THE FAILURES OF GOOD MORAL CHARACTER DETERMINATIONS FOR NATURALIZATION

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This Article examines the effects of the good-moral-character requirement in naturalization proceedings. Specifically, it looks to such character requirements as a method by which a citizen polity screens out undesirable noncitizens from those who are deserving of inclusion in the "in" group of citizenship. The Article discusses historical methods of good-moral-character adjudication, and especially how such methods carried an undercurrent of forgiveness and redemption—an undercurrent lacking in the current method of statutory bars to showings of good moral character. By looking at specific examples of statutory bars to showings of good moral character, this Article argues that the overinclusive nature of these statutory bars, combined with the rigidity of the enumerated list of statutory bars, renders the current test ineffective at screening undesirable noncitizens from desirable noncitizens and precludes the naturalization of a vast population of otherwise deserving intending immigrants.

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INTRODUCTION

Modern immigration laws are filled with historical relics, circular reasoning, and impenetrable definitions. It should be no surprise then that an applicant for formal legal citizenship—the status one is conferred by U.S. Citizenship and Immigration Services (USCIS) after an immigration journey that may have spanned decades—must overcome legal criteria, centuries old, that lack clarity and have lost their original purpose. While some citizenship scholars argued in the late 2000s that formal legal citizenship was anachronistic in an increasingly interconnected world, the last decade's wave of nationalism and anti-immigrant sentiments has largely changed that view.[1] Now, the protections that come with formal citizenship are increasingly relevant in the lives of millions of lawful permanent residents, ready to take that final step, as they contend with a new climate of fear amidst strict enforcement initiatives, decreased legal protections, and social exclusion. However, despite full legal citizenship's increased relevance, there are still significant, though outdated and inefficient, hurdles that intending immigrants must overcome to reach the ultimate goal of naturalization—the focus of which, here, is the concept of "good moral character."[2]

As Professor Kevin Lapp notes, while commentators have explored citizenship and its requirements at length, discussions of good moral character and its broad reach, especially as criminal law and immigration law have converged, are notably lacking.[3] Within this gap in the discussion of good moral character

1. *Compare* PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION (2008) (arguing citizenship status has become irrelevant in an increasingly globalized world), *with* MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA (2020) (describing the impact of current exclusionary immigration policy on citizenship).

2. Immigration and Nationality Act § 101(f), 8 U.S.C. § 1101(f); 8 C.F.R. § 316.10 (2021); *see, e.g.*, *In re* Mogus, 73 F. Supp. 150, 152 (W.D. Pa. 1947) (describing good moral character as the moral standard of the average citizen).

3. *See* Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1573 (2012).

for naturalization purposes, this Article looks to such character requirements as a method by which the citizen polity screens out undesirable noncitizens from those who are deserving of inclusion as part of the "in" group of citizenship. This Article discusses historical methods of good-moral-character adjudication, and especially how such methods carried an undercurrent of forgiveness and redemption—an undercurrent that the current method of statutory bars to good moral character notably lack. By looking at specific examples of statutory bars to showings of good moral character, this Article argues that the overinclusive nature of these statutory bars, combined with the rigidity of an enumerated list of statutory bars to a showing of good moral character, renders the current test ineffective at screening undesirable noncitizens from desirable noncitizens, and in fact precludes the naturalization of a vast population of otherwise deserving intending immigrants.

Part I of this Article discusses the background of naturalization procedures and good-moral-character requirements and links these requirements to citizen society's right to exclude. Part II explores good moral character, both through its history and by providing exemplars of modern methods that bar intending immigrants from naturalizing. These exemplars demonstrate that the modern applications of the good-moral-character requirement in naturalization proceedings are unreasonably strict, are overbroad, and fail to accomplish the purpose of a good-moral-character requirement. Part III ends with a brief discussion of potential changes to the system and considers which methods are most likely to bring about the intended goal of a good-moral-character determination.

I. CITIZENSHIP, NATURALIZATION, AND THE RIGHT TO EXCLUDE

From the earliest democracies, citizen society has determined who, when, and how an individual outside of the polity may join.[4] The United States is no different. As the United States has seen an increasingly large number of groups become eligible for citizenship with, for example, the enactment of the Fourteenth and Nineteenth Amendments and the firm

4. *See, e.g.*, RICHARD BELLAMY, CITIZENSHIP: A VERY SHORT INTRODUCTION 27 (2008).

establishment of birthright citizenship,[5] relics of early eligibility criteria remain and must be overcome by intending immigrants to this day.[6] As background, the process of naturalization itself is based in the Immigration and Nationality Act (INA), specifically sections 311 to 331. The INA requires, absent special circumstances, an individual to have resided continuously in the United States for five years as a lawful permanent resident and to have been physically present in the United States for at least half of that time; to be eighteen years old; to be able to read, write, and speak English proficiently; to have a basic understanding of U.S. history and government; and to have been a person of good moral character during the, typically, five years preceding their application.[7] Although the statutory period for a good-moral-character inquiry is normally five years, an adjudicator is expressly able to look at behavior outside of this period in making their determination.[8] This requirement of "good moral character" has been present in naturalization statutes since the earliest naturalization statute in the late 1700s.[9]

That an intending immigrant, one who seeks to become a full citizen of the United States, must possess "good moral character" is perhaps not controversial on a conceptual level. After all, it is certainly in the interest of society to keep separate those who would do it harm. With the potential for large numbers of those residing within a country to be barred from becoming full

5. United States v. Wong Kim Ark, 169 U.S. 649, 693 (1989).

6. Citizenship is a multivalent concept, and distinctions in citizenship status are conceptually many. In this Article, citizenship will refer to formal legal citizenship—the legal status that is afforded to those born in the United States or who have completed the naturalization process. A noncitizen, therefore, refers to a wide range of individuals, from lawful permanent residents ready to apply for citizenship, to foreign born individuals with valid temporary visas, to undocumented immigrants. For purposes of this Article, the concept of citizenship, by necessity, is somewhat conflated with the concept of full citizenship—that which conveys all of the rights and privileges, legal protections, and social and cultural inclusions and identities that one would associate with being a full member of the political collective. To discuss the good-moral-character requirement for naturalization, this distinction is largely immaterial, but the author acknowledges that the issue of inclusion and exclusion in the polity after being granted citizenship is more nuanced than this Article addresses. For a discussion on how even those members of citizen society lack some of the full legal protections and benefits afforded to "full citizens," such as migrants, children, and the disabled, see ELIZABETH F. COHEN, SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS (2009).

7. Immigration and Nationality Act § 316, 8 U.S.C. § 1427.

8. *Id.* § 1427(e).

9. Naturalization Act of 1790, Pub. L. No. 1-3, §1, 1 Stat. 103, 103 (repealed 1795).

legal citizens, then, what is the purpose of citizenship in the first place? One answer, and one which seems to provide the greatest support to the concept of a good-moral-character requirement, is that citizenship—and to a larger extent, the process of naturalization—is one method of providing for the inclusion of the deserving members of the polity, separating them from the "others" who are either unworthy or unqualified for membership.[10] It is to separate the "good" immigrant from the "bad" immigrant, to select those who are worthy of full inclusion in society, and in so screening, to brand those who possess disqualifying characteristics as undesirable.

This concept of screening out those whose moral character is suspect, or even poor, makes intuitive sense, but the modern "good-moral-character" requirements are massively overinclusive, denying inclusion to otherwise deserving immigrants, and infected with the biases of adjudicators. These flaws lead to a chilling effect on naturalization applications for deserving immigrants, barring these immigrants from being able to become full members of the polity, or else barring the qualified and desirable solely based on their membership in a politically unpopular group. The test does not comport with modern concepts of morality, and instead wholly fails to reach the purpose and goal of a good-moral-character assessment.

Rather, "citizenship" as a concept inherently creates two groups: those who have it and those who do not. Further, because the formal citizen is afforded increased rights, such as the right to self-governance by means of voting; increased protections, such as the protection from deportation; and increased privileges, such as the ability to travel freely, these groups are not only separate but hierarchical. The groups are not coextensive, and the noncitizen "other" is excluded from many rights, protections, and privileges that render them subordinate to the citizen.

As such, citizenship can be seen as a system of inclusion and exclusion, of the included members of the polity and the "other." As Rogers Brubaker puts it, it is a method of "social closure" that separates the in-group from the "other."[11] He states that these in-groups and out-groups can be defined in two ways: the

10. *See* ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 29 (1992) (discussing the classification of citizenship through insider-outsider distinctions).

11. *Id.* at 21.

outsider "may be defined and identified residually, as [a non-member], or directly, as [a bearer] of some disqualifying attribute."[12] In the first method, the in-group is defined positively, such as being members of a family, and the other is defined residually by not being a part of the in-group.[13] "They are excluded not because of what they are but because of what they are not—because they are not recognized or acknowledged as insiders."[14] On the other hand, an out-group may also be branded by some disqualifying characteristic or attribute that positively identifies them as "other."[15]

This method of conceptualizing the naturalization process is helpful in several respects. It demonstrates how social exclusion can function on a large scale, such as in a nation-state: it assists one in understanding the ways that in-groups and out-groups can be delineated, and it provides a framework for understanding why certain barriers in the naturalization process exist. The first method of defining the "other" that Brubaker describes, that of a residual definition, is an intuitive way to think about noncitizens who are not yet, but may someday be, qualified for citizenship. These noncitizens have perhaps not yet met the temporal residency requirements for naturalization. They are not categorically excluded, but neither are they included in the in-group. On the other hand, there are many in the noncitizen category who *are* categorically and indefinitely excluded. These are those individuals with good-moral-character problems. A line has been drawn between citizen and noncitizen, and by having acted in a certain way at a certain time, these individuals are no longer permitted to cross that line.

But who draws theses lines? It is inherently the federal government that grants formal citizenship. Congress certainly drafts the legislation that provides who is precluded from establishing good moral character, but the lines themselves have, since the country's first naturalization laws, been drawn by the citizen society as a whole.[16]

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12. *Id.* at 29.
13. *Id.*
14. *Id.*
15. *Id.*
16. *See* 1 ANNALS OF CONG. 1147–64 (1790) (Joseph Gales ed., 1834). "I think, before a man is admitted to enjoy the high and inestimable privileges of a citizen of America, that something more than a mere residence among us is necessary. . . . [H]e ought to pass some time in a state of probation, and, at the end of the term, be able to bring testimonials of a proper and decent behavior . . . ." *Id.* at 1153 (statement of Rep. Jackson). These debates led to the enactment of the first

Even nearly a century and a half ago, courts recognized that society shifts and that a good-moral-character assessment must also necessarily shift with both society and society's notions of morality. In the first reported case to discuss good moral character, in 1878, the court held that the standard would vary from one generation to the next, and "probably the average man of the country is as high as it can be set."[17] The standard courts used was, therefore, one based on the "generally accepted moral conventions current at the time."[18] In modern adjudications, applicants must show that they possess "character which measures up to the standards of average citizens of the community in which the applicant resides."[19] It has therefore always been, however imperfectly, citizen society that defines what should constitute the screening criteria for the inclusion of the noncitizen "other" into the polity, or the indefinite exclusion from full membership.

This conception of the "other" manifests in two ways in the immigration context, as discussed by Nora V. Demleitner: the criminal noncitizen and the noncitizen as a financial burden.[20] Currently, the dominant screen to separate the "good" immigrant from the "bad" in U.S. immigration law is by conceiving the noncitizen "other" as criminal. The use of the noncitizen as a financial-burden paradigm is more common in the context of admissibility as a temporary nonimmigrant or as a permanent resident.[21] One warning Professor Demleitner shares is that

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naturalization law in the United States, the Naturalization Act of 1790, Pub. L. No. 1-3, 1 Stat. 103 (repealed 1795). This law required, among other things, that an applicant prove to the satisfaction of the court that they were a person of good moral character. The concept was left undefined until 1952, but the debate surrounding the bill illuminates its intended meaning and, indeed, foreshadows the definitions used today for what constitutes good moral character: "character which measures up to the standards of average citizens of the community in which the applicant resides." 12 U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS POLICY MANUAL pt. F, ch. 1 [hereinafter USCIS POLICY MANUAL], https://www.uscis.gov/policy-manual/volume-12 [https://perma.cc/9MJT-ZAJB].

17. *In re* Spenser, 22 F. Cas. 921, 921 (C.C.D. Or. 1878) (No. 13,234).

18. Repouille v. United States, 165 F.2d 152, 153 (2d Cir. 1947) (quoting United States v. Francioso, 164 F.2d 163, 163 (2d Cir. 1947)).

19. USCIS POLICY MANUAL *supra* note 16, at pt. F, ch. 1.

20. *See* Nora V. Demleitner, *The Fallacy of Social "Citizenship," or the Threat of Exclusion*, 12 GEO. IMMIGR. L.J. 35 (1997).

21. Indeed, a noncitizen may be prohibited from the acquisition of a nonimmigrant or immigrant visa or barred from adjusting their status to that of a lawful permanent resident if they, "in the opinion" of the adjudicator, are "likely at any time to become a public charge." Immigration and Nationality Act § 212(a)(15), 8 U.S.C. § 1182(a)(4)(A). There were recent attempts to greatly expand this bar. *See,*

such characterizations come with a real danger, as "[a]ny negative construction of an 'other' carries with it the possibility that ultimately the separation and possibly even the destruction of the 'other' will appear rational, necessary and in the end even desirable."[22]

The discourse surrounding immigrants in recent years demonstrates just that. While immigration law has always been rife with stereotyping, scapegoating, and outright racism,[23] the modern concept of the "criminal alien" began to rear its head in the late 1990s, when the legislative branch itself began investigating this "serious and growing threat."[24] Studies show that immigrants as a group commit substantially less crime,[25] yet in recent years, the executive has painted noncitizens as a highly dangerous, highly criminal group.[26] Justifications for this view largely stem from perceptions about the undocumented immigrant population perpetually breaking the law, a perception that is applied to the noncitizen population as a whole. For example,

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e.g., Proclamation No. 9945, 84 Fed. Reg. 53,991 (Oct. 9, 2019) (suspending entry of immigrants who lack health insurance or the liquid assets to pay for medical treatment).

22. *See* Demleitner, *supra* note 20, at 42.

23. Perhaps one of the clearest examples of this, one of the nation's early immigration laws was entitled the "Chinese Exclusion Act" of 1882, which sought to do just that. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 59 (repealed 1943). Similarly, the Naturalization Act of 1790, which provided the earliest methods of naturalization, was only applicable to "aliens being free white persons and to aliens of African nativity and to persons of African descent." Naturalization Act of 1790, Pub. L. No. 1-3, §1, 1 Stat. 103, 103 (repealed 1795). This led to such cases as *Ozawa v. United States*, 260 U.S. 178 (1922), in which an individual from Japan argued that, due to the shade of his skin, he qualified as a "free white person" and was, therefore, entitled to naturalization. *See id.* at 190. Facial racial distinctions continued to exist in U.S. immigration law until the enactment of the McCarran-Walter Act, now known as the Immigration and Nationality Act, in 1952. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952).

24. *See* S. REP. NO. 104-48, at 1 (1995). The late 1990s is also when Congress enacted major reforms to the immigration system, which created new grounds of inadmissibility, new procedures for removal proceedings, new measures on stricter border control, and new penalties for undocumented noncitizens present in the United States. *See* Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

25. *See* Alex Nowrasteh, *Criminal Immigrants in Texas: Illegal Immigrant Conviction and Arrest Rates for Homicide, Sex Crimes, Larceny, and Other Crimes*, CATO INST. 1, 2, https://www.cato.org/sites/cato.org/files/pubs/pdf/irpb-4-updated.pdf [https://perma.cc/EQ4W-SS32] (Aug. 2018).

26. Alex Nowrasteh, *The White House's Misleading & Error Ridden Narrative on Immigrants and Crime*, CATO INST.: CATO LIBERTY (June 25, 2018, 8:35 AM), https://www.cato.org/blog/white-houses-misleading-error-ridden-narrative-immigrants-crime [https://perma.cc/5NXZ-QT9A].

during President Trump's Administration, a specific task force was created within the Department of Homeland Security (DHS) dedicated to reducing crime and protecting public safety by combatting "illegal immigration, drug trafficking, and violent crime."[27] Restrictionist groups reinforce views that immigrants remain criminals in perpetuity and, indeed, are a threat to national security.[28] Under these narratives, lawlessness is equated with the country's moral deterioration,[29] and thus, a large portion of the country perceives the noncitizen "other" as posing a threat to the moral fiber of society.[30]

It is this quality—criminality—that determines good moral character in the majority of situations. As discussed below, its application comports least with the moral convictions of modern society. Rather, as one reviews the list of bars to good moral character, it is clear that *character* is not what is at issue in a good-moral-character determination. Instead, it is simply an applicant's criminal record and a particular adjudicator's view on any list of crimes an individual may have committed.

With this understanding of how and why good moral character is used to determine which "others" are worthy of inclusion and which should be excluded, Part II will look to the citizenship process and the modern good-moral-character requirements to examine how effective, or rather ineffective, they are as screens for the undesirable, dangerous, and immoral.

II. WHAT IS "GOOD MORAL CHARACTER"?

To understand how the good-moral-character requirement fails, one first must understand what the requirement even is. Good-moral-character requirements have been a part of American immigration laws in one nebulous form or another since the

27. Exec. Order No. 13,776, 82 Fed. Reg. 10,699 (Feb. 9, 2017).

28. *See Illegal Immigration Is a Crime*, FED'N FOR AM. IMMIGR. REFORM (Mar. 2013), http://www.fairus.org/issue/illegal-immigration/illegal-immigration-crime [https://perma.cc/UN7A-6YTH].

29. *See* Peter H. Schuck, *Alien Rumination*, 105 YALE L.J. 1963, 1987 (1996) (book review) (reviewing anti-immigration activist Peter Brimelow's book, *Alien Nation*, which discusses crime, illegitimacy rates, and limited English proficiency as indicia of a decline in the moral values of immigrants).

30. *See, e.g.*, Erin Durkin, *Laura Ingraham Condemned After Saying Immigrants Destroy 'the America We Love'*, GUARDIAN (Aug. 9, 2018), https://www.theguardian.com/media/2018/aug/09/laura-ingraham-fox-news-attacks-immigrants [https://perma.cc/7GBJ-2CG6].

country passed its first naturalization statute in 1790.[31] Until the middle of the twentieth century, good moral character was not explicitly defined, whether in statute or elsewhere, and naturalization applications were adjudicated by federal judges. It was only with the ratification of the McCarren Walter Act in 1952, now known as the Immigration and Nationality Act, that Congress provided guidance on what good moral character is or should be.[32] Without express guidance from Congress, judges, sometimes decrying the highly subjective nature of the inquiry,[33] applied a rather forgiving standard based on the generally accepted moral conventions at the time.[34] An important distinction from modern adjudications, this standard focused exclusively on the present character of an applicant. Thus, even one convicted of murder outside of the statutory window was not forever precluded from demonstrating good moral character, so long as the conviction was outside of the statutory period by his next petition.[35] In the Immigration Act of 1990, Congress removed the district courts from the naturalization process and instead vested the Attorney General with exclusive jurisdiction to grant naturalization applications.[36] At this point, the legacy Immigration and Naturalization Service (INS), and now the USCIS, began to adjudicate naturalization applications.

Thus, modern adjudications are no longer conducted by federal judges, but instead by civil servants within the USCIS, housed within the DHS, and these adjudications no longer possess the forgiving and expansive view the courts formerly adopted. Whereas previously the standard was defined in the

31. Naturalization Act of 1790, Pub. L. No. 1-3, §1, 1 Stat. 103, 103 (repealed 1795).

32. *See* Immigration and Nationality Act, Pub. L. No. 82-414, § 316, 66 Stat. 163, 242–43 (1952).

33. *See* Johnson v. United States, 186 F.2d 588, 589 (2d Cir. 1951) ("[The Court] must own that the statute imposes upon courts a task impossible of assured execution; people differ as much about moral conduct as they do about beauty.").

34. *See* Repouille v. United States, 165 F.2d 152, 153 (2d Cir. 1947) (stating that a manslaughter conviction rendered an individual ineligible for naturalization for not possessing good moral character: "[W]e feel reasonably secure in holding that only a minority of virtuous persons would deem the practise [sic] [of euthanasia] morally justifiable, while it remains in private hands, even when the provocation is as overwhelming as it was in this instance").

35. *See id.* at 153–54. ("[W]e wish to make it plain that a new petition would not be open to this objection; and that the pitiable event, now long passed, will not prevent Repouille from taking his place among us as a citizen."); *see also* Lapp, *supra* note 3, at 1587.

36. Immigration Act of 1990, Pub. L. No. 101-649, § 401, 104 Stat. 4978, 5038 (codified as amended at 8 U.S.C. § 1421(a)).

affirmative, looking at what the generally accepted moral conventions *were* in contemporary society, good moral character under the INA focuses on what *precludes* a showing of good moral character.[37] Ostensibly, the USCIS has adopted the position that Congress "intended to make provision for the reformation and eventual naturalization of persons who were guilty of certain past misconduct;"[38] however, in practice, this seems to be little more than lip service. Where adjudications previously held an undercurrent of forgiveness and redemption, modern adjudications seek out black marks on an applicant's character, sometimes finding the applicant branded by a prior act that permanently precludes them from possessing good moral character.[39] The standard, importantly, is not defined as moral excellence, but as character "which measures up to the standards of average citizens of the community in which the applicant resides."[40]

In modern adjudications, USCIS officers first look to an applicant's conduct during the statutory period, normally five years, and judge if any conduct matches any bar to a demonstration of good moral character.[41] Importantly, the burden of proof is on the applicant to establish that they are a person of good moral character.[42] The adjudicator maintains some discretion to impose their view of what constitutes good moral character,[43] but in large part, the test now focuses on the statutorily enumerated bars. As Professor Kevin Lapp notes, the instructions for immigration officials on how to adjudicate good moral character focus almost entirely on how to find a *lack* of good moral character.[44] These statutory bars to good moral character can be roughly divided into two somewhat coextensive categories: criminal behavior and "immoral" conduct. While each of the enumerated bars suffers from the same issues of over-inclusiveness, in

37. Immigration Nationality Act § 101(f), 8 U.S.C. § 1101(f) ("No person shall be regarded as, or found to be, a person of good moral character who . . . .").

38. *See* USCIS POLICY MANUAL, *supra* note 16, at pt. F, ch. 1.

39. *Compare* Daddona v. United States., 170 F.2d 964, 965–66 (2d Cir. 1948) (finding good moral character although the applicant had been convicted of manslaughter only a few weeks outside of the statutory window), *with* 8 C.F.R. § 316.10(b)(1)(i) (2021) (an applicant is permanently barred from showing good moral character if he has been convicted of murder at any time).

40. USCIS POLICY MANUAL, *supra* note 16.

41. *See id.* at pt. F, ch. 5.

42. *See id.* at pt. F, ch. 1.

43. *See id.* at pt. F, ch. 5 ("An offense that does not fall within a permanent or conditional bar to GMC may nonetheless affect an applicant's ability to establish GMC.").

44. *See* Lapp, *supra* note 3, at 1607–08.

the interest of brevity, this Article looks to a few exemplars from each category.

A. Criminal Behavior

Criminal behavior, while likely one of the more intuitive categories of "immigrants who deserve excluding," presents significant problems, perhaps most strikingly due to the malleable definitions of certain criminal consequences in the immigration context.[45] Of the criminal bars to good moral character, there are certain permanent bars—murder,[46] persecution, torture, or genocide,[47] or commission of an aggravated felony[48]—which bar a finding of good moral character regardless of whether the conduct occurred during the statutory period. There are also conditional bars, which only theoretically bar a finding of good moral character if they happened during the statutory period of three or five years.[49]

1. Permanent Bars: Murder, Aggravated Felonies, Persecution, Torture, or Genocide

Certain behaviors permanently preclude an individual from demonstrating good moral character, and at first blush, these categories seem reasonable. After all, it seems to be a stretch to say that the character of an individual convicted of murder is really morally "good." Someone who participated in a genocide or torture is unlikely to have their morality measure up to that of the average citizen in the community in which they reside in the United States. A person convicted of an aggravated felony has ostensibly committed serious crimes that the average person would find morally reprehensible.

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45. For a criminal violation to qualify as a "conviction" in immigration law, an individual does not necessarily have to have undergone a jury trial, or even entered a plea of guilty. Under the INA, a deferred sentence, a diversionary program, or an expunged conviction all typically qualify as a conviction, and if the crime falls into one of the categories below, the individual suffers the same consequences as if they had received a guilty verdict after trial. *See* 8 U.S.C. § 1101(a)(48).

46. 8 C.F.R. § 316.10(b)(1)(i) (2021).

47. Immigration Nationality Act § 101(f)(9), 8 U.S.C. § 1101(f)(9).

48. 8 C.F.R. § 316.10(b)(1)(ii) (2021).

49. *See* Immigration Nationality Act § 101(f), 8 U.S.C. § 1101(f). It should be noted, however, that, as discussed above, an adjudicator is not bound by the statutory period, and so the commission of, or conviction for, a crime that occurred outside of the statutory period could still lead to an adjudicator denying a petition based on a lack of good moral character. *See* 8 U.S.C. § 1427(e).

However, under a doctrine focused on rehabilitation and forgiveness, the permanent bars are not as reasonable or necessary as they first appear. Before the permanent bars to establishing good moral character were codified in 1952, and before the ratification of the Immigration Act of 1990 in the context of aggravated felonies, as long as a conviction fell outside of the statutory period and evidence of rehabilitation was produced, even those convicted of manslaughter were able to naturalize. For example, in the 1948 case *Daddona v. United States*, a man who was indicted for second-degree murder, pleaded guilty to manslaughter, and was sentenced to five years in prison was able to establish his good moral character for purposes of naturalization.[50] In rejecting the Government's argument that his conviction should be taken into account and that the five-year statutory period should run from the time of the petitioner's release from prison, the court simply stated that "[t]he statute itself prescribes no such limitation, and we see no good reason for so construing it."[51] The fact that the petitioner in that case behaved in a positive manner while in prison was viewed as a positive factor in demonstrating his good moral character.[52]

Of course, the modern system need not be changed to the point that a murder committed one week prior to the statutory period cannot be considered relevant, but some measure of forgiveness and rehabilitation should be inherent in the system. As it is now, regardless of whether the murder was committed one year ago or forty, that individual is permanently barred from a showing of good moral character, and thus permanently barred from naturalizing.[53] The same is true of other crimes that result in a permanent bar to demonstrating good moral character. As long as the offense was committed after the ratification of the Immigration Act of 1990, regardless of when the individual was convicted of trafficking controlled substances, regardless of the amount, regardless of any extenuating circumstances, and regardless of any rehabilitation, they are forever relegated to being part of the "other" and denied the benefits that come with

50. Daddona v. United States, 170 F.2d 964, 965 (2d. Cir. 1948).

51. *Id.*

52. *See id.* at 965–66.

53. *See* 8 C.F.R. § 316.10(b)(1)(i) (2021) ("An applicant shall be found to lack good moral character, if the applicant has been [c]onvicted of murder at any time. . . .").

inclusion.[54] While stories of redemption, overcoming adversity, and realizing success after a prison term are common and popular,[55] the reality for millions of intending immigrants is that their single lapse in judgment relegates them to an eternity in limbo—residents of their chosen country but never citizens.

The injustice inherent in the policy of permanent bars becomes more evident when one examines what *constitutes* an aggravated felony. Immigration law is notorious for legal definitions that do not quite make sense and tests that are far from intuitive.[56] Indeed, for a crime to be an aggravated felony under the law, it need not be "aggravated" nor a felony.[57] Take, for example, the aggravated felony of illicit trafficking in a controlled substance.[58] To be permanently barred as an aggravated felon drug trafficker, courts have found that an individual need only have attempted to sell a controlled substance—with no specific amount necessary.[59] Another example of a crime that permanently barred an individual from showing good moral character, by virtue of its classification as an aggravated felony, was a conviction for misdemeanor shoplifting of a ten-dollar video game.[60]

This is not to say many aggravated felonies are not serious crimes—it is undeniable that they are. But the statutory definition of an "aggravated felony" is so broad as to be meaningless. A person with a misdemeanor shoplifting conviction is treated the same as a murderer or a bank robber. A person selling a

54. *See id.* § 316.10(b)(1)(ii); *see also* USCIS POLICY MANUAL, *supra* note 16, at pt. F, ch. 4.

55. *See, e.g.*, Reginald Dwayne Betts, *Could an Ex-Convict Become an Attorney? I Intended to Find Out*, N.Y. TIMES MAG. (Oct. 16, 2018), https://www.nytimes.com/2018/10/16/magazine/felon-attorney-crime-yale-law.html [https://perma.cc/LH2A-FBUP].

56. *See, e.g.*, David Bier, *Why the Legal Immigration System Is Broken: A Short List of Problems*, CATO INST.: CATO LIBERTY (July 10, 2018, 9:25 AM), https://www.cato.org/blog/why-legal-immigration-system-broken-short-list-problems [https://perma.cc/US5E-RRXC].

57. *See* AM. IMMIGR. COUNCIL, AGGRAVATED FELONIES: AN OVERVIEW (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/aggravated_felonies_an_overview_0.pdf [https://perma.cc/YXD4-DJK2]; *see also* United States v. Pacheco, 225 F.3d 148, 149 (2d. Cir. 2000) ("In the case before us, we deal with the question of whether Congress can make the word 'misdemeanor' mean 'felony.' As will be seen, we hold that it can . . . .").

58. Immigration Nationality Act § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).

59. *See* Pascual v. Holder, 707 F.3d 403 (2d. Cir. 2013) (conviction for third-degree criminal sale of a controlled substance constitutes an aggravated felony—even if the defendant did no more than offer or attempt to sell the cocaine), *aff'd on reh'g*, 723 F.3d 156 (2d Cir. 2013).

60. *See Pacheco*, 225 F.3d at 149 (one-year suspended sentence for shoplifting qualifies as an aggravated felony).

small amount of marijuana is treated the same as a major distributor of cocaine. The categorical bar to demonstrating good moral character is a dragnet that catches both minnows and sharks. Considering the DHS's massive enforcement infrastructure and the numerous ways a criminal noncitizen would find themselves in removal proceedings prior to qualifying for naturalization, at the point of naturalization, this good-moral-character test is far more likely to bar the individual with a minor conviction than the hardened criminal.[61] Indeed, Immigration and Customs Enforcement (ICE) arrests occur at probation offices,[62] at courthouses following criminal proceedings,[63] and in some jurisdictions, following criminal detention in jails.[64] As of 2020, 70 percent of the arrests ICE made occurred after a local law enforcement agency notified ICE of an immigrant's pending release from jail or state prison.[65]

There simply are not untold numbers of murderers, drug traffickers, and terrorists who have slipped through the dragnet of immigration enforcement and are now applying for naturalization. Those individuals have likely already found themselves

61. *See* DEP'T OF HOMELAND SEC., FY 2022 BUDGET IN BRIEF (2021), https://www.dhs.gov/sites/default/files/publications/dhs_bib_-_web_version_-_final_508.pdf [https://perma.cc/J8V8-MGUC]. For fiscal year 2022, Immigration and Customs Enforcement (ICE) is budgeted for 21,257 employees, *id.* at 29; Customs and Border Protection is budgeted for 60,455 employees, *id.* at 23; and the DHS collectively has a total budget authority of over $90 billion, *id.* at 1, and over $54 billion in net discretionary budget authority, *id.*

62. *See, e.g.*, Chris Walker, *Probation Office in Denver Still Facilitating ICE Arrests, Records Show*, WESTWORD (July 6, 2018, 9:00 AM), https://www.westword.com/news/denver-office-of-adult-probation-allows-ice-to-make-arrests-using-special-room-staircase-10507967 [https://perma.cc/5B8J-C4FE].

63. *See FAQs: Sensitive Locations and Courthouse Arrests,* U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/about-ice/ero/sensitive-loc#when-civil-immigration-enforcement-in-or-near-a-courthouse-does-occur-will-there-be-any-additional-limitations [https://perma.cc/7FT9-5F3N] ("To the fullest extent possible, civil immigration enforcement action in a courthouse will be taken in a non-public area, outside of public view, be conducted in collaboration with courthouse security personnel, utilize the courthouse's non-public entrances and exits, and be conducted at the conclusion of the judicial proceeding that brought the individual to the courthouse.").

64. *See* HILLEL R. SMITH, LSB10375, CONG. RSCH. SERV., IMMIGRATION DETAINERS: BACKGROUND AND RECENT LEGAL DEVELOPMENTS 1 (2020), https://fas.org/sgp/crs/homesec/LSB10375.pdf [https://perma.cc/QM8F-Q5DU] ("In FY2019 alone, ICE issued more than 160,000 detainers.").

65. Nick Miroff & Devlin Barrett, *ICE Preparing Targeted Arrests in 'Sanctuary Cities,' Amplifying President's Campaign Theme*, WASH. POST (Sept. 29, 2020, 6:37 PM), https://www.washingtonpost.com/immigration/trump-ice-raids-sanctuary-cities/2020/09/29/99aa17f0-0274-11eb-8879-7663b816bfa5_story.html [https://perma.cc/GG5E-KD5A].

in immigration proceedings and have been subject to removal.[66] The permanent bars, therefore, catch only those who have long left their criminal pasts behind them, or whose criminal offenses were minor enough to escape ICE attention. The permanent bars wholly fail to serve the purpose that the good-moral-character test is meant to fulfill—that is, to ensure that an individual seeking to enter the citizen polity possesses "character which measures up to the standards of average citizens of the community in which the applicant resides."[67]

2. Conditional Bars: Crimes Involving Moral Turpitude, Controlled Substance Violations, "Unlawful Acts"

The other major category of criminal bars to establishing good moral character is "conditional."[68] That is, they are not permanent, but if they occurred within the statutory period, they would preclude a finding of good moral character. One of the more insidious of these conditional bars is the conviction *or admission of acts that would constitute* one or more "crimes involving moral turpitude."[69] This means that if an adjudicator determines that an individual has committed acts that constitute a crime involving moral turpitude, even if the individual has never been charged with a crime, that person is treated the same as one who was convicted after a jury trial.

"Crimes involving moral turpitude" is an opaque category of crimes involving "reprehensible conduct" with a culpable *mens rea*.[70] Reprehensible conduct is vaguely defined as conduct that

66. *See* Muzaffar Chishti et al., *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POL'Y INST. (Jan. 26, 2017), https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not [https://perma.cc/B5AE-DGYS] (finding that, by the end of President Obama's term, over 90 percent of interior removals were for those DHS described as "serious crimes").

67. USCIS POLICY MANUAL, *supra* note 16, at pt. F, ch. 5.

68. 8 C.F.R. § 316.10(b)(2) (2021).

69. USCIS POLICY MANUAL, *supra* note 16, at pt. F, ch. 5.

70. De Leon v. Lynch, 808 F.3d 1224, 1228 (10th Cir. 2015) (writing that the phrase "crime involving moral turpitude" is "perhaps the quintessential example of an ambiguous phrase"); *see also* Louissaint, 24 I. & N. Dec. 754, 756–57 (B.I.A. 2009) (describing how Board of Immigration Appeals judges should decide if a crime involved moral turpitude through a "'categorical inquiry' . . . [which] requires an examination of the law of the convicting jurisdiction to determine whether there is a 'realistic probability,' as opposed to a 'theoretical possibility,' that the statute

is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[71] This category of crime has plagued criminal defense attorneys and immigration attorneys alike for years due to the complicated legal test to determine whether a given crime involves moral turpitude, the results of which are subject to multiple interpretations.[72] In fact, this classification has come under attack as unconstitutional and void for vagueness, though the phrase and the law still remain entrenched in U.S. immigration laws.[73]

Determining whether certain crimes involve moral turpitude often leads to contradictory results, and the test for whether a conviction constitutes a crime involving moral turpitude does not involve a review of the facts of that particular conviction.[74] Rather, the statute of conviction undergoes an analysis regarding whether there is a "realistic probability" that an individual would be charged under the statute for conduct that did *not* involve moral turpitude.[75] The intricacies of this "categorical

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under which the alien was convicted would be applied to reach conduct that does not involve moral turpitude").

71. E.E. Hernandez, 26 I. & N. Dec. 397, 398 (B.I.A. 2014).

72. Silva-Trevino, 24 I. & N. Dec. 687 (Att'y Gen. 2008); *see* IMMIGRANT LEGAL RES. CTR., § N.7 CRIMES INVOLVING MORAL TURPITUDE 111 (2013), https://www.ilrc.org/sites/default/files/resources/n.7-crimes_involving_moral_turpitude.pdf [https://perma.cc/RP8B-2NPP] ("An administrative decision, *Matter of Silva-Trevino*, has made it impossible to tell whether certain offenses will be held [crimes involving moral turpitude].").

73. Jordan v. De George, 341 U.S. 223, 245 (1951) (Jackson, J., dissenting) ("We do not disagree with a policy of extreme reluctance to adjudge a congressional Act unconstitutional. But we do not here question the power of Congress to define deportable conduct. We only question the power of administrative officers and courts to decree deportation until Congress has given an intelligible definition of deportable conduct."); *see also*, Arias v. Lynch, 834 F.3d 823, 830 (7th Cir. 2016) (Posner, J., concurring) ("It is preposterous that stale, antiquated, and, worse, meaningless phrase should continue to be a part of American law.").

74. *See* Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) (explaining that the categorial approach involves a sole focus on the statutory criminal elements "while ignoring the particular facts of the case"); Descamps v. United States, 570 U.S. 254, 258 (2013); Moncrieffe v. Holder, 569 U.S. 184, 190–91 (2013); Silva-Trevino, 26 I. & N. Dec. 826, 827 (B.I.A. 2016) ("We conclude that the categorical and modified categorical approaches provide the proper framework for determining when a conviction is for a crime involving moral turpitude.").

75. Silva-Trevino, 24 I. & N. Dec. 826, 828 (B.I.A. 2016). For example, in determining whether an individual convicted under Colorado's resisting arrest statute, C.R.S. § 18-8-103(1)(b), committed a crime involving moral turpitude (CIMT), one looks first to the general rule that knowingly resisting arrest by virtue of simple assault and battery is not a CIMT. *See, e.g*, Matter of B-, 5 I & N Dec. 538 (B.I.A. 1953). However, where the statute of conviction requires injury to the officer

analysis" are vast, and the landscape through which immigration judges and attorneys must navigate is ever changing.[76]

Assault may be, but is not always, a crime involving moral turpitude.[77] Theft may be, but is not always, a crime involving moral turpitude.[78] Eluding a police officer may be, but is not always, a crime involving moral turpitude.[79] The complexity of this area of immigration law is immense, and a criminal court

(Matter of Danesh, 19 I & N Dec. 669 (B.I.A. 1988)) or use of a deadly weapon (Matter of Logan, 17 I & N Dec. 367 (B.I.A. 1980)), then resisting arrest generally *does* constitute a CIMT. After a fairly lengthy review of the statute and other secondary sources, such as jury instructions, to determine whether C.R.S. § 18-8-103 is "divisible" for purposes of the categorical analysis, one can see that, according to the statute itself, an individual charged under C.R.S. § 18-8-103(1)(b) need not even commit a simple assault or battery against an arresting officer. A search of caselaw on this statute confirms that the minimum conduct necessary to be charged does not involve bodily injury to the officer or use of a deadly weapon, and thus that there is a realistic probability that an individual charged under C.R.S. § 18-8-103(1)(b) did not commit an act that would rise to the level of a CIMT. *See* Dempsey v. People, 117 P.3d 800, 803 (Colo. 2005) (individual charged after he allegedly "attempted to walk away, while placing his hand in his pocket" and then struggled to pull away after officers grabbed the individual's arms).

76. Even the applicability of certain portions of the categorical analysis vary depending on Circuit. *Compare* Larios v. Att'y Gen., 978 F.3d 62, 72 (3d. Cir. 2020) (holding that the realistic probability test never applies when assessing crimes involving moral turpitude under the categorical or modified categorical approaches), *with* Alexis v. Barr, 960 F.3d 722, 729 (5th Cir. 2020) (holding that the realistic probability test requires a showing that the statute has actually been applied in an overbroad manner, while acknowledging that "it is nearly impossible for Alexis to determine if Texas has ever prosecuted anyone for [overbroad conduct] in a citable state decision").

77. *Compare* B-, 5 I. & N. Dec. 538, 538 (B.I.A. 1953) (finding simple assault is not a CIMT, despite the victim being a police officer), *with* Danesh, 19 I. & N. Dec. 669, 672–73 (B.I.A. 1988) (finding assault is a CIMT where essential elements of the statute of conviction include the aggravating factors of actual bodily injury and knowledge of the victim's status as a police officer engaged in the lawful discharge of an official duty).

78. *Compare* Diaz-Lizarraga, 26 I. & N. Dec. 847, 852–55 (B.I.A. 2016) (finding theft is a CIMT where the offense involves a taking, without consent, of property with the intent to deprive the owner of that property either permanently, or under circumstances where the owner's property rights are substantially eroded. Thus, shoplifting constituted a CIMT.), *with* Munguia-Baeza v. Sessions, 730 Fed. App'x. 576 (10th Cir. 2018) (finding first-degree aggravated motor vehicle theft does not constitute a CIMT where statute of conviction does not require intent to permanently deprive the owner of the vehicle).

79. *Compare* Ruiz-Lopez, 25 I. & N. Dec. 551, 556 (B.I.A. 2011) (finding the respondent committed a crime of moral turpitude because "while attempting to elude the pursuing police vehicle, [he] drove his vehicle in a manner indicating a wanton and/or willful disregard for the risk of injury to another person or to property"), *with* Ramirez-Contreras v. Sessions, 858 F.3d 1298, 1305 (9th Cir. 2017) (holding that deliberately fleeing the police "does not necessarily create the risk of harm that characterizes crimes of moral turpitude").

does not make a ruling on whether a given crime is a crime involving moral turpitude when a person is convicted or enters a guilty plea. This means that nonlawyer adjudicators at USCIS are forced to make these complex determinations and, in so doing, determine whether a person is barred from establishing their good moral character.[80] Worse still, if the adjudicator determines that the individual *might* be removable based on the conviction or the admission of acts that would constitute a crime involving moral turpitude, that adjudicator may refer the individual to ICE for removal proceedings.[81] This presents a real risk for someone with any sort of criminal past when they apply

80. The general process for the adjudication of a naturalization application is: (1) Initially, an applicant files form N-400 with a $640 filing fee and the necessary supporting documentation, *see 10 Steps to Naturalization,* U.S. CITIZENSHIP & IMMIGR. SERVS. (https://www.uscis.gov/citizenship/learn-about-citizenship/10-steps-to-naturalization (June 23, 2021) [https://perma.cc/62GX-X5VF]; DEP'T OF HOMELAND SEC., FEE SCHEDULE 10 (2021), https://www.uscis.gov/sites/default/files/document/forms/g-1055.pdf [https://perma.cc/H5SW-8ZQA]; (2) After the application has undergone initial processing to ensure the required initial documents have been submitted, the applicant is scheduled for an appointment to have their biometrics taken, including fingerprints and a photograph, which are then used to run background checks and security screens, *see 10 Steps to Naturalization*, *supra*; (3) The applicant is then scheduled for a naturalization interview with a USCIS officer, who reviews the application with the applicant, including any potential good-moral-character or other eligibility concerns, *see id.*; (4) The officer, in coordination with his or her supervisor, renders a decision, *see id.*; (5) If that decision is a denial, an applicant has the option to request a rehearing on their naturalization application by filing form N-336 and paying an additional $700, *see Questions and Answers: Appeals and Motions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 2, 2021), https://www.uscis.gov/forms/all-forms/questions-and-answers-appeals-and-motions [https://perma.cc/W5KF-JNQF]; DEP'T OF HOMELAND SEC., *supra*. Recent data shows that only approximately 6 percent of naturalization denials are administratively appealed, and only approximately half of these appeals are successful, KRSNA AVILA, IMMIGRANT LEGAL RES. CTR., HOW TO SUCCESSFULLY ADMINISTRATIVELY APPEAL YOUR NATURALIZATION DENIAL (2019), https://www.ilrc.org/sites/default/files/resources/appeal_of_natz_denial_final.pdf [https://perma.cc/GJ3R-N8AB]; (6) Assuming that re-hearing results in a denial, the applicant has the ability to bring a challenge in federal court, wherein *de novo* review is conducted and, at the request of the petitioner, a *de novo* hearing is held in front the judge, *see* 8 U.S.C. § 1421(c); 8 C.F.R. § 336.9(b) (2021). In such a case, the administrative record from the underlying proceedings is produced, leading to proceedings that are in many ways similar to a claim under the Administrative Procedure Act, but new testimony and new evidence *may* be produced to supplement that administrative record. The long process, several filings and hearings, and ultimate review by federal court (which will take many additional months to resolve) creates large time-related and financial incentives for an applicant to, rather than fight a decision to its ultimate legal conclusion, simply wait for any disqualifying conduct to fall outside of the statutory period and reapply for naturalization with proof of rehabilitation.

81. *See* USCIS POLICY MANUAL, *supra* note 16, at pt. F, ch. 2.

for naturalization.[82] It also creates a chilling effect on attempts to naturalize by those with a criminal past. It is not uncommon for an immigration attorney practicing in naturalization to determine that an individual's application would be too risky, and thus recommend against an application for naturalization.[83]

Those who have "violated any law of the United States, any State, or any foreign country" that is related to a controlled substance are similarly barred from showing good moral character during the statutory period.[84] Importantly, those who fall into this category are not smuggling massive amounts of controlled substances nor are they even low-level drug dealers. Such people would fall under the bar for aggravated felons discussed above. Rather, included in this statutory bar to showing good moral character are offenses like possession of drug paraphernalia or simple possessions of small amounts of controlled substances.

In immigration law at large, and including in good-moral-character determinations, there is a palpable tension between the government's desire to win its "war on drugs" and the reality that drug use is extremely common—in 2016, one in ten Americans aged twelve or older had used an illicit drug within the last month[85]—and, in many ways, recreational drug use is becoming increasingly accepted by society as a whole.[86] Alongside

82. *See* Julia Preston, *Perfectly Legal Immigrants, Until They Applied for Citizenship*, N.Y. TIMES (Apr. 12, 2008), https://www.nytimes.com/2008/04/12/us/12naturalize.html [https://perma.cc/7Z9K-QT6B].

83. *Naturalization: To File or Not to File AC19*, AM. IMMIGR. LAWS. ASS'N (June 20, 2019), https://agora.aila.org/product/detail/4037?sel=description [https://perma.cc/PN9M-4N54].

84. 8 C.F.R. § 316.10(b)(2)(iii) (2021).

85. 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#illicit1 [https://perma.cc/JC29-F9EX].

86. This is especially true for marijuana, the most commonly used controlled substance. *Id.* In 2016, 34 percent of Americans aged twelve and older perceived great risk from smoking marijuana weekly. *See* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., RISK AND PROTECTIVE FACTORS AND ESTIMATES OF SUBSTANCE USE INITIATION: RESULTS FROM THE 2016 NATIONAL SURVEY ON DRUG USE AND HEALTH (2017), https://www.samhsa.gov/data/sites/default/files/NSDUH-DR-FFR3-2016/NSDUH-DR-FFR3-2016.htm [https://perma.cc/7SY3-FVUR]. Similarly, both cities and states are increasingly decriminalizing the possession of certain recreational drugs for personal use. *See, e.g.*, Nicole Chavez & Ryan Prior, *Denver Becomes the First City to Decriminalize Hallucinogenic Mushrooms*, CNN (May 9, 2019, 4:25 PM), https://www.cnn.com/2019/05/08/us/denver-magic-mushrooms-approved-trnd/index.html [https://perma.cc/R6Z9-7FTD]; Amelia Templeton, *Oregon Becomes 1st State in the US to Decriminalize Drug Possession*, OR. PUB. BROAD.

changing societal perceptions, the issue of addiction has become better understood by society in general.[87]

For good-moral-character purposes, any legal violation should be secondary to the conduct behind that violation. After all, the standard is not a review of an individual's criminal record, but whether the individual possesses "character which measures up to the standards of average citizens *of the community in which the applicant resides*."[88] An individual who ingested psychedelic mushrooms in Washington D.C., therefore, *should* have their character judged in a different manner than one who did so in Missouri. In both cases, federal controlled substance laws have been violated through the possession of a controlled substance. However, the community of Washington D.C. overwhelmingly voted to decriminalize psychedelic mushrooms in the Fall of 2020,[89] while the community in Missouri did not. Present good-moral-character determinations do not follow the contours of particular communities. That is, both applicants would be treated equally as lacking good moral character, and their conduct would result in the denial of the individuals' naturalization applications.[90]

It is plainly contrary to traditional notions of redemption to permanently bar an individual from citizenship for the failed attempt to sell any amount of a controlled substance or for minor

(Nov. 4, 2020, 10:00 AM), https://www.opb.org/article/2020/11/04/oregon-measure-110-decriminalize-drugs [https://perma.cc/EHS3-99PS].

87. *See infra* note 138 and accompanying text.

88. USCIS POLICY MANUAL, *supra* note 16, at pt. F, ch. 1 (emphasis added).

89. *See Washington, D.C., Initiative 81, Entheogenic Plants and Fungus Measure (2020)*, BALLOTPEDIA, https://ballotpedia.org/Washington,_D.C.,_Initiative_81,_Entheogenic_Plants_and_Fungus_Measure_(2020) [https://perma.cc/VFY5-WJGH].

90. The problem of establishing uniform rules for naturalization on a federal level and permitting good-moral-character determinations to be based upon "each state's legislative judgment of the common conscience and standards of the community it governs," *In re* Briedis, 238 F. Supp. 149, 150 (N.D. Ill. 1965), is far from a new one. When naturalization proceedings were within the jurisdiction of district courts, there was common disagreement between courts in different circuits as to the extent local laws should inform interpretations of standards in federal immigration laws. *Compare id.* (holding that varying standards depending on local jurisdiction would "lead to an [absurd] patchwork result, resting a petitioner's right to United States citizenship upon the whims and idiosyncrasies of individual state legislatures," in contradiction with Article I, Section 8, of the U.S. Constitution, granting Congress the power to establish a uniform rule of naturalization), *with* Wadman v. INS, 329 F.2d 812, 816–17 (9th Cir. 1964) (using California state law to define adultery, which required cohabitation, and subsequently held that the petitioner did not lack good moral character by virtue of committing adultery where his extramarital affair did not involve cohabitation).

shoplifting, yet that is the current state of the good-moral-character determination. Embedding the amorphous and complicated "crime involving moral turpitude" standard within a good-moral-character determination creates unpredictable and unfair results. The standards of the average citizen are plainly not being used in imposing immigration penalties for controlled substance violations. Ultimately, by tethering the determination of a person's character to these highly abstract and highly capricious standards, these statutory bars allow for this massive over-inclusivity.

Furthermore, even convictions that do not fall within the delineated categories of criminal bars to good moral character in the form of "aggravated felonies," "crimes involving moral turpitude," or "controlled substance violations" may preclude a finding of good moral character due to a "catch-all" provision in the law that allows an adjudicator to find a lack of good moral character for *any* unlawful act.[91] The question we must ask, then, is whether these overbroad statutory bars, and the rigid manner in which they are used in adjudications, truly comply with the moral standards of the average citizen. Considering that one in three adults in the United States has a criminal record of some kind,[92] the answer seems to be definitively that they do not.

B. "Immoral" Conduct

The second major category of statutory bars to a finding of good moral character has more to do with the personal conduct of the individual. Rather than tying an individual's character to their compliance with local, state, and federal laws, these bars involve a determination of whether a person has acted in a manner that may not violate any laws but is nonetheless considered so morally reprehensible that the person could not possess character that measures up to the standards of the average citizen

91. 8 U.S.C. § 1101(f) ("The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character."); 8 C.F.R. § 316.10(b)(3)(iii) (2021) (Absent extenuating circumstances, an applicant shall be found to lack good moral character if the applicant "[c]omitted unlawful acts that adversely reflect upon the applicant's moral character.").

92. Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas [https://perma.cc/CDQ2-G869].

in their community.[93] That these types of statutory bars exist begs the question: Why these, and only these? That only a very small amount of noncriminal conduct statutorily bars an individual from demonstrating good moral character by necessity means that conduct will not be included that should be. Yet the list of conduct triggering the bar more strongly calls into question the existence of a statutory bar for noncriminal conduct at all. Five exemplars highlight exactly how out of touch and misused some of these bars are and have been.

1. Habitual Drunkard

The first in this category is that of the habitual drunkard. This category has been present, without change, in the enumerated bars to good moral character since the INA's codification in 1952.[94] One who has been a habitual drunkard in the statutory period is conditionally excluded from demonstrating good moral character.[95] There is no definition beyond those found in dictionaries as to what constitutes a "habitual drunkard." At least one circuit has struck down the provision on equal protection principles, though that holding was later vacated.[96] Guidance is extremely limited, even for adjudicators who have instructions only to look to "divorce decrees, employment records, and arrest records" to see if there is evidence that an individual has been a habitual drunkard.[97] Cases challenging naturalization denials are sparse. Those challenging a denial based on a lack of good moral character by reason of being a habitual drunkard are even sparser, suggesting that an alcohol-related criminal offense carries a substantial chilling effect on naturalization applications

93. While some conduct bars may implicate criminal laws in some or many cases, not all conduct under these categories would necessarily be violative of a criminal statute. These include, for example, being a habitual drunkard, 8 U.S.C. § 1101(f)(1); adultery that tends to destroy an existing marriage, 8 U.S.C. § 1101(f)(2) (repealed in 1981, but still present at 8 C.F.R. § 316.10(b)(3)(ii) (2021)); giving false testimony for purposes of obtaining an immigration benefit, 8 U.S.C. § 1101(f)(6); involvement in prostitution, 8 C.F.R. § 316.10(b)(2)(vii) (2021) (explanation as to why this is a conduct-based bar below); practicing polygamy, 8 C.F.R. § 316.10(b)(2)(ix) (2021); and willful failure or refusal to support one's dependents, 8 C.F.R. § 316.10(b)(3)(i) (2021).

94. *See* Immigration and Nationality Act, Pub. L. No. 82-414, § 101(f), 66 Stat. 163, 172 (1952); 8 U.S.C. § 1001(f)(1).

95. 8 C.F.R. § 316.10(b)(2)(xii) (2021).

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

97. USCIS POLICY MANUAL, *supra* note16, at pt. F, ch. 5.

and that those denied on this ground often wait to reapply for naturalization after the statutory period has run.

Regardless, this statutory preclusion seems out of place amidst bars for murder and genocide, fraud, and human trafficking. For what purpose is only drunkenness included, and is this really in accordance with society's normative judgments about the morality of alcoholism? As our understanding of addiction evolves, and our judgments about those suffering from addiction evolve with it, this moral judgment seems increasingly out of place.[98] There is no guidance from the government on why this conduct deserves special condemnation, and commentators are silent on this point. In the end, this may be the quintessential example of how statutorily enumerated bars to good moral character are lacking: the bar is ill-defined, it does not evolve with the moral judgments of the community, and its enforcement is left to such broad discretion that it serves more as a deterrent for those with alcohol-related criminal convictions than an actual screen on morally dubious applicants.

2. Prostitution

While this category does involve criminal penalties, the law here appears to be more concerned with conduct rather than with the crime itself. A bar on prostitution, both engaging in prostitution and attempting procurement of prostitution, is not a bar due to criminality, but rather due to the practice itself. Indeed, as the Board of Immigration Appeals states, "one must have engaged in a regular pattern of behavior or conduct" for this bar to apply—a single act does not constitute "engaging in" or "procurement of" for purposes of the bar.[99]

That a single criminal act, or the conduct that constitutes the crime, does not trigger this bar is an anomaly in immigration law. The typical bar is written broadly to include, for example, the admission of acts that would constitute the commission of a crime of moral turpitude or the violation of certain controlled substance laws, requiring not even a finding of guilt and with no regard for the "behavior or conduct" behind those acts.[100] The

98. *See* Karl Mann et al., *One Hundred Years of Alcoholism: The Twentieth Century*, 35 ALCOHOL & ALCOHOLISM 10 (2000).

99. USCIS POLICY MANUAL, *supra* note 16, at pt. F, ch. 5; T-, 6 I. & N. Dec. 474 (B.I.A. 1955).

100. 8 C.F.R. § 316.10(b)(2)(iv) (2021).

act itself, alone, is enough for someone to find themselves barred from establishing their good moral character. This referendum on prostitution requiring a regular pattern of the proscribed conduct, however, is an irregularity and a condemnation on the immorality of the practice itself in a way that does not fit with the rest of the statutory bars.

In practice, the regulations and policy guidance related to this bar do not reflect the nuance of this caselaw. The regulation bars an individual who "is or was involved in prostitution or commercialized vice,"[101] and the reference table in the policy manual, used by adjudicators to determine an applicant's good moral character, describes the bar for prostitution as applying to those who "engaged in prostitution, attempted or procured to import prostitution, or received proceeds from prostitution."[102] The nuance of the law is added further in this chapter of the policy manual, but the reference chart's lack of nuance raises questions on its application. This is further compounded by the naturalization application itself, which simply asks, "Have you EVER . . . [b]een a prostitute, or procured anyone for prostitution?"[103] In fairness to the agency, an explanation for a "yes" answer can be provided, and presumably this would simply open the door to further questioning, but the dearth of caselaw[104] and policy guidance renders the adjudicatory practice in this category relatively opaque. Considering the application of the other conditional bars, it would not be surprising for such an offense to result in a denial for an applicant's failure to meet their burden in establishing their good moral character.

In the end, while caselaw suggests this bar is concerned with the morality of the *practice* of prostitution, its anomalous place as a quasi-criminal and quasi-conduct-based bar suggests that the statute would have it both ways in assessing good moral character. On the one hand, a single illegal act devoid of additional facts reflects upon and may determine whether an applicant has demonstrated that they are a person of good moral

101. 8 C.F.R. § 316.10(b)(2)(vii) (2021).

102. USCIS POLICY MANUAL, *supra* note 16, at pt. F, ch. 5.

103. U.S. CITIZENSHIP & IMMIGR. SERVS., N-400: APPLICATION FOR NATURALIZATION (2019) (emphasis in original).

104. The prostitution-based bar appears more frequently in the *denaturalization* context, where an individual's citizenship is stripped from them for, as an example, material misrepresentations regarding their prostitution enterprise prior to their application for naturalization. *See, e.g.*, United States v. Hongyan Li, 619 F. App'x 298 (5th Cir. 2015).

character. On the other, only a regular pattern of behavior, regardless of a single act, may do so. This irregularity alone demonstrates the inappropriateness of this bar on grounds of both statutory consistency and its effect of further contorting an already overbroad and misapplied statute.

3. False Testimony

The next category is that of false testimony given under oath. The general rule is that any person who gives false testimony for the purpose of obtaining an immigration benefit is barred from establishing their good moral character.[105] The subjective intent to deceive is the determining factor, and the bar is not triggered if the testimony was not given under oath.[106] Interestingly, only oral statements are considered for this category—false statements in a written application or falsified documents do not qualify as "testimony."[107] This category makes intuitive sense because it is essential to the naturalization process that applicants are candid with adjudicators regarding the intimate details of their lives. Indeed, the process ends with a solemn oath.[108] One whose truthfulness is questionable perhaps should find additional obstacles on their path toward naturalization. But that only oral statements qualify—not falsified documents nor affidavits knowingly perjured—again begs the question if this is truly a category concerned with moral character, or if it is a different concern shoehorned into a category that has such amorphous boundaries as to let nearly *anything* in.

The amorphous boundaries and the resulting bias and discrimination inherent in enforcing this provision is exactly what Professor Nermeen Saba Arastu discovered in analyzing federal court cases challenging naturalization denials.[109] In reviewing 158 cases in which courts reviewed naturalization denials based, at least in part, on allegations of false testimony, Professor Arastu found that "it is clear that the false testimony provision has allowed adjudicator and systemic bias to permeate the

105. 8 C.F.R. § 316.10(b)(2)(vi) (2021).

106. *See, e.g.*, Kungys v. United States, 485 U.S. 759 (1988).

107. L-D-E-, 8 I. & N. Dec. 399 (B.I.A. 1959).

108. *10 Steps to Naturalization, supra* note 80 ("Step 9. Take the Oath of Allegiance to the United States.").

109. Nermeen Saba Arastu, *Aspiring Americans Thrown Out in the Cold: The Discriminatory Use of False Testimony Allegations to Deny Naturalization*, 66 UCLA L. REV. 1078 (2019).

naturalization process. Throughout United States history, the government has used this provision disproportionately against applicants of certain nations and religions to pretextually deny their citizenship applications."[110]

Certainly, some applications were validly rejected. For example, in *Chan v. Immigration and Naturalization Services*, an applicant lied about both a marriage that would have rendered him ineligible for permanent residency and an arrest for possession and distribution of heroin.[111] But in the end, Professor Arastu found that "the appeals data set displays that the government has predominantly used false testimony allegations focusing on irrelevant and immaterial facts against populations they seek to exclude."[112] And, based on the appeals data, those populations in modern times appear to be People of Color and those from Muslim-majority countries.[113] Rather than a screen to keep dangerous or immoral immigrants from joining citizen society, the false testimony ground seems more a method for "gotcha" questions to disproportionately exclude politically unpopular groups.

4. Sexuality and Adultery

One must also consider that statutorily enumerated lists do not evolve with society and require specific amendments, which do not always fix the underlying issue. Take, for example, the issue of homosexuality. While it was never enumerated within the statutory bars to good moral character, homosexuality was, until quite recently, considered relevant in assessing an individual's moral character.

In *In re Schmidt*,[114] the court noted that "it was established from petitioner's testimony . . . that petitioner had engaged in homosexual activities in her native Denmark with a girl friend of her age and that this relationship continued for about six years, terminating in 1947, one year prior to petitioner's emigration [sic] to the United States."[115] Her naturalization petition was denied for a lack of good moral character, and based on the

110. *Id.* at 1082.

111. Chan v. INS, No. 00 MISC 243, 2001 WL 521706, at *2 (E.D.N.Y. May 11, 2001).

112. Arastu, *supra* note 109, at 1122.

113. *Id.* at 1112 tbl.1, 1113–14.

114. *In re* Schmidt, 289 N.Y.S.2d 89 (N.Y. Sup. Ct. 1968).

115. *Id.* at 90.

evidence provided in her naturalization proceedings, the Government instituted deportation proceedings against her, charging that she was "a sexual deviate" at the time of her entry.[116] The deportation proceedings against her were eventually terminated after the Board of Immigration Appeals determined that the Government failed to *prove* that she was a "sexual deviate" at the time of her entry.[117]

Her naturalization, though, was doomed. The facts found by the examiner were that she was and had been employed for fourteen years by an oculist; that "she ha[d] never been convicted of any crime or offense, never discharged from any employment by reason of sexual deviation;" and that while she was known to be a lesbian, "nothing else of a derogatory nature was disclosed."[118] Nonetheless, the examiner recommended her petition be denied for lack of good moral character. In applying the standard of whether the ordinary man or woman would find the petitioner's conduct consistent with good moral character, the court denied her naturalization petition, stating:

> Although the conduct of petitioner was not such as to be violative of any criminal statute, and although her activities were confined to her home and with persons with whom she lived, her admitted practices of these sexual deviations continually during the five years preceding the filing of her petition, are not, in the court's opinion, consistent with good moral character as the 'ordinary man or woman' sees it.[119]

Congress attempted to alleviate some of the issues facing LGBT immigrants in the Immigration Act of 1990, which removed the "psychopathic personality" exclusion ground that included LGBT men and women.[120] However, for years after this amendment, LGBT men and women were denied naturalization for lack of good moral character due to their commission of acts which would constitute crimes involving moral turpitude—namely, sodomy and public morality offenses.[121] Such an

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 92.
120. *See* Shannon Minter, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT'L L.J. 771, 772 (1993); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).
121. Minter, *supra* note 120.

example illustrates that this system of statutory bars to good moral character is fundamentally flawed and unquestionably overinclusive.

Similarly, while removed from the statutory bars in 1981, adultery is a past bar to a showing of good moral character that has roots in regulation and agency policy.[122] Modern versions of the application for naturalization do not ask any questions regarding adultery.[123] However, prior to its rescission, the ground of adultery was capriciously applied, and the factors that courts considered seemed to vary, most generally, by gender. In *Posusta v. United States*, a woman's application for naturalization was initially denied for lack of good moral character.[124] She had been the "paramour" of a U.S. citizen since she was nineteen and had two children with him over the course of approximately a decade.[125] She continued to try and maintain this relationship after the man left for the United States. However, the man had left her to marry another woman—one whom he later divorced prior to the statutory period during which the applicant must show her good moral character.[126] In an opinion that outwardly judged the behavior of the applicant as poor for her transgressions in following the father of her children to the United States, Judge Learned Hand overturned the denial caused by her youthful "illicit amatory adventures" due to the statutory period having lapsed.[127]

Contrast this with Judge Learned Hand's earlier opinion in *Schmidt v. United States*, in which a man petitioning for naturalization stated that he occasionally "engaged in an act in sexual intercourse with women."[128] Grasping a bit at what standard

122. *See* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 2(c), 95 Stat. 1611, 1611 (1981); 8 U.S.C. § 1101(f)(2) (repealed 1981); 8 C.F.R. § 316.10(b)(3)(ii) (2021) ("Unless the applicant establishes extenuating circumstances, the applicant shall be found to lack good moral character if . . . the applicant [h]ad an extramarital affair which tended to destroy an existing marriage."); USCIS POLICY MANUAL, *supra* note 16, at pt. F, ch. 5 ("An applicant who has an extramarital affair during the statutory period that tended to destroy an existing marriage is precluded from establishing GMC.").

123. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 103.

124. Posusta v. United States, 285 F.2d 533, 534 (2d Cir. 1961).

125. *Id.*

126. *Id.*

127. *Id.* at 535. Judge Hand was fairly explicit in rendering this decision that he viewed her past conduct as immoral, stating that "[t]he petitioner's conduct before the probationary period certainly showed that in her youth she disregarded the accepted rules of sexual conduct." *Id.*

128. Schmidt v. United States, 177 F.2d 450, 450 (2d Cir. 1949).

should be applied to determine whether this conduct would preclude a showing of good moral character, Judge Hand stated that "recent investigations have attempted to throw light upon the actual habits of men in the petitioner's position, and they have disclosed—what few people would have doubted in any event—that his practice is far from uncommon."[129] Rather than castigating the male petitioner, as he did the female petitioner in *Posusta*, Judge Hand instead stated that "[w]e have answered in the negative the question whether an unmarried man must live completely celibate, or forfeit his claim to a 'good moral character,'" even in the context of an adulterous relationship.[130]

Cases of this character were, unfortunately, not uncommon. In determining that no good-moral-character bar applied to a discretionary form of relief from deportation, the court in *Wadman v. INS* looked to state law to determine the definition of adultery. It found that, because no co-habitation had occurred, the male petitioner did not commit the *crime* of adultery under California law and was not barred from establishing his good moral character.[131] Conversely, as recently as 1970, courts have gone to great lengths to justify why a woman who had "no evidence of promiscuity or other unstable behavior," and whose behavior did not fall into any of the statutorily enumerated bars, did not lack good moral character, just by virtue of her living with her long-term partner with whom she had no intention of marrying.[132]

That is not to say all opinions were determined by gender. Men were denied citizenship for adulterous relationships in contravention of state laws,[133] and women's relationships were respected (though expected to remain private).[134] These cases also

129. *Id.* at 451–52.

130. *Id.* at 452.

131. Wadman v. INS, 329 F.2d 812, 816–17 (9th Cir. 1964).

132. *In re* Mortyr, 320 F. Supp. 1222, 1223 (D. Or. 1970) ("While Oregon does not recognize the validity of common-law marriages," other jurisdictions do, and "[i]n the interests of uniformity in the application of federal immigration and naturalization law, the petitioner should be granted that status wherever she makes her home.").

133. *See* Estrin v. United States, 80 F.2d 105, 105 (2d Cir. 1935) ("Adultery is a crime under the penal law of New York . . . . No argument is needed to support the assertion that it is offensive to the generally accepted moral standards of the community.").

134. *See In re* Kielblock, 163 F. Supp. 687, 688 (S.D. Cal. 1958) ("[A sexual affair] becomes a matter of official concern when some statute of the United States or of a State is violated. Otherwise it will be treated by courts as an act of immorality if it be commercialized, . . . or if illegitimate children are begotten. Likewise,

largely bridged the divide between the unbridled discretion judges wielded prior to the enactment of the Immigration and Nationality Act in 1952 and the relative limits on their discretion after the Act's enactment established statutorily enumerated bars to establishing good moral character. Regardless, these laws and cases carry an undercurrent of outright sexism and a patriarchal concern for women's morality. The statute may have been repealed in the 1980s, but the regulation and policy guidance still exist, and the very policy manual that adjudicators use *specifically lists* adultery as a bar to good moral character.[135] That there are not recently published cases regarding this does not necessarily preclude adultery from being considered in an overall determination on whether an applicant has met their burden of proof in establishing good moral character.

The majority of the remaining noncriminal conduct categories contain behavior that some would find reprehensible.[136] After all, willfully failing to provide support for one's dependent children, as an example, would generally be considered contrary to public policy, and indeed, states incarcerate individuals who fail to pay court-ordered child support.[137] The question remains though: Why these categories? Of all possible morally dubious conduct, that only these categories are severe enough to be included as statutory bars to establishing good moral character all but guarantees that the list is underinclusive. It is clear that modern society as a whole does not have such a poor opinion of, for example, alcoholics that we categorically judge them to lack good moral character.[138] Instead, this concept of conduct-based

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open flaunting publicly what should be a private matter or promiscuity might adversely affect a petitioner's standing as a moral person.").

135. USCIS POLICY MANUAL, *supra* note 16, at pt. F, ch. 5.

136. At the same time, the dearth of caselaw and discussion surrounding some of these bars suggests that either their application is rare or applicants prefer to wait for the statutory period to pass before applying for naturalization. For example, only one district court case cites 8 C.F.R. § 316.10(b)(2)(ix), dealing with polygamy, as a reason for upholding a denied naturalization application. *See* Hassan v. Johnson, 93 F. Supp. 3d 457 (E.D. Va. 2015).

137. *See About the Child Support Enforcement Program*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., https://oig.hhs.gov/fraud/child-support-enforcement/about [https://perma.cc/2K8D-YY59] ("Parents who fail to pay court-ordered support for the care of their children put an unnecessary strain on the custodial parent and the children, as well as on agencies that are tasked with enforcing these matters.").

138. Raul Caetano, *Public Opinions About Alcoholism and Its Treatment*, 48 J. STUD. ON ALCOHOL 153 (1987) (survey of respondents showing 91 percent agree with the notion that alcoholism is an illness, and only 40 percent agree that alcoholics drink because they want to).

bars to good moral character reflects an outdated snapshot of what society perhaps once considered morally reprehensible, such as habitual drinking. As a whole, the inflexibility inherent in a statutorily enumerated list, combined with the amorphous boundaries of some of these bars, highlights just how ineffectual these bars are at ensuring that citizenship is granted only to those who meet the purpose of a good-moral-character test: to grant membership only to those who possess "character which measures up to the standards of average citizens of the community in which the applicant resides."[139]

III. RECOMMENDATIONS

We can see that a system based on strict statutory bars to findings of good moral character is unworkable for three major reasons. First, it is overinclusive by barring qualified applicants who have engaged in conduct that is not truly immoral from citizenship, especially in the category of "criminal acts." Thus, it permits the biases of adjudicators to infect the adjudicatory process through vague definitions. Second, it is necessarily underinclusive, as it possesses a limited ability to change and lacks tailoring to specific community standards. Finally, it is fundamentally contrary to society's understanding of forgiveness, permanently delegating some individuals to the category of "other" with no path to redemption. These issues stem from the inflexibility of an enumerated statutory list. The test ultimately suffers from overinclusivity and underinclusivity because it is incapable of evolving with societal standards. The basic goal that these good-moral-character screens are meant to serve is not reached with the current scheme, and so, changes to this system must be made.

There is, however, no easy fix for the system. Changes intended to fix the system are as likely to introduce new errors as mend the old ones, at least in the naturalization context. As such, perhaps these judgments are not needed at all. After all, when one considers the path an immigrant must take to even reach the point of naturalization, it seems they have gone through so many screens and background checks as to make the good-moral-character requirement almost unnecessary. While not explored in length, the suggestion that good-moral-character

139. USCIS POLICY MANUAL, *supra* note 16, at pt F., ch. 1.

requirements are unnecessary in the naturalization context is far from a new one and is to some the intuitive solution.[140]

To obtain a nonimmigrant visa to enter the United States, a person must first undergo security screenings and background checks. Upon their attempted entry, their information is run through a database to ensure they have not committed any acts that would render them inadmissible to the United States. They then must comply with certain laws and refrain from certain conduct to maintain their nonimmigrant status and avoid removal or deportation from the United States.[141] At the adjustment-of-status stage, when an individual becomes a permanent resident of the United States, further security screens and background checks are conducted. The individual *still* must comply with certain laws and refrain from certain conduct, or else risk the revocation of that permanent residency and removal from the United States. When applying for naturalization, the person must *again* undergo further security screens and background checks, including those specifically designed to screen out cases with national security concerns.[142] Only after this years-long process,[143] involving multiple petitions, applications, interviews, and background checks, does an intending immigrant finally have their good moral character judged in a naturalization interview.

Without a final determination on an applicant's good moral character at this naturalization interview, not much would be lost. Some bars to a demonstration of good moral character, such as adultery, are already ostensibly ignored, despite their place in regulation and policy. The standard argument *for* agency discretion and deference to this discretion is that an agency can employ its own expertise in an area, thus placing the agency in a

140. *See* Peter J. Spiro, *Questioning Barriers to Naturalization*, 13 GEO. IMMIGR. L.J. 479, 508–16 (1999); Lapp, *supra* note 3, at 1630.

141. 8 U.S.C. § 1227.

142. *See, e.g.*, KATIE TRAVERSO & JENNIE PASQUARELLA, ACLU S. CAL., PRACTICE ADVISORY: USCIS'S CONTROLLED APPLICATION REVIEW AND RESOLUTION PROGRAM (2016), https://www.nationalimmigrationproject.org/PDFs/practitioners/our_lit/impact_litigation/2017_03Jan-ACLU-CARRP-advisory.pdf [https://perma.cc/9JPZ-GGFX].

143. For some intending immigrants, this process could be decades long. One recent estimate shows that current backlogged petitions for employment-based permanent residency will wait *eighty-four years* before adjudication. David J. Bier, *Employment-Based Green Card Backlog Hits 1.2 Million in 2020*, CATO INST.: CATO LIBERTY (Nov. 20, 2020, 11:35 AM), https://www.cato.org/blog/employment-based-green-card-backlog-hits-12-million-2020?queryID=03232637a3ac1368abca15a854703746 [https://perma.cc/5HQ8-5ZWR].

better position to make certain decisions.[144] The data from federal court cases involving false testimony alone demonstrates that the agency's "expertise" is not being utilized in a fair and impartial manner to obtain a more desirable result.[145] Surely there will be those who have committed crimes in the interim period between security checks, which are not so serious as to warrant the rescission of permanent residence and removal from the United States. Individuals convicted of such serious crimes would almost certainly be subject to ICE's broad-reaching enforcement apparatus discussed in Part II. To catch any bad actors that slip through the cracks, certain criminal convictions could certainly remain as bars to naturalization, whether temporarily or permanently. Yet the boundaries of these criminal bars should be well defined—that is, accompanied by definitions that elevate them beyond nebulous concepts like "crimes involving moral turpitude" and allow for transparent reviews of naturalization eligibility.

With clear bars to naturalization, and by lessening the discretion of any particular immigration officer, the final hurdle an immigrant must overcome to join the polity becomes insulated from the political whims of the executive branch. Whether an immigration restrictionist or expansionist heads the agency, policies and regulations will be grounded in unambiguous statute. Thus, lacking unfettered discretion in their determinations, immigration officers adjudicating naturalization petitions should avoid massive variances in outcomes.[146] Where variances do exist, a lack of discretion opens the door to judicial review. This, in turn, would alleviate the current injustice in which denials based solely on discretion are insulated from that review, leading to what Professor Shoba Sivaprasad Wadhia has dubbed "Darkside Discretion," where an individual may be fully statutorily qualified for a benefit and yet nonetheless lose their case.[147]

Other potential solutions come with their own problems that would render these solutions unworkable. Modernizing and clarifying the statutory list, for example, may remove some of

144. *See, e.g.*, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

145. Arastu, *supra* note 109.

146. For a discussion on how unfettered discretion in sentencing leads to massive variances in sentencing, see Mistretta v. United States, 488 U.S. 361 (1989).

147. Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367 (2020).

the issues that plague good-moral-character analyses. Congress could lend guidance to adjudicators with a well-crafted definition of "good moral character," which could then percolate down through regulation into policy and practice. As recent history has shown us though, immigration laws are not so easily amended,[148] and what members of Congress might find sufficiently immoral to include in such an amendment is by no means guaranteed to develop with the views of society. In fact, a rigid list seems quite more likely to be left with historical relics, such as the "habitual drunkard" or the recent bars based on homosexuality. A statutory list is inflexible, and inflexibility is the hallmark of the problems currently facing the good-moral-character test.

Removing Congress from the equation and trusting agency expertise would, however, lead to even more unfair results. With the need for standards to be fluid and flexible and to develop alongside community standards, it makes some intuitive sense to leave the agency to develop regulations and policies on good moral character. Adjudicators could then judge applicants' moral character based on conduct, utilizing their discretion to determine whether an individual's character comports with their community's moral standards. This solution, however, runs headlong into a different problem—unfettered discretion leading to massively variable outcomes for similarly situated individuals. Other areas of the law have shown that larger amounts of discretion in adjudications lead to inequitable and unpredictable outcomes, with, for example, asylum grant rates varying *drastically* by not only geographic area but also by

148. One need only look to the legislative battle over the so-called "DREAM Act" over the last twenty years to see how even popular, bipartisan legislative proposals in the immigration context may stall. A bill that would create a pathway to citizenship, protection from removal, and access to certain benefits for immigrants brought to the United States as children, the first version of the Development, Relief, and Education for Alien Minors (DREAM) Act was introduced as far back as 2001 and included both Republican and Democrat cosponsors. *See* S. 1291, 107th Cong. (2001). The bill did not pass and has since been introduced, with variations, at least eleven more times. S. 1545, 108th Cong. (2003); H.R. 1684, 108th Cong. (2003); S. 2075, 109th Cong. (2005); H.R. 5131, 109th Cong. (2006); S. 2205, 110th Cong. (2007); H.R. 1275, 110th Cong. (2007); H.R. 6497, 111th Cong. (2010); S. 729, 111th Cong. (2009); S. 3992, 111th Cong. (2010); H.R. 1842, 112th Cong. (2011); S. 952, 112th Cong. (2011); H.R. 1468, 115th Cong. (2017); H.R. 3591, 115th Cong. (2017); H.R. 2820, 116th Cong. (2019). Two versions of the DREAM Act are again under consideration in Congress, again with both Republican and Democratic sponsors. *See* S. 264, 117th Cong. (2021); H.R. 6, 117th Cong. (2021).

officer within the same asylum office.[149] Similarly, even in the judicial branch, where Article III judges seem to be more consistent than employees and officers of the political branches, indeterminate sentencing guidelines led to "great variation among sentences imposed by different judges upon similarly situated offenders."[150] Simply put, agency discretion permits too much variation, while a statutory list does not comport with the idea that society, and society's morals, evolve over time. Neither would fix the problems plaguing the current system, and the current system appears unnecessary altogether.

If, however, the goal of removing the good-moral-character requirement is too lofty, some lesser amendments are still imperative. Good-moral-character inquiries must be removed from amorphous and ever-expanding definitions of misconduct, such as "aggravated felony" or "crimes involving moral turpitude." Too many otherwise qualified immigrants are excluded for conduct that fully comports with modern notions of morality. Change from the highest level is the most important method for reforming the system.

CONCLUSION

Good-moral-character assessments are, at least conceptually, an appropriate method by which the citizen polity engages in social inclusion and exclusion to create a group composed of individuals it finds desirable. However, in its current iteration, the good-moral-character assessments in immigration law wholly fail to do that. The test is overinclusive, excluding otherwise desirable noncitizens from membership in a manner contrary to traditional values of redemption and forgiveness, and permits biases to plague adjudications. The test must be reformed, which can be done in several ways. The most effective solution would do away with the good-moral-character test altogether, leaving perhaps a few criminal bars to naturalization. Before the passage of the McCarren-Walter Act, the Board of Immigration Appeals stated that while the term good moral

149. *See* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007) ("This study analyzes . . . 133,000 [asylum] decisions involving nationals from eleven key countries rendered by 884 asylum officers over a seven-year period . . . . [I]n one regional asylum office . . . some officers grant[ed] asylum to no Chinese nationals, while other officers granted asylum in as many as 68% of their cases.").

150. *See Mistretta*, 488 U.S. at 366.

character is "elusive and difficult of definition, [w]e do not think [good moral character] should be construed to mean moral excellence, or that it is destroyed by a single lapse. Rather do we think it is a concept of a person's natural worth derived from the sum total of all his actions in the community."[151] The current good-moral-character test has caused the immigration system to stray far from that standard, and for too long. Moral excellence cannot be the standard, and we cannot forever exclude people as lacking moral character for a single lapse in judgment.

151. B-, 1 I. & N. Dec. 611, 612 (B.I.A. 1943).