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Ledezma-Cosino v. Sessions: The Ninth Circuit Maintains Archaic View That Alcoholism is a Moral Character Flaw

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NOTE

LEDEZMA-COSINO V. SESSIONS: THE NINTH CIRCUIT MAINTAINS ARCHAIC VIEW THAT ALCOHOLISM IS A MORAL CHARACTER FLAW

COREY TIMPSON*

INTRODUCTION

The United States is a “Nation of Immigrants;”¹ after the United States won independence from Great Britain, more people began immigrating to the newly established colonies.² Since then, the United States remains a top destination for people looking to start a fresh, new life.³ People choose to come to America for many reasons, including to escape from past persecution, poverty, or to find better job opportunities.⁴ Regardless of the reasons, people have immigrated and will continue to immigrate to the United States from all over the world.

Yet, with high rates of immigration come increased regulations. The United States Citizenship and Immigration Services (“USCIS”), a branch of the Department of Homeland Security (“DHS”), controls citizenship

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¹ JOHN F. KENNEDY, *A NATION OF IMMIGRANTS* (1964) (John F. Kennedy wrote this manuscript in 1958 and it was published posthumously in 1964).

² *Immigration Timeline*, THE STATUTE OF LIBERTY ELLIS ISLAND FOUND., INC., <https://www.libertyellisfoundation.org/immigration-timeline> (last visited Mar. 15, 2018).

³ *Id.*

⁴ Christina Nuñez, Jana Sepehr & Erica Sanchez, *Why People Migrate: 11 Surprising Reasons*, GLOBAL CITIZEN (Dec. 4, 2014), <https://www.globalcitizen.org/en/content/why-people-migrate-11-surprising-reasons/>.

and immigration as well as enforces the policies in those areas.⁵ Another branch of DHS that enforces immigration policies is the United States Immigration and Customs Enforcement.⁶ Along with the Executive Office for Immigration Review, these agencies enforce and adjudicate claims by immigrants arising from immigration laws, such as those involving deportation.⁷ Although there are many reasons undocumented immigrants or permanent residents are deported, deportation typically occurs when a person violates one or more immigration laws.⁸

Immigrants, like American citizens, face similar problems and most come to the United States seeking a better life.⁹ One such problem is alcoholism, which affects the United States population in general¹⁰ and increasingly affects the immigrant population.¹¹ Alcoholism, or Alcohol Use Disorder, is a brain disease that is “characterized by compulsive alcohol use, loss of control over alcohol intake, and a negative emotional state when not using.”¹² One study found evidence of alcohol abuse among immigrants in the U.S. persists despite the fact that alcoholism is less prevalent among immigrant populations when compared to U.S.-born citizens.¹³

This Note focuses on one historically uncommon way in which courts decide to deport an undocumented immigrant seeking cancellation of removal.¹⁴ The United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) in *Ledezma-Cosino v. Sessions* found an undocumented

⁵ *Mission Statement*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/aboutus> (last visited Mar. 15, 2018).

⁶ *What We Do*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/overview> (last updated Jan. 3, 2018).

⁷ *Organization, Mission, & Functions Manual: Executive Office for Immigration Review*, U.S. DEP'T OF JUST., <https://www.justice.gov/jmd/organization-mission-and-functions-manual-executive-office-immigration-review> (last updated Aug. 3, 2018).

⁸ *Deportation*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/tools/glossary/deportation> (last visited Mar. 15, 2018).

⁹ Nuñez et al., *supra* note 4.

¹⁰ *Alcoholism: Natural History and Background*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, <https://pubs.niaaa.nih.gov/publications/healthdisparities/alcoholism1.htm> (last visited July 31, 2018).

¹¹ Magdalena Szaflarski et al., *Epidemiology of Alcohol Abuse Among US Immigrant Populations*, 13 J. IMMIGR. & MINOR HEALTH 647 (2011), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3133815/>.

¹² *Alcohol Use Disorder*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, (<https://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/alcohol-use-disorders>) (last visited July 31, 2018).

¹³ Szaflarski et al., *supra* note 11.

¹⁴ See 8 U.S.C. § 1229(b) (1996) (explaining that cancellation of removal allows undocumented immigrants subject to deportation to remain in the United States). See also 8 U.S.C. § 1101(f)(1) (the habitual drunkard provision of the good moral character statute that has only been used one other time as grounds to deport an undocumented immigrant); *In re H.*, 6 I. & N. Dec. 614 (B.I.A. 1955).

immigrant¹⁵ seeking cancellation of removal¹⁶ ineligible because he was considered a “habitual drunkard.”¹⁷ As an undocumented immigrant, Salomon Ledezma-Cosino (“Ledezma-Cosino”) was subject to deportation.¹⁸ After conceding his eligibility for removal, Ledezma-Cosino sought cancellation of removal.¹⁹ The Immigration Judge²⁰ and the Board of Immigration Appeals²¹ denied his request because he was found to be a habitual drunkard.²² Upon this finding, Ledezma-Cosino was unable to satisfy the good moral character requirement for cancellation of removal.²³ Ultimately, his case was reheard en banc where the Ninth Circuit vacated the original three-judge panel opinion and upheld the Immigration Judge and the Board of Immigration Appeals’ decision finding Ledezma-Cosino ineligible for cancellation of removal because he was a habitual drunkard.²⁴

The first part of this Note discusses the factual and procedural history and the Ninth Circuit’s analysis of *Ledezma-Cosino v. Sessions*. Second, this Note discusses the controlling statutes at issue: cancellation of removal and good moral character. The third part discusses the background of the habitual drunkard provision, the tests used to determine a person’s status as a habitual drunkard, and how the habitual drunkard provision relates to good moral character. Fourth, it argues that the Ninth Circuit’s analysis regarding a person’s status as a habitual drunkard or alcoholic should not automatically determine his or her moral character and that the court erred by finding that it does. Alcoholism is a growing

¹⁵ For the purposes of this Note I will be using the more accurate term “undocumented immigrant” rather than the outdated term “alien” which is typically used by immigration statutes. *See* 8 U.S.C. § 1229(b) (1996); *see also* 8 U.S.C. § 1101(f) (1996) (using the term “alien”).

¹⁶ *See* 8 U.S.C. § 1229(b) (1996) (explaining that cancellation of removal is a form of declaratory relief for non-resident immigrants seeking to stop his or her deportation in order to remain in the United States as a resident).

¹⁷ *Ledezma-Cosino v. Sessions*, 857 F.3d 1042 (9th Cir. 2017). The author disagrees with the term “habitual drunkard,” however, for the purpose of this Note, the language codified in the statute is used for lack of a better alternative. *See* 8 U.S.C. § 1101(f)(1) (2014).

¹⁸ *Ledezma-Cosino v. Sessions*, 857 F.3d at 1045.

¹⁹ *Ledezma-Cosino v. Lynch*, 819 F.3d 1070, 1072 (9th Cir. 2016), *vacated*, 857 F.3d 1042, 1045 (9th Cir. 2017). The vacated Ninth Circuit opinion will be used for factual information not found in the en banc panel’s decision.

²⁰ An Immigration Judge is “an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings.” 8 U.S.C. § 1101(b)(4) (1996).

²¹ The Board of Immigration Appeals interprets and applies immigration laws and is the highest governing administrative body to do so before the matter is taken to the judicial court system. *Board of Immigration Appeals*, U.S. DEP’T OF JUST. (Mar. 15, 2018, 3:54 PM), <https://www.justice.gov/eoir/board-of-immigration-appeals>.

²² *Ledezma-Cosino v. Lynch*, 819 F.3d 1070, 1072 (9th Cir. 2016), *vacated*, 857 F.3d 1042, 1045 (9th Cir. 2017).

²³ *Id.*

²⁴ *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1049 (9th Cir. 2017).

problem in American society that tends to arise out of external factors that result in a loss of one's ability to voluntarily control their alcohol consumption.²⁵ Thus, a person's inability to control his or her alcohol consumption should not automatically indicate a lack of good moral character. Finally, this Note provides solutions to the problems arising from the Ninth Circuit's analysis. The solutions proposed include: accurately defining and distinguishing between the terms habitual drunkard and alcoholic; amending the habitual drunkard provision of the good moral character statute; and creating a new standard to deal with immigrants found to be habitual drunkards.

I. BACKGROUND OF *LEDEZMA-COSINO V. SESSIONS*

A. FACTUAL AND PROCEDURAL BACKGROUND OF *LEDEZMA-COSINO V. SESSIONS*

In 1987,²⁶ Ledezma-Cosino entered the United States illegally from Mexico.²⁷ Ledezma-Cosino has five children who were born in the United States and are American citizens, and he has three additional children who are not citizens of the United States.²⁸ While in the United States, Ledezma-Cosino supported his family by working in construction.²⁹ His doctors diagnosed him with acute alcoholic hepatitis and other alcohol-related diseases,³⁰ noting a ten-year history of drinking approximately one liter of tequila daily.³¹ Ledezma-Cosino's daughter also testi-

²⁵ See U.S. DEP'T HEALTH & HUMAN SERV., OFFICE OF THE SURGEON GEN., *The Neurobiology of Substance Use, Misuse, and Addiction*, in *FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS, AND HEALTH 2-1* (2016), <https://addiction.surgeongeneral.gov/sites/default/files/chapter-2-neurobiology.pdf>.

²⁶ The author attempted via internet searches to determine when the Petitioner came into the U.S., but there is not enough information to ascertain the true year of Petitioner's entry. Other related cases and news stories list 1997 as the year Petitioner entered, and thus it seems like the Ninth Circuit made a numerical error in listing 1987 as the year Petitioner entered the United States.

²⁷ *Ledezma-Cosino v. Sessions*, 857 F.3d at 1045.

²⁸ *Id.*

²⁹ *Id.*

³⁰ A "chronic alcoholic" is someone with a "progressive behavioral disorder characterized by a strong urge to consume ethanol and an inability to limit the amount of drinking despite adverse consequences. *Alcoholism*, FREE DICTIONARY, <https://medical-dictionary.thefreedictionary.com/Chronic+alcoholic> (last accessed Mar. 7, 2018); see also *Alcohol Use Disorder*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/alcohol-use-disorder/symptoms-causes/syc-20369243> (last accessed Nov. 9, 2018) ("Alcohol use disorder . . . is a pattern of alcohol use that involves problems controlling your drinking . . .").

³¹ *Ledezma-Cosino v. Lynch*, 819 F.3d at 1073, *vacated sub nom.* *Ledezma-Cosino v. Sessions*, 857 F.3d 1042 (9th Cir. 2017).

fied to her father's drinking problem, saying that "his liver had failed because of '[t]oo much alcohol,' [and] '[t]oo much drinking.'"³²

On May 7, 2008, the police detained Ledezma-Cosino in Carlsbad, California after they stopped and arrested him for driving under the influence and driving with a suspended license.³³ Ledezma-Cosino was then charged with removability by the Department of Homeland Security.³⁴ Initially, Ledezma-Cosino conceded removability, but later petitioned for cancellation of removal.³⁵ The judge denied Ledezma-Cosino's petition on multiple grounds.³⁶ The first removal hearing resulted in the Immigration Judge denying relief because Ledezma-Cosino did not meet the fourth requirement for cancellation of removal—that leaving the United States would cause great hardship on a family member.³⁷ The first appeal to the Board of Immigration Appeals resulted in a remand due to an incomplete record.³⁸ The Immigration Judge continued the second remand hearing because Ledezma-Cosino was in the hospital for a liver ailment.³⁹ The Immigration Judge placed Ledezma-Cosino's new medical records into the hearing record and then decided that he was ineligible for cancellation of removal on the basis that he was a habitual drunkard.⁴⁰ The Immigration Judge made this determination *sua sponte* and did not, on remand, state that he was ineligible for failure to meet the hardship requirement.⁴¹ Ultimately, the Board of Immigration Appeals affirmed only on the basis of Ledezma-Cosino's status as a habitual drunkard, barring a finding of good moral character.⁴²

Ledezma-Cosino timely sought review by the Ninth Circuit after the Board of Immigration Appeals affirmed his eligibility for removal.⁴³ The sole means to challenge a removal decision is to seek review by the court of appeals.⁴⁴ Thus, he brought suit against Loretta Lynch, the Attorney General at the time, on the grounds that his classification as a habitual drunkard was unconstitutional under the Due Process Clause and Equal

³² Ledezma-Cosino v. Sessions, 857 F.3d at 1047.

³³ *Id.* at 1045.

³⁴ 8 U.S.C. § 1182(a)(6)(A)(i) 2013); Ledezma-Cosino v. Sessions, 857 F.3d at 1045.

³⁵ 8 U.S.C. § 1229b(b)(1) (2008); Ledezma-Cosino v. Sessions, 857 F.3d at 1045.

³⁶ Ledezma-Cosino v. Lynch, 819 F.3d at 1074, *vacated sub nom.* Ledezma-Cosino v. Sessions, 857 F.3d 1042 (9th Cir. 2017).

³⁷ Ledezma-Cosino v. Sessions, 857 F.3d at 1059 (9th Cir. 2017) (Thomas, J., dissenting).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Ledezma-Cosino v. Lynch, 819 F.3d 1070, 1074 (9th Cir. 2016), *vacated sub nom.* Ledezma-Cosino v. Sessions, 857 F.3d 1042 (9th Cir. 2017).

⁴³ *Id.* at 1072.

⁴⁴ The REAL ID Act, Pub. L. No. 109-13, Div. B., 119 Stat. 231 (2005); *see also* Martinez v. Napolitano, 704 F.3d 620, 622 (9th Cir. 2012).

Protection Clause of the Constitution because it determined a person's "moral character on the basis of a medical disability."⁴⁵ A three-judge panel reviewed Ledezma-Cosino's claims "that the Due Process Clause and Equal Protection Clause of the Constitution forbid the Government from making such an irrational classification as to moral character on the basis of a medical disability."⁴⁶ The three-judge panel agreed with Ledezma-Cosino's Equal Protection argument and found the habitual drunkard provision unconstitutional.⁴⁷ The Board of Immigration Appeals decision was then vacated and the case was remanded.⁴⁸ The Ninth Circuit then granted a rehearing en banc pursuant to a majority vote.⁴⁹ Because the Ninth Circuit granted a rehearing en banc, the three-judge panel decision was vacated.⁵⁰

The Ninth Circuit en banc panel reviewed the case on three grounds: (1) whether there was substantial evidence to support Ledezma-Cosino's label as a habitual drunkard; (2) whether the habitual drunkard provision was unconstitutionally vague under the Due Process Clause; and (3) whether the habitual drunkard provision violates the Equal Protection Clause.⁵¹ The court did not decide these three arguments in Ledezma-Cosino's favor and his petition for cancellation of removal was denied.⁵²

On August 25, 2017, Ledezma-Cosino filed a timely Petition for a Writ of Certiorari and the United States Supreme Court denied Ledezma-Cosino's petition on January 8, 2018.⁵³

B. THE NINTH CIRCUIT DECLINED TO REVIEW THE BOARD OF IMMIGRATION APPEALS' DENIAL OF LEDEZMA-COSINO'S REQUEST FOR CANCELLATION OF REMOVAL

Ledezma-Cosino sought review by the Ninth Circuit on three different bases.⁵⁴ First, he argued that there was insufficient evidence to support his classification as a habitual drunkard.⁵⁵ Next, he believed the term habitual drunkard in the good moral character statute was unconsti-

⁴⁵ Ledezma-Cosino v. Lynch, 819 F.3d at 1072, *vacated sub nom.* 857 F.3d 1042, 1045 (9th Cir. 2017).

⁴⁶ *Id.*

⁴⁷ *Id.* at 1073.

⁴⁸ *Id.*

⁴⁹ FED. R. APP. P. 35(a) (2016); Cir. R. 35-3 (2007); Ledezma-Cosino v. Lynch, 839 F.3d 805 (9th Cir. 2016).

⁵⁰ Ledezma-Cosino v. Lynch, 839 F.3d 805 (9th Cir. 2016).

⁵¹ Ledezma-Cosino v. Sessions, 857 F.3d 1042, 1046 (9th Cir. 2017).

⁵² *Id.* at 1045.

⁵³ Petition for Writ of Certiorari, Ledezma-Cosino v. Sessions, 857 F.3d 1042 (9th Cir. 2017) (No. 17-313) 2017 WL 3809746; Ledezma-Cosino v. Sessions, 138 S. Ct. 643 (2018).

⁵⁴ Ledezma-Cosino v. Sessions, 857 F.3d at 1046.

⁵⁵ *Id.*

tionally vague.⁵⁶ Finally, he argued the habitual drunkard provision violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.⁵⁷ The Ninth Circuit reviewed each argument separately, decided each argument against Ledezma-Cosino, and denied his petition for review of the Board of Immigration Appeal's denial of his request for cancellation of removal.⁵⁸

1. *The Ninth Circuit Found Sufficient Evidence to Classify Ledezma-Cosino as a Habitual Drunkard*

The Ninth Circuit agreed with the Immigration Judge and the Board of Immigration Appeals that Ledezma-Cosino qualified as a habitual drunkard.⁵⁹ First, the Ninth Circuit defined habitual drunkard as “a person who regularly drinks alcoholic beverages to excess.”⁶⁰ The court distinguished between an “alcoholic” and a “habitual drunkard” for its analysis because Congress’s use of these two terms in different parts of the statute indicated its intent to distinguish between the two.⁶¹ The court did not define a standard for determining one’s habitual drunkard classification.⁶² Rather, the en banc panel reasoned that “the [good moral character] statute asks whether a person’s *conduct* during the relevant time period meets the definition; the person’s status as an alcoholic, or not, is irrelevant to the inquiry.”⁶³ The court concluded Ledezma-Cosino was a habitual drunkard based on the amount of alcohol he consumed and his daughter’s testimony that he had a drinking problem.⁶⁴

2. *The Ninth Circuit Found That the Habitual Drunkard Provision is Not Unconstitutionally Vague*

The Ninth Circuit disagreed with the original three-judge panel and concluded that the habitual drunkard provision is constitutional.⁶⁵ The court found that a person’s status as a habitual drunkard could easily be determined by an objective factual inquiry.⁶⁶ A statute will only be considered “unconstitutionally vague if it ‘is so standardless that it autho-

⁵⁶ 8 U.S.C. § 1101(f)(1) (2014); *Ledezma-Cosino v. Sessions*, 857 F.3d at 1046.

⁵⁷ *Ledezma-Cosino v. Sessions*, 857 F.3d at 1046.

⁵⁸ *Id.* at 1045-49.

⁵⁹ *Id.* at 1047.

⁶⁰ *Id.* at 1046.

⁶¹ *Id.* at 1046-47.

⁶² *Id.*

⁶³ *Id.* at 1046.

⁶⁴ *Id.* at 1047.

⁶⁵ *Id.*

⁶⁶ *Id.*

rizes or encourages seriously discriminatory enforcement' or if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited.'"⁶⁷ The court concluded that the statute is not unconstitutionally vague pursuant to the criminal law standard and therefore, must satisfy the less-stringent standards for vagueness in non-criminal contexts.⁶⁸ Finally, the court said Ledezma-Cosino could not argue that the statute is vague as applied to other people when his conduct is clearly included.⁶⁹

3. *The Ninth Circuit Found That the Habitual Drunkard Provision Does Not Violate Equal Protection Principles*

The Ninth Circuit found the habitual drunkard provision to be consistent with Equal Protection principles because the provision is rationally related to legitimate government interests.⁷⁰ The provision must pass rational basis scrutiny, meaning it must be "rationally related to a legitimate governmental interest."⁷¹ Under this standard, the burden is on Ledezma-Cosino to show that the government has no conceivable basis to support the government's classification of habitual drunkards.⁷² The court noted that it is rational for Congress to believe, for the legitimate governmental interest of public safety, that habitual drunkards could pose an excess risk "to themselves and to others, [so] cancellation of removal was unwarranted" to that class of persons.⁷³ The court also noted that although this classification may be under-inclusive and other classes may pose the same risks to public safety, "[a] legislature may address a problem 'one step at a time.'"⁷⁴ Ledezma-Cosino argued that classifying habitual drunkards as lacking good moral character was irrational, but the court found this argument was inappropriate for purposes of the Equal Protection Clause.⁷⁵ Instead, the argument must focus on whether Congress's actions violate Equal Protection.⁷⁶ Therefore, Congress's choice to deny "cancellation of removal to habitual drunkards" is not in violation of the Equal Protection Clause.⁷⁷ Further, whether habitual drunkards lack good moral character is irrelevant to Equal Protection claims.⁷⁸

⁶⁷ *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 1048.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

II. TITLE VIII OF THE UNITED STATES CODE: LAWS GOVERNING IMMIGRATION AND NATIONALITY

Title VIII of the United States Code governs immigration and nationality, which includes deportation of undocumented immigrants.⁷⁹ Undocumented individuals that come to the United States may be deported for various reasons,⁸⁰ such as committing aggravated felonies or partaking in illegal gambling.⁸¹ After a finding for deportation has been made for any reason, undocumented immigrants may petition for cancellation of removal to remain in the United States despite their eligibility for removal.⁸²

A. CANCELLATION OF REMOVAL STANDARD

Cancellation of removal, a form of declaratory relief, allows undocumented immigrants that are subject to deportation to remain in the United States if they meet four criteria.⁸³ An undocumented immigrant may be eligible for cancellation of removal if he or she: (a) has been physically, continuously present in the United States for ten years; (b) has good moral character during those ten years; (c) has not been convicted of certain enumerated offenses; and (d) can prove that removal would cause extreme hardship to a spouse, parent, or child who is a lawful resident or United States citizen.⁸⁴ This section and its elements were introduced in 1996 to create a stricter standard for “suspension of deportation.”⁸⁵ Formerly, the process of cancellation of removal was referred to as suspension of deportation and was held to a different, lower standard.⁸⁶ Under suspension of deportation, an applicant only needed to reside in the United States, to maintain good moral character for seven years, and to not be convicted of certain crimes.⁸⁷ The Immigration and Nationality Act (“INA”) created the original basis for suspension of deportation.⁸⁸ In 1996, portions of the INA were annulled and superseded by the Illegal

⁷⁹ 8 U.S.C. § 1227 (2012).

⁸⁰ *Id.*

⁸¹ *See* 8 U.S.C. § 1101(f) (2014).

⁸² 8 U.S.C. § 1229b(b)(1) (2012).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Beth Holliday, Annotation, *Construction and Application of “Good Moral Character” Requirement for Cancellation of Removal of Alien Under 8 U.S.C.A. § 1229b(b)(1)(B)*, 87 A.L.R. FED. 2D 231 (2014).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/act.html> (last viewed Aug. 28, 2018).

Immigration Reformation and Immigrant Responsibility Act of 1996,⁸⁹ which introduced the new procedure: cancellation of removal.⁹⁰ When determining whether an applicant is eligible for cancellation of removal, the main element at issue is usually whether the person meets the good moral character element.⁹¹

B. GOOD MORAL CHARACTER

The only guidance courts have for determining good moral character is a list of “unlawful or unethical behaviors”⁹² that preclude the finding of good moral character as it applies to those seeking cancellation of removal.⁹³ Neither Congress nor the Supreme Court has clearly defined what constitutes good moral character. When an applicant does not fall within this codified list of precluded behaviors, the Immigration Judge presiding over the case makes a discretionary determination of whether an applicant has the necessary moral character to be eligible for cancellation of removal.⁹⁴ The requisite good moral character must be met and maintained through the entirety of the ten-year period until the Immigration Judge or the Board of Immigration Appeals makes a final decision.⁹⁵ When making the good moral character determination, the Immigration Judge balances favorable and unfavorable factors related to a person’s character, and makes a decision based on the balancing test.⁹⁶ Even when a person’s character is similar to one of the prohibited behaviors, the Immigration Judge must “consider [and balance] all of [the] evidence on factors relevant to the determination of good moral character.”⁹⁷

Under the good moral character statute,⁹⁸ undocumented immigrants conclusively lack good moral character if they: (1) are a habitual drunkard; (2) have been convicted of certain crimes; (3) get their income principally from illegal gambling; (4) have been convicted of at least two gambling offenses; (5) have given false testimony; (6) have been confined due to convictions for a combined total of at least 180 days; (7) have been convicted of an aggravated felony; or (8) have engaged in

⁸⁹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, H.R. REP. NO. 104-828, (1996), available at <https://www.congress.gov/104/crpt/hrpt828/CRPT-104hrpt828.pdf>.

⁹⁰ Holliday, *supra* note 85, § 2.

⁹¹ *Id.*

⁹² *Maslenjak v. United States*, 137 S. Ct. 1918, 1926 (2017).

⁹³ *Torres-Guzman v. INS*, 804 F.2d 531, 533 (9th Cir. 1986).

⁹⁴ Holliday, *supra* note 85, § 3.

⁹⁵ *Id.* § 5.

⁹⁶ *Torres-Guzman v. INS*, 804 F.2d at 534.

⁹⁷ *Id.*

⁹⁸ 8 U.S.C. § 1101(f) (2014).

conduct relating to violations of religious freedom.⁹⁹ This section is non-exhaustive¹⁰⁰ and includes a catch-all provision stating that “the fact that any person is not within any of the specified classes of persons will not preclude a finding that for other reasons such person is or was not of good moral character” during the ten-year period before submitting an application.¹⁰¹ Similar to good moral character, Congress and the Supreme Court have failed to define habitual drunkard.¹⁰²

III. DETERMINING WHETHER OR NOT AN APPLICANT IS CONSIDERED A HABITUAL DRUNKARD

A. DEFINITION OF HABITUAL DRUNKARD

The term “habitual drunkard” is undefined in the immigration context.¹⁰³ To explain an undefined term, “[the court] generally interpret[s] that term by employing the ordinary, contemporary, and common meaning of the words that Congress used.”¹⁰⁴ Here, Congress used the term habitual drunkard which *Black’s Law Dictionary* previously defined as “a person given to ebriety or the excessive use of intoxicating drink, who has lost the power or the will by frequent indulgence, to control his appetite for it.”¹⁰⁵ Modernly, in *Black’s Law Dictionary*, the definition for habitual drunkard is referred to as the definition of “drunkard.”¹⁰⁶ A drunkard is defined as “[s]omeone who habitually consumes intoxicating substances excessively; [especially], one who is often intoxicated” and may be used to refer to an alcoholic as well as a drug addict.¹⁰⁷ Similarly, an alcoholic is defined as “someone who habitually abuses alcohol and loses self-control, often to the extent of endangering the health, safety, or welfare of self or others.”¹⁰⁸

The Ninth Circuit does not see the terms “habitual drunkard” and “alcoholic” as synonymous.¹⁰⁹ It bases its interpretation on Congress’s tendency to use “habitual drunkard” in some contexts and “alcoholic” or

⁹⁹ See 8 U.S.C. § 1101(f) (2014).

¹⁰⁰ Holliday, *supra* note 85, § 2.

¹⁰¹ 8 U.S.C. § 1101(f) (2014).

¹⁰² *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1046 (9th Cir. 2017).

¹⁰³ *Id.*

¹⁰⁴ *Id.* (quoting *Arizona v. Tohono O’odham Nation*, 818 F.3d 549, 556 (9th Cir. 2016)).

¹⁰⁵ *What is Habitual Drunkard?*, LAW DICTIONARY (2d ed. 1910), <https://thelawdictionary.org/habitual-drunkard/>.

¹⁰⁶ See *Habitual Drunkard*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁰⁷ *Drunkard*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁰⁸ *Alcoholic*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁰⁹ *Ledezma-Cosino v. Sessions*, 857 F.3d at 1046-47.

“alcoholism” in other places of the immigration statutes.¹¹⁰ This indicates that Congress intended for there to be two different meanings associated with the words because they used the terms in different contexts.¹¹¹ Congress, however, does not explain how the terms are meant to diverge from each other, except for using the different terms in distinctive portions of the statutes.¹¹² Using the dictionary definitions of these terms, the phrases appear synonymous, but using an interpretation of congressional intent, the words appear to have different meanings to Congress.¹¹³ However, Congress does not provide any reasoning as to why it used two different terms or how these terms are meant to be differentiated. Regardless of the definitions of the terms, the presiding court must make a factual inquiry into the person’s history to determine his or her status as a habitual drunkard.¹¹⁴

B. FACTUAL INQUIRY TO DETERMINE WHETHER AN APPLICANT IS A HABITUAL DRUNKARD

The United States Citizenship and Immigration Services Policy Manual instructs agents performing an inquiry into an applicant’s drinking habits to look towards several factors to determine if a person qualifies as a habitual drunkard.¹¹⁵ This inquiry looks primarily at certain documents to make the determination, which include, but are not limited to: “divorce decrees, employment records, and arrest records. In addition, termination of employment, unexplained periods of unemployment, and arrests or multiple convictions for public intoxication or driving under the influence.”¹¹⁶ One of the factors includes “*multiple* convictions for . . . driving under the influence.”¹¹⁷ Thus, courts are reluctant to find one or two DUIs without other aggravating circumstances as grounds to label a person a habitual drunkard.¹¹⁸ This has also been insufficient to pre-

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See *Drunkard*, BLACK’S LAW DICTIONARY (10th ed. 2014); see also *Ledezma-Cosino v. Sessions*, 857 F.3d at 1046-47.

¹¹⁴ Myriam Jaidi, *Highlights of Good Moral Character in Naturalization*, INSIGHTFUL IMMIGR. BLOG (Jan. 7, 2014), http://blog.cyrusmehta.com/2014/01/highlights-of-good-moral-character-in_7523.html.

¹¹⁵ U.S. CITIZENSHIP & IMMIGR. SERV., *Conditional Bars for Acts in Statutory Period*, in POLICY MANUAL, <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartF-Chapter5.html#S-J> (last updated Aug. 15, 2017).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Jaidi, *supra* note 114.

clude a finding of good moral character based on a person's habitual drunkenness.¹¹⁹

IV. THE NINTH CIRCUIT FAILED TO CONSIDER MODERN TRENDS CONCERNING ALCOHOLISM, THE INVOLUNTARY NATURE OF ALCOHOLISM, AND THE LEGALITY OF DRINKING

The Ninth Circuit's analysis focused primarily on the constitutionality of the habitual drunkard provision, seemingly when it was enacted, but failed to take into account how the public's view regarding alcohol consumption has changed drastically since the habitual drunkard provision's inception.¹²⁰ Specifically, the court failed to consider modern trends showing that alcoholism is an involuntary disease and that alcohol consumption is legal. This is contrary to the other seven precluded categories of persons in making a good moral character determination, which all involve both voluntary intent and illegality.¹²¹

A. THE COURT FAILED TO CONSIDER RECENT STUDIES SHOWING ALCOHOLISM IS A DISEASE AND IS DIFFERENT FROM CLASSIFICATION AS A "HABITUAL DRUNKARD"

The court erred in finding that the habitual drunkard provision is a legitimate bar to proving good moral character. Today, alcoholism is less often considered a moral shortcoming and more often seen as a medical disease.¹²² The habitual drunkard provision went into effect in 1952 through the Immigration and Nationality Act.¹²³ In 1956, the American Medical Association classified alcoholism as a disease.¹²⁴ Afterwards, it took many years for the public to accept alcoholism as a disease.¹²⁵ In 2016, the United States Surgeon General released a report highlighting

¹¹⁹ *Id.*; see also *Rangel v. Barrows*, No. 4:07-cv-279, 2008 WL 4441974, at *4 (E.D. Tex. Sept. 25, 2008); *Ragoonanan v. U.S. Citizenship & Immigration Serv.*, No. 07-3461 PAM/JSM, 2007 WL 4465208, at *5 (D. Minn. Dec. 18, 2007); *Yaqub v. Gonzalez*, No. 1:05-cv-170, 2006 WL 1582440, at *4-5 (S.D. Ohio June 6, 2006); and *Le v. Elwood*, No. Civ. A. 02-CV-3368, 2003 WL 21250632, at *3 (E.D. Pa. 2003).

¹²⁰ *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1047 (9th Cir. 2017).

¹²¹ See 8 U.S.C. § 1101(f).

¹²² U.S. DEP'T HEALTH & HUMAN SERV., OFFICE OF THE SURGEON GEN., *supra* note 25, at 2-1.

¹²³ Immigration and Nationality Act, Pub. L. No. 82-414, § 101, 66 Stat. 163, 167 (1952) (codified as amended at 8 U.S.C. § 1101(f)(1)), available at <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/act.html>.

¹²⁴ *Why is Alcoholism a Disease?*, FOUND. FOR ALCOHOLISM RES. (Dec. 27, 2013), <http://alcoholismresearch.org/why-is-alcoholism-a-disease/> (the American Medical Association is the largest network of physicians and medical students in the United States).

¹²⁵ Karl Mann et al., *One Hundred Years of Alcoholism: The Twentieth Century*, 35 ALCOHOL & ALCOHOLISM 10 (Jan. 1, 2000), <https://academic.oup.com/alcac/article/35/1/10/142396>.

the prevalence of America's alcohol and drug-related issues.¹²⁶ The report also discussed how views of alcohol and addiction have evolved from "moral failing[s] or character flaw[s], [to] now [being] understood to be chronic illnesses characterized by clinically significant impairments in health, social function, and voluntary control."¹²⁷ In Chief Judge Sidney R. Thomas's dissent, he faulted the majority for allowing a person's status as a recovering alcoholic to bar an applicant from establishing good moral character.¹²⁸ The court has not accepted this classification. It should have considered the modern views of alcoholism in making its determination. Instead, it used an outdated view of "drunks" as immoral to bar an undocumented immigrant from getting relief.¹²⁹

Although the majority opinion reasoned that there is a difference between habitual drunkards and persons suffering from alcoholism,¹³⁰ the dictionary definitions do not compel as grand a distinction as the majority portrays.¹³¹ Thus, by failing to consider the nearly identical definitions, differing only in that drunkard also encompasses persons addicted to other intoxicants, the court erred in finding the habitual drunkard provision a legitimate bar to finding good moral character. As the Surgeon General's report indicated, substance use, including alcoholism, was considered immoral but is modernly accepted as an involuntary genetic disorder.¹³² Likewise, the habitual drunkard provision should be analyzed as a disease and not as a moral shortcoming.

B. THE HABITUAL DRUNKARD PROVISION SHOULD BE DISTINGUISHED BECAUSE THE REMAINING PRECLUDED CATEGORIES INDICATE VOLUNTARY BEHAVIORS

All of the precluded behaviors in the good moral character statute involved more voluntary decisions, with the exception of the habitual drunkard provision, which can be distinguished by its more involuntary nature. The statute lists eight behaviors that preclude a person from showing good moral character.¹³³ A person falling within one or more of

¹²⁶ U.S. DEP'T HEALTH & HUMAN SERV., OFFICE OF THE SURGEON GEN., *supra* note 25, at 1-1 to -12.

¹²⁷ *Id.* at 2-1.

¹²⁸ *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1053-54 (9th Cir. 2017) (Thomas, J., dissenting).

¹²⁹ *Id.* at 1057.

¹³⁰ *Ledezma-Cosino v. Sessions*, 857 F.3d at 1046-47.

¹³¹ See *Drunkard*, BLACK'S LAW DICTIONARY (10th ed. 2014); see also *Alcoholic*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹³² U.S. DEP'T HEALTH & HUMAN SERV., OFFICE OF THE SURGEON GEN., *supra* note 25, at 2-1.

¹³³ 8 U.S.C. § 1101(f) (2014).

these enumerated categories is barred from proving that he or she is of good moral character.¹³⁴ Each of these prohibited behaviors includes a voluntary component with the exception of the habitual drunkard provision.¹³⁵ First, undocumented individuals entering the United States to promote prostitution, smuggling, polygamy, and other criminal acts are barred from showing they have good moral character.¹³⁶ The second and third categories involve gambling and provide that a person will inherently lack good moral character if their primary “income is derived principally from *illegal* gambling activities” or if they have convictions for at least two gambling offenses.¹³⁷ Certain gambling activities are considered illegal.¹³⁸ Although what constitutes “illegal gambling” varies by state, running an illegal gambling business will typically qualify as an “illegal gambling activity.”¹³⁹ Fourth, a person that chooses to give false testimony to benefit from the protections of the United States laws governing immigration and nationality will also be barred from showing good moral character.¹⁴⁰ Fifth, a person convicted of crimes and confined for an aggregate 180 days will be precluded.¹⁴¹ Sixth, an applicant convicted of an aggravated felony will lack good moral character.¹⁴² Finally, individuals engaging in conduct violating religious freedom or relating to participation in Nazi persecution automatically lack good moral character.¹⁴³

In contrast to the categories above, suffering from habitual drunkenness is more often than not accompanied by involuntary and genetic predispositions to alcohol abuse.¹⁴⁴ Alcoholism has been scientifically proven to be an uncontrollable behavior in many people.¹⁴⁵ As of 2015, 15.1 million adults suffer from Alcohol Use Disorder,¹⁴⁶ which is a “chronic relapsing brain disease characterized by an impaired ability to stop or control alcohol use despite adverse social, occupational, or health

¹³⁴ See *Ledezma-Cosino v. Sessions*, 857 F.3d at 1052.

¹³⁵ See 8 U.S.C. § 1101(f) (2014).

¹³⁶ 8 U.S.C. § 1101(f)(3) (2014).

¹³⁷ 8 U.S.C. § 1101(f)(4)-(5) (2014) (emphasis added).

¹³⁸ 18 U.S.C. § 1955 (2014).

¹³⁹ *Id.*

¹⁴⁰ 8 U.S.C. § 1101(f)(6) (2014).

¹⁴¹ 8 U.S.C. § 1101(f)(7) (2014).

¹⁴² 8 U.S.C. § 1101(f)(8) (2014).

¹⁴³ 8 U.S.C. § 1101(f)(9) (2014).

¹⁴⁴ U.S. DEP’T HEALTH & HUMAN SERV., OFFICE OF THE SURGEON GEN., *supra* note 25, at 2-1.

¹⁴⁵ *Id.*

¹⁴⁶ *Alcohol Facts and Statistics*, NAT’L INST. ON ALCOHOL ABUSE & ALCOHOLISM, <https://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/alcohol-facts-and-statistics> (last updated Aug. 2018).

consequences.”¹⁴⁷ Thus, labeling a person as a “habitual drunkard” for something they cannot control is an inappropriate way to approach this inquiry. By associating people classified as habitual drunkards with the other precluded categories, and allowing this classification to stand, the court ignored the fact that alcoholism is a disease that is comprised of an involuntary urge to consume alcohol. Therefore, being a habitual drunkard is not a voluntary behavior that should preclude a person from showing that he or she has good moral character despite a dependence on alcohol.

C. THE NINTH CIRCUIT EFFECTIVELY TREATED ALCOHOL CONSUMPTION AS A FELONY BECAUSE IT FAILED TO CONSIDER THE LEGALITY OF ALCOHOL CONSUMPTION

Each of the eight provisions in the good moral character statute, with the exception of being a habitual drunkard, encompass behavior that is illegal in some way.¹⁴⁸ Illegal gambling,¹⁴⁹ polygamy,¹⁵⁰ and aggravated felonies¹⁵¹ to name a few of the precluded categories, are all behaviors or actions that have an illegal component; whereas drinking alcohol is legal, except when drinking under the legal drinking age limit.¹⁵² The habitual drunkard provision was passed in 1952,¹⁵³ 19 years after the Twenty-First Amendment repealed prohibition.¹⁵⁴ Since the habitual drunkard provision was enacted when the Constitution no longer prohibited alcohol, the act of merely drinking has been legal continuously from the time Congress enacted this provision.¹⁵⁵ Thus, the Ninth Circuit erred by allowing the habitual drunkard provision to stand amidst other illegal activities that actually indicate a lack of good moral character.

Further, comparing habitual drunkards to most of the other categories within the good moral character statute makes the act of drinking

¹⁴⁷ *Id.*

¹⁴⁸ See 8 U.S.C. § 1101(f) (2014).

¹⁴⁹ 8 U.S.C. § 1101(f)(4) (2014).

¹⁵⁰ 8 U.S.C. § 1101(f)(3) (2014).

¹⁵¹ 8 U.S.C. § 1101(f)(8) (2014).

¹⁵² See U.S. CONST. amend. XXI; see also National Minimum Drinking Age Act, 23 U.S.C. § 158 (2012), available at <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title23/pdf/USCODE-2011-title23-chap1-sec158.pdf> (Although there was a time between the ratification of the Eighteenth Amendment in 1919 and the ratification of the Twenty-First Amendment in 1933 when drinking alcohol was illegal, that period of time is irrelevant to the present inquiry because the habitual drunkard provision was passed in 1952 after drinking became legal again in 1933.).

¹⁵³ Immigration and Nationality Act, Pub. L. No. 82-414, § 101, 66 Stat. 163, 167 (1952) (codified as amended at 8 U.S.C. § 1101(f)(1)), <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/act.html>.

¹⁵⁴ See U.S. CONST. amend. XXI.

¹⁵⁵ See *id.*

synonymous to felonies.¹⁵⁶ Felonies are “serious crime[s], characterized under federal law and many state statutes as any offense punishable by death or imprisonment in excess of one year.”¹⁵⁷ Drinking alcohol habitually is neither a crime nor an offense that is “punishable by death or imprisonment in excess of one year.”¹⁵⁸ Although there are restrictions related to the consumption of alcohol, such as driving under the influence,¹⁵⁹ the mere consumption of alcohol is not.¹⁶⁰ Under the penalty statute for driving under the influence, regardless of repeated offenses, DUIs will always result in less than a year of imprisonment and are therefore not a felony by definition.¹⁶¹

Moreover, many lower courts agree that one or two alcohol-related convictions does not preclude an applicant from establishing good moral character.¹⁶² Although most of these cases are unreported, courts have found that a person does not lack good moral character merely because he has one or two DUIs or other alcohol-related offenses.¹⁶³ Therefore, even if there are some alcohol-related offenses, neither the act of drinking nor a single DUI should preclude the finding of good moral character.

V. SOLUTIONS

A. THE COURT SHOULD CLEARLY DEFINE THE TERM HABITUAL DRUNKARD AND DISTINGUISH IT FROM THE TERM “ALCOHOLIC”

The court should use its power of statutory interpretation to clearly define and distinguish habitual drunkards from alcoholics. Although the prevailing view decades ago was that people who consumed alcohol were inherently immoral,¹⁶⁴ modern trends now accept people suffering

¹⁵⁶ See generally 8 U.S.C. § 1101(f) (2014).

¹⁵⁷ *Felony*, FREE DICTIONARY, <https://legal-dictionary.thefreedictionary.com/felony> (last visited Sept. 11, 2018).

¹⁵⁸ See U.S. CONST. amend. XXI; see also *Felony*, FREE DICTIONARY, <https://legal-dictionary.thefreedictionary.com/felony> (last visited Sept. 11, 2018).

¹⁵⁹ See 23 U.S.C. § 164 (2016).

¹⁶⁰ See U.S. CONST. amend. XXI.

¹⁶¹ See 23 U.S.C. § 164(a)(5) (2016).

¹⁶² *Rangel v. Barrows*, No. 4:07-cv-279, 2008 WL 4441974, at *3 (E.D. Tex. Sept. 25, 2008).

¹⁶³ See *Rangel v. Barrows*, No. 4:07-cv-279, 2008 WL 4441974, at *3 (E.D. Tex. Sept. 25, 2008); *Ragoonanan v. U.S. Citizenship & Immigration Serv.* No. 07-3461 PAMJSM, 2007 WL 4465208, at *5 (D. Minn. Dec. 18, 2007); *Yaqub v. Gonzales*, No. 1:05-cv-170, 2006 WL 1582440, at *4 (S.D. Ohio June 6, 2006); and *Le v. Elwood*, No. Civ. A. 02-CV-3368, 2003 WL 21250632, at *3 (E.D. Pa. Mar. 24, 2003).

¹⁶⁴ U.S. DEP’T HEALTH & HUMAN SERV., OFFICE OF THE SURGEON GEN., *supra* note 25, at 2-1.

from alcoholism as people suffering from a disease and not persons having a character flaw.¹⁶⁵ If the court wishes to uphold the habitual drunkard provision as it is, then the court should “determine the meaning of the phrase habitual drunkard in a way that does not make the phrase synonymous with ‘alcoholic.’”¹⁶⁶ By failing to create a distinction between the two terms, the court interprets that those suffering from and diagnosed with the disease of alcoholism are immoral, rather than sick.¹⁶⁷ As discussed above, alcoholism is modernly accepted as a disease or disorder.¹⁶⁸ Thus, the court maintained the archaic view that excessive alcohol consumption means a person cannot have good moral character despite a person’s medical diagnosis as an alcoholic. Although actually changing the good moral character statute is up to Congress, by not clearly defining or distinguishing the terms habitual drunkard and alcoholic, the court failed to alert Congress to the potential problems with applying the statute fairly.

B. THE COURT SHOULD ALSO PROPOSE THAT CONGRESS AMEND THE GOOD MORAL CHARACTER STATUTE TO BETTER DEFINE HABITUAL DRUNKARD

Further, the court should recommend that Congress reconsider the effects of the habitual drunkard provision and revise this statute in one of two proposed amendments. First, the statute would still have its desired effect by removing the habitual drunkard provision from outright precluding a finding of good moral character. The only other reported Board of Immigration Appeals decision to use the habitual drunkard provision was decided nearly 60 years ago.¹⁶⁹ In *In re H*, the Board of Immigration Appeals held that the applicant was not eligible for cancellation of removal and was barred from relief because he fell within the habitual drunkard provision “and is thereby unable to prove good moral character.”¹⁷⁰ There are no other reported cases discussing the habitual drunkard provision in the removability or cancellation of removal realms.

Second, if removal of this provision is considered unwarranted, the statute should adequately and precisely define the term habitual drunkard in order for courts to better apply it since it is unclear how a habitual

¹⁶⁵ *Id.*

¹⁶⁶ *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1060 (9th Cir. 2017) (Thomas, J., dissenting).

¹⁶⁷ *Id.* at 1058-59.

¹⁶⁸ U.S. DEP’T HEALTH & HUMAN SERV., OFFICE OF THE SURGEON GEN., *supra* note 25, at 2-1.

¹⁶⁹ *Ledezma-Cosino v. Sessions*, 857 F.3d at 1054.

¹⁷⁰ *In re H*, 6 I. & N. Dec. 614 (B.I.A. 1955).

drunkard differs from being medically diagnosed as an alcoholic. As this case indicates, the lack of a clear definition detailing who qualifies as a habitual drunkard makes it difficult to properly adjudicate petitions for cancellation of removal.¹⁷¹ Originally, a three-judge panel of the Ninth Circuit found the habitual drunkard provision to be unconstitutional.¹⁷² The three-judge panel defined habitual drunkards as “persons with chronic alcoholism” which would be more consistent with the modern views of alcoholism as a disease and not a moral character flaw.¹⁷³ The en banc panel similarly varied in its interpretations of the provision’s meaning by defining habitual drunkard as “a person who regularly drinks alcoholic beverages to excess.”¹⁷⁴ Chief Judge Thomas’s dissent does not directly define habitual drunkard, but urges the court or Congress to determine the correct legal definitions of “habitual drunkards” and “chronic alcoholics” since they are not synonymous.¹⁷⁵ In the Ninth Circuit alone, three different groups of judges have defined habitual drunkard differently and thus, at the very least, a clear definition of habitual drunkard needs to be provided if this provision is to be used more frequently in the future. A clarifying definition is needed to ensure that applicants seeking cancellation are actually morally compromised rather than suffering from a medical disease.

C. THE COURT SHOULD ESTABLISH A REBUTTABLE PRESUMPTION REGARDING A PERSON’S GOOD MORAL CHARACTER WITHIN THE CONTEXT OF HABITUAL DRUNKARDS IF STATUTORY AMENDMENTS ARE DISFAVORED

In the context of habitual drunkards, courts should implement a rebuttable presumption that allows people who fall into the habitual drunkard category to provide evidence that he or she maintains good moral character. As it stands now under the good moral character statute, undocumented applicants falling within the habitual drunkard provision are automatically barred from showing they have good moral character.¹⁷⁶ When a person does not fall within one of the categories that automatically preclude a finding of good moral character, courts balance favorable and unfavorable facts that provide insight into a person’s char-

¹⁷¹ Ledezma-Cosino v. Sessions, 857 F.3d at 1058.

¹⁷² Ledezma-Cosino v. Lynch, 819 F.3d 1070, 1073 (9th Cir. 2016), *vacated*, 857 F.3d 1042 (9th Cir. 2017).

¹⁷³ *Id.* at 1075.

¹⁷⁴ Ledezma-Cosino v. Sessions, 857 F.3d at 1046.

¹⁷⁵ *Id.* at 1053-54.

¹⁷⁶ 8 U.S.C. § 1101(f) (2014).

acter to determine whether an applicant has good moral character.¹⁷⁷ Due to the historically negative view of alcohol,¹⁷⁸ this balancing test is not currently applied to people deemed habitual drunkards.¹⁷⁹ However, this Note urges the court to reconsider the current approach to allow applicants that inevitably fall within this category to systematically show their good moral character, despite the possibility of alcohol dependence. The proposed alternative balancing test would weigh favorable and unfavorable factors of a person's character. It is the fact finder's function to gather all the evidence and adjudicate the issues based on all of the facts presented.¹⁸⁰ Thus, implementing a balancing test that allows for a showing that a person is capable of maintaining good moral character despite alcohol dependency may inject more fairness into the process. This would hold persons falling into this category to a higher standard because instead of merely providing evidence for the court to balance, as the court does in other situations, the applicant would need to provide more evidence to overcome the presumption. Despite being a higher standard, it would at least allow the applicant a chance to overcome this presumption if his or her only flaw is an involuntary urge to consume alcohol.

VI. CONCLUSION

In *Ledezma-Cosino v. Sessions*, the Ninth Circuit missed an opportunity to declare the good moral character statute, and specifically the habitual drunkard provision of that statute, as vague and unconstitutional. The court could have proposed a better way to handle the inquiry into someone's good moral character rather than outright preclude him or her due to behavior not fully within his or her control. Going forward, Congress should amend the statutes accordingly or the courts should follow a balancing test to determine whether each person found to be a habitual drunkard is of good moral character despite being diagnosed with alcoholism. This balancing test will ensure a higher degree of fairness to all affected by the preclusion of showing good moral character.

Ledezma-Cosino v. Sessions may pave the way to broadening the methods the court uses to find a person ineligible for cancellation of removal since the habitual drunkard provision has not been discussed or

¹⁷⁷ *Torres-Guzman v. INS*, 804 F.2d 531, 534 (9th Cir. 1986).

¹⁷⁸ U.S. DEP'T HEALTH & HUMAN SERV., OFFICE OF THE SURGEON GEN., *supra* note 25, at 2-1.

¹⁷⁹ *See* 8 U.S.C. § 1101(f); *see also* *Torres-Guzman v. INS*, 804 F.2d at 534 (rejecting the notion that conduct not within the enumerated categories of 8 U.S.C. § 1101(f) can be a bar to good moral character *without* considering other relevant factors) (emphasis added).

¹⁸⁰ *Torres-Guzman v. INS*, 804 F.2d at 534.

used in any reported cases as a basis for finding a lack of good moral character in over 50 years.¹⁸¹ Despite significant evidence that people who drink in excess often do so out of their control,¹⁸² Congress has implemented a federal law¹⁸³ that will exclude undocumented immigrants based on a diagnosis of alcoholism, which is something that is less voluntary than what was previously known to society.¹⁸⁴ At the very least, because this provision has not been used excessively in the past, the Ninth Circuit's decision will likely bring the provision back into the attention of the agencies that adjudicate claims relating to immigration as a means to exclude undocumented immigrants for lacking good moral character.

With the current presidential administration focusing its efforts on reducing illegal immigration,¹⁸⁵ it is likely that the habitual drunkard provision will become more relevant going forward. The United States was once considered a “nation of immigrants,”¹⁸⁶ yet the current administration seeks to take that thought out of the minds of Americans by increasing its efforts to control, minimize, and criminalize immigration.¹⁸⁷ The United States would not be where it is today if it were not for immigrants. Thus, rather than ignoring the plight of immigrants that need help, the government should focus its efforts on helping them and once again pride itself as a “nation of immigrants.”¹⁸⁸ Alcoholism is a continuing problem throughout society, even among immigrants.¹⁸⁹ Thus, instead of criminalizing the consumption of alcohol, as the good moral character statute does, Congress and the courts should create legislation that promotes recovery, rather than deportation. Although it is too late for Salomon Ledezma-Cosino since the Supreme Court denied certiorari,¹⁹⁰ it is not too late for the courts and Congress to change the course of future jurisprudence surrounding this vague statute.

¹⁸¹ Holliday, *supra* note 85, § 3.

¹⁸² See U.S. DEP'T HEALTH & HUMAN SERV., OFFICE OF THE SURGEON GEN., *supra* note 25, at 2-1.

¹⁸³ 8 U.S.C. § 1101(f)(1) (2014).

¹⁸⁴ See U.S. DEP'T HEALTH & HUMAN SERV., OFFICE OF THE SURGEON GEN., *supra* note 25, at 2-1.

¹⁸⁵ President Donald Trump, Inaugural Address (Jan. 20, 2017) (transcript available at <https://www.whitehouse.gov/briefings-statements/the-inaugural-address/>) (the administration of President Trump declaring immigration one of its top priorities).

¹⁸⁶ KENNEDY, *supra* note 1.

¹⁸⁷ See Sephora Smith, *Trump Again Threatens Government Shutdown Over Immigration*, NBC NEWS (July 29, 2018), <https://www.nbcnews.com/politics/donald-trump/trump-again-threatens-government-shutdown-over-immigration-n895586>.

¹⁸⁸ KENNEDY, *supra* note 1.

¹⁸⁹ Szaflarski et al., *supra* note 11.

¹⁹⁰ *Ledezma-Cosino v. Sessions*, 138 S. Ct. 643 (2018).

