizona v. United States* considered how S.B. 1070 might work in practice, the Court instinctively turned to a police officer stopping an immigrant for driving under the influence.<sup>353</sup>

As described above, incidents involving immigrants and alcohol receive extraordinary media scrutiny and continue to stoke the concerns that solidified during the Prohibition Era.<sup>354</sup> Stories of immigrants driving under the influence are constantly reported, and tend to linger in the public consciousness.<sup>355</sup> One such incident occurred on the morning of August 1, 2010, in Prince William County, Virginia, when Carlos A. Martinelly Montano crashed his Subaru Outback into a guardrail and collided head-on with a vehicle carrying three elderly female passengers.<sup>356</sup> Martinelly Montano, an undocumented immigrant from Bolivia with a criminal record, had been driving under the influence of alcohol.<sup>357</sup> The crash claimed the life of Sister Denise Mosier, a 66-year-old Benedictine nun.<sup>358</sup> The incident unleashed, once again, the long-standing public concerns about alcohol use among immigrants and the need for heavier—and swifter—sanctions against noncitizens who commit alcohol-related crimes.<sup>359</sup> Moreover, the incident reverberated in immigration courts across the country, leading government attorneys and judges to scrutinize carefully immigrants with prior alcohol-

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353. *Arizona v. United States*, 132 S. Ct. 2492, 2497, 2509 (2012).

354. See BEHR, *supra* note 27, at 30 (noting that Prohibitionists were concerned with drunk immigrants because of their perceived threat to U.S. citizens); *Drunk and Dangerous*, *supra* note 7 (describing numerous stories of immigrants driving drunk and killing or seriously injuring U.S. citizens).

355. See Jennifer Buske & Paul Duggan, *Va. Driver Had Record of DUIs Before Fatal Crash*, WASH. POST, Aug. 3, 2010, at A1; *Drunk and Dangerous*, *supra* note 7.

356. Buske & Duggan, *supra* note 355.

357. *Id.*

358. *Id.*

359. See Caroline Black, *Illegal Immigrant Carlos Montano Charged with Killing Nun in Drunk Driving Crash*, CBS NEWS (Aug. 4, 2010), <http://www.cbsnews.com/news/illegal-immigrant-carlos-montano-charged-with-killing-nun-in-drunk-driving-crash/>; Suzanne Gamboa & Kathleen Miller, *Death of Nun, Sister Denise Mosier, Sparks Anti-Immigration Backlash in Virginia*, HUFFINGTON POST (Aug. 8, 2010), [http://www.huffingtonpost.com/2010/08/08/death-of-nun-sister-denis\\_n\\_674783.html](http://www.huffingtonpost.com/2010/08/08/death-of-nun-sister-denis_n_674783.html).

related offenses.<sup>360</sup> The August 2010 crash and its aftermath is simply a recent iteration of a long-standing narrative, forged in the Prohibition Era, which links immigrants in the United States with excessive and potentially dangerous alcohol use.

Although Prohibition's legacy on immigrants is most pronounced in the habitual drunkard clause, the same forces continue to give shape to societal perceptions and subtly guide public debates. The stereotypes regarding immigrants and alcohol use are fairly well entrenched and undoubtedly reach spheres of society outside immigration law. A full examination of the broader societal impact of Prohibition is clearly beyond the scope of this Article. Nevertheless, in the context of immigration law, Prohibition's legacy can be seen in immigration enforcement and adjudication and in legislative proposals targeting immigrant alcohol use. While elimination of the habitual drunkard clause would be an important first step, government representatives and advocates must be cognizant of equally concerning dynamics in these and other spheres.

#### A. *Immigration Adjudication and Enforcement*

Considerations of alcohol use are very much alive in the practice of immigration law, especially through discretionary decisions of immigration judges and DHS officers.<sup>361</sup> Government attorneys sometimes raise the specter of habitual drunkenness in removal proceedings where moral character is at issue or where discretion is allowed.<sup>362</sup> For example, when making discretionary bond determinations, Immigration Judges instinctively inquire about alcohol-related offenses, often before turning to other types of misconduct or attributes that might pose a danger to society.<sup>363</sup> It is unsurprising that judges would fall into certain narratives about immigrant behavior, since narrative and schema are the ways that all

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360. This statement is based on the Author's own experience as a practicing immigration attorney, and based on conversations with colleagues in the Washington, D.C. area and across the country. It is offered as anecdotal evidence; further empirical study would aid understandings of any trends.

361. See, e.g., Keyes, *supra* note 351, at 233–35.

362. H-, 6 I. & N. Dec. 614, 614, 616 (B.I.A. 1955).

363. See, e.g., BRYAN LONEGAN, IMMIGRATION LAW UNIT OF THE LEGAL AID SOC'Y, IMMIGRATION DETENTION AND REMOVAL: A GUIDE FOR DETAINEES AND THEIR FAMILIES 21 (2007), available at [http://www.aclu-tn.org/pdfs/Immigrant%20Resource%20Center/Immigration%20Detention%20and%20Removal%20-%20A%20Guide%20for%20Detainees%20and%20Their%20Families%20\\_English\\_.pdf](http://www.aclu-tn.org/pdfs/Immigrant%20Resource%20Center/Immigration%20Detention%20and%20Removal%20-%20A%20Guide%20for%20Detainees%20and%20Their%20Families%20_English_.pdf) ("In the cases of cancellation, 212(c), and adjustment, your life becomes an open book. The judge wants to hear about your whole life . . . [including your] alcohol and drug abuse history . . .").

human beings retain and structure information and view the world.<sup>364</sup>

A recent example, involving a real case in immigration proceedings, serves to highlight how these forces play out. Alberto is a 59-year-old lawful permanent resident of the United States, currently residing in the Washington, D.C. metropolitan area.<sup>365</sup> Alberto left his native El Salvador in the early 1980s due to ongoing civil strife and made his way to the United States. He first settled in Texas, where he performed agricultural work for several years. In 1990, Alberto obtained lawful permanent residence as a special agricultural worker and moved with his family to a Central American immigrant enclave in northern Virginia.

Life in the United States, however, had never been easy for Alberto. He was haunted by memories of the violent civil conflict in El Salvador—a conflict that had claimed the lives of many members of his family. Moreover, a few years after their move to Virginia, Alberto separated from his wife and slowly lost contact with his children, whose loyalties had drifted towards their mother.

Lacking a stable support network, Alberto began to self-medicate with alcohol. He eventually lost his apartment, became homeless, and accumulated over a dozen citations for public drunkenness. During this period in his life, Alberto committed two minor theft offenses—once, for stealing a razor, and another time for stealing a bottle of wine. For each of these incidents, Alberto was convicted and served no more than a week in jail. A few years later, when Alberto applied to renew his lawful permanent resident card, his criminal record came to the attention of DHS, and he was flagged as a deportable alien<sup>366</sup> and eventually placed in immigration removal proceedings.

Before the immigration court, Alberto sought cancellation of removal under Section 240A(a) of the INA.<sup>367</sup> In completing the application form with their client, Alberto's attorneys struggled with answering the following question: "Have you ever been a

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364. Keyes, *supra* note 351, at 234–38.

365. Alberto's story is based on the experience of a former client of the Immigrant Justice Clinic at the Washington College of Law. The name and other identifying information have been changed.

366. Each of Alberto's theft offenses constituted a "crime involving moral turpitude" under U.S. immigration law. Consequently, he was charged with being deportable under 8 U.S.C. § 1227(a)(2)(A)(ii), as an "alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct."

367. See Act of Sept. 30, 1996, Pub. L. No. 104-208, § 240A, 110 Stat. 3009, 3594 (codified as amended at 8 U.S.C. § 1229b (2012)).

habitual drunkard?”<sup>368</sup> On the one hand, Alberto had certainly succumbed to alcohol dependence in recent years, to the point where his consumption was uncontrollable. On the other hand, answering “Yes” would make it difficult to obtain the relief sought. Finding little clear guidance for the meaning of “habitual drunkard” under the INA, the attorneys strategically chose to answer “No.”

At trial, Alberto’s attorneys elicited information about his criminal record during the direct examination. Alberto explained the origins of his alcohol dependence, expressed remorse for his past conduct, and offered evidence of rehabilitation. On cross-examination, a skeptical government attorney vigorously questioned Alberto about how he could possibly have marked “No” to the “habitual drunkard” question given his record of alcohol-related convictions and public drunkenness citations. During her closing statement, the government attorney focused on Alberto’s alcohol use as evidence that he lacked good moral character.<sup>369</sup> She also emphasized that his alcohol use should be a discretionary factor weighing against an exercise of discretion.

Alberto’s case is not unique. In another case, the government denied relief under Nicaraguan Adjustment and Central American Relief Act (NACARA) to a noncitizen with a handful of alcohol-related offenses in 2005, notwithstanding considerable positive equities, and the fact that the application was adjudicated several years later; the case was successfully appealed to the Board of Immigration Appeals.<sup>370</sup> In yet another case, the government attorney in immigration court accused a respondent of being a “habitual drunkard” after he admitted to being an alcoholic—despite the difference between the terms.<sup>371</sup> The immigration judge ultimately found in favor of the respondent, but the government nonetheless appealed that decision, to no avail.<sup>372</sup>

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368. See *Application for Cancellation of Removal*, *supra* note 4, at 6.

369. Although “good moral character” is not an enumerated requirement under the LPR cancellation statute (8 U.S.C. § 1229b), the Board of Immigration Appeals has ruled that Immigration Judges should examine an applicant’s good moral character, to determine whether to favorably exercise their discretion. C-V-T, 22 I. & N. Dec. 7, 11 (B.I.A. 1998); see also *Cancellation of Removal Under INA Section 240A(a)*, U.S. DEP’T OF JUSTICE, [http://www.justice.gov/eoir/vll/benchbook/templates/240A\(a\)%20Standard.htm](http://www.justice.gov/eoir/vll/benchbook/templates/240A(a)%20Standard.htm) (last visited Feb. 6, 2014).

370. E-mail correspondence with Julie A. Soinenen, Attorney (Sept. 5, 2013) (on file with Author).

371. E-mail correspondence with Jonathan Willmoth, Attorney (Sept. 4, 2013) (on file with Author).

372. *Id.*

In addition to the dynamics in immigration court, concerns about alcohol use also drive immigration enforcement efforts. Although a simple DUI conviction is not a deportable offense,<sup>373</sup> ICE nevertheless touts the number of noncitizens with DUI convictions that it has deported from the United States. In a March 2013 statement before the U.S. House of Representatives' Subcommittee on Homeland Security, former ICE Director John Morton reported that in fiscal year 2012, ICE removed "36,166 aliens convicted for driving under the influence."<sup>374</sup> Such metrics typically reflect and drive enforcement policies; indeed, in press releases regarding the apprehension of noncitizens, ICE has conceded that it prioritizes DUI violators for enforcement efforts.<sup>375</sup> ICE, like the judiciary, has also been subject to the influence of high-profile events. After the incident involving Carlos Martinelly Montano, local media reported that ICE had decided to take a stricter posture towards noncitizens with DUI convictions.<sup>376</sup>

Latino immigrants, in particular, are targeted for immigrant enforcement efforts.<sup>377</sup> While immigrants from Latin America (especially Mexico) constitute the bulk of the nation's undocumented immigrant population,<sup>378</sup> specific narratives and stereotypes propel enforcement efforts. For example, the Latino day laborer population has been the subject of exceptional scrutiny, both

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373. See *supra* note 312 and accompanying text.

374. *Hearing on Immigration Enforcement Before the H. Comm. on Appropriations, H. Subcomm. on Homeland Sec.*, 113th Cong. 2 (2013) (statement of John Morton, Dir., U.S. Immigr. & Customs Enforcement), available at <http://www.ice.gov/doclib/news/library/speeches/130314morton.pdf>.

375. Press Release, U.S. Immigr. & Customs Enforcement, U.S. Dep't of Homeland Security, ICE Arrests 18 in Maryland Operation Targeting Criminal Aliens Charged with DUI (Nov. 23, 2010), available at <http://www.ice.gov/news/releases/1011/101123baltimore.htm> ("ICE's Fugitive Operations Teams (FOT) give top priority to cases involving aliens who pose a threat to national security and public safety, including . . . DUI violators.").

376. Neal Augenstein, *Jail for Illegals Facing Drunken Driving Charges*, WTOP (Sept. 13, 2010), <http://www.wtop.com/?sid=2051253&nid=25> (reporting that "[i]mmigration officials now plan to incarcerate illegal aliens when they're arrested for drunken driving" and quoting an ICE official as saying, "The message has gone out to the field offices: Take them into custody, and don't let them out on bond").

377. N.C. Aizenman, *Conflicting Accounts of an ICE Raid in Md.: Officers Portray Detention of 24 Latinos Differently in Internal Probe and in Court*, WASH. POST, Feb. 18, 2009, at A1 (illustrating how immigration enforcement officers target specific places where Latino immigrants are known to frequent in an effort to make arrests).

378. JEFFREY S. PASSEL, ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 7 fig.2 (2005), available at <http://pewhispanic.org/files/reports/44.pdf>.

by federal enforcement officials<sup>379</sup> and at the state level.<sup>380</sup> Several of the state-level anti-immigrant law specifically target day laborer solicitation.<sup>381</sup> Concerns about drunkenness and delinquency are fueling, at least in part, this assault on Latino day laborers<sup>382</sup> and are clearly shaping the overall enforcement priorities of ICE.

### *B. Legislative Proposals Targeting Immigrant Alcohol Use*

Concerns about immigrant alcohol use continue to be reflected in both discussions in Congress and in the text of proposed legislation. For example, in congressional debates about illegal immigration, restrictionists frequently invoke stories of citizens whose lives were shattered by undocumented immigrants driving under the influence of alcohol.<sup>383</sup> These discussions are often triggered by high-profile news reports.<sup>384</sup> As news of these incidents filters down and is absorbed by the public, the calls for stricter control over immigrant alcohol use emerge.

One such call arose in 2005. In that year, Congresswoman Sue Wilkins Myrick (R-NC) proposed a legislative amendment that would make the crime of driving while intoxicated a deportable offense. Specifically, the House Bill (entitled Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005) proposed to add a new deportability ground under the INA, which would make deportation mandatory for any noncitizen convicted of a DWI offense.<sup>385</sup>

379. Aizenman, *supra* note 377 (describing a U.S. Immigration and Customs Enforcement raid at a 7-Eleven in Baltimore, Maryland, a site where local day laborers were known to congregate).

380. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2497–98, 2505 (2012) (explaining that the Arizona Act, S.B. 1070 § 5(C), originally targeted immigrant day laborers but was held to be preempted by federal law).

381. See, e.g., TEX. TRANSP. CODE ANN. § 552(a) (West 2013), *invalidated by* *Jornaleros de Las Palmas v. City of League City*, 945 F. Supp. 2d 779 (S.D. Tex. 2013); *Arizona*, 132 S. Ct. 2497–98, 2505.

382. See GUERETTE, *supra* note 330, at 3 (asserting, without support, that day “[l]aborers may drink and sell or use illicit drugs in public”).

383. See, e.g., Tancred Statement, *supra* note 8, at 18,431 (describing how Tricia Taylor of Detroit lost both legs above the knee when Jose Carmaco, an undocumented immigrant, crashed into her).

384. *Hearing Before the H. Subcomm. on Immigration Policy & Enforcement of the Comm. on the Judiciary*, 112th Cong. 1 (2012) (mentioning the “recent and egregious” incident involving Carlos Martinelly Montano’s drunken driving); Buske & Duggan, *supra* note 355 (reporting over the Montano drunk driving homicide).

385. The proposed language was as follows:

(F) DRIVING WHILE INTOXICATED.—Any alien who is convicted of driving while intoxicated, driving under the influence, or similar violation of State law (as determined by the Secretary of Homeland Security), or who refuses in



Proposals such as this one respond directly to public fears and stereotypes and represent attempts to override the existing statutory framework. As described above, immigration law already outlines several criminal deportability grounds, including crimes involving moral turpitude and aggravated felonies. While a DWI offense (without more) is not a deportable offense, certain aggravating conditions can transform a “simple” DWI into a deportable offense.<sup>386</sup> Myrick’s proposal runs afoul of the current scheme and imposes a disproportionately harsh punishment for the offense. The proposal unquestionably reflects the selfsame fears that informed both the Volstead Act and the habitual drunkard clause.

Similar proposals emerged during the 112th Congress, as legislators debated amendments to VAWA.<sup>387</sup> The version of the bill passed by the Senate included language that would make receipt of a third drunk driving conviction an aggravated felony for purposes of immigration law.<sup>388</sup> The bill proposed to accomplish this by amending the definition of “crime of violence,” which constitutes an aggravated felony under immigration law.<sup>389</sup> Although the VAWA reauthorization failed in the 112th Congress, it was reintroduced the very next session. Senator Chuck Grassley (R-IA) repeated the call for making a third DUI offense a deportable offense. In support, he stated:

Under the Immigration and Nationality Act, foreign nationals are required to be of “good moral character” before they are able to adjust status or become citizens of the United States. Unfortunately, habitual drunk driving does not stand in one’s way from gaining these benefits. In other words, it is not a deportable offense. There are numerous stories about individuals who have taken innocent lives because they were driving under the influence of alcohol. . . . [U]nfortunately, the law will allow drunk driving to continue without repercussions

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violation of State law to submit to a Breathalyzer test or other test for the purpose of determining blood alcohol content is deportable and shall be deported.  
151 CONG. REC. 29,145 (2005).

386. Lopez-Meza, 22 I. & N. Dec. 1188, 1194–96 (B.I.A. 1999) (finding that DUI with knowledge of a revoked or suspended license is a crime involving moral turpitude rendering it a deportable offense).

387. 158 CONG. REC. S2745–46 (daily ed. Apr. 26, 2013).

388. Violence Against Women Reauthorization Act of 2012, S. 1925, 112th Cong. § 1008.

389. *Id.* Specifically, the proposed bill sought to amend § 101(a)(43)(F) of the Immigration and Nationality Act, which is codified as 8 U.S.C. § 1101(a)(43)(F). *Id.*

for foreign nationals who are on a path to citizenship. It is time that these offenses were classified as an aggravated felony. It is time to get these people off the streets. Residing in the United States is a privilege, not a right.<sup>390</sup>

During the recent debates around comprehensive immigration reform, questions of alcohol use have once again risen to the surface in Congress. In a March 2013 hearing before the House Committee on the Judiciary, Rep. Trey Gowdy (R-SC) questioned ICE Director John Morton about the agency's release of detainees, including some noncitizens with DUI convictions.<sup>391</sup> In a separate prepared statement submitted as part of the record, Rep. Gowdy vehemently disagreed with the government's characterization of certain DUI offenders as "low-risk" and raised the specter of a recidivist drunk driver injuring or killing a member of the public.<sup>392</sup>

The momentum around drunk driving has led to a specific provision included in the Immigration Bill passed by the U.S. Senate in summer 2013. Specifically, Section 3702 of the Bill, entitled "Banning Habitual Drunk Drivers from the United States," would make three statutory changes designed to rid the United States of noncitizens who have driven drunk.<sup>393</sup> The Bill would create a new ground of criminal inadmissibility under INA Section 212(a)(2) for noncitizens who have been "convicted of 3 or more offenses for driving under the influence or driving while intoxicated on separate dates."<sup>394</sup> The Bill also creates a new deportability ground, targeted at noncitizens "convicted of 3 or more [DUI/DWI offenses], at least 1 of which occurred after the enactment of [the new law]."<sup>395</sup> Finally, the provision includes the language suggested in the context of VAWA and designates a third DUI/DWI conviction for which the term of imprisonment is at least one year to be a "crime of violence" and hence an aggravated felony for immigration purposes.<sup>396</sup> Senator John Cornyn (R-TX) had offered an amendment that would have barred noncitizens with a *single* drunk driving conviction from obtaining lawful permanent residence or even the Registered Provisional Immigrant status; this

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390. 159 CONG. REC. S509 (daily ed. Feb. 7, 2013).

391. *Release of Criminal Detainees by U.S. Immigration & Customs Enforcement: Policy or Politics?: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 46 (2013).

392. *Id.* at 6.

393. S. 744, 112th Cong. § 3702(a)–(c) (2013).

394. *Id.*

395. *Id.* § 3702(b).

396. *Id.* § 3702(c).

amendment was rejected and was not included in the bill.<sup>397</sup> If immigration reform is enacted in the future, some version of these proposals may very well become law.

## VI. CONCLUSION

The Immigration and Nationality Act has many little-understood provisions that have puzzled scholars and practitioners. The provisions relating to alcohol consumption, in particular, have raised questions since their first enactment in 1917. Although alcohol-related regulation has long been a part of the American legal system, the specific alcohol-related provisions in U.S. immigration law were forged in the lead up to the Prohibition Era. Under the surface, these norms operated as forms of social control over immigrants and were driven by economic, political, and xenophobic impulses. The habitual drunkard clause, the most visible surviving example, emerged from this milieu.

Today, other aspects of U.S. immigration law have rendered the habitual drunkard clause largely obsolete. Nevertheless, given the longevity of the negative stereotypes involving immigrants and alcohol, the clause should be eliminated from the statute and substituted with a more objective approach to evaluating alcohol abuse and dependence. Moreover, those who work in the field must be conscious of the history described in this Article and the influence of that history on present-day congressional debates and on immigration adjudication and enforcement. In the months and years to come, attentiveness and advocacy on all these fronts will be essential to counter the troublesome and enduring legacy of Prohibition.

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397. S. REP. NO. 113-40, at 40 (June 7, 2013).