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Addiction-Informed Immigration Reform

Rebecca Sharpless

ADDICTION-INFORMED IMMIGRATION REFORM

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Abstract: Immigration law fails to align with the contemporary understanding of substance addiction as a medical condition. The Immigration and Nationality Act regards noncitizens who suffer from drug or alcohol substance use disorder as immoral and undesirable. Addiction is a ground of exclusion and deportation and can prevent the finding of "good moral character" needed for certain immigration applications. Substance use disorder can lead to criminal behavior that lands noncitizens, including lawful permanent residents, in removal proceedings with no defense. The time has come for immigration law to catch up to today's understanding of addiction. The damage done by failing to contemporize the law extends beyond the harms of unwarranted family separation due to the deportation or exclusion of people who suffer from substance use disorder. Holding noncitizens to an archaic standard threatens our civic and political identity as a diverse and democratic country. The bigger the gap between contemporary mores and immigration law and policy, the harder it is for U.S. citizens to develop a civic and political identity that is free of ethnic and racial animus. Double standards for citizens and noncitizens create cognitive dissonance, leaving society vulnerable to discriminatory or stereotypical views to justify the differential treatment. This phenomenon not only harms noncitizens but thwarts the formation of a national civic and political identity free of ethnic and racial bias. This Article proposes and explains the legislative reforms necessary to remedy the current state of immigration law's treatment of people with substance use disorders.

* Professor of Law, University of Miami School of Law. I am grateful for comments on earlier drafts of this article from Kaci Bishop, Richard Boswell, Katherine Evans, Lindsay Harris, Mary Holper, Danielle Jeffris, Elizabeth Keyes, Romy Lerner, Andrew Stanton, and Stacy Taeuber. I thank the organizers of the 2018 Clinical Law Review Workshop and the Works In Progress session of the 2019 AALS Conference on Clinical Legal Education for facilitating feedback on this Article. Librarian Assistant Professor Nicholas Mignanelli and law students Tatiana Krimus and Tesneem Shraiteh provided excellent research assistance.

INTRODUCTION

Shifts in social mores and advances in scientific understanding can be powerful drivers of evolution in the law. As the United States Supreme Court has recognized, "new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged."[1] But immigration law—largely insulated from constitutional oversight—lags behind.[2] One important example of this

1. Obergefell v. Hodges, 576 U.S. __, 135 S. Ct. 2584, 2603 (2015).

2. Under the plenary power doctrine, immigration laws and policies are not subject to regular constitutional scrutiny. *See generally* EMER DE VATTEL, THE LAW OF NATIONS, bk. II, ch. VII, § 94, at 309 (1758) (discussing how the power to exclude is inherent in sovereignty); Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77 (2017) (noting how federal courts are less likely to abide by the plenary power doctrine in cases involving decisions of agencies rather than Congress); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1994) (analyzing trends of federal courts when adjudicating constitutional challenges in immigration cases); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1984) (discussing how "phantom constitutional norms" govern statutory interpretation in immigration law and that the plenary power doctrine should be "reassess[ed]"); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990).

misalignment of law and contemporary understanding is immigration law's conception of substance addiction and related behavior as moral failings that justify the exclusion and expulsion of noncitizens. Since the earliest federal immigration laws, people viewed as "chronic alcoholic[s]," "habitual drunkards," or drug addicts, and people convicted of drug use or addiction-related drug sales have been denied citizenship, deported, and excluded.[3] As society has moved away from understanding addiction as a character flaw and toward a medical understanding of addiction as a mental disorder with physical manifestations,[4] immigration law and policy have remained firmly rooted in anachronistic social and scientific norms. This Article makes the case for contemporizing immigration law's view of addiction. The argument is both descriptive and normative. As a descriptive matter, the prevailing understanding of addiction is that it is a disease from which people can recover.[5] This Article's normative claim is that a diagnosis of "substance use disorder" should mitigate moral judgments about addiction and related behavior, such as drug possession.[6] Immigration law does not reflect these views, but it should.

From colonial times to the present day, we have excluded and expelled people whom we have dubbed undesirable or unworthy.[7] For almost a century before the federal government passed immigration laws, towns and states regulated their borders based on health, morals, and economics.[8] Early federal statutes banned entry of people considered "convicts," sex workers, "idiots," "lunatics," and persons deemed likely to become a public charge.[9] From 1882 to 1943, race-based laws excluded and expelled Chinese immigrants.[10] More recently, the Trump Administration has banned the entry of noncitizens who are not lawful

3. The phrase "chronic alcoholism" appeared as a statutory ground of exclusion in the Immigration Act of 1917 and was repealed in 1952. Pub. L. No. 64-301, § 3, 39 Stat. 874, 875 (1917) (repealed 1952). The other terms, however, appear in the current version of the Immigration and Nationality Act. *See infra* section II.

4. *See infra* section II.

5. *Id.*

6. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 483–84 (5th ed. 2013) [hereinafter DSM-V] (defining "substance use disorder").

7. *See generally* DANIEL KANSTROOM, DEPORTATION NATION (2007). For a critique of immigration policy premised on perceived worthiness, see Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-CIV. LIBERTIES L. REV. 257, 273–90 (2017); Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 141–55 (2013).

8. *See infra* notes 40–41 and accompanying text.

9. Act of March 3, 1875, ch. 141, 18 Stat. 477; Act of Aug. 3, 1882, ch. 376, 22 Stat. 214.

10. Act of May 6, 1882, ch. 126, 22 Stat. 58, *repealed by* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

permanent residents from certain majority-Muslim countries, citing national security concerns.[11] Under the plenary power doctrine established in the late nineteenth century to exclude Chinese immigrants, the sovereign authority of the United States to regulate its borders without limitation has been "a proposition . . . [not] open to controversy."[12] Although more recent Supreme Court jurisprudence has found a place for some limited constitutional restraints, at least with respect to noncitizens already inside the United States, immigration law remains marked by constitutional exceptionalism.[13] In other areas of the law, constitutional challenges—enabled and supported by social movements—have facilitated the law's incorporation of modern understandings and popular opinion.[14] By comparison, the U.S. Constitution has left immigration law relatively untouched.

Due in part to this lack of constitutional oversight, immigration law has lagged behind developments in science, social norms, and medical understanding, including the Diagnostic and Statistical Manual of Mental Disorders (DSM) published by the American Psychiatric Association.[15] Even though the DSM removed "homosexuality" as a mental disorder in

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11. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017); *see also* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). The latter order was upheld by the United States Supreme Court. Trump v. Hawaii, 585 U.S. __, 138 S. Ct. 2392, 2423 (2018).

12. Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889); *see also supra* note 2 and accompanying text.

13. *Compare* Zadvydas v. Davis, 533 U.S. 678, 682 (2001) (finding that "indefinite detention of [lawful permanent residents] would raise serious constitutional concerns" and invoking the canon of constitutional avoidance), *and* Landon v. Plasenica, 459 U.S. 21, 35 (1982) ("[T]he courts must evaluate the particular circumstances and determine what procedures would satisfy the minimum requirements of due process on the reentry of a permanent resident alien."), *with* Trump v. Hawaii, 576 U.S. __, 138 S. Ct. 2392, 2419 (2018) ("[F]oreign nationals seeking admission have no constitutional right to entry."), Kerry v. Din, 576 U.S. __, 135 S. Ct. 2128, 2138 (2015) (finding no constitutional violation when spouse of U.S. citizen was issued denial of visa stating no reasons), Demore v. Kim, 538 U.S. 510, 531 (2003) (holding mandatory detention of criminal resident aliens pending their deportation hearings does not violate due process), Fiallo v. Bell, 430 U.S. 787, 798–99 (1977) (noting discrimination based on sex in immigration statute constitutional because Congress's power to expel or exclude noncitizens is largely immune from judicial scrutiny), *and* Kleindienst v. Mandel, 408 U.S. 753, 768–70 (1972) (holding that denial of entry to noncitizen seeking to engage in academic exchange did not violate First Amendment rights of those seeking to communicate with him).

14. *See, e.g.*, United States v. Windsor, 570 U.S. 744, 773–75 (2013) (holding that the ban on same-sex marriage is an equal protection violation); Roe v. Wade, 410 U.S. 113, 164–66 (1973) (holding that prohibition on abortion is unconstitutional); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (requiring the government to provide defense attorneys for indigent defendants in criminal proceedings); Loving v. Virginia, 388 U.S. 1, 12 (1961) (invalidating state laws prohibiting interracial marriage); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that segregation in public schools constitutes illegal racial discrimination).

15. *See generally* DSM-V, *supra* note 6.

1973, gay, bisexual, and transgender noncitizens were denied entry into the United States until 1990.[16] Immigration law dubbed them excludable as "afflicted with psychopathic personality."[17] Until 2010, HIV-positive status was grounds for exclusion as a communicable medical condition despite widespread understanding of how the disease is transmitted.[18] Immigration statutory provisions continue to employ archaic language and concepts, including outdated gender stereotypes, distinctions between children born in and out of wedlock, and proof of marriage consummation as a requirement in some circumstances.[19]

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16. Immigration Act of 1990, Pub. L. No. 101-649, § 601(a) 104 Stat. 4978, 5067 (1990); AM. PSYCIATRIC ASS'N, HOMOSEXUALITY AND SEXUAL ORIENTATION DISTURBANCE: PROPOSED CHANGE IN DSM-II, 6TH PRINTING, PAGE 44, at 1 (1973), https://pages.uoregon.edu/eherman/teaching/texts/DSM-II_Homosexuality_Revision.pdf [https://perma.cc/TS3S-2HZJ] ("Homosexuality per se is one form of sexual behavior and, like other forms of sexual behavior which are not by themselves psychiatric disorders, is not listed in this nomenclature of mental disorders.").

17. Immigration and Nationality Act, Pub. L. No. 414, § 212(a)(4) 66 Stat. 163, 182, *amended by* Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (codified as amended at 8 U.S.C. § 1182(a)(4) (1988) (repealed 1990)); *see also* OSCAR M. TRELLES & JAMES F. BAILEY, IMMIGRATION AND NATIONALITY ACTS: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS, 1950–1978, at 361–63 (1951) (recounting the homophobic remarks during congressional hearings for the 1952 Act); *see generally* Shannon Minter, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT'L L.J. 771 (1993).

18. Congress attached a rider to an appropriations bill in 1987 that added being HIV positive to the grounds upon which noncitizens could be excluded. Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, § 518, 101 Stat. 391, 475; *see also* 133 Cong. Rec. S6943-01 (1987); LORI SCIALABBA, DONALD NEUFELD & PEARL CHANG, U.S. CITIZENSHIP & IMMIGR. SERVS., PUBLIC LAW 110-293, 42 CFR 34.2(B), AND INADMISSIBILITY DUE TO HUMAN IMMUNODEFICIENCY VIRUS (HIV) INFECTION 1 (2009), https://www.immigrationequality.org/wp-content/uploads/2013/09/USCIS-nov-29-2009-hiv-memo.pdf [https://perma.cc/G5MY-EGP2]; Juan P. Osuna, *The Exclusion from the United States of Aliens Infected with the AIDS Virus: Recent Developments and Prospects for the Future*, 16 HOUS. J. INT'L L. 1, 7–12 (1993).

19. *See, e.g.*, 8 U.S.C. § 1409(a) (2012) (requiring blood relationship with father, financial affidavit of support for children born out of wedlock abroad); Nguyen v. INS, 533 U.S. 53, 68–71 (2001) (upholding statute making it more difficult for out-of-wedlock child born abroad to one United States parent to claim citizenship through that parent if citizen parent was father); Miller v. Albright, 523 U.S. 420, 424 (1998) (upholding proof-of-paternity requirement imposed for citizenship by birth whenever the citizen parent of child who is born out of wedlock and abroad is child's father, as opposed to the mother); Fiallo v. Bell, 430 U.S. 787, 799–800 (1987) (upholding preferential treatment of children born in wedlock and their parents and children born out of wedlock and their mothers, as opposed to children born out of wedlock and their fathers); U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL (2019), https://fam.state.gov/fam/09FAM/09FAM020305.html [https://perma.cc/Q3M3-GS4J] (requiring "consummation" of marriages that occur when the parties are not in the same place for a marriage ceremony). *See generally* Kerry Abrams, *Peaceful Penetration: Proxy Marriage, Same-Sex Marriage, and Recognition*, 2011 MICH. ST. L. REV. 141 (2011); Jung Kim, Nguyen v. INS*: The Weakening of Equal Protection in the Face of Plenary Power*, 24 WOMEN'S RTS. L. REP. 43 (2002); Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in* Nguyen v. INS, 12 COLUM. J. GENDER & L. 222 (2003).

An enduring example of the misalignment of law with contemporary understanding is immigration law's conception of alcohol and drug addiction as character flaws that justify exclusion and expulsion. Under current law and practice, the use of drugs, addiction to alcohol and drugs, and related behavior leads to thousands of noncitizens being denied U.S. citizenship and deported from, or denied entry into, the United States every year.[20] Although limited statistics exist regarding the number of exclusions, deportations, and citizenship denials based on drug and alcohol use and addiction,[21] the federal government does publish statistics relating to the drug abuser/addict ground of inadmissibility for people seeking a visa abroad. In 2017, 1,353 people seeking lawful permanent residency were denied a visa due to drug addiction.[22]

The few attempts to mount constitutional challenges to immigration statutes penalizing behaviors associated with addiction have failed.[23] The slow incorporation of prevailing scientific and social norms is not new or limited to immigration law. As commentators have noted, the modern understanding of addiction has only begun to influence other areas of the law, such as our criminal justice system.[24] However, in contrast to

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20. *See* U.S. DEP'T OF STATE, IMMIGRANT AND NONIMMIGRANT VISA INELIGIBILITIES tbl. xx (2017), https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableXX.pdf [https://perma.cc/YW4Z-JGWS] (citing U.S. State Department statistics discussing the rates of inadmissibility due to drug addiction for people seeking lawful permanent residency from a consulate abroad).

21. Statistics for lawful permanent residency applications made in the United States, as well as deportation and denial of citizenship statistics, do not appear to be publicly available. However, assessments of drug and alcohol use and addiction are routine in immigration adjudications and often affect outcomes. *See* Mimi E. Tsankov, *Tipsy: A Sobering Look At the Effects of Alcohol-Related Incidents In Immigration Removal Proceedings*, FED. L., Sept. 2012, at 22 ("Depending on the type of relief application at issue and the nature, frequency, and recency of the alcohol-related history, alcohol use can have a significant impact on whether or not a respondent is successful in receiving relief."); *Table 3. ICE Deportations Under Secure Communities by Most Serious Conviction, January 2012 – October 2017*, TRAC IMMIGR. (Apr. 25, 2018), http://trac.syr.edu/immigration/reports/509/include/table3.html [https://perma.cc/6PFB-8UQY] (displaying a table showing that 20% of immigrants deported between January 2012 and October 2017 under the Secure Communities program had a drug offense as their most serious conviction).

22. *See* U.S. DEP'T OF STATE, *supra* note 20.

23. *See, e.g.*, Tomaszczuk v. Whitaker, 909 F.3d 159, 165–68 (6th Cir. 2018) (rejecting equal protection challenge to "habitual drunkard" bar to showing good moral character needed for cancellation of removal); Ledezma-Cosina v. Sessions, 857 F.3d 1042, 1048–49 (9th Cir. 2017) (rejecting equal protection challenge to the "habitual drunkard" bar to showing the good moral character needed for naturalization); McJunkin v. INS, 579 F.2d 533, 536 (9th Cir. 1978) (rejecting Eighth Amendment challenge to statute authorizing the deportation of any noncitizen who is, or who has ever been, addicted to drugs); *see also infra* section III.A.

24. *See generally* JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT (2001) (discussing the history of drug courts since their emergence in the 1990s); Susan Stefan & Bruce J. Winick, *A Dialogue on Mental Health Courts*, 11 PSYCHOL. PUB. POL'Y & L. 507

immigration law, criminal law has made at least some advances in the last five decades toward incorporating current thinking about substance use disorder. Since 1962, criminal law has recognized that the status of having an addiction cannot be a crime, and addiction can serve as a mitigating factor in sentencing.[25] In addition, the criminal justice system has developed specialty drug and mental health courts to focus on rehabilitation and treatment, diverted some defendants to rehabilitative programs in lieu of punishment, reduced sentences for certain drug offenses, and decriminalized marijuana possession.[26]

The time has come for immigration law to catch up to contemporary understanding. The status of being an addict should carry no immigration consequences, as this reflects a misplaced moral judgment. While immigration law may legitimately reflect concerns about public safety, behavioral triggers for deportation ought to reflect the diminished culpability attendant to disease-influenced behavior and be proportional to deportation, which "may result . . . in loss of both property and life; or of all that makes life worth living."[27] Rules for entry should similarly

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(2005) (discussing the pros and cons of mental health courts).

25. *See infra* section III.B.

26. *See* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 16–18 (2009), https://www.nacdl.org/getattachment/d15251f8-6dfe-4dd1-9f36-065e3224be4f/americas-problem-solving-courts-the-criminal-costs-of-treatment-and-the-case-for-reform.pdf [https://perma.cc/B6TN-52JL] (noting that there are over 2,000 drug courts in existence); Peggy F. Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 719 (2008) (contrasting today's drug courts with the "traditional criminal justice system," which "consumes vast economic and human resources in the processing of drug abusers" and does so "without regard to the incredibly high rates of recidivism"); Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1587, 1591 (2018) (noting that "pioneering" drug courts started in the 1990s were a response to substance abuse and other "complex social issues"). Thirty-three states and the District of Columbia have legalized marijuana, including eleven that have adopted broad laws legalizing the drug for recreational use. *See State Marijuana Law in 2019 Map*, GOVERNING, http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html [https://perma.cc/G337-SFXD]; *see also* BRIAN ELDERBROOM & JULIA DURNAN, URBAN INST., RECLASSIFIED: STATE DRUG LAW REFORMS TO REDUCE FELONY CONVICTIONS AND INCREASE SECOND CHANCES 3–6 (2018), https://www.urban.org/sites/default/files/publication/99077/reclassified_state_drug_law_reforms_to_reduce_felony_convictions_and_increase_second_chances.pdf [https://perma.cc/JL72-DXW9] (summarizing reclassification of drug possession offenses in states). The criminal justice systems of the federal government and most states have diversion programs that permit certain drug offenders to receive treatment in lieu of a conviction. *See* 42 U.S.C. § 3401 (2012); NAT. ASSOC. OF PRETRIAL SERVS. AGENCIES, PROMISING PRACTICES IN PRETRIAL DIVISION 9 (2006) ("Today, NAPSA recognizes 298 pretrial diversion programs in 45 states, the District of Columbia, and the U.S. Virgin Island.").

27. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922); Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1302–07 (2011); *see also* Michael J. Wishnie, *Immigration Law and the*

reflect our society's core values, understandings, and expectations.[28] The severity of the consequences for addiction-related behavior imposed by immigration statutes suggests that immigration laws directed at people suffering from addiction are animated, at least in part, by concerns about the desirability of the noncitizens in question.[29] Only one of the statutes imposing immigration consequences on addiction requires a showing of harm to others.[30]

The failure to re-align our immigration policy on deportation and exclusion with current thinking about addiction inflicts damage beyond the harms of unwarranted family separation and the loss of talent. It threatens our civic and political identity as a diverse and democratic country. The bigger the gap between contemporary mores and immigration policy and practice, the harder it is for U.S. citizens to develop a civic and political identity that is free of ethnic and racial animus. The cognitive dissonance created by having double standards for citizens and noncitizens leaves society vulnerable to adopting discriminatory or stereotypical views to justify the differential treatment.[31] This phenomenon not only harms noncitizens but thwarts the formation of a national civic and political identity free of ethnic and racial bias.[32] While all U.S. citizens suffer from the stifling of an egalitarian national identity, the groups most affected by the double standard are non-White citizens, including those who share a common heritage with the noncitizens deemed undesirable.[33]

While President Trump's anti-immigrant politics and policies make addiction-informed amendments to immigration law unlikely at the moment, this Article provides a guide for future reform. As discussed below, society's reaction to the current opioid epidemic may provide a window of opportunity to improve the law, including in the area of immigration.[34] To make the case for contemporizing immigration law's

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Proportionality Requirement, 2 U.C. IRV. L. REV. 415, 416–44 (2012).

28. *See generally* T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9 (1990) (noting how immigration laws reflect the values undergirding community membership).

29. *See infra* Part I.

30. *See infra* notes 53–54 and accompanying text.

31. *See infra* section IV.A.

32. *See infra* section IV.A.

33. *See infra* section IV.A.

34. *See infra* notes 166–174, 182 and accompanying text. Derrick Bell has described how evolution of social and legal norms depends on interest convergence between dominant and subjugated groups. *See* Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1624 (2003) ("[N]o matter how much harm blacks were suffering because of racial hostility and discrimination, we could not obtain

view of substance use and abuse and related behavior, Part I of this Article describes the view of alcohol and drugs enshrined in immigration law. Part II recounts a brief history of substance use and addiction, and Part III analyzes the primary ways in which immigration and criminal courts have analyzed the relationship between addiction, morality, and culpability. In Part IV, this Article details the harms of the outdated views in immigration law, which affect citizens and noncitizens alike. In closing, the Article proposes and explains the types of legislative reforms necessary to remedy the current state of immigration law's handling of substance use disorder. The reforms suggested below reflect the twin principles that immigration law should not impose consequences on the status of being an addict and that the immigration consequences for addiction-related behavior should not be disproportionate to the physical harm caused to others.

I. IMMIGRATION CONSEQUENCES OF ALCOHOL AND DRUG ADDICTION

Immigration law imposes severe consequences for drug and alcohol addiction and related behavior, reflecting the view that people suffering from substance use disorder are undesirable and should be denied entry into, and deported from, the United States. Deportation or exclusion from the United States based on addiction does not require a criminal conviction.[35]

Throughout human history, exclusion and expulsion have existed as tools of social control.[36] For example, early humans were tribal and depended on clear notions of membership to distinguish friends from foes.[37] The Latin word for "stranger," *hostis*, also means "enemy."[38] Evidence of banishment as a form of punishment or community control appears as early as the fifth century B.C.[39] Before the United States was even a nation, towns and cities enforced their borders, banishing people deemed unworthy or a burden.[40] This local border policing often reflected

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meaningful relief until policymakers perceived that the relief blacks sought furthered interests or resolved issues of more primary concern.").

35. *See infra* notes 49–68 and accompanying text.

36. *See* GEOFFREY ABBOTT, ENCYCLOPEDIA BRITANNICA, EXILE AND BANISHMENT (LAW), https://www.britannica.com/topic/exile-law [https://perma.cc/Z4DU-HM56]; Melissa M. McDonald et al., *Evolution and the Psychology of Intergroup Conflict: The Male Warrior Hypothesis*, 367 PHIL. TRANSACTIONS ROYAL SOC'Y BIOLOGICAL SCI. 670, 670–71 (2012).

37. McDonald et al., *supra* note 36, at 670–71.

38. *Hostis*, OXFORD LATIN DICTIONARY (1968).

39. *See Ostracism*, ENCYCLOPEDIA OF ANCIENT GREECE (Nigel G. Wilson ed., 2006).

40. KUNAL M. PARKER, MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000, at 22–25 (2015).

racial or ethnic animus directed at certain groups.[41] A century later, the U.S. government's first immigration laws policed the national border along similar lines. These laws prohibited the entry of women, primarily Chinese women, considered "prostitutes" and people convicted of certain crimes.[42] Thus, from the earliest of times in colonial America, exclusion and expulsion practices were tied to perceived moral fitness and reflected racial discrimination.

Alcohol use and addiction have figured into immigration law for over a century, while immigration law has penalized drug use and addiction for over six decades. Current immigration law imposes consequences on substance use and abuse in four ways, which are discussed in detail below. First, addiction to controlled substances and alcohol is a ground for denying admission or lawful status to noncitizens seeking to enter the United States.[43] Being a drug abuser or addict also triggers deportation of people already in the country, including those who are lawful permanent residents.[44] Second, addiction can bar a showing of "good moral character," which is a statutory requirement for becoming a U.S. citizen through naturalization and for some forms of relief from deportation.[45] Third, addiction may lead to a criminal record, which might cause the denial of entry or initiation of removal proceedings of a person already here.[46] Even if applicants for immigration status have no criminal record, their admission to the essential elements of a drug offense bars entry and lawful status.[47] Lastly, being addicted to alcohol or drugs often counts as a negative factor in the calculus of immigration judges and other adjudicators when adjudicating discretionary immigration applications.[48]

A. Addiction as a Ground of Exclusion and Deportation

Noncitizens face the denial of entry into the United States for alcohol addiction, and both exclusion and deportation for being addicted to

41. *Id.* at 5–8.

42. Act of Mar. 3, 1875, ch. 141, §§ 3–5, 18 Stat. 477, 477–78 (repealed 1974). For a discussion of how the first exclusion bars were directed at Chinese women, see Kerry Abrams, *Polygamy, Prostitution and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 648–64 (2005).

43. *See infra* section I.A.

44. *See infra* section I.A.

45. *See infra* section I.B.

46. *See infra* section I.C.

47. *See infra* note 89 and accompanying text.

48. Tsankov, *supra* note 21, at 22, 55–56 (discussing how alcohol use can negatively affect an immigration application).

drugs.[49] Federal immigration law first incorporated alcohol addiction as an express ground of exclusion in 1917 during the temperance movement, barring the immigration of "persons with chronic alcoholism."[50] Others deemed excludable at that time included "idiots, imbeciles, feeble-minded persons, epileptics, insane persons," among others.[51] In 1990, Congress removed the express provision barring alcoholics but retained a more general ground of exclusion that barred people with a "mental defect," renaming it "mental disorder," which remains in force today.[52] Under the current "mental disorder" provision, noncitizens are rendered inadmissible if they suffer from alcohol addiction and exhibit "behavior associated with that disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others."[53] To be excluded on this ground, a physician designated by the government must certify that the person has a mental disorder and associated harmful behavior.[54] As of 2010, these physicians must follow the criteria for "substance use disorders" in the latest Diagnostic and Statistic Manual of Mental

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49. *See* 8 U.S.C. § 1182(a)(1)(A)(iii)(I–II) (2012) (barring admission of people who have a mental disorder and behavior associated with the disorder may, or has, posed threat of harm); 8 U.S.C. § 1182(a)(1)(A)(iv) (barring admission of people who are drug abusers or addicts); 8 U.S.C. § 1227(a)(2)(B)(ii) (providing deportation ground for people addicted to drugs).

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

51. *Id.*

52. *Compare* Immigration and Nationality Act, Pub. L. No. 82-414, § 212(a)(1–7), 66 Stat. 163, 182 (1952) (codified at 8 U.S.C. § 1182(a)(4–5) (excluding "chronic alcoholics" and people with a "mental defect"), *with* Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978, 5067 (codified at 8 U.S.C. § 1182(a)(1)(A)(ii)(I–II) (barring admission of people who have a "mental disorder" and behavior associated with the disorder may, or has, posed threat of harm).

53. 8 U.S.C. § 1182(a)(1)(A)(iii)(I–II); 9 FAM 302.2-7(B)(3)(U) (2019) ("Although, INA 212(a)(1)(A)(iii) does not refer explicitly to alcoholics or alcoholism, substance-related disorders including alcohol use disorder constitutes a medical condition."); U.S. CITIZENSHIP IMMIGR. SERVS., POLICY MANUAL (2019), https://www.uscis.gov/policy-manual/export [https://perma.cc/ZVK4-FL9B] ("[A]lcohol use disorders are treated as a physical or mental disorder for purposes of determining inadmissibility."); *see also* 42 C.F.R. §§ 34.1–4 (2019) (describing responsibilities of medical examiners).

54. *See* WILLIAM R. YATES, U.S. CITIZENSHIP & IMMIGRATION SERVS., REQUESTING MEDICAL RE-EXAMINATION: ALIENS INVOLVED IN SIGNIFICANT ALCOHOL-RELATED DRIVING INCIDENTS AND SIMILAR SCENARIOS (2004), https://www.aila.org/infonet/uscis-duis-health-related-inadmissibility-grounds [https://perma.cc/PZ52-Q3TY] [hereinafter YATES MEMO]. Under regulations of the U.S. Department of Health and Human Services, medical examiners screen visa applicants for alcohol and drug use. 42 C.F.R. § 34.1-4 (2019). The Centers for Disease Control (CDC) has technical instructions to guide these physicians. *See* CTRS. FOR DISEASE CONTROL, TECHNICAL INSTRUCTIONS FOR PHYSICAL OR MENTAL DISORDERS WITH ASSOCIATED HARMFUL BEHAVIORS AND SUBSTANCE-RELATED DISORDERS FOR CIVIL SURGEONS (Aug. 25, 2017), [hereinafter CDC, TECHNICAL INSTRUCTIONS] https://www.cdc.gov/immigrantrefugeehealth/exams/ti/civil/mental-civil-technical-instructions.html [https://perma.cc/3BZL-5L9Z].

Disorders (DSM-V) when screening for alcohol abuse and dependence.[55] Then, the civil surgeons must separately assess whether associated harmful behavior is present.[56] In practice, people seeking lawful permanent residency or admission into the United States are often excluded if they meet the DSM-V criteria for an alcohol-related substance use disorder and have a related arrest, such as driving while under the influence.[57]

Unlike alcohol addiction, which is only a ground for denying admission into the United States, drug addiction has been both a ground of inadmissibility and a ground of deportation since 1952.[58] People seeking to enter or immigrate to the United States can be denied admission and lawful status if an examining physician finds them to be a "drug abuser or addict" under regulations established by the Secretary of Health and Human Services.[59] Like the technical instructions for determining whether an alcohol-related mental defect exists, these regulations also incorporate the DSM-V's section on substance-related disorders. A person is considered a drug "abuse[r]" if they have a "current substance use disorder or substance-induced disorder" that is mild under the DSM-V.[60] A person is considered a drug "addict[]" if the substance use disorder is moderate or severe.[61] Unlike a finding of alcohol addiction, if a civil surgeon finds

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55. CDC, TECHNICAL INSTRUCTIONS, *supra* note 54; DSM-V, *supra* note 6, at 490–91. People whose substance abuse disorder is in remission, as defined by the DSM-V, are not inadmissible under the drug addiction ground. *See* CDC, TECHNICAL INSTRUCTIONS, *supra* note 54; DSM-V, *supra* note 6, at 491 (discussing the criteria for alcohol remission). Waivers of inadmissibility for having an alcohol-related "mental disorder" are available in limited circumstances. *See* 8 U.S.C. § 1182(a)(1)(A)(iii) (2012).

56. *See* CDC, TECHNICAL INSTRUCTIONS, *supra* note 54.

57. *See* Matter of Siniauskas, 27 I. & N. Dec. 207, 208–09 (BIA 2018) (noting that in a determination of whether a noncitizen is a danger to the community in bond proceedings, driving under the influence is a significant adverse consideration). U.S. Citizenship & Immigration Services considers "[a] record of criminal arrests and/or convictions for alcohol-related driving incidents may constitute evidence of a health-related inadmissibility as a physical or mental disorder with associated harmful behavior." U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MANUAL CHAPTER 7 - PHYSICAL OR MENTAL DISORDER WITH ASSOCIATED HARMFUL BEHAVIOR (2019), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume8-PartB-Chapter7.html [https://perma.cc/TJY3-UWSE].

58. *See* 8 U.S.C. § 1182(a)(1)(A)(iv) (2012) (barring admission of people who are drug abusers or addicts); 8 U.S.C. § 1227(a)(2)(B)(ii) (providing deportation ground for people addicted to drugs). Prior to 1952, addiction to drugs was not ground for deportation. 8 U.S.C. § 155(a).

59. *See* 8 U.S.C. § 1182(a)(1)(A)(iv); 42 C.F.R. § 34.2(h) (2019) (drug abuse); 42 C.F.R. § 34.2(i) (drug addiction). While there is no waiver for the drug addiction and abuse ground of inadmissibility, drug addicts and abusers are admissible if their addiction is in remission, as defined by the DSM-V. *See* CDC, TECHNICAL INSTRUCTIONS, *supra* note 54.

60. *See* 42 C.F.R. § 34.2(h) (drug abuse); 42 C.F.R. § 34.2(i) (drug addiction); DSM-V, *supra* note 6.

61. For the diagnostic criteria of a substance use disorder, see DSM-V, *supra* note 6. A diagnosis of moderate substance use or substance-induced disorder involves the presence of four to five of the

that an individual has a moderate or severe substance use disorder that involves a controlled substance, no additional showing of associated harmful behavior is needed.[62]

Under the ground of deportation, any noncitizen, including longtime lawful permanent residents, can be deported if they are, or at any time after admission have been, a drug abuser or addict.[63] An immigrant need not have engaged in related harmful behavior to trigger this statute,[64] which has not been substantively amended since its enactment. Even though this provision applies to longtime permanent residents, it is harsher than the ground of inadmissibility in several ways. Unlike inadmissibility, deportation applies to people who were abusers or addicts in the past but who are now in remission.[65] Moreover, unlike inadmissibility, deportation does not require an examination by a physician.[66] As a result, adjudicators are left to their own devices to make findings. A training guide for immigration adjudicators contains a definition of addict that is not based on the DSM-V and references "public morals."[67] While significant numbers of people have been excluded under the addiction ground of inadmissibility, only small numbers of noncitizens already in the United States have been deported under the addiction ground of deportation.[68]

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symptoms of a substance use disorder. A severe diagnosis involves six or more symptoms. *See id.*; CDC, TECHNICAL INSTRUCTIONS, *supra* note 54, at 3.

62. *Compare* 8 U.S.C. § 1182(A)(1)–(7) (2012), *with* 8 U.S.C. § 1182(a)(1)(A)(iv).

63. 8 U.S.C. § 1227(a)(2)(B)(ii) (providing deportation ground for people addicted to drugs).

64. *Id.*

65. *Id.*

66. *Compare* 8 U.S.C. § 1182(a)(1)(A)(iv) (requiring determination of drug abuse or addiction under regulations issued by the Secretary of Health and Human Services), *with* 8 U.S.C. § 1227(a)(2)(B)(ii) (requiring no such determination).

67. The training handbook states that

> [t]he term 'addict' means any person who habitually uses any habit-forming narcotic drugs so as to endanger the public morals, health, safety, or welfare, or who is or has been so far addicted to the use of such habit-forming narcotic drugs as to have lost the power of self-control with reference to his addiction.

U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., BASIC: BSC_217 INADMISSIBILITY, DEPORTABILITY AND WAIVERS INSTRUCTOR GUIDE 134 AILA No. 15082634 (2015), https://www.aila.org/infonet/uscis-instructor-guide-training [https://perma.cc/86T4-UAPQ].

68. Between 2002 and 2011, only 307 immigrants in the United States were charged as "deportable" under 8 U.S.C. § 1227(a)(2)(B)(ii) for being drug addicts or drug abusers. *See Charges Asserted in Deportation Proceedings in the Immigration Courts: FY 2002 - FY 2011*, TRACIMMIGRATION (2011), http://trac.syr.edu/immigration/reports/260/include/detailchg.html [https://perma.cc/CJT6-T8MJ]. Few published cases exist that involve the addiction ground of deportation. *See generally* McJunkin v. INS, 579 F.2d 533 (9th Cir. 1978) (holding that proceedings against the noncitizen under the Narcotic Addict Rehabilitation Act, including the commitment order of the district court, were sufficient to establish that the noncitizen was a drug addict and thus deportable); Espindola v. Barber, 152 F. Supp. 829 (N.D. Cal. 1957) (denying noncitizen derivative

However, as discussed below, people who suffer from addiction are more likely to come to the attention of immigration enforcement officials and face removal if they have even a minor criminal record.[69]

B. The "Habitual Drunkard" Bar to Good Moral Character

At the same time that Congress added addiction-related health grounds of exclusion and deportation in the 1952 Act, it made being a "habitual drunkard" a bar to the showing of "good moral character," thus expressly tying alcohol abuse to morality.[70] The habitual drunkard bar derives from the common-law status offense of being a "common drunkard."[71] The 1952 Immigration and Nationality Act's (INA) good moral character definition replaced a more general requirement, first adopted in 1790, that required that applicants demonstrate "good character" to naturalize.[72] Good moral character is a requirement for certain types of applications for lawful permanent residency and is a requirement for lawful permanent residents to become U.S. citizens through the process of naturalization.[73]

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citizenship and subjecting them to deportation after being adjudicated as a narcotic drug addict). In contrast, almost 600 people in 2017 were denied lawful permanent residency under the drug addict or abuser ground of inadmissibility at a U.S. consulate abroad. *See supra* note 20 and accompanying text.

69. *See infra* section I.C.

70. *See* Immigration and Nationality Act, Pub. L. No. 82-414, § 101(f), 66 Stat. 163, 172 (1952) (codified as amended at 8 U.S.C. §1101(f) ("No person shall be regarded as, or found to be, a person of good moral character who during the period for which good moral character is required to be established is, or was . . . a habitual drunkard."). For a discussion of the origins of the phrase "habitual drunkard," see generally Harry G. Levine, *The Discovery of Addiction: Changing Conceptions of Habitual Drunkenness in America*, 39 J. STUD. ALCOHOL 143 (1978); Jayesh M. Rathod, *Distilling Americans: The Legacy of Prohibition on U.S. Immigration Laws*, 51 HOUSTON L. REV. 781, 793–97 (2014). For a critique of the use of good moral character as a predictor of future negative behavior, see generally Deborah L. Rhode, *Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation and Immigration Proceedings* 43 L. & SOC. INQUIRY 1027 (2018).

71. 8 U.S.C. § 1101(f). "Persons with chronic alcoholism" were excluded from the United States starting in 1917. Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 875, *repealed by* §403(a)(13), 66 Stat. 163, 279. For a discussion of the origin of the status crime of being a "common drunkard," *see generally* Erik Luna, *The Story of Robinson: From Revolutionary Constitutional Doctrine to Modest Ban on Status Crimes*, *in* CRIMINAL LAW STORIES 47 (Donna Coker & Robert Weisberg eds., 2013).

72. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414, 415 (modifying requirement to "good moral character"). Subsequent naturalization statutes also included a general good character requirement, but the requirement was not specifically defined until the INA was enacted in 1952. *See generally* Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571 (2012).

73. *See* 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb) (requiring that VAWA self-petitioners be persons of good moral character); 8 U.S.C. § 1229b(b)(1)(B) (non-lawful permanent resident who is seeking cancellation of removal must establish her good moral character during the ten-year period preceding

Typically, lawful permanent residents must show five years of good moral character to qualify to become a U.S. citizen.[74]

The INA defined "good moral character" for the first time by specifying what attributes or behaviors would constitute an absolute bar to showing good moral character—including being a "habitual drunkard."[75] However, scant case law interprets, or applies, the term habitual drunkard in the good moral character definition. The only published decision of the Board of Immigration Appeals (BIA) occurred in *Matter of H-*, only three years after the INA was enacted.[76] In that case, the noncitizen's treating doctor testified that his patient was a hospitalized chronic alcoholic who had "escaped" a few times and had begun to "immediately . . . drink[] heavily."[77] The BIA found that the noncitizen qualified as a "habitual drunkard."[78] The BIA equated alcoholism with habitual drinking, making no attempt to distinguish between alcoholism as a medical condition and habitual drinking as a symptom of a non-recovered alcoholic.[79] Nor did the BIA require a showing of harmful behavior for the noncitizen to be considered lacking good moral character as a habitual drunkard.[80] Today, the ill-defined habitual drunkard bar

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the date of the application); 8 U.S.C. § 1427(a) (2012) (requiring good moral character for naturalization); Nicaraguan and Central American Relief Act, Pub. L. No. 105-100, § 203(f)(1)(A)(iii), 111 Stat. 2160, 2198 (1997) (requiring good moral character for relief eligibility); 8 C.F.R. § 1240.65(b)(2) (requiring good moral character for suspension of deportation). It is also a requirement for voluntary departure. 8 U.S.C. §§ 1229b(b)(1), 1229c(b)(1)(B) (limiting eligibility for cancellation of deportation or voluntary departure to non-citizens of good moral character). While not a defense to removal, voluntary departure is a benefit in that it permits a noncitizen to avoid having an order of removal on their record.

74. *See* 8 U.S.C. § 1427(a).

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

76. *Id.*; *see also* A. Herbert Safford, *Habitual Drunkenness*, 30 LAW MAG. & L. REV. Q.J. JURISPRUDENCE 108, 108 (1871) (discussing the history of habitual drunkenness); Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1584–93 (2012) (arguing that the "habitual drunkard" requirement, and other good moral character requirements, are vague); L.S. Tao, *Criminal Drunkenness and the Law*, 54 IOWA L. REV. 1059, 1075 (1969) (arguing that "habitual drunkenness" is not well-defined); Note, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660, 1665 (1981) (discussing the ambiguity and wide scope of definitions of "public intoxication").

77. *Matter of H-*, 6 I. & N. Dec. at 616.

78. *Id.*

79. *See id.* (basing the "habitual drunkard" finding on the fact that the noncitizen left a hospital and started drinking).

80. *Id.* The U.S. Court of Appeals for the Sixth Circuit has interpreted the term "habitual drunkard" to require a showing of harmful conduct. Tomaszczuk v. Whitaker, 909 F.3d 159, 166 (6th Cir. 2018). While drug addiction is not a bar to showing good moral character, noncitizens who admit to the essential elements of a drug offense are barred from showing good moral character, even if they have

remains in force and represents the most express link between alcohol and morality in the INA.

C. *Crime-Related Immigration Provisions*

Substance use and addiction also figure into our immigration enforcement system through the criminal justice system.[81] Studies show a high correlation between addiction and having a criminal record.[82] For example, addiction can lead people to commit property crimes or to sell small quantities of drugs to generate cash needed to sustain a substance use disorder.[83] Being arrested, convicted, or even admitting to a criminal offense, can have serious immigration consequences.[84] Drug offenses carry some of the most severe consequences in immigration law.[85] The drug grounds of deportation and exclusion were added to the INA in 1952, and Congress later expanded them.[86] The Anti-Drug Abuse Act of 1988 created an aggravated felony ground of deportation and defined it to

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no criminal record. *See* 8 U.S.C. § 1101(f)(3) (2012) (cross-referencing 8 U.S.C. § 1182(a)(2)(A) (2012)); *infra* section I.C.

81. *See generally* Katherine Beckett & Heather Evans, *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*, 49 LAW & SOC'Y REV. 241 (2015) (discussing how immigration has become intertwined with the criminal justice system).

82. *See* Mirko Bagaric & Sandeep Gopalan, *A Sober Assessment of the Link Between Substance Abuse and Crime—Eliminating Drug and Alcohol Use from the Sentencing Calculus*, 56 SANTA CLARA L. REV. 243, 244–53 (2016) ("Most crimes are committed by offenders who are substance involved, and nearly half of all crimes that are committed are done so by offenders who are intoxicated at the time of the offense."); Redonna K. Chandler et al., *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301 JAMA 183, 183–84 (2009); Rajita Sinha & Caroline Easton, *Substance Abuse and Criminality*, *27* J. AM. ACAD. PSYCHIATRY & L. 513, 514 (1999); Megan Testa, *Imprisonment of the Mentally Ill: A Call for Diversion to the Community Mental Health System*, 8 ALB. GOV'T L. REV. 405, 411–12 (2015).

83. *See* Benjamin R. Nordstrom & Charles A. Dackis, *Drugs and Crime*, 39 J. PSYCH. & L. 663, 674–83 (2011); David N. Nurco et al., *Differential Criminal Patterns of Narcotic Addicts Over an Addiction Career*, 26 CRIMINOLOGY 407, 418–21 (1988); Lauren Rousseau & I. Eric Nordan, Tug v. Mingo*: Let the Plaintiffs Sue-Opioid Addiction, the Wrongful Conduct Rule, and the Culpability Exception*, 34 W. MICH. U. COOLEY L. REV. 33, 33 (2017) ("The drive to obtain these drugs often leads to criminal behavior, such as forging prescriptions, lying to obtain drugs, and unlawfully possessing and using drugs.").

84. *See* 8 U.S.C. § 1182(a)(2) (criminal grounds of inadmissibility); 8 U.S.C. § 1227(a)(2) (2012) (criminal grounds of deportation).

85. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II) (controlled substance ground of inadmissibility); 8 U.S.C. § 1227(a)(2)(B) (controlled substance ground of deportation); 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1101(a)(43)(B) (setting forth the illicit trafficking provision of the aggravated felony ground of deportation).

86. *See* Immigration and Nationality Act, Pub. L. No. 82-414, § 212(a), 66 Stat. 163, 182 (1952) (codified at 8 U.S.C. § 1182(a)) (discussing exclusion); *id.* § 241(a), at 206 (codified at 8 U.S.C. § 1251(a)) (discussing deportation); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751, 100 Stat. 3207, 3207–47 (codified at 8 U.S.C. §§ 1182(a), 1227(a)(2)(B)).

include drug trafficking, which includes sale of a small amount of drugs.[87] Any conviction for an offense relating to a federally controlled substance, including misdemeanors, is a ground for denying noncitizens entry into the United States, even if they are married to a U.S. citizen.[88] In 1990, Congress amended the law to render inadmissible any noncitizen who admits to the essential elements of a drug offense, even if there was no conviction.[89] In a 2002 case before the U.S. Court of Appeals for the Ninth Circuit, for example, an applicant for lawful permanent residency admitted to using marijuana when he was under twenty-one, and, as a result, the U.S. government denied his residency application.[90] Such denials are common.[91] Noncitizens who admit to the essential elements of

87. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4469–70 (codified as amended at 8 U.S.C. § 1101(a)(43)).

88. 8 U.S.C. § 1182(a)(2)(A)(i)(II)).

89. Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067 (codified at 8 U.S.C. § 1182(a)). 8 U.S.C. § 1182(a)(2)(A)(i)(II) makes inadmissible "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21)." Immigration enforcement officials regularly pursue these admissions to drug use. *See, e.g.*, Pazcoguin v. Radcliffe 292 F.3d 1209, 1214–18 (9th Cir. 2002), *as amended on denial of reh'g and reh'g en banc*, 308 F.3d 934 (9th Cir. 2002) (discussing applicant admitted to past drug use); Romero-Fereyros v. Attorney General, 221 F. App'x 160, 162–63 (3d Cir. 2007) (discussing applicant interrogated about past drug use); *see also* KEITH HUNSUCKER, FED. LAW ENF'T TRAINING CTR., CRIMINAL WITHOUT CONVICTION—PROSECUTING THE UNCONVICTED ARRIVING CRIMINAL ALIEN UNDER SECTION 212(A)(2)(A) OF THE IMMIGRATION AND NATIONALITY ACT 2, http://www.fletc.gov/training/programs/legal-division/the-informer/research-by-subject/miscellaneous/ aliencriminalwithoutconviction.pdf [https://perma.cc/ERT4-HSN8] ("If the alien admits to such criminal activity, the alien can then be refused admission to the United States, even though he has not been convicted of the criminal offense.").

90. *Pazcoguin*, 292 F.3d at 1216–18.

91. *See, e.g.*, Rodriguez v. Sessions, 741 F. App'x 381, 384–85 (9th Cir. 2018) (discussing admission by noncitizen he possessed and smoked marijuana constituted an admission that he committed acts which constituted the essential elements of violations of a law relating to a controlled substance); Martinez v. Att'y Gen., 577 F. App'x 969, 971–72 (11th Cir. 2014) (relying correctly upon a pretrial intervention document stating that the noncitizen had admitted to possessing cocaine as evidence of admission to a drug offense); *Romero-Fereyros*, 221 F. App'x at 162–65 (discussing an applicant who was denied a visa in 2005 after admitting to cocaine use); Talioaga v. Gonzales, 212 F. App'x 612, 614 (9th Cir. 2006) (upholding finding of admission to essential elements of a drug offense based on admission to doctors during physical and psychiatric examinations required for an immigrant visa); Galvez v. Ashcroft, 98 F. App'x 666, 667–68 (9th Cir. 2004) (discussing admission to drug use rendered noncitizen inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(II)). The only waiver of inadmissibility for having been convicted or having admitted the essential elements of a controlled substance offense is available for a single simple possession of under 30 grams of marijuana. 8 U.S.C. § 1182(h). This limited waiver was added to the INA in 1981. *See* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 8, 95 Stat. 1611, 1616. It is only available to individuals who can show that a close family member who is a U.S. citizen or lawful permanent resident would suffer extreme hardship if the individual was denied admission. 8 U.S.C. § 1182(h).

a drug offense are also barred from showing good moral character on applications for naturalization, even if they have no criminal record.[92]

All drug offenses, except a single conviction of "30 grams or less" of marijuana possession for one's own use, are grounds for deportation of people already inside the United States, including lawful permanent residents.[93] No exceptions exist for people convicted while they were under eighteen, and no statute of limitations limits the use of old convictions as the basis for immigration consequences.[94] Convictions involving a federally controlled substance and an element of sale or commercial dealing are considered "aggravated felonies" and trigger an additional ground of deportation.[95] The immigration statute makes no distinction between drug distributions related to sustaining a drug addiction and other types of sales. The aggravated felony designation is the most serious under immigration law. Virtually no discretion exists for immigration judges or other adjudicators to halt the deportation of someone with an aggravated felony conviction, regardless of the length of time they have been a lawful permanent resident, their rehabilitation, and hardship to family caused by deportation.[96]

Prior to sweeping amendments to immigration law in 1996, the law permitted immigration judges and other adjudicators to consider a variety of factors to determine whether a waiver of deportation was warranted, as long as the noncitizen had permanent resident status and had not served five years of a prison sentence for an aggravated felony.[97] These waivers

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92. 8 U.S.C. § 1182(a)(2)(A)(i)(II). This ground is incorporated into the good moral character definition by reference. *See* 8 U.S.C. § 1101(f)(3) (cross-referencing 8 U.S.C. § 1182(a)(2)(A)).

93. 8 U.S.C. § 1227(a)(2)(B)(i) (setting forth the ground of deportation for controlled substance conviction).

94. *Id.* For a critique of the harshness of immigration law's treatment of controlled substance convictions even prior to major amendments in 1996, see Steven Legomsky, *Reforming the Criteria for the Exclusion and the Deportation of Alien Criminal Offenders*, 12 IN DEF. OF THE ALIEN 64, 65–66 (1990). Amendments in 1996 increased the consequences for criminal convictions, including those relating to controlled substances. *See generally* Daniel C. Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L REV. 703 (1997).

95. 8 U.S.C. § 1101(a)(43) (2012) (defining "aggravated felony"); 8 U.S.C. § 1227(a)(2)(A)(iii) ("aggravated felony" is a ground for deportation); *see* Lopez v. Gonzales, 549 U.S. 47, 53–54 (2006) (stating that "ordinarily 'trafficking' means some sort of commercial dealing"); Matter of Davis, 20 I. & N. Dec. 536, 541 (BIA 1992) (stating that a "business or merchant nature, the trading or dealing of goods," is essential for trafficking). As a result, single conviction for possession of a small amount of marijuana with intent to sell qualifies as an aggravated felony. 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felony ground of deportation); 8 U.S.C. § 1101(a)(43)(B) ("trafficking" provision of aggravated felony definition).

96. *See* 8 U.S.C. § 1229b(a)(3) (barring lawful permanent resident cancellation of removal for any applicant convicted of an aggravated felony).

97. 8 U.S.C. § 1182(c); *see also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L.

allowed adjudicators to consider all relevant factors, including whether the applicant suffered from a substance use disorder and whether the underlying criminal act was related to the disorder.[98] With the elimination of the waiver in 1996,[99] judges retain only narrow discretion in a limited number of cases.[100] Today, the primary discretionary remedy for lawful permanent residents is not available to people who have an aggravated felony conviction, including a small drug sale conviction related to addiction.[101] Individuals who have not had their lawful permanent residency for at least five years are also not eligible.[102]

Alcohol-related offenses may also trigger crime-based exclusion or deportation, although not as often as drug crimes. Some driving under the influence (DUI) statutes have been held to constitute crimes that fall within the removal grounds referencing a "crime involving moral turpitude," while others have not.[103] Similarly, some aggravated DUI convictions have been considered aggravated felonies.[104] In October

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No. 104-132, § 440,110 Stat. 1214, 1277; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304, 110 Stat. 3009, 3009–597, *amended by* Act of October 11, 1996, Pub. L. No. 104, § 302, 110 Stat. 3656.

98. *See* Matter of Marin, 16 I. & N. Dec. 581, 584–85 (BIA 1978).

99. Illegal Immigration Reform and Immigrant Responsibility Act § 304(b); *see also* INS v. St. Cyr, 533 U.S. 289, 297 (2001) (summarizing history of the discretionary waiver under former 8 U.S.C. § 1182(c) and its repeal in 1996).

100. The waiver under former 8 U.S.C. § 1182(c) was replaced by cancellation of removal, a much more limited form of relief. *See* Illegal Immigration Reform and Immigrant Responsibility Act § 304(a) (codified as 8 U.S.C. § 1229b(a) (2012)) (setting forth the cancellation of removal for lawful permanent residents).

101. *Id.*

102. *Id.* In addition, applicants for cancellation of removal must have been admitted to the United States in any status at least seven years before having committed the removable offense and before being placed into removal proceedings. *Id.* Applicants stop accruing time towards eligibility for cancellation of removal once served with a charging document putting them in removal proceedings or once they commit a crime making them removable. *Id.* § 1229b(d)(1).

103. *Id.* § 1182(a)(2)(A)(i). *Compare* Matter of Torres-Varela, 23 I. & N. Dec. 78, 78 (BIA 2001) (holding that Arizona conviction for aggravated DUI due to prior DUI convictions was not crime involving moral turpitude), *with* Matter of Lopez-Meza, 22 I. & N. Dec. 1188, 1194–96 (BIA 1999) (holding that Arizona conviction for aggravated DUI that included a scienter element of knowledge was a crime involving moral turpitude); *and* Marmolejo-Campos v. Holder, 558 F.3d 903, 912–17 (9th Cir. 2009) (upholding BIA's determination that noncitizen's conviction for DUI with a suspended license was a crime involving moral turpitude). Even if the noncitizen is already deportable because of prior criminal history or immigration violations, the specifics of the additional conviction can affect eligibility for discretionary relief. *See, e.g.*, Navarette v. Holder, No. CV-F-09-1255, 2010 WL 1611141, at *3 (E.D. Cal. Apr. 20, 2010) (analyzing a DUI conviction vis-à-vis discretionary good moral character).

104. United States v. McGill, 450 F.3d 1276, 1280 (11th Cir. 2006) (holding that Alabama's DUI statute is a crime of violence). *But see* Leocal v. Ashcroft, 543 U.S. 1, 11 (2004) (holding that Florida aggravated DUI conviction was not a crime of violence aggravated felony because the statute was a

2019, the U.S. Attorney General ruled that noncitizens with two or more non-aggravated DUIs are presumptively barred from showing good moral character and that evidence of rehabilitation is irrelevant.[105]

D. Discretionary Determinations

Although the 1996 amendments to immigration law dramatically scaled back discretionary waivers of deportation for people facing removal on account of a criminal record, judges still adjudicate the few waivers that were in the pipeline before the changes, as well as a handful of other types of applications for discretionary relief.[106] Standard practice is for the judge to assess the seriousness of the underlying circumstances of the activity that led to a criminal record and to consider evidence of rehabilitation and hardship to family members in the event of deportation.[107] If the applicant suffers from substance use disorder, this diagnosis would be relevant to the inquiry into hardship and rehabilitation.

Facts relating to drug and alcohol use routinely emerge in testimony and other evidence before the immigration judge.[108] Neither the BIA nor federal circuit courts have provided guidance on how addiction figures into the discretionary calculus, including whether substance use disorder constitutes a positive or negative factor.[109] A survey of administrative appellate decisions reveals that abuse or addiction to drugs or alcohol is

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strict liability offense). The U.S. Supreme Court has struck down part of the crime of violence aggravated felony ground as void for vagueness. *See* Sessions v. Dimaya, 584 U.S. __, 138 S. Ct. 1204, 1223 (2018).

105. Matter of Castillo-Perez, 27 I. & N. Dec. 664 (A.G. 2019). Studies of people in treatment programs after a DUI conviction show that nearly all repeat DUI offenders suffer from substance use disorder. Howard J. Shaffer et al., *The Epidemiology of Psychiatric Disorders Among Repeat DUI Offenders Accepting a Treatment-Sentencing Option*, 75 J. CONSULTING & CLINICAL PSYCHOL. 795, 802 (2007); *see also* Sandra C. Lapham et al., *Psychiatric Disorders in a Sample of Repeat Impaired-Driving Offenders*, 67 J. STUD. ON ALCOHOL & DRUGS 707, 710–11 (2006). The DSM-V diagnostic standards include repeated conduct like driving after drinking as a symptom of substance use disorder. *See* DSM-V, *supra* note 6, at 483–84, 491, 541.

106. *See* 8 U.S.C. § 1159(c) (setting forth refugee waiver); 8 U.S.C. § 1229b(a) (setting forth cancellation of removal for lawful permanent residents); 8 U.S.C. § 1182(h) (stating that discretionary criminal waiver is not available for drug offenses with the exception of a single conviction of simple possession of less than thirty grams of marijuana).

107. *See* Matter of Marin, 16 I. & N. Dec. 581, 584–85 (BIA 1978) (describing the factors involved in the discretionary analysis); Matter of C-V-T-, 22 I. & N. Dec. 7, 10–12 (BIA 1998) (applying the *Marin* factors to cancellation for removal cases).

108. IMMIGRANT LEGAL RESEARCH CTR., A GUIDE FOR IMMIGRATION ADVOCATES 12-16–12-23 (18th ed. 2012) (discussing rehabilitation in cancellation cases and case examples involving drug addiction).

109. Tsankov, *supra* note 21, at 22, 55 (noting the lack of guidance to immigration adjudicators).

typically considered a negative factor in discretionary determinations.[110]

In the absence of appellate guidance, immigration judges are left to rely on their own views about addiction. A judge who understands addiction as a medical condition might be more willing to grant discretionary relief to someone if there was a connection between their criminal record and their substance use disorder. In contrast, a judge who views addiction as a choice or a moral failing might take the opposite approach. The absence of a clear understanding of the nature of addiction, and its relevance to discretionary determinations, leaves adjudicators to their own devices when exercising discretion for, or against, noncitizens suffering from substance use disorder. Trainings for immigration judges are rare, and at least one recent annual training was cancelled.[111] Materials distributed at the 2018 Legal Training Program for Immigration Judges did not address the relevance of addiction to adjudications.[112]

II. UNDERSTANDING SUBSTANCE USE AND ADDICTION

As the previous Part describes, addiction and related behavior trigger severe immigration consequences, reflecting the outdated view that our legal system should castigate those who suffer from substance use disorder. This Part traces the history of societal thinking about drug and alcohol use and addiction, demonstrating how views have shifted over time, influenced by science, cultural norms, as well as racial and ethnic

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110. There are no published decisions of the BIA expressly addressing whether addiction to drugs or alcohol is a positive or negative factor in the exercise of discretion. Unpublished decisions of the BIA illustrate that drug and alcohol addiction is considered a negative factor. *See, e.g.*, In Re: Juan Angel Martinez-Gonzalez A.K.A. Juan Angel Gonzalez-Martinez, A074 669 817 LOS, 2018 WL 3045825, at *2 (BIA Apr. 27, 2018) (declining to count the fact that criminal history "stemm[ed] from . . . abuse of alcohol" as mitigating factor); In Re: Emmanuel Babajide Adegbite, A086 976 697 ATL, 2017 WL 1330141, at *1 (BIA Mar. 3, 2017) (including "negative factors" within "history of alcohol abuse"); In Re: Herick Juvenal Guevara Argueta, A096 242 065 ARL, 2015 WL 5180597, at *3 (BIA Aug. 5, 2015) (noting that the noncitizen "has a serious alcohol problem and, although an admitted alcoholic, has continued to drink"); In Re: Evvers Rafael Guevara-Moreno, A36 064 070 ELOY, 2008 WL 2401103, at *3 (BIA May 1, 2008) (listing "drug abuse history" as a negative factor); In Re: Miguel Angel Pasillas Pinedo A.K.A. Miguel Angel Pasillas, A90 057 238 ELOY, 2007 WL 3318653, at *1 (BIA Sept. 14, 2007) (including "negative equities" within "abuse of controlled substances").

111. *See* Paul Smidt & Jeffrey Chase, *HON. JEFFREY CHASE: Matter of W-Y-C- & H-O-B- & The Unresolved Tension In Asylum Adjudication! – Plus My Added Commentary On EOIR Training!*, IMMIGR. COURTSIDE BLOG (Feb. 05, 2018), https://immigrationcourtside.com/2018/02/05/hon-jeffrey-chase-matter-of-w-y-c-h-o-b-the-unresolved-tension-in-asylum-adjudication-plus-my-added-commentary-on-eoir-training/ [https://perma.cc/H5SS-8NV3].

112. *See EOIR Releases Materials from the 2018 Legal Training Program for Immigration Judges*, AM. IMMIGR. LAW. ASS'N (Oct. 25, 2018), https://www.aila.org/infonet/eoir-2018-training-program-judges [https://perma.cc/38Y4-9H6Z].

animus. Drug and alcohol use and addiction are complex phenomena with biological, psychosocial, and cultural-historical dimensions.[113]

A. A Brief History

Alcohol and other mind-altering substances play an important role in society.[114] Over the course of human history, they have been tied to religious, ceremonial, and medical practices.[115] Substance use is found in almost all cultures throughout human existence, suggesting it is rooted in fundamental human traits linked to adaptation and survival.[116] For example, the first evidence of alcohol use was in Egyptian and Mesopotamian civilizations more than 6,000 years ago.[117]

The first use of opium also dates to more than 6,000 years ago in Sumeria, current-day Iraq.[118] In the sixth or seventh century A.D., opium reached China and East Asia through traders to the west, leading to its widespread use in mainly communal settings in Asia.[119] In the latter half of the 1800s, Europeans became keenly interested in opium, including for medicinal purposes. Used in a manner similar to aspirin, it served as a painkiller and sedative and for dysentery, diarrhea, and coughs.[120]

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113. *See generally* RUSSIL DURRANT & JO THAKKER, SUBSTANCE USE AND ABUSE: CULTURAL AND HISTORICAL PERSPECTIVES (2003); Robert West, Editorial, *Theories of Addiction*, 96 ADDICTION 2001, at 3; *see also* Sana Loue, *The Criminalization of the Addictions: Toward a Unified Approach*, 24 J. LEGAL MED. 281, 292–93 (2003) (discussing how medical and societal views of alcohol have changed over time); NORMAN ZINBERG, DRUG, SET, AND SETTING (1984) (discussing cultural and social influences on drug use).

114. For historical accounts of American societal views on alcohol and other mind-altering substances, see generally 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); CHRISTOPHER M. FINAN, DRUNKS: AN AMERICAN HISTORY (2017); MARK E. LENDER & JAMES K. MARTIN, DRINKING IN AMERICA: A HISTORY 129, 131 (1982); WILLIAM L. WHITE, SLAYING THE DRAGON: THE HISTORY OF ADDICTION TREATMENT AND RECOVERY IN AMERICA (2014); Harry G. Levine, *The Discovery of Addiction: Changing Conceptions of Habitual Drunkenness in America*, *in* 39 J. STUD. ON ALCOHOL 143, 143–44 (1978).

115. *See* DURRANT & THAKKER, *supra* note 113, at 64, 90.

116. *Id.* at 35.

117. *Id.* at 64.

118. *See* THOMAS M. SANTELLA & D. J. TRIGGLE, OPIUM 8–9 (2007); Michael J. Brownstein, *A Brief History of Opiates, Opioid Peptides, and Opioid Receptors*, 90 PROC. NAT'L ACAD. SCI. USA 5391, 5391–93 (1993), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC46725/pdf/pnas01469-0022.pdf. Neolithic sites in Switzerland suggest the cultivation of opium poppies. *See* DURRANT & THAKKER, *supra* note 113, at 65. Evidence dating from 315–92 A.D. suggests that women used cannabis to ease the process of giving birth. *Id.* at 62.

119. *See* ZHENG YANGWEN, THE SOCIAL LIFE OF OPIUM IN CHINA 5 (2005) (citing MARTIN BOOTH, OPIUM: A HISTORY (1997)).

120. *See* DURRANT & THAKKER, *supra* note 113, at 75. Sigmund Freud recommended cocaine to

Similarly, in nineteenth century America, cocaine was used to treat a wide range of illnesses, including morphine and alcohol addiction.[121] During the Civil War, numerous soldiers became addicted to the morphine used to treat their wounds.[122] The dominant use of mind-altering drugs in the United States turned recreational in the late nineteenth century.[123]

The scientific and popular understanding of substance addiction has also changed with time. While the addictive nature of certain substances was known to doctors in ancient Greece and Rome,[124] the roots of the modern notion of addiction as a disease with symptoms requiring treatment lie in writings from the late eighteenth century.[125] In the United States, the nineteenth and early twentieth centuries saw the first institutionalized response to alcoholism as a disease needing treatment with the founding of homes and asylums for people struggling with alcohol.[126] However, these institutions eventually gave way to an understanding of addiction as either a mental infirmity needing psychiatric intervention, or willful misconduct best dealt with by the criminal justice system.[127] Likewise, in 1910, President Taft declared a

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treat such wide-ranging ailments as syphilis, asthma, and digestive disorders. WHITE, *supra* note 114, at 147.

121. *See* WHITE, *supra* note 114, at 146.

122. Sana Loue, *The Criminalization of the Addictions Toward A Unified Approach*, 24 J. LEG. MED. 281, 310 (2003).

123. SARAH W. TRACY & CAROLINE J. ACKER, INTRODUCTION TO ALTERING AMERICAN CONSCIOUSNESS: THE HISTORY OF ALCOHOL AND DRUG USE IN THE UNITED STATES, 1800–2000, at 14–15 (2004) ("In the nineteenth century, Romantics associated opium and hashish use with exoticism, Orientalism, and stimulation of the imagination. Fitzhugh Ludlow's *The Hashish Eater* exemplified the literature that explored psychoactive drug effects with interest. On a more mundane level, an emerging American middle class sought to relieve the pressures of work and social life in an increasingly complex urban industrial economy through drugs, particularly opiates and cocaine.").

124. *See* DURRANT & THAKKER, *supra* note 113, at 65; ELVIN M. JELLINEK, THE DISEASE CONCEPT OF ALCOHOLISM 150–51 (1960); WHITE, *supra* note 114, at 31. In ancient Egypt, people were described as "mad from wine or beer." *Id.* (internal quotation marks omitted).

125. The writings of Benjamin Rush and Thomas Trotter were highly influential. *See generally* BENJAMIN RUSH, AN INQUIRY INTO THE EFFECTS OF ARDENT SPIRITS 5, 22 (1784) (discussing diseases stemming from "habitual use" of alcohol, and characterizing them as of a "mortal" or "fatal" nature); THOMAS TROTTER, AN ESSAY: MEDICAL, PHILOSOPHICAL AND CHEMICAL, ON DRUNKENNESS AND ITS EFFECTS ON THE HUMAN BODY (1804).

126. *See* WHITE, *supra* note 114, at 31–62. White describes these institutions as "mark[ing] the first broadscale professional movement to medicalize excessive drinking and drug use in America." *Id.* at 43.

127. *See* WHITE, *supra* note 114, at 44; *see also* Leavitt v. City of Morris, 117 N.W. 393, 395 (Minn. 1908) (noting that legislators were increasingly treating alcohol addiction "as a disease of mind and body, analogous to insanity . . . .").

cocaine epidemic.[128] Four years later, Congress made the use of cocaine and opiates illegal, converting patients into criminals and thwarting the development of the disease understanding of drug addiction.[129] The Eighteenth Amendment to the U.S. Constitution criminalized the possession and use of alcohol from 1920 until the Twenty-first Amendment restored the legality of alcohol in 1933.[130]

In 1935, during the Great Depression, Alcoholics Anonymous launched the modern mutual-aid movement for intervention into alcohol addiction.[131] Like earlier nineteenth century groups, Alcoholics Anonymous called for the intervention into and treatment of alcoholism.[132] Between the 1930s and the 1950s, the group spearheaded a movement that began to "transform[] the alcoholic from a morally deformed perpetrator of harm to a sick person worthy of sympathy and support."[133]

In 1960, Elvin Jellinek's canonical book, *The Medical Concept of Alcoholism*, heavily influenced the public's perception of alcoholism.[134] This disease model popularized a comparison of alcohol addiction to diabetes, analogizing the alcoholic and drug addict as needing substances in the same way that a diabetic needs insulin.[135] In 1965 and 1967, two crime commissions under the Johnson Administration concluded that alcoholics should be treated, not incarcerated, and that the criminal justice

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128. *See* David F. Musto, *America's First Cocaine Epidemic*, 13-3 WILSON QUARTERLY 59, 64 (1989). President Taft's views on opium originated with his Opium Commissioner, Hamilton Wright. *See* INT'L OPIUM COMM'N, REPORT OF THE INTERNATIONAL OPIUM COMMISSION (1909).

129. Harrison Narcotics Act of 1914, 38 Stat. 785 (repealed 1970, and replaced with the Controlled Substances Act); *see also* Webb v. United States, 249 U.S. 96, 99–100 (1919) (stating that a physician's provision of morphine to an addict could be illegal under some circumstances); U.S. v. Jin Fuey Moy, 241 U.S. 394, 402 (1916) (stating that possession by addict of illegal drugs was a violation of the Harrison Act).

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

131. *See generally* ERNEST KURTZ, NOT GOD: A HISTORY OF ALCOHOLICS ANONYMOUS (1991).

132. *Id.* One of the first groups of recovered alcoholics was from the 1840s, called the Washingtonians. Thomas J. Reed, *The Futile Fifth Step: Compulsory Disclosure of Confidential Communications Among Alcoholics Anonymous Members*, 70 ST. JOHN'S L. REV. 693 (1996).

133. *See* WHITE, *supra* note 114, at 233.

134. *See generally* ELVIN JELLINEK, THE MEDICAL CONCEPT OF ALCOHOLISM (1960); *see also* 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) (discussing Jellinek's landmark work with Alcoholics Anonymous and published studies).

135. *See* MICHELLE L. MCCLELLAN, LADY LUSHES: GENDER, ALCOHOLISM, AND MEDICINE IN MODERN AMERICA 105 (2017), https://books.google.com/books?id=DG8kDwAAQBAJ&pg=PA105&dq=alcoholism+diabetes+metaphor&hl=en&sa=X&ved=0ahUKEwipr6Ls5cfcAhUFmlkKHQNjC3EQ6AEIKTAA#v=onepage&q=diabetes&f=false [https://perma.cc/DC94-EE6W].

system should deal "flexibl[y]" with drug offenders.[136] Betty Ford's high-profile struggle with alcohol and drug addiction generated sympathy and understanding within mainstream America.[137] Sustained campaigns started in the 1990s to educate the public about addiction, particularly alcoholism.[138] Popular television shows and magazines disseminated de-stigmatizing messages that portrayed addiction as a chronic disease.[139]

While the condemnation of people addicted to alcohol began to cool, the criminalization of narcotics use and DUIs heated up.[140] In 1951, the Boggs Act upped sentences for drug offenses and established mandatory minimum sentences.[141] President Eisenhower declared a "new war on narcotic addiction" in 1954.[142] The Narcotic Control Act of 1956 further raised criminal penalties to include life imprisonment and even death.[143] The criminalization of drug possession and sale was followed by the steady increase in drug offense penalties through the 1990s.[144] Reflecting the general push for heavy penalties for criminal behavior, states and localities began more aggressive enforcement of laws against DUIs and lengthened DUI sentences.[145] During this same period of time, Congress amended immigration law to expand the grounds for removing

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136. PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 223–24, 236 (1967). In 1970, Congress passed the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act, establishing the National Institute on Alcohol Abuse and Alcoholism (NIAAA). Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, Pub. L. 91-616, § 101(a), 84 Stat. 1848, 1848. In 1971, the National Conference of Commissioners on Uniform State Laws created a model legal code that called for the decriminalization of public intoxication called the Uniform Alcoholism and Intoxication Act. *See* WHITE, *supra* note 114, at 453.

137. *See* WHITE, *supra* note 114, at 395.

138. *See* Patricia M. Loewit-Phillips & Abbie Goldbas, *Mothers Against Drunk Driving: History and Impact*, 28 INT. J. CHILDBIRTH ED. 62, 62–67 (2013); Ben Young et al., *Effectiveness of Mass Media Campaigns to Reduce Alcohol Consumption*, 53 ALCOHOL & ALCOHOLISM 302, 302–16 (2018).

139. *See* WHITE, *supra* note 114, at 438, 441. In the 2000s, addiction as a disease became defined as non-substance-specific and as appearing on a spectrum. *Id.* at 436.

140. *Id.* at 305.

141. Act of Nov. 2, 1951, ch. 666, 65 Stat. 767 (repealed 1970).

142. W.H. Lawrence, *President Launches Drive on Narcotics; President Opens War on Drugs; Names 5 in Cabinet to New Panel*, N.Y. TIMES, Nov. 28, 1954, at 1.

143. Narcotic Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 651.

144. For a discussion of the ways in which it has become easier for law enforcement officials to arrest someone for a drug offense in the last decades, see MARKUS D. DUBBER, VICTIMS IN THE WAR ON CRIME: THE USES AND ABUSES OF VICTIMS' RIGHTS (2002).

145. *See* SUSAN CHEEVER, DRINKING IN AMERICA: OUR SECRET HISTORY 208 (2015) (discussing the role of Mothers Against Drunk Driving in "lobb[ying] for higher drinking ages and more severe punishments for driving drunk").

noncitizens with criminal records and reduce the availability of defenses to deportation.[146]

B. Substance Addiction and Race, Gender, Ethnicity, and Class

Changing views of drug use and addiction have been driven in part by the social status, ethnicity, gender, and race of users.[147] European colonists and early white Americans used alcohol as a means of power and control over Native Americans and enslaved Africans.[148] As a means of ensuring that Native Americans would remain productive as trappers, colonists controlled their access to alcohol.[149] At the same time, colonists fostered a stereotype of male Native Americans as drunks, building a mythology of Native Americans' supposed innate inability to handle alcohol.[150] In a similar manner, white people used alcohol to exert power and control over enslaved African men and women. To ensure that alcohol would not diminish the ability of enslaved men and women to engage in hard labor, slave owners limited their drinking.[151] Slaves owners also used "controlled promotion of drunkenness" on certain occasions as a form of domination and degradation.[152] Professor Jayesh Rathod argues that whites' use of alcohol as a means of social control over Native Americans and slaves laid the groundwork for later negative associations between

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146. *See supra* notes 97–102 and accompanying text.

147. *See* Gregory Y. Mark, *Racial, Economic and Political Factors in the Development of America's First Drug Laws*, 10 ISSUES CRIM. 49 (1975). Levels of the use and abuse of drugs have also depended in part on their availability, as well as people having time and money to access them. The role of the United States abroad has affected supply, including U.S. involvement in cocaine and heroin trafficking as part of its support of anti-communist groups. *See* DURRANT & THAKKER, *supra* note 113, at 83, 103. The rise of the recreational use of drugs in the twentieth century correlates with an increase in leisure time and available income. *Id.* at 92.

148. *See* WHITE, *supra* note 114, at 1.

149. *See* EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA 17 (2011); LENDER & MARTIN, *supra* note 114, at 21–24.

150. *See generally* PETER C. MANCALL, DEADLY MEDICINE: INDIANS AND ALCOHOL IN EARLY AMERICA 11 (1995). Literature reflected societal views linking Native Americans with excessive alcohol use. *See* Don Coyhis & William L. White, *Alcohol Problems in Native America: Changing Paradigms and Clinical Practices*, 20 ALCOHOLISM TREATMENT Q., No. 3–4, 157–165 (2002); Beth Kraig, *It's About Time Somebody Out Here Wrote the Truth: Betty Bard MacDonald and North/Western Regionalism*, 40 WESTERN AM. LIT. 237, 260–61 (2005) (discussing the racist portrayal of Native Americans as drunks in the 1945 popular book *The Egg and I*).

151. *See* LENDER & MARTIN, *supra* note 114, at 27 (discussing how the slave codes forbade enslaved men and women from purchasing or consuming alcohol without the permission of the owners).

152. *See* WHITE, *supra* note 114, at 1, 12 (discussing Frederick Douglass's analysis of how slave owners used alcohol in furtherance of slavery); FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 254, 256 (1857).

alcohol and immigrants.[153] In his view, the link between anti-immigrant sentiment and alcohol use was so strong that a driving force behind Prohibition was the exertion of social control over immigrants, who had been painted as alcohol abusers.[154]

Class and gender have also played a role in how addiction is perceived. Prior to the twentieth century, the typical opium user was a white middle-class woman who had been prescribed the drug by a physician.[155] In the early part of the twentieth century, the typical user became a lower-class man.[156] With this change in the demographics of opium use, the drug drew more stigma.

Racial and ethnic animus is also apparent from the fact that the same drugs, when associated with different groups, have been perceived and treated differently. In mid-nineteenth century America, opium smoking among Chinese immigrants was a communal activity of men and part of their cultural identity.[157] White society, however, considered opium smoking—as opposed to its medicinal use in pill form—a dangerous vice.[158] Reflecting racial animus against the Chinese, laws against opium smoking predated laws against other forms of opium.[159]

The negative view of cannabis and cocaine in the early twentieth century was due in part to their unwarranted association with ethnicity and race, specifically Mexicans and black Americans.[160] White people's association of black people with drugs may even have given impetus to lynchings.[161] In

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153. *See* Rathod, *supra* note 70, at 798–802. Judgmental attitudes about drug and alcohol use were tied to anti-immigrant sentiment in other ways as well. The eugenics movement at the turn of the nineteenth century endorsed the idea that alcoholics would be weeded out of the human race as a matter of natural selection. *See* WHITE, *supra* note 114, at 120–22. Proposals such as the involuntary sterilization of alcoholics were bound up with proposals for restricting immigration. *Id.* at 121.

154. *See* Rathod, *supra* note 70, at 802.

155. *See* DURRANT & THAKKER, *supra* note 113, at 81.

156. DAVID T. COURTWRIGHT, DARK PARADISE: A HISTORY OF OPIATE ADDICTION IN AMERICA 3 (2001).

157. *See* DURRANT & THAKKER, *supra* note 113, at 77; ZHENG YANGWEN, THE SOCIAL LIFE OF OPIUM IN CHINA (2005).

158. *Id.* (discussing racial animus of whites directed at the Chinese); WHITE, *supra* note 114, at 148 ("While the dominant profile of opiate addiction was that of the woman addicted to use of opiate-laced medicines, the image of the drug addict was one centered around the Chinese opium dens. The former was considered to be suffering from a disease, while the latter was viewed as perpetrating a heathen vice.").

159. Mark, *supra* note 147, at 61 (describing the first opium offense laws as part of San Francisco's package of anti-Chinese municipal ordinances).

160. *See* DURRANT & THAKKER, *supra* note 113, at 109–10.

161. Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 72 (1995) ("Most alarmingly, some writers spread the notion that 'most of the attacks upon white women of the South . . . are the direct result of a cocain[e]-

the 1960s, drug use helped form the positive group identity of people opposed to the Vietnam War and in favor of civil rights—a movement that encompassed both blacks and whites.[162] The "War on Drugs" declared by President Nixon in 1971, however, linked drugs to crime and perpetuated derogatory racial and class stereotypes.[163] The pejorative term "crackhead" emerged as a thinly veiled racial slur in the 1980s.[164] For decades, federal law punished the use and possession of crack cocaine, which was prevalent in poor black communities, more harshly than the use and possession of powder cocaine, which was favored by wealthier white people.[165] This stark discrepancy persisted until 2010, when President Obama facilitated the passage of the Fair Sentencing Act, which equalized the punishment of crimes involving crack and powder cocaine.[166]

C. *Public Perception Today*

The public perception of people addicted to crack contrasts sharply with societal views about drug addiction today, particularly opioid use. Now, as in the late nineteenth century, opioid use is associated with White middle-class America.[167] The skyrocketing rate of opioid addiction has prompted President Trump to describe the "opioid epidemic" as the

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crazed negro brain.'") (internal citations omitted); *see also generally* Carl L. Hart, *How the Myth of the 'Negro Cocaine Fiend' Helped Shape American Drug Policy*, NATION (Jan. 29, 2014), https://www.thenation.com/article/how-myth-negro-cocaine-fiend-helped-shape-american-drug-policy/ [https://perma.cc/6VPV-YWTJ]; Desmond Manderson, *Symbolism and Racism in Drug History and Policy*, 18 DRUG & ALCOHOL REV. 2 (1999) (discussing racism in drug history).

162. *See* KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 83–88 (1997) (noting how race provides the subtext of the politicization of crime policies); Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 367–68 (1999).

163. Michael Tonry, *Race and the War on Drugs*, U. CHI. LEGAL F. 25, 52–55 (1994).

164. R. Terry Furst et al., *The Stigmatized Image of the "Crack Head": A Sociocultural Exploration of a Barrier to Cocaine Smoking among a Cohort of Youth in New York City*, DEVIANT BEHAVIOR 20.2, 153–81 (1999); *see also* MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA 4, 97–98 (1995); Autumn Gilbert, *The "Crack Head": How Systematic Inequality Informs Popular Discourse*, MEDIUM (May 14, 2015), https://medium.com/@autumngilbert/the-crack-head-how-systematic-inequality-informs-popular-discourse-8e2f5d9eb3e0 [https://perma.cc/3GZV-PG4G].

165. *Compare* 21 U.S.C. § 841(b)(1)(A)(ii)(II) (1982 & Supp. V 1987) (powder cocaine), *with id.* § 841(b)(1)(A)(iii) (crack cocaine).

166. Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified as amended in scattered sections of 21 U.S.C.).

167. *See* Andrew Cohen, *When Heroin Hits the White Suburbs*, MARSHALL PROJECT (Aug. 12, 2015), https://www.themarshallproject.org/2015/08/12/when-heroin-hits-the-white-suburbs [https://perma.cc/SY9U-HAJ5].

"worst drug crisis in American history."[168] As people in positions of power have experience with addiction in their families and communities, they have shaped the public discourse about drug use and addiction.[169] Today's opioid epidemic, as opposed to the crack epidemic of prior decades, is viewed by many as a public health crisis rather than a public safety problem.[170]

Due in no small part to the struggle of white America with addiction, the dominant discourse today is that addiction—including both alcohol and drug addiction—is a medical condition requiring intervention, not a moral failing.[171] Congressional legislation in the area of healthcare also reflects the understanding of addiction as a medical condition. The Mental Health Parity and Addiction Equity Act of 2008[172] requires medical insurance plans to provide the same coverage for substance use disorders

168. Jenna Johnson & John Wagner, *Trump Declares the Opioid Crisis a Public Health Emergency*, WASH. POST (Oct. 26, 2017) (internal quotation marks omitted), https://www.washingtonpost.com/news/post-politics/wp/2017/10/26/trump-plans-to-declare-the-opioid-crisis-a-public-health-emergency/?utm_term=.58c250d1b88d [https://perma.cc/N3W8-HT23].

169. Jeffrey Jones, *Americans with Addiction in Their Family Believe it is a Disease*, GALLUP (Aug. 11, 2006), https://news.gallup.com/poll/24097/americans-addiction-their-family-believe-disease.aspx [https://perma.cc/G6ME-9JCL] (discussing a survey that polled people with immediate family member addicted to drugs or alcohol and found that 76% said that addiction is a disease, 81% said they believed people addicted to alcohol could make a complete recovery).

170. *See* Matthew Perrone, *AP-NORC Poll: Most Americans See Drug Addiction as a Disease*, ASSOCIATED PRESS (Apr. 5, 2018), http://www.apnorc.org/news-media/Pages/AP-NORC-Poll-Most-Americans-see-drug-addiction-as-a-disease.aspx [https://perma.cc/H77G-2MWP] (stating the percentage of people who consider opioid addiction a significant issue for their community increased from 33% in 2016 to 43% in 2018); ASSOCIATED PRESS-NORC CTR. FOR PUB. AFFAIRS RESEARCH, AMERICANS RECOGNIZE THE GROWING PROBLEM OF OPIOID ADDICTION (2018), http://www.apnorc.org/PDFs/Opioids%202018/APNORC_Opioids_Report_2018.pdf [https://perma.cc/LNA9-A97T] (noting that the majority of the public views prescription drug addiction as a disease, and most people surveyed thought it was likely that a person exhibiting the symptoms of opioid addiction was experiencing a mental illness, suffering from a genetic problem, or suffering from a malfunction of the brain).

171. Even over a decade ago, 76% of people with an immediate family member suffering from addiction believed it was a disease. *See* Jeffrey M. Jones, *Americans With Addiction in Their Family Believe It Is a Disease: Most Believe Complete Recovery Possible*, GALLUP (Aug. 11, 2006), https://news.gallup.com/poll/24097/americans-addiction-their-family-believe-disease.aspx [https://perma.cc/F5L7-NK6L]; *see also* Nat'l Inst. Health, Dep't Health & Human Servs., *Biology of Addiction: Drugs and Alcohol Can Hijack Your Brain*, NIH NEWS HEALTH 1–2 (Oct. 2015), https://newsinhealth.nih.gov/sites/nihNIH/files/2015/October/NIHNiHOct2015.pdf [https://perma.cc/GD3Q-RRLV]; Shaffer et al., *supra* note 105 (noting how nearly 100% of the repeat DUI offenders sampled qualified for a lifetime diagnosis of substance abuse disorder).

172. Pub. L. No. 110-343, §§ 511–512, 122 Stat. 3765, 3881–93 (2008) (codified as amended at 29 U.S.C. § 1185a and 42 U.S.C. § 300gg-26).

that is provided for other illnesses.[173] Recent federal legislation increases resources for substance use treatment.[174]

Polls show that Americans increasingly do not support harsh penalties for unlawful drug use.[175] The criminal justice system has taken some steps to reflect contemporary views, including the decriminalization of marijuana and the creation of diversion programs and drug courts.[176] For repeat DUI offenders, federal law encourages states to require "assessment of the [defendant's] degree of abuse of alcohol and treatment as appropriate."[177]

D. Addiction as a Medical Condition

Despite the late-eighteenth-century roots of the idea that addiction is a medical condition, this view did not enjoy acceptance in the medical community until the mid-1950s.[178] Only in 1956 did the American

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173. Paul Wellstone & Pete Domenici, Mental Health Parity and Addiction Equity Act of 2008, in Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, §§ 511–512, 122 Stat. 3765, 3881–93 (2008) (codified as amended at 29 U.S.C. § 1185a and 42 U.S.C. § 300gg-26); *see also id.* § 512(a)(1), § 712(a)(3)(A) (regulating the financial requirements and treatment limitations that are applied to both mental health and substance use disorder benefits); *id.* § 512(a)(4), § 712(e)(5) (adding a new definition of "substance use disorder benefits").

174. SUPPORT for Patients and Communities Act, Pub. L. No. 115-271 §§ 7001–8092, 8201–8222 (2018).

175. *See* Wilber A. Barillas, *Collateral Damage: Drug Enforcement and Its Impact on the Deportation of Legal Permanent Residents*, 34 B.C. J.L. & SOC. JUST. 1, 11, 25 (2014) ("[M]any Americans have begun to adopt a more tolerant view of drugs. . .This more accepting attitude has manifested itself in recent state laws.");; Press Release, *Poll: Maine Voters Oppose Attorney General's Punitive Drug Policies, Support Decriminalizing Drug Possession and Treating Drugs as a Health Issue*, DRUG POL'Y ALLIANCE (Feb. 8, 2016), http://www.drugpolicy.org/press-release/2016/02/poll-maine-voters-oppose-attorney-generals-punitive-drug-policies-support [https://perma.cc/KM4M-TAXB]; Press Release, *New Poll Finds Strong Majority of CA Voters Believe Too Many People Imprisoned, Favor Reducing Drug Possession Penalty from the Felony to a Misdemeanor*, DRUG POL'Y ALLIANCE (Apr. 10, 2011), http://www.drugpolicy.org/news/2011/04/new-poll-finds-strong-majority-ca-voters-believe-too-many-people-imprisoned-favor-reduc [https://perma.cc/ZLU7-VERD]; Ubi Ofer, *ACLU Poll Finds Americans Reject Trump's Tough-on-Crime Approach*, ACLU (Nov. 16, 2017, 1:45 PM), https://www.aclu.org/blog/smart-justice/aclu-poll-finds-americans-reject-trumps-tough-crime-approach [https://perma.cc/UU6E-BKCY]. As Professor Nancy Morawetz has observed, past presidents have admitted to drug use and the use of drugs is so prevalent among the American public that the Federal Bureau of Investigations no longer regards past drug use as a disqualifier for employment. Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163, 165 (2008) (noting a poll in which "84 percent of voters said that they did not think that proof of cocaine use in his twenties should disqualify Bush from the presidency").

176. *See supra* notes 24–26 and accompanying text.

177. 23 U.S.C. § 164(a)(5)(B).

178. Agreement in the medical community regarding the disease understanding of addiction is not total. For an explanation of addiction as a function of social factors, see Gene M. Heyman, *Is*

Medical Association formally recognize that physicians must treat alcohol addiction as a medical issue in their practices.[179] Not until 1988 did the group admit the American Society of Addiction Medicine to its ranks.[180]

In 1972, the National Council on Alcoholism published the Criteria for the Diagnosis of Alcoholism.[181] The first edition of the DSM in 1952 categorized substance use disorder as a personality disorder.[182] In 1980, the third edition made "substance use disorder" its own category of mental disorder.[183] It was not until the 1980s that most insurance companies included alcoholism as a disease for the purpose of medical insurance coverage.[184]

Today, the American Society of Addiction Medicine describes addiction as "a primary, chronic disease of brain reward, motivation, memory and related circuitry."[185] "Substance use disorder," encompassing both alcohol and drug addiction, appears as a mental medical condition in the DSM.[186] The neuroscience of substance use and addiction has advanced in the last two decades such that neurobiologists can now point to the processes in the brain that underlie addiction.[187] As

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Addiction a Chronic, Relapsing Disease?, *in* DRUG ADDICTION AND DRUG POLICY: THE STRUGGLE TO CONTROL DEPENDENCE 81, 81–117 (Philip B. Heyman & William N. Brownsberger eds., 2001).

179. Report of American Medical Association Comm. on Legislation, 162 JAMA 749, 759 (1956). In 1987, the American Medical Association recognized that addiction is a disease and urged the development of treatments and policies that recognize this fact. Proceedings of the House of Delegates, 136th Annual Meeting, at 348 (1987) https://ama.nmtvault.com/jsp/viewer.jsp?doc_id=ama_arch%2FHOD00001%2F00000061&page_name=34 [https://perma.cc/WM45-UERC]. Today, numerous treatments exist for substance use disorder. *See* Deborah A. Dawson et al., *Recovery from DSM-IV Alcohol Dependence: United States, 2001–2002*, 100 ADDICTION 281, 289–90 (2005) [hereinafter Dawson et al., *Recovery*]; Sean Esteban McCabe et al., *Stressful Events and Other Predictors of Remission from Drug Dependence in the United States: Longitudinal Results from a National Survey*, 71 J. SUBSTANCE ABUSE TREATMENT 41, 43 (2016) [hereinafter McCabe et al., *Stressful Events*].

180. *See* David E. Smith, *The Evolution of Addiction Medicine as a Medical Specialty*, 13 AM. MED. ASS'N J. ETHICS 900 (2011).

181. *Id.* at 384.

182. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS (1st ed., 1952). For a chart on the DSM changes, see Sean M. Robinson & Bryon Adinoff, *The Classification of Substance Use Disorders: Historical, Contextual, and Conceptual Considerations*, 6 BEHAV. SCI. 1, 10 tbl.1 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5039518/ [https://perma.cc/EA2V-KJSH].

183. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS (3d ed., 1980).

184. *See* WHITE, *supra* note 114, at 383.

185. *Resources: Definition of Addiction*, ASAM: AM. SOC'Y ADDICTION MED., https://www.asam.org/resources/definition-of-addiction [https://perma.cc/JVE9-7L7F].

186. *See* DSM-V, *supra* note 6, at 483.

187. In 1997, Alan Leshner, a doctor and director of the National Institute on Drug Abuse, published the influential article *Addiction is a Brain Disease, and It Matters*, 278 SCI. 45, 45 (1997).

the DSM now recognizes, addictive substances affect dopamine levels in the brain and rewire the brain's reward centers, the result being a deep craving for the substance.[188] Genetic predisposition to addiction may also play a role.[189] Substance use disorder is treatable and many people achieve remission.[190] Relapse, however, is an integral part of the disease.[191]

Despite the broad medical consensus of addiction as a brain disease, the fact that substance use has a volitional component, especially at the beginning, continues to influence how some regard addiction.[192] Medical journals discuss the failure of some in the medical community to understand addiction as a disease needing treatment, as opposed to a character flaw.[193]

The social acceptance of addiction as a medical condition is not complete. In 2016, President Obama issued a proclamation during National Alcohol and Drug Addiction Recovery Month characterizing addiction as "a disease of the brain" and recognizing that "many misconceptions surrounding it have contributed to harmful stigmas that can prevent individuals from seeking the treatment they need."[194] People

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See also Eric J. Nestler, *Molecular Neurobiology of Addiction*, 20 AM. J. ADDICTIONS 201 (2001).

188. The DSM-V states: "An important characteristic of substance use disorders is an underlying change in brain circuits that may persist beyond detoxification, particularly in individuals with severe disorders." DSM-V, *supra* note 6, at 483. *See also* Fran Smith, *How Science is Unlocking the Secrets of Addiction*, NAT'L GEOGRAPHIC (Sept. 2017), https://www.nationalgeographic.com/magazine/2017/09/the-addicted-brain/ [https://perma.cc/F85G-RJL].

189. David Goldman et al., *The Genetics of Addictions: Uncovering the Genes*, 6 NATURE REV. GENETICS 521, 522 (2005).

190. *See* Dawson et al., *Recovery*, *supra* note 179, at 281, 289–90; McCabe et al., *Stressful Events*, *supra* note 179, at 43; Robert A. Motano & Stanley F. Wanat, *Addiction is a Treatable Medical Condition, Not a Moral Failing*, 172 WESTERN J. MED. 63 (2000).

191. *See* John W. Davison et al., *Outpatient Treatment Engagement and Abstinence Rates Following Inpatient Opioid Detoxification*, 25 J. ADDICTIVE DISEASES 27, 33 (2008); Christian S. Hendershot et al., *Relapse Prevention for Addictive Behaviors*, 6 SUBSTANCE ABUSE TREATMENT, PREVENTION, & POL'Y 17 (2011) (describing recovery as "a dynamic, ongoing process rather than a discrete or terminal event").

192. *See* Stephanie Bell et al., *Views of Addictions: Neuroscientists and Clinicians on the Clinical Impact of a 'Brain Disease Model of Addiction'*, 7 NEUROETHICS 19, 19, 23–24 (2013); NICK HEATHER, ADDICTION AND CHOICE: RETHINKING THE RELATIONSHIP 66–82 (2017).

193. *See, e.g.*, Matano & Wanat, *supra* note 190, at 63 ("Despite the fact that it was long ago acknowledged that alcohol and drug dependency are diseases (the AMA accepted this a quarter of a century ago), the everyday world of medical practice often reflects the stigmatizing attitudes of medical personnel . . . ."); Nora D. Volkow et al., *Neurobiologic Advances from the Brain Medical Condition Model of Addiction*, 374 NEW ENG. J. MED. 363, 364 (2016) ("The concept of addiction as a disease of the brain challenges deeply ingrained values about self-determination and personal responsibility that frame drug use as a voluntary, hedonistic act.").

194. *National Alcohol and Drug Addiction Recovery Month, 2016*, 81 Fed. Reg. 61973 (Aug. 31, 2016), https://www.gpo.gov/fdsys/pkg/DCPD-201600541/pdf/DCPD-201600541.pdf [https://perma.cc/ZED3-A9SN].

with addictions still suffer from stigma fueled by the idea that alcohol and drug abuse is a shameful choice and a weakness of character rather than a medical condition needing a public health solution.[195] But the dominant discourse surrounding drug and alcohol addiction rejects this view.[196] Society is moving away from viewing addiction as a moral failing.

III. JUDICIAL CONCEPTIONS OF ADDICTION

Courts have struggled to contend with the legal implications of addiction, especially in light of evolving scientific and societal views. Some decisions have relied on a view of addiction to justify diminishing culpability, while others have emphasized the volitional component of becoming and remaining addicted to justify full responsibility.[197] In keeping with the latter approach, the U.S. Supreme Court, in a case involving disability benefits for veterans, held that alcohol addiction constitutes "willful misconduct."[198]

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195. NAT'L INST. ON DRUG ABUSE, DRUGS, BRAINS, AND BEHAVIOR: THE SCIENCE OF ADDICTION, https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/preface [https://perma.cc/45GJ-MLFB]; *see also* Thomas R. Kosten, *Addiction as a Brain Disease*, 155 AM. J. PSYCHIATRY 711, 711 (1998); Alan I. Leshner, *Science is Revolutionizing Our View of Addiction—and What to Do About It*, 156 AM. J. PSYCHIATRY 1 (1999).

196. *See supra* notes 167–171 and accompanying text; Justin McCarthy, *Substance Abuse Spikes as Perceived U.S. Health Problem*, GALLUP (Nov. 15, 2017), https://news.gallup.com/poll/222293/substance-abuse-spikes-perceived-health-problem.aspx [https://perma.cc/63Y7-3KYB] (noting a survey showing that from 2016 to 2017, the number of Americans who cited drug/alcohol abuse as the most urgent health problem in the United States increased from 3% to 14%, which is more than double the previous high).

197. Elizabeth Williams, *Proof of Chemical Dependency and Rehabilitative Efforts as Factor in Sentencing*, 51 AM. JURIS. PROOF FACTS 3D 413 (1999, updated Nov. 2018) (surveying court decisions on sentencing). For discussions of whether criminal law should be modified to take account of current thinking about addiction, see Patrick Murray, Comment, *In Need of a Fix: Reforming Criminal Law in Light of a Contemporary Understanding of Drug Addiction*, 60 UCLA L. REV. 1006 (2013); Stephen J. Morse, *Addiction, Choice, and Criminal Law*, *in* ADDICTION AND CHOICE: RETHINKING THE RELATIONSHIP 426, 435 (2017) ("[A]lthough the law's approach is generally justifiable, current doctrine and practice are probably too unforgiving and harsh."). Addiction or being under the influence generally does not excuse culpability under the insanity defense. *See* Jeff Felix & Greg Wolber, *Intoxication and Settled Insanity: A Finding of Not Guilty by Reason of Insanity*, 35 J. AM. ACAD. PSYCHIATRY & L. 172, 172–82 (2007) (stating "courts have generally not upheld substance-induced psychotic symptoms as providing for an insanity defense when the substance in question had been taken voluntarily."). The highest court in Massachusetts has ruled that a defendant who suffers from substance use disorder violated her probation by using drugs, even though relapse is a part of the rehabilitation process. Commonwealth v. Eldred, 101 N.E.3d 911 (Mass. 2018).

198. *See* Traynor v. Turnage, 485 U.S. 535, 550 (1988) (finding veterans had "engaged with some degree of willfulness in the conduct that caused them to become disabled"); *cf.* Montana v. Egelhoff, 518 U.S. 37, 50 (1996) (discussing Montana criminal statute rendering irrelevant evidence of voluntary intoxication is constitutional given "society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences").

In criminal law, there is no consensus on whether addiction counts as a mitigating or aggravating factor in criminal sentencing.[199] In death penalty cases, the Supreme Court has ruled that the Eighth Amendment requires sentencing courts to consider all facts bearing on the defendant's character, including addiction.[200] But in non capital cases, no constitutional rule requires that addiction be considered as a sentencing mitigator.[201] Federal and state rules and practices vary.[202] Federal sentencing guidelines forbid courts from calculating a sentencing range based on addiction.[203] But pre sentencing reports routinely address addiction and rehabilitation, and these facts influence sentencing within the scored guideline range.[204] Even in states that follow the federal

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199. For discussions of how neuroscience in general should inform our criminal justice system, if at all, see Henry T. Greely, *Neuroscience and Criminal Justice: Not Responsibility but Treatment*, 56 U. KANS. L. REV. 1103, 1103–04 (2008) ("[A]dvances in neuroscience will change, dramatically, the criminal justice system, but I expect issues of responsibility to play a small role in those changes."); Joshua Greene & Jonathan Cohan, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACT. ROYAL SOC'Y LONDON B 1775 (2004); Dean Mobbs et al., *Law, Responsibility, and the Brain*, 5 PLOS BIOL. 693 (2007); Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397 (2006).

200. *See* Cone v. Bell, 556 U.S. 449, 475 (2009) (remand for juror consideration of whether addiction of defendant "was sufficiently serious to justify a decision to imprison him for life rather than sentence him to death").

201. Harmelin v. Michigan, 501 U.S. 957, 995 (1991); *see also* United States v. Salmon, 944 F.2d 1106, 1130 (3d Cir. 1991) (defendant not entitled under Eighth Amendment to "individualized sentencing" in non-capital case such that "mitigating circumstances such as [defendant's] drug addiction" need not be reflected in his sentence), *abrogated on other grounds by* United States v. Caraballo-Rodriguez, 726 F.3d 418 (3d Cir. 2013). Regarding the related, but distinct, question of whether a person is culpable while voluntarily intoxicated, the Supreme Court has ruled that the Constitution does not mandate admissibility of evidence of voluntary intoxication in a criminal trial. *Egelhoff*, 518 U.S. at 50 (relying upon "society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences"). For a discussion of the view that intoxication and addiction are voluntary and thus provide no defense to criminal liability based on intoxication and addiction, see HERBERT FINGARETTE & ANN FINGARETTE HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 77–191 (1979).

202. *See* Williams, *supra* note 197. A study of Spanish courts found that it is routine for evidence of addiction to be considered a mitigating factor at sentencing. M. Argente et al., *Reports of Medical Experts in Cases of Drug Addiction and Assessment of Mitigating Circumstances by the Court*, 21 MED. & L. 793, 793 (2002).

203. The U.S. Sentencing Guidelines state that any substance addiction by a defendant "is not a factor in sentencing." U.S. SENTENCING GUIDELINES § 5H1.4 (emphasis added). Challenges to this provision of the guidelines have been unsuccessful. *See, e.g.*, United States v. Yates, 918 F.2d 225, 225 (D.C. Cir. 1990) (rejecting Eighth Amendment challenge to federal sentencing guidelines for failure to recognize drug addiction as a mitigating factor); *Salmon*, 944 F.2d at 1131 (same).

204. *See* CENTER ON JUVENILE & CRIM. JUSTICE, THE HISTORY OF THE PRE-SENTENCE INVESTIGATION REPORT 4 (2008), http://www.cjcj.org/uploads/cjcj/documents/the_history.pdf [https://perma.cc/RN99-AFGV]; Leanne F. Alarid & Carlos D. Montemayor, *Attorney Perspectives and Decisions on the Presentence Investigation Report*, 21 CRIM. JUST. POL'Y REV. 119 (2010).

approach, such as Florida, judges can take addiction and people's management of their disease as reasons to sentence someone at the low end of the sentencing guideline range.[205]

In the immigration context, disagreement about the legal significance of scientific advancements, coupled with the traditional low standard of review often applied in immigration cases,[206] make it unlikely that the judiciary will align immigration law and contemporary understanding of addiction anytime soon. This reality was apparent in the Ninth Circuit's 2017 en banc, plurality decision in *Ledezma-Cosino II*.[207]

A. Addiction as Moral Failing: Ledezma-Cosino

The Ninth Circuit's en banc plurality decision in *Ledezma-Cosino* reflects the struggle to map current understanding of addiction onto the law. Despite the wide consensus among the deciding judges that addiction is not a moral failing, the court nonetheless upheld an immigration provision saying that it is. *Ledezma-Cosino* involved an equal protection challenge to the "habitual drunkard" bar to good moral character in the INA.[208] A panel of the court, composed of Circuit Judges Stephen Reinhardt, Richard R. Clifton, and District Judge Miranda M. Du, found an equal protection violation.[209] The panel held that it was irrational, and thus a violation of the Equal Protection Clause, to categorically preclude habitual drunkards from showing good moral character.[210] After surveying the scientific consensus on alcoholism, the panel dubbed "an old trope" the idea "that alcoholics are blameworthy because they could simply try harder to recover."[211] Finding no rational relationship between alcoholism and moral character, the panel ruled the statute unconstitutional.[212]

A plurality of the court sitting en banc on rehearing reversed the decision.[213] Four judges—Susan P. Graber, Richard R. Clifton, Mary H. Murguia, and John B. Owens—found that Congress could rationally

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205. Interview with Andrew Stanton, Assistant Pub. Def., Miami-Dade Cty., Fla. (Feb. 7, 2019).

206. *See supra* note 2 and accompanying text.

207. Ledezma-Cosino v. Sessions, 857 F.3d 1042 (9th Cir. 2017).

208. Ledezma-Cosino v. Lynch (*Ledezma-Cosino I*), 819 F.3d 1070 (9th Cir. 2016), *rev'd en banc sub nom. Ledezma-Cosino II*, 857 F.3d 1042 (9th Cir. 2017). For a discussion of the habitual drunkard bar, see *supra* section I.B.

209. *Ledezma-Cosino I*, 819 F.3d at 1078.

210. *Id.* at 1076.

211. *Id.* ("We are well past the point where it is rational to link a person's medical disability with his moral character.").

212. *Id.* at 1078.

213. *Ledezma-Cosino II*, 857 F.3d at 1049.

exclude habitual drunkards because they might pose a danger to others, a legitimate government interest.[214] But in so doing, these judges declined to find that it was rational for Congress to legislate that habitual drunkards lack "good moral character."[215] To the contrary, the judges indicated that the good moral character label was "unfortunate, outdated, or inaccurate."[216] The judges instead ruled against Ledezma-Cosino on the ground that the "good moral character" designation was irrelevant as an "intermediate category" that did not require justification.[217] The only inquiry was whether it was rational to deny immigration benefits to habitual drunkards as a class because they could pose a danger to the community.[218]

Three other judges—Alex Kozinski, Carlos T. Bea, and Sandra S. Ikuta—disagreed with the idea that the "good moral character" language was irrelevant and reasoned instead that Congress did not even need to establish a rational basis.[219] Citing to the plenary power doctrine, under which the judiciary exercises little to no review over immigration matters, these judges found that the proper standard was only whether Congress had a "facially legitimate and bona fide" reason for characterizing habitual drunkards as lacking good moral character.[220] Under this test, the judges found that Congress could exclude Ledezma-Cosino on moral grounds.[221] But in so doing, they warned that differential treatment of habitual drunkards in non-immigration contexts, such as public housing or Medicare, "would be far more problematic."[222] Echoing the sentiment of the first four judges, these concurring judges characterized the equation of alcoholism with bad character as "foolish."[223]

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214. *Id.* The U.S. Court of Appeals for the Sixth Circuit took a similar approach. *See* Tomaszczuk v. Whitaker, 909 F.3d 159 (6th Cir. 2018). In *Tomaszczuk v. Whitaker*, the court found that the "habitual drunkard" designation requires a finding of harmful conduct, not just a finding that a person is an alcoholic. *Id.* at 165. On that basis, the Court found that it was rational, and therefore not a violation of equal protection, for Congress to legislate that habitual drunkards cannot show good moral character. *Id.*

215. *See Ledezma-Cosino II*, 857 F.3d at 1048–49.

216. *Id.* ("The intermediate label is therefore of no constitutional moment, even if we were to agree that the label is unfortunate, outdated, or inaccurate.").

217. *Id.* at 1048.

218. *Id.*

219. *Id.* at 1049 (Kozinski, J., concurring).

220. *Id.* at 1051. This exceptionally low standard of review derives from the U.S. Supreme Court's decision in *Fiallo v. Bell*, 430 U.S. 787 (1977).

221. *Ledezma-Cosino II*, 857 F.3d at 1051 (Kozinski, J., concurring) ("Congress can exclude Ledezma on account of a medical condition or *it can do so because it considers him immoral.*" (emphasis added)).

222. *Id.*

223. *Id.*

Another group of three concurring judges, Judge Paul J. Watford, M. Margaret McKeown and Richard R. Clifton, filed an opinion on yet a third ground. For them, it could be rational for Congress to find habitual drunkards morally blameworthy and thus lacking in good moral character.[224] While acknowledging that "[w]e know considerably more about alcohol addiction today than we did back in 1952 [when the INA was passed]," these judges reasoned that science "confirms that, at least to some extent, there is indeed a volitional component to developing an addiction to alcohol."[225] They found that the question of whether a person addicted to alcohol has enough free will to make a person morally blameworthy for drinking "is a policy question for Congress to resolve."[226]

Although the en banc court reversed the panel's decision in *Ledezma-Cosino I*, the plurality and multiple concurrences underscored the current consensus that addiction is a medical condition and not simply bad behavior or a failure of will. Three concurring judges did not believe that the statute would have survived rational basis review if it had been outside the immigration context.[227] No judge endorsed the view that being a habitual drunkard was morally blameworthy, although three judges believed that it would have been rational for Congress to have legislated on these grounds.[228] Only four found that the habitual drunkard bar to good moral character clearly passed the rational basis test, as opposed to a lesser standard, and these judges appeared to disapprove of linking being a "habitual drunkard" to morality.[229]

Ledezma-Cosino II illustrates that constitutional review in the area of immigration is unlikely to contemporize the law's view of addiction.[230] Despite many of the judges' sympathy for delinking morality and addiction, they upheld the habitual drunkard bar to good moral

224. *Id.* at 1052 (Watford, J., concurring) ("In my view, Congress could rationally deem habitual drunkards to be at least partially responsible for having developed their condition.").

225. *Id.* at 1052–53.

226. *Id.* at 1053.

227. *Id.* at 1051 (Kozinski, J., concurring) (stating that it was only "the near limitless power of the political branches over immigration and foreign affairs that puts the statute here beyond cavil").

228. *Id.* at 1053 (Watford, J., concurring) ("It has been suggested that Congress' decision to treat habitual drunkards as lacking in good moral character is irrational because Congress has not classified individuals suffering from other chronic medical conditions, such as diabetes, heart disease, and bipolar disorder, as morally blameworthy for their conditions. The mere fact that a classification drawn by Congress may be underinclusive, however, is not sufficient to render it invalid under rational basis review.").

229. *Id.* at 1048–49 (plurality opinion) (suggesting that labeling "habitual drunkard[s]" as lacking good moral character is "unfortunate, outdated, or inaccurate").

230. The Ninth Circuit had previously rejected an Eighth Amendment challenge to the deportation ground for drug addiction. *See* McJunkin v. INS, 579 F.2d 533, 536 (9th Cir. 1978).

character.[231] This result was due in part to plenary power, as three judges relied on this doctrine for their concurrence in the decision.[232] Equally important to the result was the idea, endorsed by three concurring judges, that science had not yet proven that addicts sufficiently lack volition when suffering from their medical condition.[233]

The Ninth Circuit's divided decision in *Ledezma-Cosino II* reflects the difficulty courts face when trying to contemporize the view of addiction in case law. Despite the unsettled nature of how the law relates to addiction, one clear judicial rule from criminal law draws a distinction between the *status* of being an addict and *acts* associated with addiction. Under Supreme Court precedent, the former cannot be criminalized, whereas the latter can.[234] Criminal law thus differs from immigration law, which, as discussed above, imposes consequences on both the status of suffering from substance use disorder and the acts associated with the disease.

B. Status versus Act

In two U.S. Supreme Court cases from the 1960s, *Robinson v. State of California*[235] and *Powell v. State of Texas*,[236] the Court addressed whether the state of being an addict or being in public while under the influence could be criminalized without running afoul of the prohibition against cruel and unusual punishment in the Eighth Amendment. In *Robinson*, the Court held that the state of California could not criminalize being "addicted to the use of narcotics."[237] The Court held that the statute at issue was unconstitutional because it made the passive "status" of drug addiction illegal, as opposed to a particular "act," such as the use, purchase, sale, or possession of drugs or disorderly conduct due to drug use.[238] Embracing the disease model of addiction, the Court analogized people addicted to drugs as like being "mentally ill, or a leper, or . . . afflicted with a venereal disease."[239] The court reasoned that "in the light of contemporary human knowledge," criminalization of "such a disease would doubtless be universally thought to be an infliction of cruel

231. *See Ledezma-Cosino II*, 857 F.3d at 1048–49.

232. *Id.* at 1051 (Kozinski, J., concurring).

233. *Id.* at 1053 (Watford, J., concurring); *see also supra* note 225 and accompanying text.

234. *See infra* section III.B.

235. 370 U.S. 660, 666–67 (1962).

236. 392 U.S. 514, 531–37 (1968).

237. *Robinson*, 370 U.S. at 660.

238. *Id.* at 662.

239. *Id.* at 666.

and unusual punishment."[240] Indeed, the attorney for the state of California had conceded that "narcotic addiction is an illness."[241]

Six years later, the Court in *Powell* confronted the question whether a Texas statute's criminalization of public intoxication also violated the Eighth Amendment.[242] Powell had not disputed that he was an alcoholic but argued that it was cruel and unusual to punish him because "his appearance in public (while drunk was) . . . not of his own volition."[243] In a plurality opinion, the Court ruled against him, distinguishing *Robinson* on the ground that "being in public while drunk on a particular occasion" was punishment for an "act," not punishment for the "status" of being a chronic alcoholic.[244] The decision rested in part on the "current state of medical knowledge," which did not show consensus that alcoholics "suffer from such an irresistible compulsion to drink and to get drunk in public that they are *utterly unable* to control their [actions]."[245] The Court characterized public drunkenness as an "antisocial deed[]" for which Powell had "moral accountability."[246] By referencing the "current state" of science,[247] the Court appeared to leave an opening to revise its views in light of developments in the medical understanding of addiction.[248]

The tension between the *Richardson* and *Powell* decisions has sparked considerable commentary.[249] The distinction between the status of being an addict and the act of appearing in public while under the influence rests on a slender reed. *Powell* was a four-to-five decision and the dissenting justices in *Powell* would have applied the reasoning of *Robinson*.[250] For the dissenters, the "essential constitutional defect" in both cases was that the "defendant was accused of being in a condition which he had no capacity

240. *Id.*

241. *Id.* at 667.

242. Powell v. Texas, 392 U.S. 514, 531–37 (1968).

243. *Id.* at 517.

244. *Id.* at 532.

245. *Id.* at 535 (emphasis added).

246. *Id.* at 535–36; *see also id.* at 531 (recognizing the "harsh moral attitude which our society has traditionally taken toward intoxication and the shame which we have associated with alcoholism"); *id.* ("Anglo-American society has long condemned [alcoholism] as a moral defect").

247. *Id.* at 535.

248. For a discussion of how the Supreme Court fails to incorporate new science into its jurisprudence, see Joanmarie Ilaria Davoli, *Still Stuck in the Cuckoo's Nest: Why Do Courts Continue to Rely on Antiquated Mental Illness Research?*, 69 TENN. L. REV. 987 (2002).

249. *See* Michael Davis, *Addiction, Criminalization and Character Evidence*, 96 TEX. L. REV. 619, 637–38 (2018); Maria Slater, *Is* Powell *Still Valid? The Supreme Court's Changing Stance on Cruel and Unusual Punishment*, 104 VA. L. REV. 547 (2018).

250. *Powell*, 392 U.S. at 566–70 (Fortas, J., dissenting).

to change or avoid."[251] Both the plurality and the dissent in *Powell* believed that resolution of the constitutional issue turned on whether the defendant had a total loss of volition.[252] The plurality found a lack of medical consensus that alcoholics lose all power to control their actions,[253] whereas the dissent thought that the record was sufficiently clear that alcoholism is a disease that results in total loss of control.[254] In a concurrence, Justice White stated that he would have joined the dissent, which would have then formed a majority to invalidate the Texas statute, if Powell had demonstrated evidence of chronic alcoholism and homelessness.[255]

In the years following *Powell*, some state legislatures reacted to the decision by decriminalizing public intoxication by statute.[256] Moreover, the judiciaries of at least two states struck down public intoxication as unlawful, notwithstanding *Powell*.[257] For example, the Minnesota Supreme Court interpreted the phrase "voluntarily drinking" to apply only to people who consumed liquor by choice, not to alcoholics.[258] The court found that the defendant "was no more able to make a free choice as to when or how much he would drink than a person would be who is forced to drink under threat of physical violence."[259] The court relied on "advances in man's knowledge of himself and his environment" for its conclusion.[260] The Supreme Court of Appeals of West Virginia held that criminal punishment of chronic alcoholics for public intoxication violated the state's constitutional prohibition against cruel and unusual

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251. *Id.* at 567–68.

252. *Id.* at 534–70.

253. *Id.* at 522 (plurality opinion).

254. *Id.* at 562 (Fortas, J., dissenting).

255. *Id.* at 551 (White, J., concurring); *see also id.* at 554 (stating that Powell had "made no showing that he was unable to stay off the streets on the night in question").

256. *See* David Robinson, Jr., Powell v. Texas*: The Case of the Intoxicated Shoeshine Man Some Reflections A Generation Later by a Participant*, 26 AM. J. CRIM. L. 401, 440, 453 (1999); *Alcoholism and Intoxication Treatment Act*, UNIFORM L. COMM'N (providing a table of jurisdictions wherein the Uniform Alcoholism and Intoxication Treatment Act has been adopted), https://my.uniformlaws.org/committees/community-home?communitykey=af688858-dcd8-4760-bede-17393b648974&tab=groupdetails (last visited Nov. 17, 2019). Another writer has put the number of adopting states at "in one form or another . . . [at] at least 20." Phillip E. Hassman, *Validity, Construction, and Effect of Uniform Alcoholism and Intoxication Treatment Act*, 85 A.L.R.3d 701, § 2 (1978).

257. *See* State v. Fearon, 166 N.W.2d 720, 724 (Minn. 1969) (interpreting the statute as inapplicable to "involuntary" intoxication); State *ex rel.* Harper v. Zegeer, 296 S.E.2d 873, 875 (W. Va. 1983) (holding that conviction is precluded by the state constitution).

258. *Fearon*, 166 N.W.2d at 723–24.

259. *Id.* at 724.

260. *Id.*

punishment.[261] Citing the fact that "[m]edical experts and professional groups have concluded that alcoholism is a disease," the court ruled that "[t]he State has a legitimate right to remove chronic alcoholics from public places, but not to incarcerate them as criminals."[262]

These cases, as well as *Powell* and the concurrence of judges Paul J. Watford, M. Margaret McKeown and Richard R. Clifton in *Ledezma-Cosino II*, turned on an analysis of whether people who are addicted still act with at least some free will such that moral condemnation and culpability can attach. But today's understanding of addiction and the brain does not fit neatly into this paradigm. As discussed above, we now know that addiction rewires the circuits in the brain.[263] It may not destroy volition, at least in most cases, but it alters normal brain functioning.[264] The question is how to map this more nuanced understanding of addiction onto the law.[265]

C. Brain Science and Culpability

The Supreme Court has considered how advancements in understanding the brain should inform culpability in its Eighth Amendment jurisprudence relating to juveniles and people with intellectual disabilities.[266] In the last two decades, the Court has held that juveniles and the intellectually disabled cannot be put to death and that mandatory life sentences for juveniles convicted of first-degree murder

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261. *Zegeer*, 296 S.E.2d at 878.

262. *Id.* at 873–74.

263. *See supra* section II.D.

264. *See generally* Eric Racine, Sebastian Miller & Alice Escande, *Free Will and the Brain Disease Model of Addiction: The Not So Seductive Allure of Neuroscience and its Modest Impact on the Attribution of Free Will to People with an Addiction*, 8 FRONTIERS PSYCHOL. 1850 (2017) (study showing that awareness of the effects of addiction on the human brain results in modest decrease in the extent to which addicted persons are perceived to have free will).

265. For an argument that "a drug addict's choice to use drugs falls into a gray area between voluntary and involuntary," see Murray, *supra* note 197, at 1009.

266. Brain science is increasingly being introduced in criminal courts. *See* Beth Baker, *The Biology of Guilt: Neuroscience in the Courts*, 68 BIOSCIENCE 628 (2018); John B. Meixner Jr., *Applications of Neuroscience in Criminal Law: Legal and Methodological Issues*, 15 CURRENT NEUROLOGY & NEUROSCIENCE REP. 513 (2015). For critiques of this trend, see Georgia Martha Gkotski & Jaques Gasser, *Critique de L'utilisation des Neurosciences dans les Expertises Psychiatriques: Le Cas de la Responsabilité Pénale* [*Critique of the Use of Neuroscience in Forensic Pyschiatric Assessments: The Issue of Criminal Responsibility*], 81 L'EVOLUTION PSYCHIATRIQUE 434, 444 (2016) ("Although neuroscientific evidence can provide assistance in the evaluation of penal responsibility by introducing new determinisms in the behavioural analysis of offenders with mental disturbances, it does not dispense with the need to define the limits of responsibility and irresponsibility of the accused.").

are unconstitutional.[267] In so holding, the Court emphasized the dynamic nature of the Eighth Amendment. What counts as cruel and unusual changes with time according to "the evolving standards of decency that mark the progress of a maturing society."[268] Regarding the culpability of juveniles, the Court found that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"[269] and these findings "diminish[]" children's "moral responsibility."[270] This holding reflects the principle that a person need not be rendered entirely out of control of their actions for their culpability to be diminished.

It remains to be seen whether the Court's jurisprudence regarding the culpability of children and the intellectually disabled will influence judicial interventions in the area of alcohol and substance addiction.[271] Eighth Amendment jurisprudence has been largely irrelevant outside of the death penalty and life without parole contexts.[272] But even if criminal law advances further in reducing culpability for individuals struggling with addiction, this evolution would have no direct effect on addiction-based provisions in civil immigration law.[273] Moreover, as demonstrated by *Ledezma-Cosino II*, the plenary power doctrine insulates immigration law from constitutional challenges.[274] Judicial intervention alone is thus unlikely to align immigration law with the contemporary understanding of addiction. To achieve this goal, legislative reform is required.

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267. Miller v. Alabama, 567 U.S. 460, 460 (2012) (finding that the Eighth Amendment forbids automatic sentencing to life without parole for juveniles convicted of homicide); Graham v. Florida, 560 U.S. 48, 48 (2010) (non-homicide juvenile offenders cannot be sentenced to life without parole); Roper v. Simmons, 543 U.S. 551, 551 (2005) (juveniles cannot be executed); Atkins v. Virginia, 536 U.S. 304, 304 (2002) (finding that the Eighth Amendment bans death penalty for defendants with intellectual disabilities).

268. *Roper*, 543 U.S. at 561 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)) (internal quotation marks omitted).

269. *Graham*, 560 U.S. at 68.

270. *Id.* at 72.

271. Slater, *supra* note 249, at 578; Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2253 (1992).

272. *See* Lonnie E. Griffith, Jr., *Construction and Application of Eighth Amendment's Prohibition of Cruel and Unusual Punishment—U.S. Supreme Court Cases*, 78 A.L.R. 2d 1, 16 (2013) ("[T]he standard of proportionality in noncapital cases is more narrow than in death penalty cases, making a successful challenge on grounds of proportionality exceedingly rare in noncapital cases."); Solem v. Helm, 463 U.S. 277, 277–79 (1983) (holding that the Eight Amendment prohibited life without parole for fraudulent $100 check because was a nonviolent crime, the defendant had only minor prior crimes, and the sentence was the most severe that could be imposed).

273. The Eighth Amendment does not apply to immigration law, which is civil. Ziglar v. Abbasi, 582 U.S. __, 137 S. Ct. 1843, 1877 (2017).

274. *See Ledezma-Cosino II*, 857 F.3d 1042, 1051 (9th Cir. 2017) (Kozinski, J., concurring).

IV. CONTEMPORIZING IMMIGRATION LAW

Society in general is moving away from harsh treatment of addiction and related behavior and toward an understanding of addiction as a disease rather than a character trait.[275] However, people suffering from substance abuse disorder still suffer significant stigma, and there is persistent disagreement about how addiction-related behavior, including relapse, should be treated in the criminal justice system.[276] Immigration law still treats addiction as a moral issue and imposes severe consequences on both the status, and associated behaviors, of addiction.[277]

Immigration law most obviously incorporates an archaic view of addiction by linking it to immorality in the good moral character definition.[278] But immigration law also treats people as undesirable on account of their status as addicts through the drug addiction deportation and exclusion statutory grounds.[279] Furthermore, addicts who are convicted, or who admit the essential elements, of drug possession or distribution are put in removal proceedings, often with no defense available to them.[280] And, unlike other medical conditions, substance use disorder is often considered a negative factor in discretionary determinations.[281] Because these immigration law provisions are not expressly tied to a moral fitness test, unlike the habitual drunkard definition, it is difficult to separate the outdated moral justifications from legitimate concerns about public health and safety. But the history and severity of these immigration statutes support the view that they are animated, at least in part, by concerns about the desirability of the noncitizens in question.[282] Only one statute requires a showing of harm to others, suggesting that public safety is not the primary concern.[283]

Immigration law should reflect the wide, albeit not total, acceptance in public and scientific opinion that addiction is a medical condition that rewires the brain and results in diminished ability to make judgments, not a character flaw. The status of being an addict should not be regarded as a moral failing, and addiction-related behavior must be understood in the

275. *See supra* Part II.

276. *See supra* notes 24–26, 192–195 and accompanying text.

277. *See supra* Part I.

278. *See supra* section I.B.

279. *See supra* section I.A.

280. *See supra* section I.C.

281. *See supra* section I.D.

282. *See supra* Part I.

283. *See supra* note 54 and accompanying text.

context of addiction as a condition of the brain that typically diminishes culpability. Immigration law should refrain from penalizing people who suffer from substance use disorder for their status and count the disorder as a mitigating factor in assessments of addiction-related behavior. While substance use disorder imposes costs on individuals, their families, and communities, immigration policy must balance these costs against the countervailing harms of treating the addiction of noncitizens differently than that of citizens.[284]

This Part details the harms of immigration law being out of step with prevailing views and makes suggestions for needed legislative reform. Addiction-informed amendments to immigration law are unlikely today because the political climate cultivated by the Trump administration is requiring pro-immigrant advocates, organizers, and legislators to play defense against aggressive and sweeping anti-immigrant policies. However, forward-looking reformers need a guidepost to help position them to take advantage of future legislative opportunities, building on the interest convergence generated by reactions to the current opioid epidemic.[285]

A. The Harms of Anachronism

The negative consequences of immigration law's failure to incorporate a modern view of addiction include the devastating and permanent effects of family separation, harm to our nation's core identity as an egalitarian society, and perpetuation of the stigmatization of addiction.[286] Judging

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284. *See infra* section IV.A.

285. *See supra* notes 167–170 and accompanying text. Derrick Bell has described how evolution of social and legal norms depends on interest convergence between dominant and subjugated groups. *See* Bell, *supra* note 34, at 1624 ("[N]o matter how much harm blacks were suffering because of racial hostility and discrimination, we could not obtain meaningful relief until policymakers perceived that the relief blacks sought furthered interests or resolved issues of more primary concern.").

286. AJAY CHAUDRY ET AL., URBAN INST., FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT 27–51 (2010), https://www.urban.org/sites/default/files/publication/28331/412020-Facing-Our-Future.PDF [https://perma.cc/4J45-NDU5]; HUMAN RIGHTS WATCH, JAILING REFUGEES: ARBITRARY DETENTION OF REFUGEES IN THE U.S. WHO FAIL TO ADJUST TO PERMANENT RESIDENT STATUS (2009); SETH FREED WESSLER, APPLIED RESEARCH CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 5 (2011), https://www.atlanticphilanthropies.org/wpcontent/uploads/2015/09/ARC_Report_Shattered_Families_FULL_REPORT_Nov2011Release.pdf [https://perma.cc/R4Y8-F3FD] (stating the United States deported "397,000 people and detained nearly that many . . . . shatter[ing] families"); Joanna Dreby, *The Burden of Deportation on Children in Mexican Immigrant Families*, 74 J. MARRIAGE & FAM. 829 (2012); M. Brinton Lykes & Cristina Hunter, *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 AM. J. ORTHOPSYCHIATRY 496, 497–98 (2014) (summarizing research in this area); Catherine A. Solheim & Jaime Ballard, *Ambiguous Loss Due to Separation in Voluntary Transnational Families*, 8 J. FAM. THEORY & REV. 341 (2016); Kalina Brabeck & Qingwen Xu, *The*

noncitizens against an anachronistic understanding of substance use disorder creates an unjustified double standard. On the one hand, addicted noncitizens, especially people of color, are castigated as bad people and face deportation for not controlling their substance use.[287] On the other, addicted white citizens are typically viewed as suffering from a medical condition and deserving of treatment, fostering a nativist identity "grounded in superiority."[288] As explained below, this discrimination based on outdated norms harms not only noncitizens struggling with addiction but also U.S. citizens and the entirety of our nation.

These harms must be balanced against legitimate reasons that relate to drug and alcohol use for regulating the U.S. border. Drug and alcohol use raise concerns about public safety.[289] But all except one of the existing immigration provisions operate against people suffering from substance use disorder without any showing of harm to other people. The only provision that requires such a showing is the mental defect exclusion ground for alcoholism, which requires a showing of associated dangerous behavior.[290] While dangerous behavior, such as driving while under the influence, can harm others, the resulting immigration consequences

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Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration, 32 HISP. J. BEHAV. SCI. 341, 352–53 (2010); Robert T. Muller, *The Traumatic Effects of Forced Deportation on Families*, PSYCHOL. TODAY (2013), http://www.psychologytoday.com/blog/talking-about-trauma/201305/the-traumatic-effects-forced-deportation-families [https://perma.cc/CU44-AMT2]; Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?_r=0 [https://perma.cc/6L7F-RZJ4] (providing anecdotes that illustrate the disruption deportations cause on communities, support systems, and family units).

287. *See, e.g.*, HUMAN RIGHTS WATCH, A PRICE TOO HIGH: U.S. FAMILIES TORN APART BY DEPORTATION FOR DRUG OFFENSES (June 16, 2015) [hereinafter HUMAN RIGHTS WATCH, A PRICE TOO HIGH] (detailing harsh effects on families of deportations based on drug offenses), https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses [https://perma.cc/SMA2-X9Z2].

288. Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 481 (2014); *see also* David Cole, *Their Liberties, Our Security: Democracy and Double Standards*, 31 INT'L J. LEGAL INFO. 290 (2003) (discussing the pitfalls for democracy of placing lower value on the fundamental rights of noncitizens).

289. *See generally* TREVOR BENNETT & KATY HOLLOWAY, UNDERSTANDING DRUGS, ALCOHOL AND CRIME (Mike Maguire ed., 2005); BARRON H. LERNER, ONE FOR THE ROAD: DRUNK DRIVING SINCE 1900 (2011); *see also* Redonna K. Chandler, Bennett W. Fletcher & Nora D. Volkow, *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301 J. AM. MED. ASS'N 183, 183 (2009) ("Involvement in the criminal justice system often results from illegal drug-seeking behavior and participation in illegal activities that reflect, in part, disrupted behavior ensuing from brain changes triggered by repeated drug use.").

290. *See supra* note 53 and accompanying text.

should be proportional to the act and not reflect a judgment that people suffering from addiction are immoral.[291]

Of course, substance use disorder inflicts other individual and communal costs, such as increased health care, spread of infectious disease, overdose deaths, effects on unborn children, domestic abuse, homelessness, familial stress and financial strain, divorce, parental neglect, and loss of work productivity.[292] While considerable, these costs must be weighed against the multiple serious harms caused by exclusion and deportation—costs that are borne by both noncitizens and citizens alike. This assessment must account for the harm to the nation's civic political identity. And morality should have no place in the balancing calculus.

Immigration law's strict addiction-related rules on exclusion and deportation separate families for reasons that are no longer generally accepted by society.[293] People should not be permanently separated from their families because they suffer from substance use disorder. The emotional and financial damage done to people, especially children, as a result of deportation of a loved one is well-documented.[294]

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291. DUIs have increasingly serious immigration consequences. The Board of Immigration Appeals ruled in February 2018 that driving under the influence is a significant adverse factor for consideration of bond. Matter of Siniauskas, 27 I. & N. Dec. 207, 209 (2018). In October 2019, the U.S. Attorney General ruled that a person convicted of two DUI offenses is presumptively barred from showing good moral character, even if the person is not disqualified from having good moral character as a "habitual drunkard" and even if the person is now rehabilitated. Matter of Castillo-Perez, 27 I. & N. Dec. 664, 666–67 (A.G. 2019).

292. ELLEN BOUCHERY ET AL., EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF NAT'L DRUG CONTROL POL'Y, THE ECONOMIC COSTS OF ALCOHOL AND DRUG ABUSE IN THE UNITED STATES 1992 TO 1998 (2001), http://drogfokuszpont.hu/wp-content/uploads/kokk_economic_costs_usa_90_98.pdf [https://perma.cc/XR3J-45DG]; HENRICK HARWOOD ET AL., EXEC. OFFICE OF THE PRESIDENT, OFFICE OF NAT'L DRUG CONTROL POL'Y, THE ECONOMIC COSTS OF DRUG ABUSE IN THE UNITED STATES 1992–2002 (2004), https://www.ncjrs.gov/ondcppubs/publications/pdf/economic_costs.pdf [https://perma.cc/L2MJ-SMVW]; ROBERT J. MACCOUN & PETER REUTER, DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES, AND PLACES (2001) (listing the different types of harms); Henrick Harwood et al., *A Report and Commentaries: Cost Estimates for Alcohol and Drug Abuse*, 94 ADDICTION 631, 631–35 (1999); Sana Loue, *The Criminalization of the Addictions: Toward a Unified Approach*, 24 J. LEGAL MED. 281 (2003).

293. *See supra* section II.C.

294. *See* Randy Capps et al., *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families: A Review of the Literature*, MIGRANT POL'Y INST. & URB. INST., 10, 12–14 (2015), https://www.migrationpolicy.org/research/implications-immigration-enforcement-activities-well-being-children-immigrant-families [https://perma.cc/CCL3-KELR]; Lauren Gambino, *Orphaned by Deportation: The Crisis of American Children Left Behind*, GUARDIAN (Oct. 15, 2014 7:59 AM), https://www.theguardian.com/us-news/2014/oct/15/immigration-boy-reform-obama-deportations-families-separated [https://perma.cc/4V6Z-ACAL]; Cindy Y. Rodriguez & Adriana Hauser, *Deportations: Missing Parents, Scared Kids*, CNN (Oct. 27, 2013 11:40 AM), http://www.cnn.com/2013/10/26/us/immigration-parents-deported-children-left-behind/ [https://perma.cc/L8H4-HYJJ]; Rebecca Sharpless, *"Immigrants Are Not Criminals": Respectability,*

But the stark difference in the way the law treats citizen and noncitizen addicts inflicts serious harm beyond that of family separation. In general, the law views U.S. citizens addicted to alcohol or drugs as deserving of medical treatment, although many do not receive it.[295] In contrast, noncitizens in the same position are deported as undesirable.[296] Treating people addicted to substances differently based on their immigration status creates cognitive dissonance, the mental discomfort that results from holding contradictory beliefs.[297] This cognitive dissonance ("Why are noncitizens who are addicted to alcohol or drugs treated differently than citizens?") encourages feelings of entitlement and superiority as a means of resolving the dissonance ("This is our nation and noncitizens need to earn the right to stay here").[298] Resolution of cognitive dissonance might rely on, and reinforce, racial and ethnic stereotypes and biases ("Mexicans are bringing drugs to our country, so we need to deport Mexicans involved with drugs").[299]

Immigration Reform, and Hyperincarceration, 53 HOUS. L. REV. 691, 722–26 (2016).

295. *See* CTR. FOR BEHAVIORAL HEALTH STATISTICS & QUALITY, U.S. DEP'T HEALTH & HUMAN SERVS., RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 81–97 (2014), https://www.samhsa.gov/data/sites/default/files/NSDUHresults PDFWHTML2013/Web/NSDUHresults2013.htm [https://perma.cc/7E3T-QCWT].

296. *See, e.g.*, HUMAN RIGHTS WATCH, A PRICE TOO HIGH, *supra* note 287; *Vet Deported Because of Felony Says He Did His Time in Prison, Belongs Back in US*, Q13 FOX (Mar. 27, 2018, 10:43 PM), https://q13fox.com/2018/03/27/vet-deported-because-of-felony-says-he-did-his-time-in-prison-belongs-back-in-us/ [https://perma.cc/L8H4-HYJJ].

297. *See* Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 239–40 (2012) (discussing cognitive dissonance and applying it in context of narratives told in discretionary immigration proceedings) (citing ELLIOT ARONSON, THE SOCIAL ANIMAL 175–245 (7th ed. 1995), as quoted in Andrew J. McClurg, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying*, 32 U.C. DAVIS L. REV. 389, 424 (1999) (describing cognitive dissonance as the "state of tension that occurs whenever an individual simultaneously holds two cognitions . . . that are psychologically inconsistent" and how "people are motivated to reduce it")); *see generally* AM. PSYCHOL. ASS'N, COGNITIVE DISSONANCE: PROGRESS ON A PIVOTAL THEORY IN SOCIAL PSYCHOLOGY (Eddie Harmon-Jones & Judson Mills eds., 1999) (describing the psychological theory of cognitive dissonance); JOEL COOPER, COGNITIVE DISSONANCE: FIFTY YEARS OF A CLASSIC THEORY (2007) (same); LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957) (same).

298. *Cf.* Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV 257, 273–90 (2017) (describing the societal harm when immigrants are perceived as needing to work off a moral deficient and "earn" citizenship).

299. *See generally* Deborah Weissman, *The Politics of Narrative: Law and the Representation of Mexican Criminality*, 38 FORDHAM INT'L L. J. 141 (2015). Racially disparate impacts of immigration enforcement are longstanding. *See* Kevin Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE WESTERN RES. L. REV. 993, 998 (citing ALFREDO MIRANDE, GRINGO JUSTICE (1987)) (exploring the history of racial disparities in U.S. immigration law).

As discussed above, the history of drug and alcohol use is racialized and the level of stigma that has attached to drug use and addiction varies depending on who is associated with a particular drug.[300] For example, the differential treatment of addiction in black and white communities relies on, and perpetuates, racial bias. In the same way that the failure to acknowledge a system of privilege for white people thwarts the development of a nonracist white identity, gross double standards for noncitizens make it more difficult for us to develop a non-xenophobic national identity.[301]

The failure of immigration law to embrace a contemporary understanding of addiction stands in the way of healthy, egalitarian identity formation of U.S.-born citizens. By encouraging people to resolve the cognitive dissonance in invidious ways, the double standard stymies the development of a civic national identity that is free from ethnic, racial, and nationalist animus. This phenomenon not only harms the disfavored group, but also society at large.

Our democracy suffers when egalitarian norms fail to guide how people regard and treat one another. Racial and ethnic animus stokes conflict between groups of people and undermines social solidarity. As is the case today, white nationalism and nativism begin to rise.[302] While the harms of an anti-egalitarian national identity affect us all, the negative effects are experienced most by the noncitizens themselves, their families, and non-white citizens, including those who share ethnic heritage with the groups of noncitizens most associated with addiction and drug use.[303] For example, viewing drug addiction of Mexicans living in the United States as a reason to deport them promotes the belief that the substance use disorder of Mexican-Americans must also be morally blameworthy. Although Mexican-Americans cannot be deported, their addiction, as

300. *See supra* section II.B.

301. *See* James, *supra* note 288, at 450.

302. *See, e.g.*, Jamelle Bouie, *Government by White Nationalism Is Upon Us*, SLATE (Feb. 6, 2017, 6:00 AM), http://www.slate.com/articles/news_and_politics/cover_story/2017/02/government_by_white_nationalism_is_upon_us.html [https://perma.cc/XU7F-5KKH]; *Hate Groups Increase for Second Consecutive Year as Trump Electrifies Radical Right*, S. POVERTY L. CTR. (Feb. 15, 2017), https://www.splcenter.org/news/2017/02/15/hate-groups-increase-second-consecutive-year-trump-electrifies-radical-right [https://perma.cc/HRL9-DZQF].

303. Commentators have observed how stigma attaches not only to noncitizens but those citizens of the same ethnicity. *See, e.g.*, Daniel I. Morales, *It's Time for an Immigration Jury*, 108 NW. U. L. REV. COLLOQUY 36, 42 (2013) ("Mass deportation stigmatizes all Latinos in the same way that mass incarceration stigmatizes all African Americans."); Weissman, *supra* note 299, at 148 (discussing the "Mexican-as-criminal narrative").

opposed to that of White Americans, is more readily regarded as a failure of will to which blame can attach.[304]

A further harm of immigration law's endorsement of substance use disorder as a moral failing is that it perpetuates the traditional stigma against those who experience the disorder, making it less likely that all sufferers, including citizens, will receive treatment.[305] People suffering from substance abuse are often not identified and treated.[306] Studies show that "[a]pproximately 1 in 5 outpatients seeking primary care and 1 in 4 hospital patients are dependent on alcohol; yet, only about 1 in 7 people who are dependent on alcohol are ever treated."[307] Immigration law's tethering of addiction to morality further stigmatizes addiction, thus discouraging all people, citizen or not, from seeking treatment.

B. A Reform Proposal

This Part details a proposal for five legislative reforms of immigration law to help align it with the contemporary understanding of substance use disorder. Immigration law should reflect the established view that being addicted is a medical condition, not a failure of will or a defect in moral

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304. David Cole has cautioned that "what we do to aliens today provides a precedent for what can and will be done to citizens tomorrow." Cole, *supra* note 288, at 304. Although he was discussing on infringements on the fundamental rights of noncitizens in the context of national security, his insight also applies to other contexts in which noncitizens are treated under an unjustified double standard. *See also* Kevin Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness*, 73 IND. L.J. 1111, 1148–58 (1998) (describing how "racial exclusions in the immigration laws reinforce the subordinated status of minority citizens in the United States").

305. *See supra* notes 194–195 and accompanying text; Shankar Vedantam et al., *Social Stigma is One Reason the Opioid Crisis is Hard to Confront*, NPR (Oct. 31, 2018, 5:00 A.M.), https://www.npr.org/2018/10/31/662009650/social-stigma-is-one-reason-the-opioid-crisis-is-hard-to-confront [https://perma.cc/27WQ-D3A6].

306. Matano & Wanat, *supra* note 190, at 64.

307. *Id.* at 63 (citing R.A. Matano & A.B. Bronstone, *Assessment, Intervention, and Referral of Patients Suffering from Alcoholism*, 14 J. CARDIOPULMONARY REHABILITATION 27, 27–29 (1994)). *See also* CTR. FOR BEHAV. HEALTH STAT. & QUALITY, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES (2016), https://www.samhsa.gov/data/report/results-2016-national-survey-drug-use-and-health-detailed-tables [https://perma.cc/3CXH-GJ3D] (finding only one in ten people with a substance use disorder will receive any type of specialty treatment); OFFICE OF THE SURGEON GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCO HOL, DRUGS, AND HEALTH ES 3 (2016), https://avanteibogaine.com/wpcontent/uploads/2016/12/surgeon-general-report.pdf [https://perma.cc/F9M2-YGWW]; REBECCA AHRNSBRAK ET AL., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2016 NATIONAL SURVEY ON DRUG USE AND HEALTH (2017), https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2016/NSDUH-FFR1-2016.htm [https://perma.cc/89H7-CUDF].

character. Science tells us that addiction is a powerful force that exerts significant control over human behavior by inducing an altered brain state. Addiction need not be entirely outside of an individual's control to disqualify it as a basis for immigration consequences, or at least harsh ones.[308] The reforms suggested below embody the principles that the status of being an addict should have no immigration consequences and the immigration consequences for addiction-related harmful behavior should be proportional to the harm to others.[309] The grounds for addiction-related exclusion or deportation should not outweigh the individual and societal harms of denying people entry or expelling them.[310] Even if someone falls within a ground of deportation or exclusion, the law should generally provide an opportunity for relief, such as a waiver of deportation, that nullifies the removal of the particular person based on an individualized analysis. Discretionary adjudication involves assessment of the underlying context of negative behavior, weighing the negative against the positive, and balancing the impact of deportation against that of the person being able to remain.[311] Addiction-informed adjudication requires an understanding of relapse as an inherent part of rehabilitation and of the connection between addiction and criminal activity, like driving while intoxicated and drug-related offenses.[312] Addiction should be regarded like other types of illnesses in discretionary adjudications. Reflecting these principles, Congress should amend immigration law to (1) abolish the habitual drunkard bar to good moral character; (2) repeal the deportation ground for drug addiction; (3) amend the addiction ground of inadmissibility to require a showing of a pattern of harm to others; (4) reduce the harsh consequences of criminal behavior stemming from substance use; and (5) reinstate the discretionary power of immigration judges to halt deportations.

1. Repeal the "Habitual Drunkard" Bar to Good Moral Character

Today's immigration law and practice is misaligned with the prevailing scientific and social views of alcohol and drug addiction in numerous ways, some of which are more apparent than others. The express tethering of the excessive use of drinking to good moral character through the

308. *See* Volkow et al., *supra* note 193, at 363.

309. For a discussion of how proportionality is embedded in immigration law, see *supra* note 27.

310. These harms are discussed in section IV.A.

311. *See* Matter of Marin, 16 I. & N. Dec. 581, 584–85 (BIA 1978).

312. *See supra* notes 190–191 and accompanying text.

"habitual drunkard" designation is the most obvious example.[313] Even the Ninth Circuit judges who defended this statute as rationally related to a legitimate government purpose in *Ledezma-Cosino II* declined to endorse the view that the excessive use of alcohol reflected on one's moral character.[314] The reforms needed to update immigration law include legislating what the Ninth Circuit in *Ledezma-Cosino II* did not feel it could do judicially under the Equal Protection Clause of the Constitution—namely, eliminating the habitual drunkard good moral character bar.[315]

2. *Repeal the Drug Addiction Ground of Deportation*

But reforms should not be limited to the good moral character definition. The deportation ground for drug addiction, which has existed since 1952, should also be repealed. As discussed above, this statute permits deportation of a person in lawful status, including a longtime permanent resident, based solely on the fact that they suffer from substance use disorder.[316] When Congress first passed the addiction ground of deportation, President Franklin D. Roosevelt vetoed it, stating that drug addiction is "a lamentable disease rather than a crime."[317] When this deportation ground was proposed again in 1952, there was opposition to it during the Congressional hearings.[318] This opposition was grounded in the core belief that noncitizens who develop addiction are entitled to the same care and concern that U.S. citizens would receive. Perhaps reflecting this understanding, and the difficulty of locating people with addictions in the absence of a criminal record, the addiction deportation ground is rarely invoked today.[319] Congress should now remedy the mistake it made over six decades ago and eliminate the drug addiction ground of deportation.[320]

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313. *See supra* section I.B.

314. *See supra* section III.A.

315. *Id.*

316. *See supra* section I.A.

317. Veto of H.R. 6724, 76th Cong., (3d Sess. 1940); Message from the President, H. Doc. No. 689, 76th Cong. (3d Sess. 1940).

318. *See, e.g.*, OSCAR M. TRELLES, II & JAMES F. BAILEY, III, IMMIGRATION AND NATIONALITY ACTS: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS, 1950–1978, at 679 (1952) (testimony of Gustav Lazarus, Ass'n of Immigration and Nationality Lawyers).

319. *See supra* note 68 and accompanying text.

320. An amendment short of repealing the deportation ground would be to tether the definition of addiction to the DSM.

3. *Amend the Addiction Grounds of Exclusion to Require Pattern of Harm to Others*

While drug addiction may legitimately give rise to a medical ground of exclusion, the status of being an addict alone should not make a person inadmissible. The drug addiction exclusion should only apply to addicts who have a pattern of harming others. Under current law, any person considered a drug "abuser" or "addict" will be denied admission, even if they pose no threat.[321] Since protection of the public is the primary impetus behind the grounds of exclusion,[322] addicts that pose no threat to others should not be excluded. Currently, a wide array of other types of behavior disqualify people from immigrating, including harm to oneself, psychological harm to others, property damage, and threats to health or safety that did not result in harm.[323] The drug addiction ground of inadmissibility should be amended to require a pattern of harmful behavior that has resulted in actual injury to other people, not property or the immigrants themselves, for immigrants to be considered inadmissible.

Unlike the drug addiction ground, the alcohol ground requires both a finding of a "mental disorder" and associated harmful behavior.[324] However, civil surgeons, including those who examine people for U.S. consular interviews abroad, are given discretion to determine whether the "mental disorder" of alcohol addiction is accompanied by sufficiently harmful behavior.[325] As a result, some civil surgeons might consider one DUI conviction sufficient to render a person inadmissible as an alcoholic, while others require a showing of multiple DUIs. The law should specify that only a pattern of harmful behavior to others, not property, is relevant. And only convictions, not arrests that fail to result in convictions, should figure into the harmful behavior analysis. An arrest does not denote criminal culpability, as guilt under our criminal justice system must be proven beyond a reasonable doubt.[326] Moreover, studies have documented the ways in which police stops are racially motivated.[327]

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321. *See* 8 U.S.C. § 1182(a)(1)(A)(iv) (2012).

322. *See* Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

323. CDC, TECHNICAL INSTRUCTIONS, *supra* note 54.

324. 8 U.S.C. § 1182(a)(1)(A)(iii)(I–II) (barring admission of people who have a mental disorder and behavior associated with the disorder may, or has, posed threat of harm).

325. CDC, TECHNICAL INSTRUCTIONS, *supra* note 54.

326. *See* Miles v. United States, 103 U.S. 304, 304 (1880).

327. *See* Washington v. Lambert, 98 F.3d 1181, 1187–88 (9th Cir. 1996); Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System is Racist. Here's the Proof.*, WASH. POST (Sept. 18, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/

4. *Reduce Harsh Consequences of Criminal Behavior Related to Substance Use*

As discussed above, addiction-related criminal behaviors, including the possession and sale of drugs, result in harsh immigration consequences.[328] The criminal grounds of inadmissibility and deportation relating to possession and sale should be made less severe and simplified. Prior scholarly work argues that no one should face removal unless they have actually served five years of prison time for a criminal offense and that discretionary waivers should be restored for those placed into removal proceedings.[329] Such reform would go a long way toward dialing back the immigration consequences for addicts, as only a limited number are likely to have served five years for an offense and all would be eligible to make individual cases for discretionary relief before an immigration judge.

A more limited reform directed only at ameliorating harsh results for people with drug addiction would distinguish between drug crimes related to addiction and those related to drug dealing for substantial profit. As described above, current law treats people who sell a small quantity of drugs to sustain a drug addiction the same as people who sell drugs as a business.[330] Both types of sale are aggravated felonies.[331] The sale of small amounts of drugs by addicts should not trigger removal or, at the very least, should not be characterized as an aggravated felony, which bars all discretionary relief.[332] The task of distinguishing between addiction-related sale and commercial sale would fall to immigration adjudicators. While such adjudications depart from the traditional "elements test" used to determine whether an offense falls within the federal removal ground,

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[https://perma.cc/5BVW-J2DG].

328. *See supra* section I.C.

329. Rebecca Sharpless, *Clear and Simple Deportation Rules for Crimes: Why We Need Them and Why It's Hard to Get Them*, 92 DENV. U. L. REV. 933 (2015). Current law results in deportation and exclusion for crimes that relatively minor. *See supra* section I.C.

330. *See supra* note 87 and accompanying text.

331. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342–7349, 102 Stat. 4469, 4469–73 (codified as amended at 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii), 1228, 1252(a)(2)(C) (2012 & Supp. II 2015)); *see, e.g.*, Ghebregziabiher v. Mukasey, 304 F. App'x 288, 290 (5th Cir. 2008) (unpublished) (removal for unlawful and knowing delivery of less than one gram of cocaine by actual transfer); *see also* NORTON TOOBY & JOSEPH JUSTIN ROLLIN, EVOLUTION OF THE DEFINITION OF AGGRAVATED FELONY, http://nortontooby.com/pdf/FreeChecklists/EvoAggFelonyStatute.pdf [https://perma.cc/9QLP-YVUG].

332. This proposal includes both the ground of inadmissibility and the ground of deportation. As discussed above, the ground of inadmissibility does not even require a conviction, just admission to the essential elements of a drug offense. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II). This ground is incorporated into the good moral character definition by reference. *See* U.S.C. § 1101(f)(1) (cross-referencing (a)(2)(A)(i)(II)).

this departure is warranted to protect addicts from being deported due to behaviors bound up with their illness.[333]

Simple drug possession, whether or not tied to addiction, should not even be a ground of deportation or exclusion. Professor Nancy Morawetz has demonstrated how societal attitudes toward drug use have changed in the last decade.[334] Our drug removal grounds should be amended to reflect the prevalence and social acceptance of drug use. Past use of drugs is no longer viewed as disqualifying behavior for the presidency.[335] Periodic drug use is socially acceptable and does not pose a threat to public safety, or at least one that would justify permanent banishment, or exclusion, from the United States.[336]

5. *Reinstate Meaningful Discretionary Review*

If, after application of the rules outlined above, a noncitizen addict is still removable, the law should provide for a discretionary waiver and instruct adjudicators to regard addiction in the discretionary calculus as an illness or disability—a positive factor that is relevant to hardship.[337] Adjudicators should also be trained on how resistance to rehabilitation is part of the disease and how relapse is an integral aspect of the process of recovery.[338] While Alcoholics Anonymous is a well-known recovery program, it represents just one approach to recovery, and critics have questioned its methods and outcomes.[339] And judges and other

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333. For a discussion of the categorical approach to analyzing the immigration consequences of crimes, see Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011); Rebecca Sharpless, *Toward a True Elements Test:* Taylor *and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979 (2008).

334. Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163, 194 (2008) ("For adults with a high school education who have reached age forty-five, the statistics show that 79 percent had tried marijuana by the time they turned forty-five and 72 percent had tried an illicit drug other than marijuana. Almost nine out of ten had tried either marijuana or another drug.").

335. *Id.* at 165.

336. *See supra* note 175 and accompanying text; Christopher Ingraham, *11 Charts that Show Marijuana has Truly Gone Mainstream*, WASH. POST (Apr. 19, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/04/19/11-charts-that-show-marijuana-has-truly-gone-mainstream/ [https://perma.cc/X5EW-9VVH].

337. *In re* K-A-, 23 I. & N. Dec. 661, 662 (B.I.A. 2004).

338. *See supra* notes 185–191 and accompanying text.

339. *See generally* LANCE DODES & ZACHARY DODES, THE SOBER TRUTH: DEBUNKING THE BAD SCIENCE BEHIND 12-STEP PROGRAMS AND THE REHAB INDUSTRY (2014) (pointing to low AA success rate of 5% to 10% and criticizing the science behind AA's twelve-step program).

adjudicators must understand that the stress of being in an immigration proceeding can aggravate the disease of addiction.[340]

As discussed above, virtually no discretionary relief exists in immigration law today and, when relief is available, judges have no clear instruction on whether to count addiction as a negative, positive, or neutral factor when making discretionary decisions.[341] The lack of guidance surrounding the significance of addiction in a balancing test leaves people suffering from addiction at the mercy of particular judges' attitudes toward it. The law should make clear that addiction is a medical condition that, like other medical conditions, should typically count as a positive factor in a discretionary calculus.

V. CONCLUSION

Immigration law's failure to align with contemporary understanding of alcohol and drug addiction undermines immigration law's moral authority. The judiciary is unlikely to correct the misalignment through constitutional review. Multiple provisions of the INA attach immigration consequences to being addicted to alcohol or a drug. Noncitizens suffering from addiction can be deported, excluded from entry, and denied U.S. citizenship. These harsh results might make sense in a world in which addiction is condemned as an "antisocial deed[]" for which addicts have "moral accountability."[342] Judged by today's sensibilities, however, these addiction-related provisions are as anachronistic as the former statutes that prevented the entry of people for being gay or suffering from epilepsy.[343]

Deportations lead to the devastating and lasting ruin of families. The integrity and legitimacy of our entire immigration enforcement regime suffers when the government deports people for reasons not generally viewed as justified. Given our nation's fundamental value of equality, any double standard erodes our commitment to equality. Thus, treating citizen addicts differently than noncitizens damages our national identity as an egalitarian society.

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340. *See* Rajita Sinha, *Chronic Stress, Drug Use, and Vulnerability to Addiction*, 1141 ANNALS N.Y. ACAD. SCI. 105, 105–30 (Oct. 2008); Sarah E. Richards, *How Fear of Deportation Puts Stress on Families*, ATLANTIC (Mar. 22, 2017), https://www.theatlantic.com/family/archive/2017/03/deportation-stress/520008/ [https://perma.cc/GH9R-TD7N].

341. *See supra* sections I.C. and I.D.

342. Powell v. Texas, 392 U.S. 514, 535–36 (1968); *see also id.* at 531 (recognizing the "harsh moral attitude which our society has traditionally taken toward intoxication and the shame which we have associated with alcoholism"); *id.* ("Anglo-American society has long condemned [alcoholism] as a moral defect.").

343. *See supra* notes 16–17, 49–51 and accompanying text.

Legislative reform is all the more urgent in view of how dominant groups have manipulated laws, practices, and perceptions relating to drugs and alcohol as a means of subjugating others based on invidious grounds. History teaches that alcohol and "drugs emerge as scapegoats on which racial fears and prejudices can be expediently hung."[344] This troubling history further undercuts any claim that the United States can legitimately deport and exclude people suffering from addiction.[345]

Conforming immigration law to prevailing norms requires the elimination of certain grounds of exclusion and deportation, as well as the "habitual drunkard" bar to good moral character. No one should be deported or denied entry for suffering from either drug or alcohol addiction. Possession of small amounts of drugs should not be a ground of removal, and sale of small amounts that relate to sustaining an addiction should either not trigger deportation or should be waivable through a discretionary waiver. Only when a person addicted to alcohol or drugs has posed a danger to society should immigration law impose a consequence. Even then, immigration judges should have the discretion to adjudicate whether deportation is appropriate on a case-by-case basis.

Popular opinion and advances in brain science have resulted in advancements in the criminal justice system with respect to addiction and addiction-related behavior. The time has come for Congress to do the same for immigration law. We no longer live in a society in which we simply castigate our family members, friends, and community members who struggle with substance use disorder. Today, we have a more robust and data-driven understanding of the effects of substances on the human brain. We must extend this enlightened understanding to all, not just to some. Our commitments to equality and human dignity demand that we delink morality from addiction and understand addiction as a disease that mitigates culpability, including in immigration law.

344. DURRANT & THAKKER, *supra* note 113, at 110.

345. For a discussion of racial profiling in immigration enforcement, see Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000).