

## Benefits of Alcohol Licensing: A Brief Discussion

### Introduction

The regulation of alcoholic beverages in North America predates the United States.<sup>1</sup> Long before the Declaration of Independence or the ratification of the Constitution, early colonists attempted to enforce a variety of region specific regulations designed to confine the sale and consumption of alcohol to socially acceptable parameters:

Beyond sanctions for drunkenness, which ranged in severity from fines, to whipping, to the stocks, to banishment, conventional mechanisms of control were: (1) limits on the hours that taverns could stay open, on the amount that customers could consume, and on the time that could be spent “tippling”; (2) prohibitions against serving slaves, indentured servants, debtors, or habitual drunkards; (3) laws that proscribed certain activities in conjunction with public drinking (e.g., gambling or loud music were generally forbidden in taverns); and (4) requirements that taverns provide lodging and food, and that retailers sell only for home consumption—not small amounts to be drunk on the premises.<sup>2</sup>

At least as common as these formal laws dictating “acceptable patterns of consumption,” legislatures throughout the colonial period also “delegated to boards of select men or county courts the authority to grant tavern licenses.”<sup>3</sup> These licenses often provided exclusive operating rights within a particular region, attached to an understanding that the inn or tavern keeper possessing the license was providing a needed public service by dispensing food, drink, and hospitality. Far from being viewed as a disreputable profession, the earliest licensed inn and tavern keepers were often seen as moral stewards, as those licensed to sell alcohol were expected

to possess “a deep sense of civic obligation,” and were correspondingly expected “to monitor behavior...[and to] keep customers in check.”<sup>4</sup>

The practice of licensing only civically responsible individuals to sell alcohol appears to have been largely effective in regulating the relatively small communities of the early colonial period. However, a rapid rise in population and a corresponding spike in illicit production and sale of alcohol soon circumvented the accountability sought by the licensing scheme.<sup>5</sup> In an effort to maintain some semblance of control over the burgeoning illegal alcohol market, licensing boards began to distribute licenses *en masse*, (often to those individuals who had previously flouted the law,) disregarding former stipulations of licensee character or regional limits on licenses.<sup>6</sup> By the early 18<sup>th</sup> century, management of a tavern had lost nearly all sense of moral stewardship, and was instead increasingly viewed exclusively as a business venture, one typically undertaken by lower class individuals.<sup>7</sup>

The rapid proliferation of both licensed and un-licensed premises often left local alcohol inspectors overwhelmed, and enforcement of laws relating to alcohol consumption and distribution plummeted.<sup>8</sup> John Adams, speaking representatively for many of his day, lamented this deterioration of control:

I was fired with a zeal, amounting to an enthusiasm, against ardent spirits, the multiplication of taverns, retailers and dram shops and tippling houses. Grieved to the heart to see the number of idlers, thieves, sots and consumptive patients made for the use of physicians in these infamous seminaries, I applied to the court of sessions, procured a committee of inspection and inquiry, reduced the number of licensed houses, etc. But I only acquired the reputation of a hypocrite and an ambitious demagogue by it. The number of licensed houses was soon reinstated,

drams, grogs, and setting were not diminished, and remain to this day as deplorable as ever.<sup>9</sup>

In addition to the rapid proliferation of alcohol retail outlets, the lack of enforceable regulation resulted in an unchecked commercialization of alcohol as an independent commodity: “[As] the tavern or inn, where food and lodging provided a milieu that militated against intense drinking, gave way almost exclusively to the...saloon...people drank more and more in places specifically and exclusively designed to cater to consumption of alcohol and as laws governing operating hours or sales to minors were regularly ignored, public drunkenness grew to be defined as a social problem.”<sup>10</sup>

The connection between this shift in public drinking culture and the corresponding temperance movement has been well documented.<sup>11</sup> Similarly, the culmination of the temperance movement in federal prohibition through the Eighteenth Amendment (and subsequent Volstead act,) have received equally comprehensive treatment.<sup>12</sup> While the legacy of federal prohibition is complex, pundits generally agree that federal prohibition may have created more public issues than it resolved.<sup>13</sup> However, the temperance movement and federal prohibition were critical in establishing the “three core realities”<sup>14</sup> that undergird all modern alcohol regulation: 1) that excessive alcohol consumption causes or exacerbates a variety of known societal issues,<sup>15</sup> 2) “that [comprehensive federal] prohibition was neither desirable nor practical,”<sup>16</sup> and 3) that the alcohol industry is an important economic sector, and provides an equally important source of governmental tax revenue.<sup>17</sup> As such, even while ardent critics of prohibition were “pressing for repeal, [they] at the same time declared their implacable opposition to the return of the unregulated saloon with all its attendant abuses.”<sup>18</sup>

After the end of federal prohibition in the United States in 1933, each state was encouraged to bring the liquor trade “under complete supervision and control,”<sup>19</sup> by implementing a new regulatory framework that best suited their constituent populations.<sup>20</sup> “The return of brewing was also accompanied by a determination on the part of the regulators to outlaw vertical integration in the industry, and specifically the ownership or control of chains of retail outlets by brewers.”<sup>21</sup> The implementation of the “three-tiered” licensing system was an attempt to prevent this vertical integration, and to strike a balance between prohibition and the lax alcohol market that had developed during the 19<sup>th</sup> century. By implementing a series of license enforced regulations at the discrete levels of production, distribution, and retail, state licensing boards established and currently maintain a high degree of regulatory control over the alcohol industry.<sup>22</sup>

At each level of the three-tiered system, licensing regulates through three key mechanisms: 1) Selection, 2) Withdrawal, and 3) Conditionality.<sup>23</sup> Federal, State, and Local agencies involved in the licensure of entities associated with the sale of alcohol can thus “select who is awarded a license, can withdraw a license if necessary, and can impose a range of conditions on a license that restrict how the given trade is carried on.”<sup>24</sup> However, as has been noted by James Nicholls, in the modern licensing framework “the powers of selection and withdrawal have reduced through time, with the consequence that...licensing today functions primarily through its powers of condition setting.”<sup>25</sup> This is not to say that current licensing agencies possess less authority to grant or revoke licenses than in the past, it is merely an observation that the granting and revocation of licenses has become *pro forma*, with legal considerations and precedents largely superseding the discretion of licensing boards and agencies. In spite of this reduction of discretionary power, the conditional authority of licensing

boards is considerable, and is largely responsible for both the form and function of the alcohol market as it currently stands.

### **Licensing and the Three-Tier System**

When discussing alcohol licensing, it is important to remember that the leeway granted to each State in structuring their regulatory framework has resulted in a “hodgepodge of [State specific] alcohol regulation that remains a policy nightmare.”<sup>26</sup> As such, no comprehensive discussion of the specific roll licensing plays in each State will be attempted here. Instead, the general function of licensing as a tool of societal control will be briefly discussed. Distilled to its most basic, the alcohol licensing framework allows a State to grant contingent permission to a private entity (producer, distributor, or retailer,) to carry out a role in the production, marketing, or sale of alcohol, so long as that entity complies with the required conditions laid forth by the licensing agency. Because of the inherent contingent nature of the license, licensing functions more as a tool of restraint than a granting of privilege.

Perhaps unsurprisingly then, alcohol licensing was originally understood, “to be an instrument designed to regulate behavior.”<sup>27</sup> Licensing attempts to reduce or eliminate negative behaviors of producers, distributors, or consumers by providing a mechanism by which entities can theoretically be removed from the alcohol marketplace if their behavior does not conform to the standards laid forth by the regulatory agency. An unlicensed industry, on the other hand, is one characterized by freedom of participation. A truly unlicensed industry, (although there is some debate as to whether such exists in the modern economy,) would have no authoritative standard of behavior as a litmus test for participation, and would also have no mechanism to remove an entity from the marketplace other than voluntary non-participation or non-

interaction.<sup>28</sup> Licensing then provides to the alcohol industry both an objective measure of acceptable behaviors, as well as a mechanism for enforcing or encouraging such behavior.

The behaviors promoted or discouraged by licensing differ between each tier of the three-tier system, as regulations governing a licensed producer of alcohol may differ radically from those governing distributors or retailers.<sup>29</sup> For instance, producers, (brewers, vintners, or distillers,) are typically restricted in their ability to sell directly to a consumer, a restriction that would be nonsensical for a licensed retailer.<sup>30</sup> Consequently, one of the most important aspects of the alcohol licensing system is its support of the three-tiered arrangement, which prevents the vertical integration of the alcohol industry.<sup>31</sup> This prevention is essential to a properly regulated marketplace, as the three-tiered system prevents aggressive production and marketing practices that may accompany a large corporation controlling the entire alcohol distribution chain.<sup>32</sup> Besides regulations on producers designed to limit their ability to promote overconsumption, licensing of producers also allows the state increased oversight of the quality of alcohol produced.<sup>33</sup> By setting standards of health and safety, licensing ensures that consumers receive uncontaminated products. An example of such a benefit was the 2008 recall of several Sam Adams brewery products after a routine quality-control inspection revealed glass suspended in the alcohol.<sup>34</sup> The National Alcohol Beverage Control Association stated that the recall was discovered and executed “quick[ly] and without major issues because of each tier’s responsibility in tracking alcohol products across distribution channels.”<sup>35</sup>

While different from those mandated to producers, the stipulations given by states to wholesale distributors in conjunction with licensing are equally important to the regulation of the alcohol industry. The role of the wholesaler in alcohol distribution is, “complex and multifaceted,” as they act as both an “intermediary and a partition between alcohol suppliers and

retailers.”<sup>36</sup> Additionally, because the role of the wholesaler varies from State to State, generalizations about licensing stipulations may not apply in every locale.<sup>37</sup> Generally, however, wholesalers “act as exclusive agents for alcohol *suppliers*, and assume responsibility for product marketing, availability and freshness.”<sup>38</sup> On the other hand, “wholesalers are intrinsically involved in their *retailers*’ operations, providing guidance on product placement within stores, distributing promotional materials and training retail employees.”<sup>39</sup> While many states have monopolized the wholesale aspect of the three-tiered system (control states,) the majority of states function as “license states,” and allow privately held businesses to operate as retailers and wholesalers.<sup>40</sup> However, these “license states” carefully supervise and regulate the wholesalers behavior through the issuance of operation licenses. These licenses allow the state to exert “regulatory influence [in] all aspects of alcohol wholesalers’ business, stipulating how and when wholesalers will undertake almost every transaction.”<sup>41</sup> The licensing of wholesalers also allows the state to more effectively collect excise tax revenue, as well as prevent black market distribution:

In perhaps their most significant role, wholesalers also act as proxy agents for the state’s revenue department. Wholesalers are responsible for collecting significant excise tax revenues on behalf of the state...and for assuring the security and control of their alcohol inventories. In this respect, it is actually...wholesalers who undertake the state’s policy goals of reducing incentives for overconsumption (through the imposition and collection of excise taxes) and controlling black market distribution (through the securing of inventories).

Because wholesalers occupy a pivotal position within the industry, it is natural for state regulators to use the wholesale level as the point of enforcement. Control via

wholesalers is an efficient way for the state to monitor and tax the flow of alcoholic beverages, since there are far fewer businesses to supervise at the wholesale level than the retail level. In addition, locally based wholesalers are presumed to be more accountable and easier to audit than alcohol suppliers, who may be located in another state.<sup>42</sup>

Because the negative behaviors associated with excessive alcohol intake are typically, “temporally and geographically proximate to [purchase and] consumption,” alcohol retail has often served as “a proxy for alcohol harms,” in state regulatory frameworks.<sup>43</sup> Licensing stipulations to retail outlets are thus typically viewed as the regulations most capable of combating negative health and societal effects from alcohol intake. For example, in several major reviews of the scientific literature, restrictions on physical availability of alcohol accomplished by reducing the number of licensed outlets in a geographic region, or limiting the hours and days of sale of retail outlets have been declared effective in reducing a variety of alcohol related harms.<sup>44</sup> Additionally, retail outlet licensing is also directly correlated to the effective enforcement of minimum legal drinking age laws.<sup>45</sup> Although validation of the effectiveness of these regulations through quantitative studies is a relatively recent development, “regulations on the availability of alcohol have been used to moderate alcohol problems in communities throughout the world for thousands of years.”<sup>46</sup> The effectiveness of these efforts at mitigating the negative effects associated with alcohol consumption has “forced the question of whether licensing should be precautionary and strategic, rather than reactive, and whether it should concern itself with the protecting of the wider public good beyond simply preventing disorder at the level of individual outlets.”<sup>47</sup> Local licensing agencies have consequently begun to recognize that licensing can be used to “shape the wider retail context through area-wide,



policy-driven approaches to the general availability of alcohol.”<sup>48</sup> By developing “licensing objectives,” decisions regarding the granting or revocation of licenses can be based on clearly articulated designs to prevent crime, promote public safety, and prevent public nuisance.<sup>49</sup>

## **Licensing and Public Health**

James Nicholls has noted that, “historically, licensing has been concerned with the prevention of antisocial behavior rather than the protection of health.”<sup>50</sup> While “health considerations have long played a part in motivating, if not framing, legislative change...licensing was initially designed as means of limiting public disorder and regulating behavior.”<sup>51</sup> For this reason, licensing regulations have tended to focus more heavily on “on-premise” alcohol sales and consumption (i.e. bars and restaurants,) rather than “off-premise” retail locations (i.e. liquor and grocery stores).<sup>52</sup> This is perhaps a consequence of some of the more visible alcohol related harms (drunk driving and alcohol induced violent crime,) having a higher correlation to on-premise locations.<sup>53</sup> However, a growing body of research has closely linked the contemporary cultural expansion of off-premise alcohol consumption to a decline in long-term health, as well as an increase in alcohol related accidents and injuries.<sup>54</sup> Additionally, off-premise alcohol sales have been demonstrated to have a positive correlation to frequency of domestic violence and child abuse, while on-premise locations have been shown to have a negative correlation to the same.<sup>55</sup> These considerations suggest that an equal amount of attention should be given to licensing regulations targeted at off-premise alcohol sales and consumption. Fortunately, several policy avenues linked to the licensing of off-premise retail locations are available to licensing agencies in their efforts to promote desired public health outcomes.

First and foremost, a critical mass of scientific scholarship has demonstrated the effectiveness of outlet density restriction in reducing the negative effects of excessive alcohol consumption.<sup>56</sup> Outlet density control has been shown to decrease overall alcohol consumption,<sup>57</sup> instances of impaired driving,<sup>58</sup> the prevalence and spread of HIV and other STIs,<sup>59</sup> violent crime,<sup>60</sup> and childhood abuse and neglect.<sup>61</sup> Licensing agencies should utilize these studies when considering applications for new retail alcohol licenses, and should deny those requests in areas where outlet density has reached a detrimental level.

Stipulations attached to licensing can also be used to limit the hours or days retail locations are allowed to engage in alcohol related transactions. While “the effects of these restrictions on alcohol use and problems are widely debated,”<sup>62</sup> recent evidence suggests extended days of sale and later commercial hours may both be related to increases in overall alcohol consumption, and corresponding health related issues.<sup>63</sup> Additionally, later commercial hours have also been associated with increased homicides,<sup>64</sup> as well as alcohol-related emergency room admissions.<sup>65</sup> Including evidence based conditions in licensing requirements that restrict the hours or days retail locations may operate can certainly assist in achieving targeted public health outcomes.

### **Conclusion:**

“Licensing remains the primary legislative instrument through which [alcohol] is regulated.”<sup>66</sup> The three-tiered licensing system of producers, distributors, and retailers provides a regulatory framework intended to: 1) provide safe alcohol to the consumer, 2) ensure that tax revenue from the sale of alcohol is returned to the state, and 3) discourage public overconsumption while mitigating the negative health and social effects of excessive alcohol intake. However, as in all public policy, “real long term power lies (as ever) in the detail of

implementation rather than in the writing of grand ‘mission’ or policy statements.”<sup>67</sup> “For their part, licensing committees and officers function, in many respects, as a form of what Michael Lipsky has called a ‘street-level bureaucracy,’” wherein local officials tasked with enforcing federal and state licensing policies ultimately determine what effect, if any, licensing policy has on public alcohol consumption.<sup>68</sup> Great efforts should then be made to ensure that state agencies tasked with enforcing license regulation are provided with sufficient tools and resources to carry out their task.<sup>69</sup> Additionally, the temporary or permanent revocation of operating licenses for reasons of repeated violation or non-compliance should cease to be a theoretical threat, and should instead be employed whenever a licensing agency has determined a serious infraction has occurred.<sup>70</sup> Lastly, as with all instances of state intervention, regulations should be subject to ongoing critical evaluation to determine their effectiveness in achieving intended outcomes.

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<sup>2</sup> Aaron, “Temperance and Prohibition, 132.

<sup>3</sup> Ibid.

<sup>4</sup> Aaron, “Temperance and Prohibition, 132-133.

<sup>5</sup> W.J. Rorabaugh, *The Alcoholic Republic: An American Tradition*, (New York: Oxford University Press, 1979), 25-29.

<sup>6</sup> Ibid.

<sup>7</sup> John Allen Krout, *The Origins of Prohibition*, (New York: Alfred A. Knopf, 1925), 45.

<sup>8</sup> Aaron, “Temperance and Prohibition, 134.

<sup>9</sup> Duane Hamilton Hurd, *History of Norfolk County, Massachusetts*, (Philadelphia: J.W. Lewis & Co., 1884), 320.

<sup>10</sup> Aaron, “Temperance and Prohibition, 134.

<sup>11</sup> John Pearson, *Prohibition in the United States*, (Toledo: Great Neck Publishing, 2009).

<sup>12</sup> Norman H. Clark, “Prohibition and Temperance,” in *Reader’s Companion to American History*, Ed. Eric Foner and John A. Garraty, (Boston:Houghton Mifflin, 1991), 871-875. See also: Holland Webb, “Temperance Movements and Prohibition,” *International Social Science Review*, 74:1 (2003), 61-69.

<sup>13</sup> Aaron, “Temperance and Prohibition in America,” 127.

<sup>14</sup> James Nicholls, “Public Health and Alcohol Licensing in the UK: Challenges, Opportunities, and Implications for Policy and Practice,” *Contemporary Drug Problems*, 42:2 (2015), 88.

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<sup>16</sup> Nicholls, “Public Health and Alcohol Licensing,” 88.

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- <sup>39</sup> Ibid. Emphasis added.
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<sup>51</sup> *Ibid.*

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<sup>68</sup> Nicholls, "Public Health and Alcohol Licensing," 93.

<sup>69</sup> Claire Wilkinson & Sarah Maclean, "Enforcement of liquor licence provisions: The introduction of civilian license inspectors in Victoria," *Drugs: education, prevention and policy*, 20:1 (2013), 15–21.

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