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# Legal Communication & Rhetoric: JALWD

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## ARTICLES & ESSAYS

**The Potemkin Temptation or, The Intoxicating Effect of Rhetoric  
and Narrativity on American Craft Whiskey**

Derek H. Kiernan-Johnson

# The Potemkin Temptation

## or, The Intoxicating Effect of Rhetoric and Narrativity on American Craft Whiskey

Derek H. Kiernan-Johnson\*

On the heels of the 1990s microbrewing revolution, and as part of the larger eat-local movement, “craft” whiskey distilleries have sprouted across America. Many, however, aren’t “distilleries” at all: They neither distill nor age whiskey, but rather purchase it premade from giant industrial plants.

These “Potemkin” craft distilleries then bottle that whiskey themselves, describing their products, on federally approved bottle labels, as “hand-bottled in [local place X].” Some Potemkins, before bottling, dilute the generic whiskey they’ve purchased with local water (often just filtered tap), giving them the legal leeway to celebrate that literal tie to place, too. Arresting visuals on the front of the bottle labels and narrative scripts on their backs allow Potemkins to further wrap their products in a myth of authenticity, craftsmanship, and place, thereby overwhelming the potential effect that the federally mandated disclosures on their labels might have.

This is more than standard marketing puffery and creative lawyering. The Potemkin phenomenon causes serious harms. It harms whiskey drinkers, who seek out and then pay a premium to support what they thought was a handcrafted, artisanal product. It harms “bona fide” craft distillers, who aspire to create from scratch authentic local whiskey that truly speaks of place, but who struggle to compete with corner-cutting Potemkins. Although they are less sympathetic than either consumers or

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\*Legal Writing Professor, University of Colorado. Deepest thanks to LC&R editors Joan Ames Magat, Ruth Anne Robbins, Mel Weresh, and JoAnne Sweeny for their insights, encouragement, and patience. Gratitude to my children, Ronan and Kelsey, for tolerating it when my mind wandered to this topic when it should have stayed focused on them, and to my spouse, Eileen, for agreeing to tour a craft-whiskey distillery as part of our 15th anniversary celebrations.

This article is dedicated to author Michael J. Jackson (1942–2007), whose writing on whiskey in the mid-1990s first sparked my lifelong love of the drink, inspiring me to take careful notes of tastings and even write an article on single malt scotch for my college newspaper.

bona fide producers, the phenomenon also harms Potemkin craft distillers themselves—both those “intentional” Potemkins who cynically set out to abuse the ethos of authenticity, and those “accidental” Potemkins (and their lawyers) who start off with the best of intentions but, faced with the particular challenges of craft distilling, and intoxicated by the special power of narrative and rhetoric in American craft whiskey, turn to find that they’ve fallen short of their ideals.

Legal responses to the Potemkin phenomenon have been inadequate. And they will continue to be, unless legal reformers take seriously, and specifically account for, the ways rhetoric and narrativity operate in the craft-whiskey industry.

This article sets the scene with a story—that of Templeton: the town, the whiskey, and the controversy. After that aperitif comes an overview of how American whiskey is made, with a focus on the steps in that process that (1) mirror and thus set up a false analogy to microbrewing, (2) make whiskey-making much harder than brewing, and then (3) tempt aspiring distillers to become Potemkins. The next course is a tasting of whiskey in American history, aimed at showing both the nostalgia today’s Potemkins draw from and the ways previous legal reformers have tried to cabin earlier shenanigans. Next up is a close look at the ways both intentional and accidental Potemkins, and their lawyers, can respectively manipulate and fall prey to the special power of rhetoric and narrativity in American craft whiskey, and possible ways for legal reformers to manage rhetoric and narrativity’s power.

## I. Templeton: A Town and Its Whiskey

The story of Templeton illustrates how rhetoric and narrativity foster the Potemkin phenomenon. Templeton, Iowa, is saturated in whiskey references:

- The town logo is a sepia-toned image of figures in newsboy caps passing a whiskey barrel;
- The town slogan is “A Strong Community Spirit” (puns intended);
- Drive into town, and you’ll pass a welcome sign featuring an old-fashioned stoneware whiskey jug;
- If you’re hungry, turn off of “Rye [Whiskey] Avenue” and stop at “The Still Grill.”<sup>1</sup>

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<sup>1</sup> CITY OF TEMPLETON, IOWA, <http://www.templetoniowa.com/> (town slogan); <http://www.felixandfingers.com/wp-content/uploads/2014/10/templeton-iowa.jpg> (town sign); Josh Noel, *Tracking down Iowa Whiskey in Templeton*, CHI. TRIB. (Apr. 24, 2010), <http://www.chicagotribune.com/lifestyles/travel/ct-trav-0425-templeton-iowa-20100422-31-story.html> (Rye Avenue, Still Grill).



The town traces its whiskey roots back to the Great Depression and Prohibition. According to “local lore,”

[f]alling crop prices knocked Templeton...back on its heels and, industrious Germans the townsfolk were, they turned to bootlegging. It turned out that Templeton was particularly good at both making whiskey and staying ahead of the law. Locals would erect a still, brew a batch, move the still—and repeat. By the time the economic cloud shifted, whiskey was too deeply in the local fabric to give up.<sup>2</sup>

This bootlegging tradition continued after Prohibition ended, with home distillers quietly passing the recipe down the generations. Over time, the legend of Templeton whiskey’s importance also grew: not only had it “saved this town from the Depression,” but it “was Al Capone’s favorite [whiskey].”<sup>3</sup> Today, even though home whiskey distilling, unlike home beer brewing, remains a felony,<sup>4</sup> if you ask the right Templeton local, you might just get a sip of authentic, homemade Templeton rye whiskey.<sup>5</sup>

It was therefore only natural that, as the “craft distiller” emerged in the 2000s,<sup>6</sup> an entrepreneur would bring the town’s storied underground recipe into the light. And so, in 2006, Templeton-area native Scott Bush opened, in tiny Templeton itself, *Templeton Rye Spirits, LLC*.<sup>7</sup> Bush claims to have gotten the recipe from a Templeton old-timer, who had gotten it from his father—a convicted bootlegger.<sup>8</sup> A grandson attested that the

<sup>2</sup> Noel, *supra* note 1; *History*, CITY OF TEMPLETON (2014), [http://www.templetoniowa.com/about\\_templeton/history.asp](http://www.templetoniowa.com/about_templeton/history.asp).

<sup>3</sup> Noel, *supra* note 1; Jason Walker, *Templeton Rye of Templeton, Iowa*, THE HEAVY TABLE (July 7, 2009), <http://heavytable.com/templeton-rye-of-templeton-iowa/>.

<sup>4</sup> See 26 U.S.C. § 5601(a)(1), (a)(8) (Westlaw through P.L. 115-90).

<sup>5</sup> Noel, *supra* note 1.

<sup>6</sup> MICHAEL R. VEACH, KENTUCKY BOURBON WHISKEY: AN AMERICAN HERITAGE 123 (2013).

<sup>7</sup> Noel, *supra* note 1; Iowa Secretary of State’s Business Entity Summary for Templeton Rye Spirits, LLC, Apr. 4, 2005, [https://sos.iowa.gov/search/business/\(S\(qylzuz45kclzrxjqdaf3mn55\)\)/summary.aspx?c=rd\\_dipmYeMLLvP1OllHw-qmQZy9g8zpQuNF35GT7gQ1](https://sos.iowa.gov/search/business/(S(qylzuz45kclzrxjqdaf3mn55))/summary.aspx?c=rd_dipmYeMLLvP1OllHw-qmQZy9g8zpQuNF35GT7gQ1).

<sup>8</sup> Noel, *supra* note 1; TEMPLETON RYE, <http://www.templetonrye.com/history/>.

commercial Templeton Rye was “almost the same stuff his grandfather [had] made.”<sup>9</sup>

The company played up their product’s small-town, hand-crafted qualities: Templeton Rye wasn’t merely hand-bottled. Instead, the bottling was done by a “staff of gray-haired locals...recruited from the church bulletin,” who then hand-marked the labels.<sup>10</sup>

The federally approved bottle label, which consumers would see in the aisles of a liquor store or on a shelf at a bar, reinforced these themes.



*Original Templeton Rye front label*<sup>11</sup>

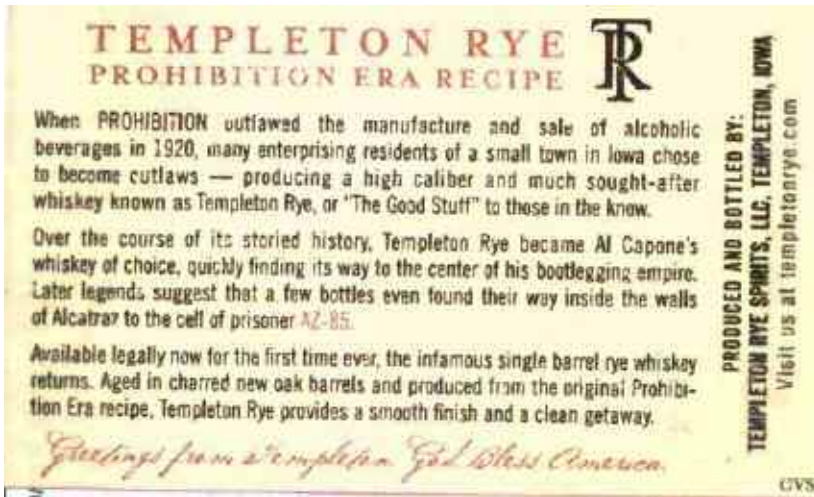
This is the label on the front of Templeton bottles. The faded, sepia photo is the first thing that catches the eye; the curve of the drinkers’ arms and dark bands of their fedoras encourage the eye to circle the image clockwise. Then the eye moves outward to take in the text’s distressed, old-timey lettering, reinforcing the mood of the image and “Prohibition Era Recipe” message in the banner.

<sup>9</sup> Noel, *supra* note 1.

<sup>10</sup> *Id.*

<sup>11</sup> See ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, *Certification/Exemption of Label/Bottle Approvals (COLA)*, [hereinafter “COLA Registry”] TTB ID 06286000000097, <https://www.ttbonline.gov/colasonline/publicViewImage.do?id=06286000000097>.

Take that bottle down, hold it in your hands, and turn it around to this:



*Original Templeton Rye back label<sup>12</sup>*

In three short paragraphs, the back label communicates (1) an origin story set in a particular time and place—the town of Templeton in the 1920s, (2) the “infamous” whiskey’s ties to the notorious Al Capone, and (3) the historically shady story’s transition to a redemptive one—the underground recipe brought to light by craft commerce. Together, the visual rhetoric of the front label and the narrative power of the back label conspire to send a clear, memorable message.

And the whiskey in that bottle was delicious, earning favorable reviews from critics and winning awards from 2008 through 2010.<sup>13</sup> This success spurred interest in the town of Templeton and its history—increasing tourism, improving finances, and leading to a book and documentary film.<sup>14</sup>

<sup>12</sup> *Id.*

<sup>13</sup> Reviews included Geoff Kleinman, *Templeton Rye Whiskey Review*, DRINKSPIRITS.COM (Jan. 26, 2011), <http://www.drinkspirits.com/whiskey/templeton-rye-whiskey-review/> (rating Templeton Rye 4.5 stars; “Very Highly Recommended”) and Steve Ury, *Whiskey Wednesday: Templeton Rye*, SKU’S RECENT EATS, (Apr. 27, 2010), <https://recenteats.blogspot.com/2010/04/whiskey-wednesday-templeton-rye.html> (describing the whiskey’s nose as “beautiful; full of rye spice with pickling herbs). The list of awards Templeton received in spirits competitions are listed at *Templeton Rye*, INFINIUM SPIRITS, <http://infiniumspirits.com/brands/templeton-rye/#1977>.

<sup>14</sup> Ken Behrens, *Templeton Rye lawsuit is misguided*, Letter to the Editor, DES MOINES REGISTER (Oct. 8, 2014, 11:17 PM CT), <http://www.desmoinesregister.com/story/opinion/readers/2014/10/09/templeton-rye-lawsuit-misguided/16949981/> (noting positive economic impact of the company on the town); BRYCE T. BAUER, GENTLEMAN BOOTLEGGERS: THE TRUE STORY OF TEMPLETON RYE, PROHIBITION, AND A SMALL TOWN IN CAHOOTS (2014); CAPONE’S WHISKEY: THE STORY OF TEMPLETON RYE (Modern American Cinema 2011).

There was just one problem: Templeton Rye’s claims to history, to locality, to authenticity, everything—turned out to be outright false or, in whiskey writer and critic Chuck Cowdery’s words, “misleading as hell.”<sup>15</sup> Templeton Rye wasn’t distilled in Templeton, Iowa. Nor was it made from a Prohibition-era recipe. Distillation took place two states over, in Indiana, by Midwest Grain Products Ingredients, Incorporated (MGP), a “food conglomerate” housed in a “massive brick complex that cranks out mega-industrial quantities of beverage-grade alcohol,” and “food grade industrial alcohol” for use in things such as solvents, antiseptics, and fungicides.<sup>16</sup> This factory whiskey was “trucked [from Indiana] to Templeton, offloaded at the plant, and bottled there.”<sup>17</sup>

The recipe for the whiskey made at that huge industrial plant wasn’t quietly passed down within Templeton families from Prohibition days, but a “stock recipe”<sup>18</sup> that MGP had inherited from a company it had acquired, which recipe the company hadn’t intended for making stand-alone whiskey but rather for use as “an ingredient in blends.”<sup>19</sup>

The truth about Templeton Rye came to light slowly, with whiskey geeks raising questions in 2008 and confirming MGP as its source in 2010.<sup>20</sup> Then, in 2014, the secret broke into the open when Templeton was one of a handful of products featured in a *Daily Beast* exposé entitled “Your ‘Craft’ Rye Whiskey is Probably from a Factory Distillery in Indiana.”<sup>21</sup>

15 Chuck Cowdery, *Templeton Rye Is Still Lying*, THE CHUCK COWDERY BLOG (July 27, 2015), <http://chuckcowdery.blogspot.com/2015/07/templeton-rye-is-still-lying.html> [hereinafter, Cowdery, *Still Lying*].

16 David Haskell and Colin Spoelman, *The Family Tree of Bourbon Whiskey*, GQ (Nov. 11, 2013), <http://www.gq.com/story/bourbon-whiskey-family-tree> (details on MGP); Eric Felten, *Your “Craft” Whiskey Is Probably from a Factory Distillery in Indiana*, THE DAILY BEAST (July 28, 2014 5:45 AM ET), <http://www.thedailybeast.com/articles/2014/07/28/your-craft-whiskey-is-probably-from-a-factory-distillery-in-indiana.html> (same); *Beverage Alcohol*, MGP (2017); <http://www.mgpingredients.com/alcohol/beverage/> (beverage-grade alcohol); *Food Grade Industrial Alcohol*, MGP (2017), <http://www.mgpingredients.com/alcohol/food-grade-industrial/> (food-grade industrial alcohol). At the time the Templeton story initially broke, its whiskey wasn’t made by MGP but by its predecessor, Lawrenceburg Distillers Indiana (LDI), which MGP acquired in late 2011. Chuck Cowdery, *MGP Acquires LDI Distillery*, THE CHUCK COWDERY BLOG (Oct. 21, 2011), <https://chuckcowdery.blogspot.com/2011/10/mgp-acquires-ldi-distillery.html>.

17 Noel, *supra* note 1.

18 Josh Hafner, *Templeton Rye to Change Labels, Clarifies how Much Made in Iowa*, THE DES MOINES REGISTER (Aug. 29, 2014 8:33 AM CT), <http://www.desmoinesregister.com/story/news/2014/08/28/templeton-rye-change-labels-clarifies-much-made-iowa/14770045/>.

19 Chuck Cowdery, *George Dickel Gives a Different Taste to LDI Rye*, THE CHUCK COWDERY BLOG (Oct. 26, 2012), <https://chuckcowdery.blogspot.com/2012/10/george-dickel-gives-different-taste-to.html> [hereinafter, Cowdery, *Different Taste*].

20 *E.g.*, Chuck Cowdery, *Templeton Rye. Hoist On Its Own Petard?*, THE CHUCK COWDERY BLOG (Nov. 18, 2009), <https://chuckcowdery.blogspot.com/2009/11/templeton-rye-hoist-on-its-own-petard.html> (noting that barrels of aging Templeton Rye appearing on the company’s own website featured distilling dates several years earlier than the company’s founding); Noel, *supra* note 1.

21 Felten, *supra* note 16.



This national attention spurred three class-action lawsuits that ended in a global settlement.<sup>22</sup> Templeton Rye changed its bottle labels and set aside \$2.5 million to pay consumers who had bought their whiskey based on the local, craft appeal.<sup>23</sup>

But some whiskey critics still weren't satisfied. Soon after the settlement, Cowdery published an article titled *Templeton Rye Is Still Lying*.<sup>24</sup> Debates about Templeton's other shady-but-technically-legal practices not covered by the settlement, such as their use of flavoring additives, continued.<sup>25</sup>

Reflecting on the lawsuits and settlement, Templeton Rye's chairman suggested that where the whiskey was made, and the stock recipe used to make it, were "not the most important thing."<sup>26</sup> Instead, what mattered was the idea of the "whiskey as a tribute to and celebration of the town of Templeton and its legendary bootlegging past."<sup>27</sup>

Cowdery noted the irony in Templeton's story: "[T]he tragedy here is that they have a delicious product and even the story is kind of sweet. The whole thing might have worked just as well if they had not tried so hard to make people believe it was literally true."<sup>28</sup> Not "tragic," surely, but understandable: the company's founders may well have been swept up in the "idea" of Templeton and surprised by the outcry. Inclined, as we all are, to seeking narrative coherence,<sup>29</sup> they may have overlooked inconvenient details in their story and fallen prey to the "seductiveness of narrative momentum."<sup>30</sup>

However, unlike other recent examples of the seductiveness phenomena in fields such as journalism (Brian Williams), nonfiction (Jonah Lehrer), memoir (James Frey), or sports writing (the Manti Te'o

<sup>22</sup> Hafner, *supra* note 18; Matthew Patane, *Templeton Rye Agrees to Pay up to \$36 per Claim in Settlement*, DES MOINES REGISTER (July 22, 2015 11:23 AM CT), <http://www.desmoinesregister.com/story/money/business/2015/07/20/templeton-rye-settlement/30420745/>.

<sup>23</sup> Patane, *supra* note 22.

<sup>24</sup> Cowdery, *Still Lying*, *supra* note 15.

<sup>25</sup> *E.g., id.*; Chuck Cowdery, *Flavoring Is Legal in American Whiskey. Yes, You Read That Correctly*, THE CHUCK COWDERY BLOG (Sept. 16, 2014), <http://chuckcowdery.blogspot.com/2014/09/flavoring-is-legal-in-american-whiskey.html> [hereinafter, Cowdery, *Flavoring Is Legal*].

<sup>26</sup> Hafner, *supra* note 18.

<sup>27</sup> *Id.*

<sup>28</sup> Cowdery, *Still Lying*, *supra* note 15.

<sup>29</sup> See J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53, 63–68 (2008) (exploring the theory of "narrative coherence" in Applied Legal Storytelling).

<sup>30</sup> This term "The Seductiveness of Narrative Momentum" was coined and the concept explored in the context of Applied Legal Storytelling in a presentation by Derek H. Kiernan-Johnson at the 2013 Applied Legal Storytelling Conference, City Law School, City University London (July 24, 2013). A pdf of the program for that conference is located at [https://www.city.ac.uk/\\_data/assets/pdf\\_file/0006/185163/Applied-Story-Telling-Conference-Programme-18-July-2013.pdf](https://www.city.ac.uk/_data/assets/pdf_file/0006/185163/Applied-Story-Telling-Conference-Programme-18-July-2013.pdf).

hoax),<sup>31</sup> the Templeton tragedy wasn't a one-off anomaly. For although Templeton was one of the first "craft" whiskey companies to buy pre-made whiskey from MGP and then gloss over that fact in its marketing,<sup>32</sup> it was not the only one to do so. MGP is a "one-stop shop for marketers who want to bottle their own brands of spirits without having to distill the product themselves."<sup>33</sup> The company manufactures "about half of the rye brands on liquor shelves today."<sup>34</sup> And not just rye whiskey, but also wheat whiskey, malt whiskey, corn whiskey, and bourbon whiskey.<sup>35</sup> The total number of whiskeys sourced from MGP is hard to pin down, but was recently estimated to be around 128.<sup>36</sup> And MGP isn't the only company offering this service to "craft" distillers.<sup>37</sup>

The technical name for whiskey companies, such as Templeton, that have others distill and age their whiskey is "non-distiller producers," or "NDPs."<sup>38</sup> As whiskey author Steve Ury notes, "There's nothing inherently wrong with buying whiskey from another company and selling it at all. What's wrong is doing it and pretending you made it yourself . . ."<sup>39</sup>

Some American NDP whiskeys are transparent about their status. An extreme example is Blaum Brothers Distilling's *Knotter Bourbon*, which celebrates its NDP status not only in its advertising ("[W]e didn't distill

31 For a summary of these three examples, see Erik Wemple, *NBC News's Brian Williams Recants Story about Taking Incoming Fire During Iraq War Coverage*, WASH. POST (Feb. 4, 2015 7:20 PM), <https://www.washingtonpost.com/blogs/erikwemple/wp/2015/02/04/nbc-news-brian-williams-recants-story-about-taking-incoming-fire-during-iraq-war-coverage/>; Alexandra Alter, *A Fraud? Jonah Lehrer Says his Remorse is Real*, N.Y. TIMES, July 11, 2016, <https://www.nytimes.com/2016/07/12/books/a-fraud-jonah-lehrer-says-his-remorse-is-real.html>; Evgenia Peretz, *James Frey's Morning After*, VANITY FAIR, (June 2008), <https://www.vanityfair.com/culture/2008/06/frey200806>; and Michael Rosenberg, *Te'o Girlfriend Hoax Filled with More Questions than Answers*, SPORTS ILLUSTRATED (Jan. 16, 2103), <https://www.si.com/college-football/2013/01/16/teo-column>.

32 Tony Sachs, *The Delicious Secret Behind Your Favorite Whiskey: The Best Spirits from MGP*, SERIOUS EATS, <https://www.serious eats.com/2015/09/best-whiskey-spirits-from-mgp.html>.

33 Felten, *supra* note 16.

34 Haskell & Spoelman, *supra* note 16.

35 Jake Emen, *Sourcing, Labeling & Lawsuits: Why American Whiskey Should Improve Its Labels*, EATER (July 7, 2015, 1:17 PM EDT), <http://www.eater.com/drinks/2015/7/7/8903167/sourcing-labeling-lawsuits-why-american-whiskey-should-improve-its>. Rye whiskey features prominently because rye is especially hard for craft distillers to work with. Haskell & Spoelman, *supra* note 16.

36 Steve Ury, *The Complete List of American Whiskey Distilleries & Brands*, SKU'S RECENT EATS, <http://recenteats.blogspot.com/p/the-complete-list-of-american-whiskey.html> (last updated May 6, 2017) [hereinafter, Ury, *Complete List*].

37 For instance, a factory distillery in Canada is the source for Vermont's Whistle Pig Rye. NPR Staff, *Why Your "Small-Batch" Whiskey Might Taste a Lot Like the Others*, ALL THINGS CONSIDERED (July 30, 2014, 6:33 PM ET), <https://www.npr.org/sections/thesalt/2014/07/30/336584438/why-your-small-batch-whiskey-might-taste-a-lot-like-the-others>; Lew Bryson, *Your "Local" Craft Whiskey May Really Be from Canada*, DAILY BEAST (June 28, 2016, 1:00 AM ET) <http://www.thedailybeast.com/articles/2016/06/28/your-local-craft-whiskey-may-really-be-from-canada>; Felten, *supra* note 16; Emen, *supra* note 35.

38 Emen, *supra* note 35; Chuck Cowdery, *The Rational Way to Regard NDP Whiskeys*, THE CHUCK COWDERY BLOG (May 26, 2013) <http://chuckcowdery.blogspot.com/2013/05/the-rational-way-to-regard-ndp-whiskeys.html>.

39 Janet Patton, *The Spirit of Kentucky: Bourbon is More of a Commodity than Many Realize*, LEXINGTON HERALD LEADER, (Nov. 12, 2015, 3:04 PM), <http://www.kentucky.com/news/business/bourbon-industry/article44457627.html>.

this bourbon. Nope, not a drop.”), but even in the product’s name (“Knotter” bourbon = “not our” bourbon).<sup>40</sup> In Scotland there’s a long tradition of “Independent bottlers,”<sup>41</sup> the loose equivalent of American NDPs, whose successful approach is seen as a possible model for the United States.<sup>42</sup>

Open, transparent NDPs aren’t the problem. The problem is the NDPs who lie about or obscure their products’ origin, a subcategory that Cowdery has dubbed “Potemkin Craft Distilleries.”<sup>43</sup> In discussing High West, a Utah-based whiskey company that got in hot water around the same time as Templeton for deceptively using stock MGP whiskey, Cowdery explained his inspiration for the moniker:

The original term refers to Grigori Aleksandrovich Potemkin, who allegedly had elaborate fake villages constructed for Catherine the Great’s tours of the Ukraine and Crimea, in an effort to show his colonization efforts there were successful. It came into common usage during the Cold War, to refer to similar Soviet efforts to portray living conditions in the USSR as better than they actually were.

I call High West a Potemkin Craft Distillery because the company’s most highly touted products, its Rendezvous and Rocky Mountain Ryes, are whiskeys High West did not make but, rather, merely bought and bottled.<sup>44</sup>

It’s this lack of transparency, this lack of honesty, that is harmful.

It harms whiskey drinkers, such as the plaintiffs in the class-action lawsuits against Templeton. The harms to drinkers, however, are not merely economic harms to them in their capacity as “consumers.” Nor are the harms to bona-fide craft-whiskey distillers limited to the severe competitive disadvantage Potemkins put them in. There’s plenty of collateral damage to go around, and the harms extend even to American whiskey itself.

To understand how the Potemkin phenomenon arose and continues to fester, to appreciate why existing legal remedies are largely ineffectual, and to see the narrative and rhetorical opportunities for Potemkins to

<sup>40</sup> *Knotter Bourbon*, BLAUM BROTHERS DISTILLING COMPANY, <http://www.blaumbros.com/knotter-bourbon>.

<sup>41</sup> E.g., *The History of the Independent Bottlers*, WHISKY.COM, <https://www.whisky.com/information/knowledge/production/independent-bottlers/the-history-of-the-independent-bottlers.html>.

<sup>42</sup> Patton, *supra* note 39; Chuck Cowdery, *Who Made That Whiskey?*, THE CHUCK COWDERY BLOG (Dec. 19, 2008), <https://chuckcowdery.blogspot.com/2008/02/who-made-that-whiskey.html> (“Independent bottlers should identify themselves as such and be proud enough of their products to tell the truth about them.”).

<sup>43</sup> Chuck Cowdery, *Potemkin Craft Distilleries*, THE CHUCK COWDERY BLOG (Feb. 11, 2010), <http://chuckcowdery.blogspot.com/2010/02/potemkin-craft-distilleries.html> [hereinafter, Cowdery, *Potemkin Craft Distilleries*]; see also Felten, *supra* note 16.

<sup>44</sup> Cowdery, *Potemkin Craft Distilleries*, *supra* note 43.

flourish, it's first necessary to bone up on a few things: First, what whiskey is and how it's made—in particular how the process is different from craft beer brewing, which is likewise associated with authenticity and place, and how it's regulated. The second is how key moments in American whiskey history create narrative and rhetorical opportunities for Potemkins to flourish and help explain today's broader craft moment.

## II. Whiskey Basics

Whiskey<sup>45</sup> is made from grain, “much as bread is, but in liquid, concentrated form.”<sup>46</sup> Dried and ground to a flourlike consistency, that grain is then steeped in hot water, like coffee or tea. It's then fermented with yeast, like beer or wine. Next, it is distilled, like vodka or gin. Finally, it is aged in wood, like brandy or aged rum.

Aficionados have defined it rhapsodically,<sup>47</sup> but more pertinent here is its legal definition. Under U.S. law, “whisky” (sic),<sup>48</sup> as defined in the Code of Federal Regulations, is

an alcoholic distillate from a fermented mash of grain produced at less than 190° proof in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to whisky, stored in oak containers (except that corn whisky need not be so stored), and bottled at not less than 80° proof, and also includes mixtures of such distillates for which no specific standards of identity are prescribed.<sup>49</sup>

That's a lot to unpack and some parts don't make sense.<sup>50</sup> But what matters here are the definition's subcategories, the two most important being “bourbon” and “rye.” Templeton Rye is, you guessed it, a rye whiskey, while the NDP whiskey Knotter (“not-our”) bourbon is a bourbon. As a legal matter, the difference between these two subcategories hinges on the

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**45** An aside about spelling: Typically, the word is spelled “whiskey” for products made in former British colonies that rebelled against the Empire—such as the United States and Ireland—but “whisky” for products made in places that remained loyal to the crown—such as Canada and Scotland. VEACH, *supra* note 6, at 13. This article follows that convention. Additionally, as an article about American whiskey written by an American author, it will use, as a category term covering all species in the genus, the American spelling: “whiskey.”

**46** LEW BRYSON, TASTING WHISKEY: AN INSIDER'S GUIDE TO THE UNIQUE PLEASURES OF THE WORLD'S FINEST SPIRITS 23 (2014) [hereinafter, BRYSON, TASTING WHISKEY].

**47** *Id.* at 10.

**48** See discussion at *supra* note 45.

**49** 27 C.F.R. § 5.22(b) (Westlaw through Jan. 11, 2018; 83 FR 1310).

**50** For example, the definition requires whiskey to, first, be distilled “in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to whisky,” and then be “stored in oak containers.” 27 C.F.R. § 5.22(b). This makes no sense, because it is this second step—aging in oak—that gives whiskey its flavors, aromas, and colors. BRYSON, TASTING WHISKEY, *supra* note 46, at 137–38.

percentage of rye or corn, respectively, used to make each. “Rye” whiskey is made from at least 51% rye; whiskey made from at least 51% corn is called not “corn” whiskey, but “bourbon.”<sup>51</sup>

Significantly, the legal definition of bourbon says nothing about Kentucky. Although it is a popular myth that bourbon can be made only in that state,<sup>52</sup> bourbon can be made, and, with the rise nationwide of local craft distilleries, Potemkin or otherwise, increasingly *is* made, anywhere within the United States.<sup>53</sup> Even Tennessee.<sup>54</sup>

Another popular myth is that the name “bourbon” refers to Bourbon County, Kentucky, or to New Orleans’s Bourbon Street.<sup>55</sup> Those appear to be mere coincidences. Instead, as with other nineteenth century products who used the “bourbon” moniker, such as bourbon coffee, bourbon sugar, and bourbon cotton, bourbon whiskey was probably so named in (unapproved) efforts to evoke the prestige of the Bourbon royal family.<sup>56</sup> Potemkin palming-off has a rich lineage.

## A. The Steps that Mirror Brewing

The initial steps in making whiskey are similar to those for making beer. Entrepreneurs with backgrounds in homebrewing or microbrewing might therefore be tempted to suppose that craft distilling is just as easy to do. This is often the first step on the path to becoming Potemkins.

As with beer-brewing, the first step in whiskey-making is harvesting and preparing cereal grains.<sup>57</sup> Which grains are used, and in what ratio, affects a whiskey’s aroma, flavor, and texture.<sup>58</sup> The grains most commonly used in American whiskey are corn, rye, wheat, and barley.<sup>59</sup> Once the

51 27 C.F.R. § 5.22(b)(1). The term “corn” whiskey is reserved for unaged whiskey made from at least 80% corn. *Id.* Other grains that can be used to make whiskey include wheat, barley, and, less commonly, oats, buckwheat, triticale, millet, spelt, and quinoa. DAVE BROOM, *WHISKEY: THE MANUAL* 46 (2014).

52 *E.g.*, BRYSON, *TASTING WHISKEY*, *supra* note 46, at 139.

53 27 C.F.R. § 5.22(b)(2), (l)(1). (“Whisky [*sic*] distilled from bourbon . . . is whisky produced in the United States . . . the word ‘bourbon’ shall not be used to describe any whisky [*sic*] . . . not produced in the United States.”).

54 Although most Tennessee whiskey producers such as Jack Daniel’s and George Dickel choose to market their products as “Tennessee whiskey,” and have recently garnered support within the state of Tennessee for that designation (*see* Tenn. Code Ann. § 57-2-106 (Westlaw through end of the 2017 First Regular Session of the 110th Tennessee General Assembly)), from a federal perspective they are bourbons. 27 C.F.R. § 5.22(b)(2) (defining Bourbon whiskey as whiskey produced in the United States at less than 160° proof from fermented mash of not less than 51% corn and stored at not more than 125° proof in charred new-oak containers).

55 *E.g.*, FRED MINNICK, *BOURBON: THE RISE, FALL, AND REBIRTH OF AN AMERICAN WHISKEY* 27 (2016) [hereinafter MINNICK, *BOURBON*]; VEACH, *supra* note 6, at 24–29.

56 MINNICK, *BOURBON*, *supra* note 55, at 27.

57 BRYSON, *TASTING WHISKEY*, *supra* note 46, at 23; BROOM, *supra* note 51, at 43.

58 BROOM, *supra* note 51, at 43.

59 BRYSON, *TASTING WHISKEY*, *supra* note 46, at 22.

grains are harvested, they are dried and milled, to about the consistency of flour,<sup>60</sup> unless the brewer chooses to first malt or smoke the grains.

Malting, common to beer-brewing, is a process by which harvested grains are made to sprout, but then dried before they can further mature.<sup>61</sup> Grains that are malted before being milled reflect that in their name. The standard MGP recipe used to make Templeton Rye (and to make many other MGP-sourced Potemkin craft whiskeys) calls for 95% (unmalted) rye and 5% malted barley.<sup>62</sup> A whiskey made entirely from malted grains may reflect that in its name, such as “single malt Scotch.” In the U.S., most grains used in whiskey-making are unmalted.<sup>63</sup> Smoking the grains, a hallmark of certain kinds of Scotch whisky, is uncommon in the U.S.<sup>64</sup>

As with beer-brewing, the next step in whiskey-making is to steep the milled grains in hot water,<sup>65</sup> releasing rich, complex flavors. For whiskey, the quality and mineral content of that water is significant<sup>66</sup> and one reason the limestone slab beneath central Kentucky makes that area a good home for whiskey.<sup>67</sup> The water is kept hot to convert the starches from the grains into sugars,<sup>68</sup> which is important for the next step.

The third step, and the last that parallels beer-brewing, is fermentation. To the now-cooled “mash,” a whiskey maker adds yeast. The choice of yeast is important, as it can significantly affect the “vast range of different flavors” produced during fermentation.<sup>69</sup>

Reusing yeast from a previous batch of whiskey is called “sour mashing” (as opposed to “sweet mashing”).<sup>70</sup> For reasons of quality-

60 *Id.* at 30.

61 *Id.* at 24.

62 Cowdery, *Still Lying*, *supra* note 15; Chuck Cowdery, *Secret Mash Bills Are Stupid*, THE CHUCK COWDERY BLOG (May 14, 2014), <http://chuckcowdery.blogspot.com/2014/05/secret-mash-bills-are-stupid.html>. Rye whiskeys must have a mash bill of 51% rye, malted or unmalted, and most top out at around 70%, with corn, rather than malted barley, filling out the remainder. Haskell & Spoelman, *supra* note 16; 27 C.F.R. § 5.22(b)(1).

63 When used in American whiskey, malted barley is usually only around 5%–14% of the total grains. Bernie Lubbers, *There's Only 3 General Bourbon Mash Bill's Y'all – THREE*, WHISKEY PROFESSOR (July 12, 2011), <http://www.whiskeyprof.com/theres-only-3-general-bourbon-recipes-yall/>. Malted rye is more unusual, and expensive. *E.g.*, Cowdery, *Different Taste*, *supra* note 19.

64 This step is most common in Scotland, where peat moss is used to dry and smoke malted grains. *E.g.*, BRYSON, TASTING WHISKEY, *supra* note 46, at 26–27; BROOM, *supra* note 51, at 46–48.

65 BRYSON, TASTING WHISKEY, *supra* note 46, at 25.

66 Calcium, for example, is good to have in the water, as it helps the yeast ferment, while iron is bad, as it can “ruin whiskey, making it turn black and foul.” BRYSON, TASTING WHISKEY, *supra* note 46, at 30.

67 Central Kentucky’s limestone strata provide iron-free, calcium-rich water, which is “so good for whiskey making” that certain distilleries near but not on that limestone slab are believed to have failed for that reason. *Id.*

68 BROOM, *supra* note 51, at 44.

69 BROOM, *supra* note 51, at 49; *see also* Chuck Cowdery, *You Call Yourself “Craft?” Make you Own Yeast*, THE CHUCK COWDERY BLOG (Feb. 6, 2011), <https://chuckcowdery.blogspot.com/2011/02/you-call-yourself-craft-make-your-own.html> (“Most of the old timers who are still around will tell you that handling yeast is one of a distiller’s most important skills, the first thing you are taught, because if you can’t master that you shouldn’t bother with the rest.”).

70 *See* VEACH, *supra* note 6, at 7.

control and batch-to-batch consistency, most American whiskeys are made using a sour-mash process.<sup>71</sup> However, some whiskey distillers—Jack Daniel’s, most famously—make a marketing point out of their sour-mash process, implying (without outright asserting) that the sour-mash process is special (rather than ubiquitous) and that it affects the flavor in an artisanal way (rather than a means of industrial control and consistency).<sup>72</sup>

Whether via sour mash or sweet mash, the yeast then eats up sugars extracted from steeping the grains, while expelling carbon dioxide and alcohol.<sup>73</sup> Once the “alcohol by volume” (ABV) in the mixture settles between 8% and 18%, it’s ready for distillation.<sup>74</sup>

## B. The Steps that Make Whiskey Different

It is here, during the next two stages—distillation, then wood maturation—that whiskey-making departs from the process for making a beverage that is merely fermented, such as wine, cider, or beer, and where the challenges in the process become most stark. Distillation is the fulcrum in the fight over Potemkin craft distilleries’ failure to make explicit that their products, while perhaps “hand-bottled” on site, are actually “distilled” somewhere else, such as at MGP in Indiana.

“Distill,” derived from the Latin verb “destillare,” meaning “to drip down,”<sup>75</sup> involves boiling a liquid, collecting the vapor coming off the boil, then letting that vapor cool and condense back into a liquid so it can “drip down” away from the original, boiling liquid.<sup>76</sup> The main piece of equipment used in distilling is called a “still,” made of copper.<sup>77</sup> The shape of every component of a still can have a tremendous, and not entirely understood, effect on the whiskey’s taste.<sup>78</sup> Whatever the equipment’s contours, the basic process is the same: because alcohol boils at a temperature lower than water does, as the mash is heated, alcohol evap-

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**71** Sour-mashing makes the mash more acidic, which helps prevent bacterial infection, and makes it more likely that the particular yeast strain used in the last batch will populate the new batch. See VEACH, *supra* note 6, at 7; BRYSON, TASTING WHISKEY, *supra* note 46, at 31.

**72** BRYSON, TASTING WHISKEY, *supra* note 46, at 31.

**73** *Id.* at 23.

**74** *Id.* at 31–32.

**75** E. PAUL PACULT, KINDRED SPIRITS 2, 8 (2008).

**76** *Id.*

**77** The use of copper is important: without it, the whiskey may acquire a repulsive, “pungently sulfury, meaty, almost a cabbagey smell.” BRYSON, TASTING WHISKEY, *supra* note 46, at 34.

**78** *Id.* at 34.

orates first.<sup>79</sup> It is this alcohol, along with various subtle aromas and flavors, that condenses and drips down into a second container.<sup>80</sup>

It is not, however, simply a matter of letting the still boil away and then collecting all of the runoff. Instead, at least when using a “pot” still, a distiller must pay careful attention to the “cut,”<sup>81</sup> to capture only the middle part of the run, the “heart cut.”<sup>82</sup> The tricky art of picking out a heart cut is where whiskey makers “earn their keep.”<sup>83</sup> It’s also a step that allows for few mistakes, and one that can’t (legally, at least) be learned at home, like aspects of beer- and wine-making can be.

In beer-making, the stakes are low: a mistake in the process might spoil the batch, making it unpleasant to consume. In whiskey distillation, however, rookie mistakes can be fatal, both for those making the whiskey and for those drinking it. For drinkers, the risk isn’t just a bad-tasting batch, but the presence of ethanol in early runs, threatening blindness or death.<sup>84</sup> The risk to distillers is that of an explosive fire from the high levels of evaporation alcohol involved in distillation, a risk that even in today’s sophisticated, regulated distilleries run by experienced professionals, remains deadly.<sup>85</sup> Heaven Hill Distilleries, for instance, was honored with the Governor of Kentucky’s “Safety and Health Award” in June of 2017.<sup>86</sup> Its achievement? Going without any accidents since October of 2015.<sup>87</sup>

Perhaps because of these risks, unlicensed distilling, or making “moonshine,” is a felony.<sup>88</sup> Merely possessing unlicensed distilling equipment is a felony.<sup>89</sup> In sum, distilling can be illegal, and is dangerous and hard to do well.

Compounding these difficulties, the next step in whiskey making—wood maturation—is also hard and dangerous, and, like a license for a still,

79 PACULT, *supra* note 75, at 8.

80 BROOM, *supra* note 51, at 49–50.

81 BRYSON, TASTING WHISKEY, *supra* note 46, at 36. The process is slightly different for whiskey made using “Coffey” or “column” stills, as well as for “hybrid” pot–column stills. *Id.* at 37–39; VEACH, *supra* note 6, at 36.

82 PACULT, *supra* note 75, at 9; BRYSON, TASTING WHISKEY, *supra* note 46, at 36.

83 BRYSON, TASTING WHISKEY, *supra* note 46, at 36.

84 This was one of the tragedies of Prohibition, as unregulated, black-market whiskey produced by criminal syndicates caused consumers to go blind and even die, with no legal recourse against their suppliers. VEACH, *supra* note 6, at 88.

85 MINNICK, BOURBON, *supra* note 55, at 50–51, 206–07.

86 Sylvia Horlander, *Heaven Hill’s Safety Record Recognized by Governor at HB 100 Signing Ceremony*, NELSON COUNTY GAZETTE, June 2, 2017, <http://nelsoncountygazette.com/?p=32529>.

87 *Id.*

88 26 U.S.C. § 5601(a)(8).

89 *Id.* at (a)(1). The TTB’s website features an eight-point summary of the various criminal penalties that home distillers may face. *Home Distilling*, TTB ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, <https://www.ttb.gov/spirits/home-distilling.shtml> (last updated Oct. 2, 2015).



requires many of the things that most aspiring craft distillers are unlikely to possess or be able to acquire. Aging the distillate in oak barrels is the hallmark of whiskey around the world and, with one minor exception, a legal requirement for all American whiskey.<sup>90</sup> Skip this step, and the clear, colorless distillate isn't really whiskey, but rather just "a sort of vodka."<sup>91</sup>

The "age statement" on a whiskey label, "such as "8-year-old bourbon" or "12-year-old rye," reflects the number of years that the *youngest* whiskey in the blend spent in oak barrels.<sup>92</sup> In other words, the blend of whiskeys in the bottle will include components that are older than the number on the label.

What happens to the spirits in the barrel all this time? Several things. First, contact with the oak inside a barrel removes "harsh elements" that would make "even the most hardened drinker wince."<sup>93</sup> Second, wood contact adds color, flavor, and aromas to the spirit. Which particular flavors and aromas it adds depends on things such as the strength of the spirit, what species of oak is used to make the barrels, and what size and shape the barrels are.<sup>94</sup> If, as required for most kinds of American whiskey,<sup>95</sup> the inside of the barrels are first charred, the effects on the maturing spirit will be different and more pronounced.<sup>96</sup>

The interaction of liquid spirit and oak barrel takes time, as it depends upon the accumulated effect of the barrels' "breathing," like lungs, as the air temperature and pressure change across a day and year.<sup>97</sup> How barrels breathe, and what kind of air they breathe in, depends not only on where they sit—exposed to the elements, sheltered from them, near the sea, inland, and so on—but where within a particular warehouse they are stored. Upper floors impart more spice and dryness to the whiskey, while lower floors make for more-subtle, mellow flavors. A barrel's location within a warehouse even affects whether the spirit inside it becomes more alcoholic or less.<sup>98</sup> For "every master distiller has a favorite floor."<sup>99</sup>

<sup>90</sup> 27 C.F.R. § 5.22(b).

<sup>91</sup> BROOM, *supra* note 51, at 53.

<sup>92</sup> 27 C.F.R. § 5.40(a) (Westlaw through Jan. 11, 2018; 83 FR 1310); BRYSON, TASTING WHISKEY, *supra* note 46, at 51.

<sup>93</sup> BROOM, *supra* note 51, at 53.

<sup>94</sup> *Id.*; BRYSON, TASTING WHISKEY, *supra* note 46, at 48; Fred Minnick, *The Secret Science of Proof and Barrels*, WHISKY ADVOC. (Nov. 2, 2017), <http://whiskyadvocate.com/secret-science-proof-and-barrels/>.

<sup>95</sup> Charred oak is not required for plain, unspecified "whiskey," or for corn whiskey, but is required for bourbon, rye, wheat, malt, and rye malt whiskey. 27 C.F.R. § 5.22(b).

<sup>96</sup> BRYSON, TASTING WHISKEY, *supra* note 46, at 42–43 (summarizing the various effects of charring on whiskey).

<sup>97</sup> *Id.* at 44, 150–53.

<sup>98</sup> Alcohol by volume (ABV) increases in barrels stored on the upper floors because the heat there causes water evaporation to outpace alcohol vaporization; for barrels stored on the lower floors, the ABV decreases because alcohol vaporization caused by updrafts outpaces water evaporation. VEACH, *supra* note 6, at 68.

<sup>99</sup> BRYSON, TASTING WHISKEY, *supra* note 46, at 49.

The “dance” between spirit and wood can’t be rushed.<sup>100</sup> This makes it extremely challenging to learn through feedback: “Bad decisions can take years to come to light in [the whiskey] industry.”<sup>101</sup> As one veteran whiskey maker put it, “[Y]ou only get about two chances to learn from a 15-year-old bourbon. There’s your first one, and you learn from it all along the time, and you put all that into your second one. By the time the second one’s done . . . you’re usually about done, too.”<sup>102</sup>

Conversely, when things go right, it can be almost impossible to meet increased demand. An “old industry joke” involves a whiskey company’s marketing department calling up their production department to gush over the success of a 16-year-old whiskey they’ve sold out of, and to ask when they’d have more. The production department’s response? “How about in 16 years?”<sup>103</sup>

Warehousing in large, multistory-warehouse operations and having so much flammable whiskey, floor upon floor, in one place creates a second fire hazard post-distillation, adding to the danger and cost of making whiskey.<sup>104</sup> In a major fire at Heaven Hill in 1996, for instance, in just four hours 90,000 barrels of Bourbon stored in seven warehouses went up in flames.<sup>105</sup> A few years later, a similar fire at Wild Turkey Distillery “luckily” destroyed only a single warehouse.<sup>106</sup>

Once a barrel is finished maturing, unless the whiskey in it is destined for a “single barrel” bottling, the next step is “marrying” different barrels, often, at large distilleries, among thousands of barrels, to complement and balance out individual barrels’ diverse quirks into a coherent whole.<sup>107</sup>

### C. The Steps that Tempt Potemkins

Barring the optional step of secondary barrel aging, the whiskey is now ready for the final stage in its creation: dilution and bottling. Both steps create legally permissible opportunities for Potemkins to state true facts about their products that nevertheless create false impressions about

<sup>100</sup> BROOM, *supra* note 51, at 53.

<sup>101</sup> BRYSON, TASTING WHISKEY, *supra* note 46, at 50.

<sup>102</sup> *Id.* at 153 (quoting Ronnie Eddins of Buffalo Trace Distillery).

<sup>103</sup> *Id.* at 53.

<sup>104</sup> MINNICK, BOURBON, *supra* note 55, at 50–51, 206–07.

<sup>105</sup> See, e.g., Steve Coomes, *Tragic Fire at Heaven Hill in '96 Didn't Stop Nascent Bourbon Boom*, THE WHISKEY WASH (Nov. 11, 2016), <https://thewhiskeywash.com/whiskey-styles/bourbon/tragic-fire-heaven-hill-96-didnt-stop-nascent-bourbon-boom/>; Distillery Trail, *Vintage Aerial Coverage of 1996 Heaven Hill Distillery Fire* (Nov. 6, 2016), <http://www.distillerytrail.com/blog/live-aerial-coverage-1996-heaven-hill-distillery-fire/>.

<sup>106</sup> Interview with Eddie Russell, Wild Turkey, (Aug. 19, 2014), <https://www.youtube.com/watch?v=3ieShvfhDb4>; *Bourbon and Smoke*, CBS News (May 9, 2000, 6:56 PM), <https://www.cbsnews.com/news/bourbon-and-smoke/>.

<sup>107</sup> BRYSON, TASTING WHISKEY, *supra* note 46, at 153.

where those products came from, what they are made from, and how they were made.

The first of these steps, with one minor exception,<sup>108</sup> is to dilute mature, barrel-aged distillate with water. Federal law allows bourbon and rye whiskey to be diluted from an initial barrel intensity of not more than 125 proof (62.5% ABV) down to not less than 80 proof (40% ABV).<sup>109</sup> Adding water to whiskey to lower its proof helps reduce the unpleasant “nose burn” that high-alcohol spirits can cause, while also revealing and magnifying aromas and flavors that had been trapped in the whiskey.<sup>110</sup> Dilution thus “energizes whiskey,” akin to the effect of a rainstorm, which can make the “hidden aromas of a dry landscape come alive.”<sup>111</sup>

But diluting whiskey before bottling also creates an opportunity for Potemkin craft distillers to make misleading claims about their product. To save shipping costs, a stock whiskey made by a company such as MGP might be delivered to a Potemkin locale at barrel proof, where it would then be diluted for bottling using “local” (sometimes just filtered tap) water.<sup>112</sup> Given the importance of place to the craft ethos, and the central role that water plays in whiskey, a word with roots in the idea “water of life” or “lively water,”<sup>113</sup> touting the origin of the water in (added to) the whiskey is almost impossible to resist. Take Tin Cup Whiskey, an MGP Potemkin bottled in Denver, Colorado, which advertises itself as having “Bottle[d] the Mountain” by having been “cut with Rocky Mountain water.”<sup>114</sup> As Cowdery notes, “Tin Cup is not ‘made’ in Colorado in any meaningful sense. It is ‘made’ in Indiana, and merely diluted and bottled in Colorado.”<sup>115</sup>

108 The exception is for “cask-strength” whiskeys, which are intentionally bottled without distillation at the same proof as the barrel. *Id.* at 62. These cask-strength bottlings are often touted as superior to standard-strength bottlings. While they are sold at a higher price, they are not necessarily higher in quality.

109 27 C.F.R. § 5.22(b)(1). An aside about the term “proof”: Although the modern definition is twice the ABV, the term has a less mathematical, more colorful origin: it comes from the days before ABV could be easily measured, when instead distillers would “prove” that their whiskey was the appropriate strength—not too weak, not too strong—using gunpowder. Specifically, they would “prove” the alcohol level in their whiskey by mixing a bit of whiskey with gunpowder and then setting it on fire. If this mixture “sputtered and smoked, it was determined to be ‘under proof.’ If it burned too quickly with a high flame, it was ‘over proof.’ If it burned with a steady flame, then it was ‘100 percent proved.’” VEACH, *supra* note 6, at 37.

110 BROOM, *supra* note 51, at 61; BRYSON, TASTING WHISKEY, *supra* note 46, at 62–63; Hannah Devlin, *Scientists Reveal Why Whisky Tastes Better with Water*, THE GUARDIAN (Aug. 17, 2017, 9:33 AM EDT), <https://www.theguardian.com/science/2017/aug/17/whisky-and-water-galore-scientists-conclude-dilution-enhances-flavour>.

111 BROOM, *supra* note 51, at 61.

112 Chuck Cowdery, *After Templeton, Who’s Next? How About Tin Cup?*, THE CHUCK COWDERY BLOG (Sept. 2, 2014) <http://chuckcowdery.blogspot.com/2014/09/after-templeton-whos-next-how-about-tinotehtml> [hereinafter, Cowdery, *After Templeton*].

113 E.g., BRYSON, TASTING WHISKEY, *supra* note 46, at 96–97 (summarizing the etymology of the word “whiskey”).

114 *Whiskey: This is How We Bottle the Mountain*, TIN CUP, <http://www.tincupwhiskey.com/whiskey/>.

115 Cowdery, *After Templeton*, *supra* note 112.

Potemkin craft distillers can take yet another tempting step before bottling, although they aren't eager to tell anyone, let alone their customers, about it:<sup>116</sup> current federal regulations permit whiskeys other than those classified as "straight" to add "coloring, flavoring, or blending materials."<sup>117</sup> Templeton does this today, using that addition of a "little bit of flavoring" as the "sole basis" for their claim that their product is not stock MGP whiskey.<sup>118</sup> However, as Cowdery dryly notes, "to many consumers the revelation that the product is artificially flavored may be worse."<sup>119</sup>

After whiskey is diluted from barrel proof to bottle proof, it is put into individual bottles. This process can be highly automated, although some whiskey companies have workers—or volunteers, as part of a carefully choreographed craft-whiskey "experience"—cork the automatically filled bottles before the mechanized assembly line resumes. This human step allows such companies to imbue their not-at-all-handmade, industrially manufactured products with the evocative phrase "hand-bottled."

After the bottles are filled they are affixed with labels. The label alone, as the Templeton Rye label illustrates, is one more opportunity for Potemkin distilleries to evoke the almost magical power of rhetoric and narrativity in American craft whiskey.

### III. Roots in American Whiskey History

The initial success of Templeton Rye relied on how it fooled consumers, and perhaps even its creators, into thinking it was an authentic craft product. It did so by building a visual brand and narrative that reinforced the idea of the whiskey's coming from a particular stock place and time—the Prohibition-era Midwest—associated with particular stock characters—Chicagoland gangsters and small-town bootleggers.<sup>120</sup> As effective as Templeton's choices were, they are not the only stock settings and characters from America's mythic past that Potemkins have drawn from. Nor was National Prohibition the only American legal reform that inflected that history and mythos.

116 Steve Ury, *The Flavoring Game*, SKU'S RECENT EATS (Oct. 12, 2015) <http://recenteats.blogspot.com/2015/10/the-flavoring-game.html>. Ury describes the reaction he received from distilleries when asking them about this practice as akin to "poking into a matter of national security." *Id.*

117 27 C.F.R. § 5.22(b)(1)(iii), (b)(5)(i); 27 C.F.R. § 5.23(a); Cowdery, *Flavoring Is Legal*, *supra* note 25.

118 Cowdery, *Still Lying*, *supra* note 15.

119 *Id.*

120 These themes are so resonant that they work even outside the U.S. See, e.g., Alia Akkam, *'Speakeasy' Bars are Killing It in Countries that Never had Prohibition*, VINEPAIR (Oct. 23, 2017), <https://vinepair.com/articles/speakeasy-bars-countries-never-prohibition/>.

Poteskins have drawn from a range of stock settings and characters in American whiskey history, involving four key themes:

- *Whiskey as pastoral*: whiskey as a farm product, unregulated, made by individual farmer-distillers from seasonal regional grains.
- *Whiskey as industrial*: whiskey as a commodity, taxed and regulated, manufactured corporately and branded nationally.
- *Whiskey as reliable*: whiskey as a beverage with integrity, made honestly above a solid regulatory floor, whose claims to origin, method, quality, and purity could be trusted.
- *Whiskey as maverick*: whiskey as bad-boy accoutrement, outside the law.

Each theme has roots in different points in American history—the pastoral in the eighteenth century, the industrial and reliable in the nineteenth, and the maverick in the twentieth—but are not exclusive to those periods. Each theme has reemerged from time to time, and now converge in today’s Poteskin moment.

### A. The Romance of the Rebel Farmers

America’s first waves of European immigrants didn’t make whiskey. Instead, they made gin or rum, using stills they had brought with them from the old world.<sup>121</sup> After America’s war of independence, those who moved westward realized that their increased distance from seaside trading in cane sugar, molasses, and spices made it cost-prohibitive to continue making gin or rum.<sup>122</sup> So those in the interior made whiskey, instead, using “whatever grain they had on hand—usually corn or rye but also occasionally wheat.”<sup>123</sup> For them, whiskey was “just another farm-made product, like cheese, butter, cider, or bacon.”<sup>124</sup> Because it preserved well, whiskey could be stored and then traded for necessities throughout the year.<sup>125</sup>

Whiskey making in the new territories was also a community affair. Farmers who didn’t own stills would borrow time on a neighbor’s, paying for privilege by giving them a portion of the finished product. And millers, who received as payment for their services a portion of the grain they had ground, distilled that surplus grain into whiskey. For these millers, whiskey not only kept better than surplus grain did, it also was easier to transport.<sup>126</sup>

121 VEACH, *supra* note 6, at 3.

122 *Id.*

123 *Id.* at 6.

124 BRYSON, TASTING WHISKEY, *supra* note 46, at 87.

125 *Id.*

126 *Id.*; VEACH, *supra* note 6, at 6.

Back East, however, the federal government needed money to pay war debts and fund the new bureaucracy. Treasury Secretary Alexander Hamilton found a solution: to tax whiskey.<sup>127</sup> Inland farmer-distillers, who viewed the tax—correctly—as favoring both coastal distillers and large, urban distilleries, were furious.<sup>128</sup> Opposition to the tax led to the Whiskey Rebellion, which started in western Pennsylvania, spread throughout Appalachia, and eventually forced George Washington’s government to back down.<sup>129</sup> As a consequence, America’s farm distilleries would remain “small-time business operations for many decades to come.”<sup>130</sup>

The Whiskey Rebellion is also the source of a popular founding myth among Kentucky distilling families—that the turmoil from that rebellion caused their ancestors to flee to Kentucky, bringing their distilling know-how with them.<sup>131</sup> History suggests, however, that the fighting “likely had a nominal impact on the state’s distilling industry.”<sup>132</sup>

Because those early farmer-distillers made whiskey from whatever local grains were available, their whiskeys took on regional characteristics. Rye whiskey “grew up in the ridges and valleys of Pennsylvania’s Appalachian and Allegheny Mountains”<sup>133</sup> and spread across the thirteen colonies, becoming “*the American whiskey*” for many years. Rye helped to power the Pennsylvania and Maryland legislatures, whose long debates would cause beer to go warm and flat.<sup>134</sup> George Washington himself built a rye distillery at Mount Vernon, and, after retiring from the presidency, he became “for a short time the nation’s largest distiller of rye whiskey.”<sup>135</sup>

South of rye country, corn (maize) was plentiful.<sup>136</sup> So in places like Kentucky and Tennessee, the predominant whiskey was the corn-based whiskey called bourbon.<sup>137</sup>

127 MINNICK, BOURBON, *supra* note 55, at 15; Steve Simon, *Alexander Hamilton and the Whiskey Tax*, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU (Sept. 4, 2012), [https://www.ttb.gov/public\\_info/special\\_feature.shtml](https://www.ttb.gov/public_info/special_feature.shtml). The text of the legislation enacting the whiskey tax can be found in the Public Statutes at Large for the First Congress, Sess. III, Ch. 15., Mar. 3, 1791, pages 199–214, available at <https://www.loc.gov/law/help/statutes-at-large/1st-congress.php>.

128 VEACH, *supra* note 6, at 12.

129 *Id.* at 13; MINNICK, BOURBON, *supra* note 55, at 15.

130 VEACH, *supra* note 6, at 15.

131 MINNICK, BOURBON, *supra* note 55, at 15.

132 *Id.*

133 BRYSON, TASTING WHISKEY, *supra* note 46, at 91–92.

134 *Id.* at 157.

135 *Id.* at 16.

136 Corn also grows further north, such as in Massachusetts, which honors that heritage in its laws. See Mass. Gen. Laws ch. 2, § 28 (Westlaw through Chapter 175 of the 2017 1st Annual Session) (“The corn muffin shall be the official muffin of the commonwealth.”).

137 As noted earlier, as a legal matter “Tennessee Whiskey” is technically bourbon. See *infra*, Section 2, and note 54.

As distinct whiskey styles evolved, consumers' appreciation for quality rose. By the 1840s, newspaper advertisements would note bourbons' vintages and how long they had spent maturing in wood.<sup>138</sup> By the 1860s, ads emphasized brand identities.<sup>139</sup> The best whiskey brands were expensive: records from 1857 suggest that a barrel of 12-year-old Old Crow whiskey sold, in today's dollars, for over \$15,000 a gallon (or \$3,000 per 750ml bottle).<sup>140</sup> Whiskey was growing up, and moving past its pastoral roots to a more realistic understanding of its role as a manufactured, regulated, and branded commodity.

## B. Commodification in the Nineteenth Century

The Industrial Revolution transformed American whiskey. The farmer-distiller ideal, preserved at the beginning of the century by the 1802 repeal of the whiskey tax,<sup>141</sup> would, by century's end, make way for a "fully fledged factory system."<sup>142</sup> This was a result not only of general technological innovations such as steam engines and railroads, but also of innovations in distilling and wood aging.<sup>143</sup> These innovations made whiskey-making "a big business and an expensive one at that—far beyond the reach of the typical farmer distiller, for whom distilling was only a side business."<sup>144</sup>

Alongside increasing mechanical sophistication came increasing marketing savvy. In 1870, for example, Old Crow's E.H. Taylor Jr. set up a taste-off in Washington, D.C., between his 21-year-old Kentucky bourbon and a 21-year-old Pennsylvania rye.<sup>145</sup> His bourbon, lauded as "the most mellow, rich, full yet delicately flavored and surpassing in bouquet," won.<sup>146</sup> This contest, and other clever stratagems, made Old Crow a national brand with a reputation for quality, thus "creating a demand for it among consumers who until that point preferred familiar, locally produced whiskey."<sup>147</sup>

138 MINNICK, BOURBON, *supra* note 55, at 38.

139 *Id.* at 44.

140 *Id.* at 38. Old Crow has changed hands, and the brand today is no longer a premium one. *Id.* at 43. E.H. Taylor Jr., however, is honored by a premium Bourbon brand from Buffalo Trace Distillery. See BUFFALO TRACE DISTILLERY, *E.H. Taylor, Jr. Collection*, <https://www.buffalotracedistillery.com/brands/eh-taylor>.

141 Public Statutes at Large for the Seventh Congress, Sess. II Ch. 19., Apr. 6, 1802, pp. 148–50, <https://www.loc.gov/law/help/statutes-at-large/7th-congress/c7.pdf>. By repealing the whiskey tax and then signing the Louisiana Purchase, which opened up new markets and trade routes for whiskey commerce, Thomas Jefferson may rightly be considered "the greatest whiskey president of all time." MINNICK, BOURBON, *supra* note 55, at 32–33.

142 VEACH, *supra* note 6, at 31–33.

143 *Id.* at 31–44.

144 *Id.* at 44.

145 *Id.* at 53–54.

146 *Id.* at 54.

147 *Id.*

The evolution of American whiskey into branded products with national, and even international, reputations meant that the companies making those well-known whiskeys now had to fight to protect the integrity of their brand identities. The main threat to whiskey's reliability were the proto-Potemkin "rectifiers."

Rectifiers were wholesale merchants who would (1) purchase cheap alcohol such as unaged neutral spirits, (2) "rectify" that alcohol with colors and flavors to suggest the look, smell, and taste of aged whiskey, and then (3) sell their Potemkin product as whiskey.<sup>148</sup> Rectifiers could thus "pass[] off as ten-year-old whiskey" a product they had manufactured "in a single day."<sup>149</sup>

Not only was rectified whiskey fast, cheap, and easy to manufacture, but it also threatened public health, or at least threatened public notions of purity.<sup>150</sup> The main concerns involved the industrial additives used to color and flavor rectified whiskey, which included coal tar (creosote) and crushed bugs (cochineal).<sup>151</sup> Some of these additives were known to be harmful; others were newly developed products of the industrial age whose long-term effects were unknown.<sup>152</sup>

Purity concerns over rectified whiskey dovetailed with similar concerns about the purity of products in other industries such as meat-packing, a concern made vivid through Upton Sinclair's book *The Jungle*.<sup>153</sup> Along with "meat . . . , milk, and medicine, whiskey was something the public wanted to be wholesome."<sup>154</sup>

The fight to preserve whiskey's identity and purity took place in the courts,<sup>155</sup> in the executive branch,<sup>156</sup> and in Congress, and made for strange bedfellows: the Women's Christian Temperance Union supported

148 *Id.* at 45–47.

149 *Id.* at 67.

150 *Id.* at 45, 74.

151 *Id.* at 46.

152 *Id.* at 74.

153 BRYSON, TASTING WHISKEY, *supra* note 46, at 94–95.

154 *Id.* at 95.

155 One of the more colorful cases was one brought by the government of Japan to prevent rectified whiskey (explained in the next section) imported into their country from being advertised as straight whiskey. The judge in that case was Alphonso Taft, father of President and Chief Justice William Howard Taft. VEACH, *supra* note 6, at 73.

156 President William Taft held hearings, then ruled on a labeling controversy in 1909. MINNICK, BOURBON, *supra* note 55, at 71–72; see also, e.g., *Taft Decides Whiskey Must be Classified*, L.A. HERALD, (Dec. 27, 1909), available at <http://cdnc.ucr.edu/cgi-bin/cdnc?a=d&d=LAH19091227.2.5>. President Taft's decision, which allowed the words "rye" or "bourbon" to accompany the words "straight whiskey," recently secured his place in the Kentucky Bourbon Hall of Fame. *Kentucky Bourbon Hall of Fame: 2009 Recipients*, KY. DISTILLERS ASS'N, [http://kybourbon.com/heritage/kentucky\\_bourbon\\_hall\\_of\\_fame/](http://kybourbon.com/heritage/kentucky_bourbon_hall_of_fame/); *President Taft Inducted to the Kentucky Bourbon Hall of Fame*, THE FILSON HISTORICAL SOCIETY (Dec. 22, 2009), <http://filsonhistorical.org/president-taft-inducted-to-the-kentucky-bourbon-hall-of-fame/> (noting that Taft was inducted into the hall of fame "to pay homage to the centennial of his famous 'Taft Decision on Whiskey'").



distillers in their legislative fights against rectifiers, arguing that “whiskey was at least an all-natural product, and, thus, the lesser and safer of two evils.”<sup>157</sup> For our purposes, the most significant legislative enactment was the “Bottled in Bond” Act of 1897.<sup>158</sup> The Act created a regulatory scheme, still in effect today, that permits the phrase “bottled in bond” to appear on labels and advertising of whiskey that is

- made by the same distillery at the same distillery in a single season,
- aged for at least four years,
- at least 100 proof, and
- contains no additives (other than water needed to reduce barrel proof to bottling proof).<sup>159</sup>

The Act also imposed invasive oversight requirements on distillers seeking that classification, such as the requirement that the whiskey be aged in government “bonded” warehouses, and criminal penalties for those who used the term without authorization.<sup>160</sup> This “landmark consumer protection legislation offered guarantees people did not have before: namely, a means to identify when and where the whiskey was produced.”<sup>161</sup>

Given today’s whiskey consumers’ similar interest in seeking explicit assurances of purity and origin, the “Bottled in Bond” category has undergone a renaissance.<sup>162</sup> Buffalo Trace’s “E.H. Taylor, Jr. Collection,” for instance, is Bottled in Bond.<sup>163</sup> But the phrase is helpful only to those who already know what it means. For everyone else, it may just be alluring rhetoric—an unfamiliar, old-fashioned-sounding whiskey word, like “sour mash,” that suggests more than it means.

157 VEACH, *supra* note 6, at 75.

158 Officially, “An Act to allow the bottling of distilled spirits in bond,” Public Statutes at Large for the Fifty-Fourth Congress, Sess. II Ch. 379, Mar. 3, 1897, pp. 626–28, <https://www.loc.gov/law/help/statutes-at-large/54th-congress/session-2/c54s2ch379.pdf>.

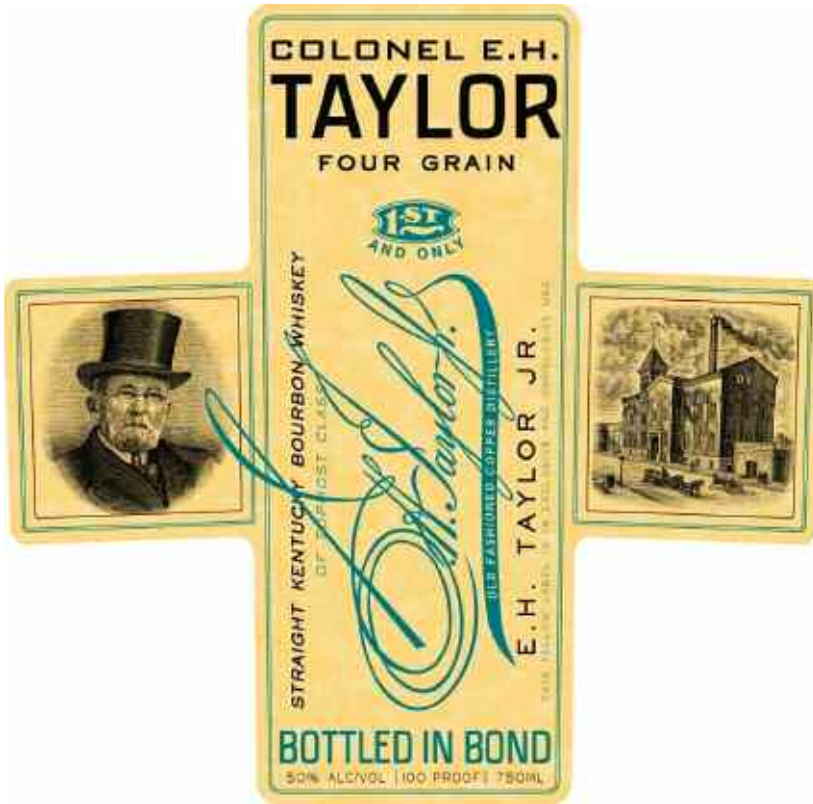
159 27 C.F.R. §§ 5.42(b)(3), 5.65(a)(7) (Westlaw through Jan. 11, 2018; 83 FR 1310).

160 Public Statutes at Large for the Fifty-Fourth Congress, secs. 1 & 7, Sess. II Ch. 379, Mar. 3, 1897, pp. 626–28, <https://www.loc.gov/law/help/statutes-at-large/54th-congress/session-2/c54s2ch379.pdf>.

161 MINNICK, BOURBON, *supra* note 55, at 59; see also Wallace Bennett, *Forty Years of Bottled in Bond*, AM. WINE LIQUOR J. 45 (Mar. 1937) (recognizing, on the Act’s 40th anniversary in 1937, how it had “insured ‘character’ for straight unblended whiskeys” and expressing the hope that this would “prevail through the years to come.”).

162 E.g., Fred Minnick, *Why You Should Try Bottled-in-Bond Whiskey*, WHISKY ADVOC. (June 1, 2106), <http://whiskyadvocate.com/why-you-should-try-bottled-in-bond-whiskey/>; Jonah Flicker, *Everything You Need to Know about Bottled in Bond Bourbon*, PASTE (Sept. 24, 2015 12:29 PM), <https://www.pastemagazine.com/articles/2015/09/everything-you-need-to-know-about-bottled-in-bond.html>.

163 See *Colonel E.H. Taylor Small Batch Bottled in Bond Bourbon*, DISTILLER, <https://distiller.com/spirits/colonel-e-h-taylor-small-batch>.



*Front label of one of Buffalo Trace's revival  
E.H. Taylor Bottled in Bond whiskeys<sup>164</sup>*

The Bottled in Bond Act and other legislative reforms were largely successful, and the whiskey industry grew, becoming “the most regulated industry in the United States.”<sup>165</sup> Whiskey was now an industrial commodity, whose corporate manufacturers had the lobbying clout to protect its integrity legally, and which the federal government taxed without fear of inciting rebellion. And tax it they did: until the introduction of a federal income tax in 1913, whiskey taxes were the largest source of federal tax revenue.<sup>166</sup>

Whiskey’s power and prestige, however, would soon change.

<sup>164</sup> See *COLA Registry*, TTB ID 16117001000016, <https://www.ttbonline.gov/colasonline/publicViewImage.do?id=06286000000097>; see also *E.H. Taylor, Jr. Collection*, *supra* note 140.

<sup>165</sup> VEACH, *supra* note 6, at 63.

<sup>166</sup> 38 Stat. 114 (1913), available at <http://legisworks.org/sal/38/stats/STATUTE-38-Pg114.pdf> at 136-37 (legislation taxing whiskey); VEACH, *supra* note 6, at 63 (noting whiskey’s role as a revenue source).

### C. The Turbulent Twentieth Century

Ever since Colonial days, while many Americans had been enjoying alcohol consumption, others had been fighting it.<sup>167</sup> This second group gained the upper hand in the beginning of the twentieth century, leading to the Eighteenth Amendment in 1919 and implementing legislation the next year.<sup>168</sup> Prohibition had begun.

America was, however, still thirsty, and Prohibition spawned a huge black market in booze. This black market attracted not only small-time bootleggers, such as those in the town of Templeton, but also large criminal syndicates, like that led by Al Capone, celebrated on Templeton Rye's back label.

Most criminal gangs made terrible whiskey. It not only tasted awful but was so poorly made that just drinking it could kill.<sup>169</sup> These gangs were also violent, although that violence tended to be restricted to rival gang members,<sup>170</sup> rather than bystanders, and thus did not deter the public from purchasing alcohol illegally.<sup>171</sup> Instead, the public viewed the criminal distributors as "modern-day Robin Hoods."<sup>172</sup>

But once the Great Depression hit, the lost federal tax revenue and increased crime that accompanied Prohibition became unsustainable.<sup>173</sup> Thus, with the passage of the Twenty-First Amendment in 1933, Prohibition ended.<sup>174</sup>

Although the American whiskey industry celebrated its end, Prohibition's thirteen long years had cast a long shadow. Most distilleries "were in ruins," and many of those who used to run those distilleries had either died, or, if still alive, "were too old to have any interest in starting up" again.<sup>175</sup> Consumers' tastes had changed, too, in favor of two main competitors to American whiskey: (1) non-wood-aged spirits such as gin and rum, which had the added advantage of not needing to be aged and thus could ramp up manufacturing quickly, and (2) imported whiskey, whose manufacturers had been unaffected by the Prohibition experiment.<sup>176</sup>

167 MINNICK, BOURBON, *supra* note 55, at 92 (citing examples from the 1600s).

168 U.S. CONST. amend. XVIII (*repealed* by 41 Stat. 305 (1919)). The variety of factors that contributed to that moment are outlined in VEACH, *supra* note 6, at 77–90.

169 VEACH, *supra* note 6, at 88.

170 MINNICK, BOURBON, *supra* note 55, at 109.

171 VEACH, *supra* note 6, at 88.

172 *Id.*

173 MINNICK, BOURBON, *supra* note 55, at 116.

174 *Id.*; *see also* U.S. CONST. amend. XXI.

175 VEACH, *supra* note 6, at 91.

176 *Id.*

These pressures caused many American distilleries to embrace whiskey-as-commodity principles antithetical to today's artisanal, craft ethos: overt industrial optimization and capital growth. Whiskey companies boasted of their "powerful workforce and size of operation," or of the "big names associated with their brands," and often became publicly traded.<sup>177</sup> This approach succeeded: just four years after Prohibition ended, "more than 530 Kentucky bourbon brands . . . [competed] for shelf space in packaged liquor stores and in taverns."<sup>178</sup>

Just as American whiskey regained its footing, though, the United States entered World War II. The U.S. military needed high-proof, industrial alcohol, and a lot of it.<sup>179</sup> America's distilleries were conscripted to its manufacture,<sup>180</sup> but the costs of refashioning their facilities forced some distilleries out of business.<sup>181</sup>

After the war, though, American whiskey revived, extending its reach as both a product and an idea internationally: aided by the cold-war expansion of American military bases, whiskey brands such as Jim Beam "followed the U.S. military to its bases in South Korea, Japan, Germany, and Italy," where "American soldiers become its unpaid salesmen."<sup>182</sup> Stateside, the popularity of American whiskey, especially Jack Daniel's, among "Rat Pack" entertainers such as Frank Sinatra and Dean Martin, gave a new twist to whiskey's identity: the edginess of bad-boy cache.<sup>183</sup> This new identity developed further when whiskey later came to be associated with other mavericks, such as "the hard rock crowd and motorcycle clubs."<sup>184</sup>

At the same time that American whiskey was projecting these narratives outward into international markets and popular culture, it was also looking inward and reflecting on its history. The Bourbon Institute, founded in 1958, sought to "solidify bourbon's heritage."<sup>185</sup> One way it did so was to popularize the legend that bourbon was created on the same day

<sup>177</sup> MINNICK, BOURBON, *supra* note 55, at 121.

<sup>178</sup> *Id.* at 122.

<sup>179</sup> About 1.7 billion gallons. VEACH, *supra* note 6, at 101. Some of the wartime uses for industrial alcohol included making smokeless gunpowder, synthetic rubber, lacquer, octane booster, and antifreeze. *Id.*

<sup>180</sup> MINNICK, BOURBON, *supra* note 55, at 138; *accord* VEACH, *supra* note 6, at 101.

<sup>181</sup> VEACH, *supra* note 6, at 103; MINNICK, BOURBON, *supra* note 55, at 139–40.

<sup>182</sup> VEACH, *supra* note 6, at 106–07.

<sup>183</sup> *Id.* at 107, 111.

<sup>184</sup> *Id.* at 111. This bad-boy cache was gendered in whiskey's marketing, effectively marginalizing women's role as some of the country's first distillers and half the whiskey-production workforce at the time. MINNICK, BOURBON, *supra* note 55, at 163–64 (noting women's role in early whiskey production). Today, women are the fastest-growing market segment of whiskey consumers. *Id.* at 164. Readers interested in an entertaining deep-dive into the role of women in whiskey, both in America and abroad, should seek out another book by Fred Minnick: *WHISKEY WOMEN* (2013).

<sup>185</sup> MINNICK, BOURBON, *supra* note 55, at 166

that George Washington was inaugurated, celebrating that day (April 30) as “the birthday of bourbon whiskey.”<sup>186</sup> Lobbying efforts culminated in 1964, when Congress christened bourbon “a distinctive product of the United States,” putting it on par with Scotch whiskey, Canadian whiskey, and French cognac.<sup>187</sup>

After this high mark, the tide once again changed. Whiskey’s goodwill with postwar America didn’t pass to their Baby Boomer children, who “rejected everything their parents stood for, including their alcoholic beverage choices.”<sup>188</sup> Vodka was ascendant; whiskey wasn’t cool, and distilleries were once again closing.

One whiskey weathered these storms in ways that inform today’s craft-whiskey movement: Maker’s Mark bourbon. Rather than emphasize its whiskey’s popularity, ubiquity, and value, the maverick Maker’s Mark focused on its operation’s small-scale, its product’s limited availability, and its high cost (three times that of other whiskeys).<sup>189</sup> Its branding reflected this proto-craft ethos and a contrasting narrative.

Why can’t I find Maker’s Mark when I travel? I always see Jack Daniel’s. The only way to truly solve the problem would be to go into mass production and we’re not about to do that. Handcrafting is what makes Maker’s Mark special. If we made much more than we do, well, it wouldn’t be your Maker’s Mark. Most of our production is taken up by our customers right here at home. There’s precious little left for elsewhere. So if, in your travels you have to search for a bottle of Maker’s Mark—after seeing row after row of Jack Daniel’s—we apologize . . .<sup>190</sup>

When a glowing story about Maker’s Mark appeared on the front page of the *Wall Street Journal*, sending demand through the roof, Maker’s responded by publishing two different ads: one in the *Wall Street Journal*, thanking it for the attention but explaining that it couldn’t meet this new demand, and another in regional newspapers in Kentucky and Tennessee, assuring “longtime customers that it would not forget their loyalty.”<sup>191</sup> Maker’s counterintuitive approach worked: it thrived throughout the Vodka Age and in 1980 became a National Historic Landmark.<sup>192</sup>

186 *Id.* at 169.

187 VEACH, *supra* note 6, at 110; MINNICK, BOURBON, *supra* note 55, at 170–71.

188 VEACH, *supra* note 6, at 110.

189 *Id.* at 111.

190 MINNICK, BOURBON, *supra* note 55, at 190.

191 *Id.* at 189–90.

192 National Historic Landmarks Survey, 74000893, *Burks’ Distillery (Maker’s Mark Distillery)*, Jan. 16, 1980.

But Maker's focus on quality and customer loyalty also restricted their ability to adapt. When Maker's recently lowered their bottle proof from 90 down to 84—in effect, diluting each 750ml bottle with more than 50ml of water<sup>193</sup>—customers noticed and were outraged. The company quickly switched back to 90 proof.<sup>194</sup>

As for the rest of the whiskey industry, it went from uncool to nothing at all, other than a prop in an old-timey movie, drunk fast, as a shot, without concern for quality. It was bad-boy cachet reduced to flavorless trope.

Ironically, signs of hope for American whiskey came from Scotch whisky, whose distillers took the hint from wine tastings popular in the '70s and began promoting single-malt tastings.<sup>195</sup> American whiskey followed suit. The early 1990s saw the emergence of premium collections of contrasting “small-batch” whiskeys,<sup>196</sup> each with a “very different flavor profile.”<sup>197</sup> Whiskey shifted its focus (back to) rare, expensive, extra-aged whiskeys.<sup>198</sup> Like rare wines, these whiskeys were sold for outlandish prices on the secondary market.<sup>199</sup>

#### D. Whiskey Tourism and Commentary

Whiskey's returned focus on quality and prestige at the end of the twentieth century inspired a unique passion among its fans that other distilled beverages, such as vodka, could never command.<sup>200</sup> Unlike vodka and other distillates, but much like wine, American whiskey inspired a cottage industry—not only of tasting notes and reviews, but books, magazines, and movies.<sup>201</sup> Much of this whiskey commentary focused on authenticity, origin, and community. A natural outgrowth of such

193 750ml x (90/84) - 1 = 53.57ml.

194 MINNICK, BOURBON, *supra* note 55, at 223.

195 VEACH, *supra* note 6, at 113.

196 *Id.* at 116; MINNICK, BOURBON, *supra* note 55, at 193, 201.

197 The most famous of these, Jim Beam's small-batch collection, featured (1) Booker's, a fierce, barrel-proof, unfiltered bourbon; (2) Basil Hayden, an 80-proof bourbon with a light flavor meant to woo Canadian whisky fans; (3) the “heavy-bodied” Baker's; and (4) the extra-aged, 9-year-old Knob Creek. VEACH, *supra* note 6, at 116–18.

198 *Id.* at 118. Older whiskey had not always been viewed as superior: in the 1920s, young whiskey was preferred, so much so that older whiskey was often unwanted and sold for medicinal purposes. MINNICK, BOURBON, *supra* note 55, at 101.

199 A bottle of *Pappy Van Winkle's Family Reserve 23-year-old* wheated bourbon, for instance, has a manufacturer's suggested retail price of almost \$300 but actually sells at an average price approaching \$3,000. *Pappy Van Winkle's Family Reserve 23 Yr, 95.6 Proof*, OLD RIP VAN WINKLE DISTILLERY, <http://www.olderipvanwinkle.com/whiskey/family-reserve-23-year/> (MSRP price), *Old Rip Van Winkle 'Pappy Van Winkle's Family Reserve' 23 Year Old Kentucky Straight Bourbon Whiskey, USA*, WINE-SEARCHER MARKET DATA, <https://www.wine-searcher.com/find/old+rip+van+winkel+pappy+fmly+rsrv+23+straight+bourbon+whisky+kentucky+usa/1/-/-/u>, (average market price).

200 BRYSON, TASTING WHISKEY, *supra* note 46, at 13.

201 MINNICK, BOURBON, *supra* note 55, at 200. The field of whiskey commentary has continued to blossom, with the present day being compared to a “golden age” in the genre. See Robert Simonson, *A Golden Age for American Whiskey Writers*, N.Y. TIMES, Dec. 30, 2016, <https://www.nytimes.com/2016/12/30/dining/bourbon-writers-american-whiskey-rye.html>.

discussions, and one really co-constitutive with them, was whiskey tourism.

The first major coordinated tourist effort was the Kentucky Distillers' Association's (KDA's) "Kentucky Bourbon Trail."<sup>202</sup> Tourists to whiskey country could travel from (KDA member) distillery to distillery with a map, getting their "passports" stamped at each stop. Get a passport with a stamp from every distillery on the trail and you could get a free t-shirt!<sup>203</sup> The program's success bred imitators. Louisville, Kentucky, created an "Urban Bourbon Trail" of approved whiskey bars in the city.<sup>204</sup> Even Tennessee got in on the act.<sup>205</sup>

Whiskey lovers gathered at conventions, such as the annual Kentucky Bourbon Festival, founded in 1992, and WhiskyFest, founded in 1998 and now meeting four times a year in four cities.<sup>206</sup> This growth has even led Kentucky's Midway University to offer an MBA degree focused on whiskey "tourism and event management."<sup>207</sup>

## E. Enter the Craft Whiskeys

Building off of this culture of whiskey tourism and commentary, the first decade of the 2000s saw the emergence of "an exciting idea—that of the 'craft distiller' who, working with a small still, would make his own spirits for sale in the market."<sup>208</sup> The concept of craft distilling was an offshoot of the broader "eat local" (and drink local) trend emergent in American culture.<sup>209</sup> It was also tied to the appeal of craft beer brewing.

202 VEACH, *supra* note 6, at 120.

203 *Id.* at 120. The program is still in effect. See *Kentucky Bourbon Trail Passport*, KY. BOURBON TRAIL, <http://kybourbontrail.com/map/kentucky-bourbon-trail-passport/>. The map of the current tour is available as both a clean, cartographic pdf and as an interactive google-maps layer. See *Kentucky Bourbon Trail*, <http://10vsslmt3js29lu005tjz1e.wpengine.netdna-cdn.com/wp-content/uploads/2013/01/KBT-2016-Map-web.pdf> and *Map*, KY. BOURBON TRAIL, <http://kybourbontrail.com/map/>. There's also an iPhone app. *Id.*

204 VEACH, *supra* note 6, at 122.

205 *Watch Out Kentucky, Here Comes the Tennessee Whiskey Trail*, FRED MINNICK, (June 19, 2017), <https://www.fredminnick.com/2017/06/19/watch-kentucky-comes-tennessee-whiskey-trail/>.

206 Veach, writing in 2013, lists three events in three cities each year, but WhiskyFest expanded, in 2016, to four: Chicago, New York, San Francisco, and Washington, D.C. VEACH, *supra* note 6, at 121; *2018 WhiskyFest Tickets Are Now On Sale!*, WHISKEY ADVOC., [http://www.whiskyfest.com/?\\_ga=2.104627392.1194702641.1518800416-1319136562.1518800416](http://www.whiskyfest.com/?_ga=2.104627392.1194702641.1518800416-1319136562.1518800416).

207 *MBA-Concentration in Tourism and Event Management*, MIDWAY UNIV., <https://www.midway.edu/majors-programs/graduate-programs/mba-tourism-and-event-management/>.

208 VEACH, *supra* note 6, at 123. "Craft" is one of several overlapping terms used to refer to this new phenomenon in whiskey. Others include "artisanal" and "micro." Bryson predicts that, just as the vocabulary in the 1990s beer-brewing revolution has settled on "craft" as the most common descriptor, so too will whiskey. For "Artisanal" is too long, and a bit pretentious; 'micro' becomes a problem when you get successful. 'Craft' is likely where it's going to wind up." BRYSON, *TASTING WHISKEY*, *supra* note 46, at 178.

209 MINNICK, BOURBON, *supra* note 55, at 227. For more on the locavore movement and its ties to ideas of "craft," see also Lynne Curry, *The Food Movement has Only Just Begun*, L.A. TIMES (Feb. 7, 2015 5:00 AM) <http://www.latimes.com/opinion/op-ed/la-oe-curry-locavore-movement-20150208-story.html> and RICHARD E. OCEJO, *MASTERS OF CRAFT: OLD JOBS IN THE NEW URBAN ECONOMY* (2016). Thanks to Ted Becker of the University of Michigan for suggesting Ocejó's book to me last summer.

Microbreweries have led to the highest-quality, most flavorful beer being made not by the big companies but by the little guys.<sup>210</sup> Yet the analogy of craft brewing to craft distilling is a false one, not only because the image of the small, local, “craft” brewer is not necessarily true, but because, as a practical matter, making whiskey is so much harder, and, as the history of American whiskey-making reveals, riskier.

Unlike those in previous generations, many craft distillers did not grow up in whiskey families. Some, like the founders of Tuthilltown Spirits, didn’t even really drink, but saw in distilling as an entrepreneurial opportunity to “make a unique material product from raw ingredients with their hands.”<sup>211</sup>

A 2015 *New York Post* article on the craft phenomenon in New York State noted that “[t]here are now about 70 New York ‘farm distilleries’ . . . up from less than a dozen a few years ago. Some of these distilleries even grow the grains and botanicals for their liquors to control everything that goes into the bottle, and many offer tours and charming tasting experiences.”<sup>212</sup>

Interest in local whiskey wasn’t limited to locals, but tied into the earlier trend toward wine-style whiskey tourism. For “local roots are authentic, even when it’s not your locale.”<sup>213</sup> And it’s a powerful experience. “A Craft distiller can take you to the spring, show you the field, and let you hold the green malt and lay your hand on a barrel filled with aging whiskey—that’s a story, and a link.”<sup>214</sup>

And stories sell whiskey. Even whiskey writers have been entranced by the craft narrative, giving “craft whiskeys a pass” even though “craft whiskeys are mostly too young, too expensive and too crappy.”<sup>215</sup> For, unlike big beer brewers, the “big macrodistilleries put out some amazing quality whiskeys” whose diversity and innovative styles “give the whiskey lover plenty to choose from.”<sup>216</sup>

<sup>210</sup> *Id.* Many microbreweries have since been bought out by the big-beverage conglomerates; others were big-bev projects from the start. Matt Allyn, *Is That Really Craft Beer? 29 Surprising Corporate Brewers*, MEN’S J., <http://mensjournal.com/food-drink/drinks/is-that-really-craft-beer-21-surprising-corporate-brewers-20150923>.

<sup>211</sup> OCEJO, *supra* note 209, at 60, 63.

<sup>212</sup> Halley Eber, *5 Great Hudson Valley Distilleries to Get Your Drink On*, NY. POST (Apr. 10, 2015 11:50 PM), <http://nypost.com/2015/04/10/5-great-hudson-valley-distilleries-to-get-your-drink-on/>; *see also* N.Y. Alc. Bev. Cont. Law § 61 (McKinney, Westlaw through L.2017, chapters 1 to 505) (state-law requirements for farm distilleries).

<sup>213</sup> BRYSON, TASTING WHISKEY, *supra* note 46, at 185.

<sup>214</sup> *Id.* at 186.

<sup>215</sup> Steve Ury, *Most Craft Whiskeys Suck!*, SKU’S RECENT EATS (July 27, 2010), <https://recenteats.blogspot.com/2010/07/whiskey-wednesday-most-craft-whiskeys.html>.

<sup>216</sup> *Id.*

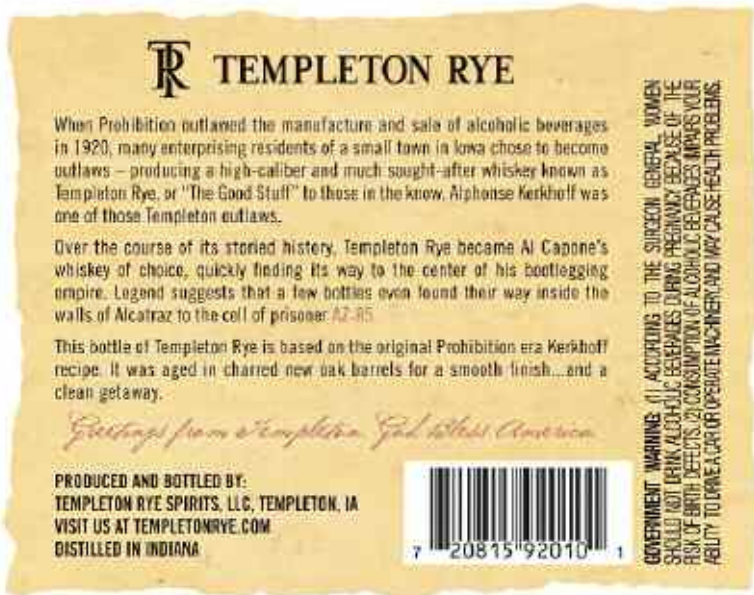


Yet the Potemkin phenomenon steams on. Curbing it through legal reform will require attending not only to American whiskey’s production process and history, but also to the ways narrativity and rhetoric create and sustain the Potemkin Temptation.

#### IV. The Law and the Label

Which brings us back to Templeton Rye. After the lawsuits settled, did Templeton close up shop? Nope. Did it become a transparent NDP like Blaum Bros., maker of “Knotter” Bourbon?<sup>217</sup> Not a chance. Instead, Templeton continued to purchase sourced whiskey from Midwest Grain Products (MGP).

The only real changes Templeton did make were subtle ones to their bottle label. The front of the revised label omits the “Prohibition Era Recipe” language from the original but visually is otherwise the same.<sup>218</sup> The back label also drops the “Prohibition Era Recipe” claim, but retains almost verbatim the same narrative text, including the impossible-to-resist references to legendary Al Capone:



*Revised Templeton Rye back label<sup>219</sup>*

<sup>217</sup> See *Knotter Bourbon*, *supra* note 40.

<sup>218</sup> See *COLA Registry*, TTB ID 15014001000338, <https://www.ttbonline.gov/colasonline/viewColaDetails.do?action=publicFormDisplay&ttbid=15014001000338>.

<sup>219</sup> *Id.*

There is, however, one key difference on the revised back label. Outside the “box” of the three-paragraph narrative text there are three bits of marginalia in sanitized, all-caps typeface: the standard government warning about the dangers of drinking; the product’s UPC bar code; and (after language noting, accurately if misleadingly, that the whiskey is “Produced and bottled by” Templeton Rye Sprits in Templeton, Iowa), a three-word disclaimer: “Distilled in Indiana.”

That disclaimer is all the law formally requires of Potemkins.<sup>220</sup> Given the effect that the bottle design as a whole has on consumers, the likelihood that this kind of disclaimer would be noticed, let alone understood, by anyone not already looking for it is slim.

And so Templeton continues to sell their flagship whiskey. They’ve even expanded their offerings, adding several exclusive (i.e., expensive) age-declared expressions to their line—a 4-year-old, 6-year-old, and 10-year-old rye—each of which features images and text on its label that builds and reinforces the “idea” of Templeton, despite the typographically inconspicuous “distilled in Indiana” disclaimer.<sup>221</sup> Although whiskey critics howled,<sup>222</sup> Templeton marched on.

Although Templeton might be hit by a second round of class-action lawsuits for deceptive trade practices, that’s unlikely. They are no longer making explicit, falsifiable claims about their products. They’re not even using suggestive, arguably deceptive words like “handmade” or “handcrafted,” the use of which on bottle labels were the focus of several theories of liability in recent lawsuits against Jim Beam and Maker’s Mark, each of which was dismissed.<sup>223</sup>

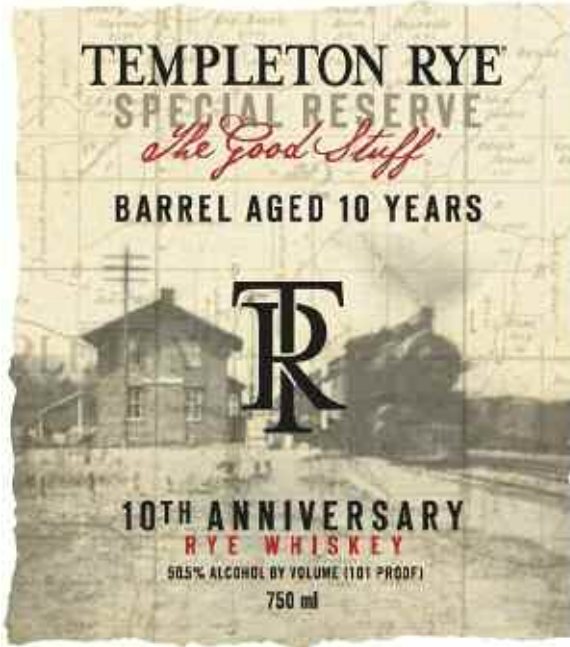
220 27 C.F.R. § 5.36(d) (Westlaw through Jan. 25, 2018) (requiring, when a whiskey “is not distilled in the State given in the address on the brand label,” that the “State of distillation” be “shown on the label”).

221 See *COLA Registry*, TTB ID 15184001000198, <https://www.ttbonline.gov/colasonline/viewColaDetails.do?action=publicFormDisplay&ttbid=15184001000198> (4 year); TTB ID 17071001000120, <https://www.ttbonline.gov/colasonline/viewColaDetails.do?action=publicFormDisplay&ttbid=17071001000120> (6 year); TTB ID 16138001000243, <https://www.ttbonline.gov/colasonline/viewColaDetails.do?action=publicFormDisplay&ttbid=17071001000120> (10 year).

222 See, e.g., Josh Peters, *Templeton Rye 6 Years—A Press Release without Integrity*, THE WHISKEY JUG (June 15, 2016), <http://thewhiskeyjug.com/press-release/templeton-rye-6-years-press-release/> (“Templeton Rye 6 Years is Bullshit. Well, the actual age of the whiskey probably isn’t, but the press release for the Templeton Rye 6 Years definitely is. It’s as if ass hats at Templeton didn’t learn anything from their \$2,500,000 lawsuit because they’re once again telling the same old made-up story.”); Cowdery, *Still Lying*, *supra* note 15.

223 See *Welk v. Beam Suntory Import Co.*, 124 F. Supp. 3d 1039 (S.D. Cal. 2015) (dismissing consumer class-action suit against distiller because the word “handcrafted” on a bourbon bottle is “mere puffery” which no reasonable consumer would understand to mean that the whiskey in a bottle making that claim had been “created by a hand process rather than by a machine”); *Salters v. Beam Suntory, Inc.*, No. 4:14cv6592015, 2015 WL 2124939, \*2 (N.D. Fla. 2015) (dismissing state deceptive and unfair-trade-practices claims against distiller for the use of the term “handmade” on their bottle labels because “[o]ne can knit a sweater by hand, but one cannot make bourbon by hand. Or at least, one cannot make bourbon by hand at the volume required for a nationally marketed brand like Maker’s Mark. No reasonable consumer could believe otherwise.”); *Nowrouzi v. Maker’s Mark Distillery, Inc.*, No. 14CV2885 JAH (NHS), 2015 WL 4523551, \*2 (S.D. Cal. 2015) (dismissing false advertising and unfair competition claims against distiller because the term “handmade” “cannot reasonably be interpreted as meaning literally by hand nor that a reasonable consumer would understand the term to mean no equipment or automated process was used to manufacture the whisky”).

Instead, Templeton is now merely implying things. Take the front label of Templeton’s 10-year-old rye:



*Templeton 10-Year Rye, front label*<sup>224</sup>

“10 years” appears twice: above the old-timey image and below it. The text above the image notes that the rye whiskey in the bottle has been “barrel aged 10 years.” That is probably true; MGP has plenty of 10-year-old stock it can sell to Templeton and others. The text below the image notes this is Templeton’s “10th Anniversary” bottling. It is also true that when this label was approved in 2016, the company was 10 years old. The label doesn’t *explicitly claim* that the *company has been aging that whiskey itself for the last ten years*, but because the whiskey in the bottle is the same age as the company, that’s implied. It therefore sets up an “enthymeme” for readers to complete, and in so doing “participate in [their] own persuasion.”<sup>225</sup>

That’s not enough to overcome a motion to dismiss, especially when Templeton can now simply point to the “distilled in Indiana” disclosure in

<sup>224</sup> *Supra* note 221.

<sup>225</sup> An enthymeme is a syllogism reduced to two steps: the first assumes that the reader accepts the major premise (Because the company’s 10 years old) and draws a conclusion based upon that premise (its whiskey is 10 years old). See Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 SO. CAL. INTERDISC. L. J. 237, 273–74 (2009) (quoting Anthony Blair, *The Rhetoric of Visual Arguments* in *DEFINING VISUAL RHETORICS* 41 (Charles A. Hill & Marguerite Helmers eds., 2004)).

the corner of the back of its label, which label had been reviewed and approved by the relevant federal agency. As ineffective as it may be for all whiskey consumers other than those who know to look for it, that disclosure means Templeton is actually complying more than some Potemkins: at least 29 have failed to make that disclosure yet still had their bottle labels approved.<sup>226</sup>

One reason noncompliant bottle labels such as Templeton's pre-settlement labels have gotten past federal regulators has to do with the agency doing the regulating. As its name implies, the federal agency charged with approving bottle labels—the Alcohol and Tobacco Tax and Trade Bureau (a/k/a “Tax and Trade Bureau” or “TTB”)—does not have consumer protection as its primary focus. Instead, this arm of the Treasury Department's mission is, in its own words “simply . . . to collect alcohol . . . taxes.”<sup>227</sup> Given the history of whiskey and taxation in the U.S., from the Whiskey Rebellion to the repeal of Prohibition, this is not surprising. Also unsurprisingly, the agency's focus on tax means their focus on label approvals is secondary, at most.

Accountability at the agency level for claims whiskey companies put on proposed labels is “largely run on the honor system.”<sup>228</sup> Significantly, Cowdery notes, because, before the current craft era, “virtually all” producers of American whiskey were “big companies, with lots of lawyers,” this honor system worked well enough.<sup>229</sup> Now, however, many Potemkin whiskey startups fail, either innocently or intentionally, to comply with requirements such as the state-of-distillation disclosure.<sup>230</sup>

Notwithstanding calls for the TTB to be staffed sufficiently to fully enforce its regulations,<sup>231</sup> even if every non-distiller producer was made to comply with the disclosure rule, it wouldn't do much. Templeton's disclosure is too subtle and is overwhelmed by the overall impact of a well-designed bottle label and by craft consumers' and purveyors' own desires

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**226** Chuck Cowdery, *TTB May Crack down on Section 5.36(d) Violations*, THE CHUCK COWDERY BLOG (May 13, 2014), <https://chuckcowdery.blogspot.com/2014/05/ttb-may-crack-down-on-section-536d.html> [hereinafter Cowdery, *TTB May Crack down*] (citing the password-protected forum <http://www.straightbourbon.com/forums/showthread.php?22157-whiskies-that-fail-to-list-State-of-Distillation&p=415903&viewfull=1#post415903>); see also Steve Ury, *Why isn't the TTB Enforcing the State of Distillation Disclosure Rule?* SKU'S RECENT EATS, (Sept. 4, 2012) <https://recenteats.blogspot.com/2012/09/why-isnt-ttb-enforcing-state-of.html> [hereinafter, Ury, *TTB Enforcing*].

**227** *The TTB Story*, TTB: ALCOHOL AND TOBACCO TAX AND TRADE BUREAU (Sept. 8, 2017), <https://www.ttb.gov/about/history.shtml>.

**228** Chuck Cowdery, *TTB Fails Are Becoming All Too Frequent*, THE CHUCK COWDERY BLOG (Apr. 22, 2014), <http://chuckcowdery.blogspot.com/2014/04/ttb-fails-are-becoming-all-too-frequent.html> [hereinafter, Cowdery, *TBB Fails*].

**229** *Id.*

**230** Even large distillers don't always follow TTB's labeling rules. See, e.g., Steve Ury, *Why Doesn't Four Roses Follow the Labeling Rules?*, SKU'S RECENT EATS (Mar. 6, 2017) <https://recenteats.blogspot.com/2017/03/why-doesnt-four-roses-follow-labeling.html>.

**231** Cowdery, *TTB May Crack Down*, *supra* note 226; Ury, *TTB Enforcing*, *supra* note 226.

for (at least the experience of) authenticity.

Rhetoric and narrativity operate so powerfully in American craft whiskey that a Potemkin can (1) comply with all explicit legal requirements, such as noting the state of distillation on their bottles, while (2) never outright lying on their bottle labels or marketing materials about the source of their whiskey or method of production, yet (3) convince most consumers (and maybe even themselves) that what is in the bottle is a bona-fide craft product.

I call Potemkin craft distillers that purposefully harness the powers of narrativity and rhetoric (whether aware of those terms or not) to create an illusion of authenticity “intentional Potemkins.” Other craft distillers, however, create start-up craft whiskey companies with the best of intentions, but themselves become seduced by the power of rhetoric and narrativity. I call them “accidental Potemkins.” Both types of Potemkins harm whiskey drinkers and bona-fide craft distillers, and not just economically: they also both represent a threat to American craft whiskey itself. The best way to see how this is so might be through stories.

### **A. The Dark Arts of the Intentional Potemkins**

Imagine that a group of cynical entrepreneurs in the current craft-whiskey moment see a business opportunity. They create a Potemkin craft distillery, build up the brand, then sell it and move on to another venture. Advised by a like-minded Applied Legal Storytelling (AppLS) scholar, well versed in the tools of persuasion, marketing, narrativity, and regulatory compliance, they take the following approach:

First, their company will need stock characters and settings that resonate with their target audience. To identify one, they look to whiskey history. If the Potemkin will operate out of New England, they’ll focus on Colonial-era farmer-distillers. A Chesapeake Bay–area Potemkin might allude to George Washington’s having distilled rye at Mount Vernon. If, instead, the company will be in Greater Appalachia, they’ll just shift the focus slightly, toward the Whiskey Rebellion and distiller farmers. The Midwest? Prohibition, bootleggers, and gangsters. West coast? Rat-pack crooners. Mountain West? Mountain vistas or spaghetti-western deserts and saloon cowboys. Even locations with no clear relationship to American whiskey history can be effective: if the company will be in a town along the Mississippi River, go with riverboat gamblers. Pacific Northwest? Lumberjacks or fur trappers.<sup>232</sup>

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<sup>232</sup> For those wondering if these stock characters and settings are merely hypothetical, browse the whiskey section of a large liquor store. You’ll find them there.

Once a theme is chosen, the company should flesh it out with specifics. Rather than alluding to the Whiskey Rebellion generally, say, their AppLS consultant might suggest playing up connections to a local whiskey rebel or battle. Historical societies and amateur genealogists can help them identify characters, plots, and settings.

Besides looking backward for resonant historical associations, the company should also look forward to identify ways to put itself in the continuing historical stream. Given whiskey's boom-bust cycle in American history, wherever the company is located should be a story that puts the company at a momentum point in a plot arc. Frame it as a hero returning to that locale, its own traditions of craft distilling facing off against the bland, industrial, corporate Big Whiskey.

Although local historical emphasis is important, it works best when connected with the land itself by evoking the ethos of terroir. An easy starting point is water, which the company must use, anyway, to dilute their sourced whiskey down to bottle proof. Even if the water used is simply filtered municipal tap, the company could state that their whiskey is made with "local" water. Even better, if the area is proud of a nearby source of water, emphasize that, as does Denver-based MGP Potemkin Tin Cup Whiskey by advertising itself as having been "cut with Rocky Mountain water."<sup>233</sup>

If possible, the company should also make allusions to local grains. Is the site in the "heart of winter wheat country" or the "birthplace of [variety X] barley?" Then "celebrate" that "heritage" by ordering, from the stock distiller, a recipe that includes at least a handful of wheat or barley. While specific local agricultural connections are ideal, they're unnecessary. It's enough to make vague allusions to place.

Though these ideas should permeate all of the company's advertising and communication, it will be especially important to feature them on the bottle labels. Because the front label will be the first thing liquor-store shoppers or bar patrons will see, its design will be especially important. For maximum rhetorical impact, the front label should, like Templeton's, be dominated not by text but by image, which not only evokes emotion but also is "hard to see as argument[]: [images] persuade without overt appeals to rhetoric."<sup>234</sup> As their AppLS advisor might note, "images are well-suited to leaving intended meanings unspoken, as would-be

233 *Whisky: This is How We Bottle the Mountain*, *supra* note 114.

234 Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 283, 692 (2012); see also Charles A. Hill, *The Psychology of Rhetorical Images*, in *DEFINING VISUAL RHETORICS* 36 (Charles A. Hill & Marguerite Helmers eds., 2009) (Images allow a company to appropriate emotions and values without having to explicitly argue for their relevance.).

persuaders may prefer, especially when [label regulations] forbid making a given claim explicitly.”<sup>235</sup>

This is especially true with photographs, which operate as “index” signs, whose “very existence” implies strongly the existence of the thing they depict.<sup>236</sup> Even if a photograph isn’t available, a well-designed graphic can still take advantage of the ways images persuade through “presence,” “vividness,” and “affect transfer.”<sup>237</sup> A New England Potemkin, for instance, might feature a black-and-white, scrimshaw-like image of an old farmhouse, while a Southwestern Potemkin might instead feature the sunset silhouette of a desert cowpoke.

The front label’s typography should reinforce ideas from the label image. Font choice will be the paramount, but not only, typographic concern.<sup>238</sup>

As Templeton does in its three-paragraph stories, the company should take advantage of the space on the back label to reinforce the narrative theme and assumptions created by the front label. Several paragraphs of text, in a mood-reinforcing typeface, will allow the company not only to tell a fairly detailed story about its product, but also to help expend readers’ attention and keep their eyes from the disclaimer at the bottom, “Distilled in [another state].”

Text on that back label should take advantage of legally undefined but evocative buzzwords, such as “small batch” and the powerful “hand bottled,” which evokes a completely handcrafted process even though it’s just volunteers placing a cork in the bottle neck.<sup>239</sup> Given big distillers’ success at swatting away lawsuits over their use of terms like “handmade” and “handcrafted,”<sup>240</sup> the company could even get away with using those terms. (Or, as the AppLS advisor might advise, the company need not take that chance, given the cumulative effect of the implications they can make without any legal risk).

235 Richard Sherwin, *Visual Literacy in Action*, in *VISUAL LITERACY* 185 (Jim Elkins ed., 2008); Jewel, *supra* note 225, at 274. For a deep dive into the operation and ethics of visual rhetoric in legal persuasion, see the work of Michael D. Murray, e.g., *The Ethics of Visual Legal Rhetoric*, 13 *LEGAL COMM. & RHETORIC*: JALWD 107 (2016); *Visual Rhetoric: Topics of Invention and Arrangement and Tropes of Style*, 21 *LEGAL WRITING* 185 (2016); *The Sharpest Tool in the Toolbox: Visual Legal Rhetoric and Narrativity* (January 22, 2018); <https://ssrn.com/abstract=3040952> or <http://dx.doi.org/10.2139/ssrn.3040952>.

236 Charles A. Hill, *The Psychology of Rhetorical Images*, in *DEFINING VISUAL RHETORICS* 29 (Charles A. Hill & Marguerite Helmers eds., 2009).

237 *Id.* at 27–38.

238 See Derek H. Kiernan-Johnson, *Telling Through Type: Typography and Narrative in Legal Briefs*, 7 *LEGAL COMM. & RHETORIC*: JALWD 87 (2010) (exploring the persuasive impact of typography and document design in legal briefing).

239 See, e.g., TEMPLETON RYE WHISKEY, *Keith Kerkhoff’s Message to Customers* (2014), [https://www.youtube.com/watch?v=p\\_d56otHSVw&](https://www.youtube.com/watch?v=p_d56otHSVw&) (presumably revealing unintentionally just such a process).

240 See cases at *supra* note 223.

Another nice touch is to have the label design leave space to handwrite a batch and bottle number, even if those numbers mean nothing. And space for the bottler's scribbled initials, adding to the aura of authenticity without giving the consumer any useful information.

All this labeling work can be done in full compliance with the letter of the law, as guided by their advisor, allowing our entrepreneurs to sign the blanket attestation of regulatory compliance on their federal label-approval form (the truthfulness of which, as noted, is self-policed on an "honor" system anyway).<sup>241</sup>

The company should also build a good website that reinforces all of these ideas. The advisor might suggest that, deep in that site, at least two clicks in, the company could mention, in passing, that the whiskey is sourced. While doing so, the company should make a vague promise to use only source whiskey during their start-up phase—just until they get off the ground—and to distill and age everything on site.

Our entrepreneurs should look for opportunities to use narrativity and rhetoric to build excitement and brand recognition. Brand recognition, after all, is about ethos, and ethos is not only culture, but credibility. Just like the church ladies at Templeton who helped out with the hand-bottling, so too volunteers (including visitors who just finished taking the slick tour) can spend an hour helping with the bottling.

Then, after reaping profits from selling what are essentially generic goods at premium prices, our entrepreneurs can move on, perhaps as many do, by selling their proven-profitable company to an international beverage conglomerate.<sup>242</sup> They could then repeat the pattern in a new locale or leave whiskey behind for whatever the next new thing is in craft culture. In their wake they leave the whiskey drinkers who had supported them, paying more than they should have for "a story and a fancy bottle, and maybe not even that."<sup>243</sup>

The harm to whiskey drinkers from this business venture is more than just economic. There are also related moral and constitutive harms. Those who support local enterprises—whether by shopping at farmers' markets, patronizing local-artists' co-ops, or eating at farm-to-table restaurants—often see their behavior in moral terms. They see shopping this way as a good deed or charitable act: rather than "purchasing" a local commodity,

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<sup>241</sup> See Cowdery, *TBB Fails*, *supra* notes 228; see also 27 C.F.R. 5.32 (outlining mandatory label information); *Application for and Certification/Exemption of Label/Bottle Approval*, Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau, OMB 1513-0020, <https://www.ttb.gov/forms/f510031.pdf> (application form with blanket attestation); Emen, *supra* note 35 (quoting Don Poffenroth, cofounder of Spokane, Washington's, bona-fide craft distillery Dry Fly, for the lack of staffing and resources at the Alcohol and Tobacco Tax and Trade Bureau).

<sup>242</sup> See, e.g., Tripp Mickle, *Constellation Brands Acquires High West Distillery for \$160 Million*, WALL ST. J. (Oct. 4, 2016, 8:34 PM ET), <https://www.wsj.com/articles/constellation-brands-acquires-high-west-distillery-for-160-million-1475625536>.



they're "supporting" a local business. Learning that they've been duped can be disillusioning and even humiliating.

Related to but distinct from this moral harm is a constitutive one. For choosing a whiskey, and drinking it, is a meaning-making activity, no less than, in James Boyd White's classic example, the act of fishing:

Imagine a bear fishing for salmon in a river of the great Northwest. What is it doing? "Fishing," we say. Now imagine a man fishing in the same river for the same fish. What is he doing? "Fishing," we say; but this time the answer has a different meaning and a new dimension, for it is now a question, as it was not before, what the fishing means to the actor himself.<sup>244</sup>

And thus the whiskey drinker who pours a dram of what they believe to be an artisanal product from a particular place—perhaps their hometown, favorite vacation spot, or wished-for locale visited only in their imagination—is creating and reinforcing an idea of themselves. Learning, after years of doing so, that their favorite craft whiskey was fake can be devastating.

Duped whiskey drinkers, however, aren't the only ones Potemkins harm. There's also the "bona-fide" craft distillers, those committed local artisans actually trying to make whiskey. Like drinkers, they suffer economically. Those who have started a bona-fide craft-whiskey distillery face profound business challenges those starting a Potemkin don't have to worry about. Unlike their Potemkin competitors, they have to "buy a still and learn how to use it; then buy all the ingredients and actually ferment and distill them; buy barrels and build or lease warehouses in which to put them; and then sit on the investment for years."<sup>245</sup> Todd Leopold, one of the two founding brothers of bona-fide craft distillery Leopold Bros.,<sup>246</sup> speaks with "disdain" of the easier road traveled by Potemkins: "All that they have to do is hire salespeople, make up a BS story, and boom, they look like a distillery."<sup>247</sup>

Bona-fide craft distillers also suffer an associational harm as knowledge of Potemkin practices spreads and more drinkers approach all craft brands with suspicion. This can be frustrating for bona-fide distillers:

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<sup>243</sup> Patton, *supra* note 39.

<sup>244</sup> James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHIC. L. REV. 684, 693 (1985).

<sup>245</sup> Felten, *supra* note 16.

<sup>246</sup> *Story*, LEOPOLD BROS.: SMALL BATCH DISTILLERS OF FINE SPIRITS, <http://www.leopoldbros.com/our-story>.

<sup>247</sup> Felten, *supra* note 16. Other legitimate craft distillers include Finger Lakes, Dry Fly, and Garrison Brothers. Cowdery, *Potemkin Craft Distilleries*, *supra* note 43.

“The smoke and mirrors used in this industry make it extremely difficult. . . when one company talks about their heritage recipe that was a favorite of a gangster, even though it is just the stock MGP recipe, we all suffer. . . .”<sup>248</sup>

Furthermore, the Potemkin phenomenon also risks harming American craft whiskey itself. As craft American whiskey’s reputation suffers from Potemkin controversies and fatigue, its availability and prestige in the crowded beverage market may suffer as well. Whiskey drinkers have choices. If, as a category, American craft whiskey is suspect, drinkers can stick with the big brands. They can also switch to whiskey made in other countries, such as Scotland, where the Potemkin phenomenon isn’t a problem. Or, as history has shown, American drinkers can choose vodka.

Although the analogy to the microbrewing movement of the 1990s is misguided in many ways, in terms of potential historical trajectory, the analogy might be promising. Like the evolution of beer tastes from the few and narrow—Budweiser or Miller, regular or lite—to tasty craft beers, “the hope is that these craft distillers can do for the distilling industry what the microbreweries did for the American brewing industry and renew interest in fine whiskeys with robust tastes.”<sup>249</sup> But when “half of the rye brands on liquor shelves today”<sup>250</sup> are identical, or near-identical variations sourced from MGP, then consumers mistake that apparent diversity for a categorical “family resemblance” clustered around a phantom core prototype, and “come to expect whiskey with a particular flavor—that is, the taste of MGP rye.”<sup>251</sup> This alters and then limits what creative distillers can do with rye, and what consumers will recognize as rye whiskey, impoverishing both. Thus even as Potemkins flourish, whiskey suffers.

## B. The Sad Story of the Accidental Potemkins

Exacerbating these harms, some who become Potemkin craft distillers don’t intend to end up that way. Instead, they’re themselves seduced and carried away by the intensity of the rhetoric and narrativity in craft whiskey. Then—like countless prosecutors in high-profile cases whose stories outpace their evidence, often forcing them into public dismissal of

248 Felten, *supra* note 16.

249 VEACH, *supra* note 6, at 124.

250 Haskell & Spoelman, *supra* note 16.

251 Felten, *supra* note 16; *see also* Jerry O. Dalton, *Heisenberg’s Spirits: Tasting is More Uncertain than it Seems*, in *WHISKEY & PHILOSOPHY: A SMALL BATCH OF SPIRITED IDEAS 195–207* (Fritz Allhoff & Marcus P. Adams eds., 2010) (outlining the inherent subjectivity and importance of consumer expectations in whiskey perception); Linda Edwards, *The Trouble with Categories*, J. LEGAL ED. 181, 205–10 (2014) (discussing prototype in the context of legal education).

charges—they're forced to confront, publically and personally, how they got there. Although these accidental Potemkins may not be the most sympathetic characters in our drama, their disillusion is real, and public shaming can be a bitter tonic.<sup>252</sup> Furthermore, unlike lawyers for the intentional Potemkins, those for potential accidental Potemkins—especially those who are savvy about how rhetoric and narrativity can lead us all astray—might see trouble coming and help their clients steer clear of it.

For this story, assume, again, that a group of entrepreneurs wish to create a craft-whiskey company. This time, however, they're not cynical about craft whiskey, but naïve. They come to the idea of craft distilling not through, say, a family history in the industry but through their participation in locavore culture. They decide to switch from merely supporting local artisans. They imagine, like the founders of Tuthilltown Spirits, that making whiskey will be easy.<sup>253</sup>

They soon learn, however, not only that distillation is difficult, but that wood maturation takes years. They have neither the patience nor the capital to (1) experiment with different recipes and techniques; (2) watch, over time, how their initial attempts fare; (3) adjust accordingly, try again; (4) and then, years from now, finally open their doors.<sup>254</sup> Though they could sell unaged spirits, like vodka, to sustain the business for a few years while they work on their whiskey, given vodka's role as the villain in American whiskey history, they have no interest in doing so.

But they've already committed to the project. They've left their jobs, and shared their dreams of making craft whiskey with friends, both in person and across social media. Their aspirational identity as whiskey makers is too engrained to easily walk back now.

Perhaps, like High West founder David Perkins, they turn to a master distiller for help.<sup>255</sup> Like Mr. Perkins, they might be advised to buy whiskey from MGP.<sup>256</sup> They might even learn of Mr. Perkins' story—how High West enjoyed annual double-digit sales growth and was then sold for \$160 million.<sup>257</sup> So, like the 128 or so non-distiller producers (NDPs) before

252 See JON RONSON, *SO YOU'VE BEEN PUBLICLY SHAMED* (2015).

253 OCEJO, *supra* note 209, at 61 ("There are guys with no teeth and a kindergarten education back in the mountain and they're making whiskey. We're an engineer and a producer and developer and businessmen having worked at the highest levels of the industries we were in. We figured [we] were smart enough to do this.").

254 As whiskey author Ian Wisniewski has noted, "getting a new distillery off the ground takes years—if not decades—of planning and preparation, trial and error." Ian Wisniewski, *Torabhaigh: Countdown to a Distillery Opening*, SCOTCHWHISKEY.COM (Mar. 15, 2017), <https://scotchwhisky.com/magazine/features/13128/torabhaig-countdown-to-distillery-opening/>.

255 Mickle, *supra* note 242.

256 *Id.*

257 *Id.*

them,<sup>258</sup> they contact MGP, choose a stock recipe, and schedule their first delivery.

Meanwhile, they work on other aspects of the business. They connect with other local artisans in their community and develop an increasing sense of connection to their town's culture and history. Like Templeton Rye's founders, they come to believe that where their whiskey is actually made, and the stock recipe used to make it, is "not the most important thing," but rather what matters is the idea of that "whiskey as a tribute to and celebration of the town" and its past.<sup>259</sup> They look to rhetoric, seeking a myth that will distinguish, and enhance, their product.

They find an independent graphic artist who offers to design their bottle labels for free (or maybe in exchange for a bottle or two of that new whiskey). This local artist hasn't designed a whiskey bottle before and doesn't know about the need for the requisite "distilled in [state X]" disclaimer. Nor do the company's founders. None is a lawyer, and the regional lawyer they use for the business isn't a whiskey specialist and doesn't know, either, so she thus doesn't think to probe into this new client's claims to artisan authenticity. Nothing in the regulations governing bottle labels stands out to the lawyer, so, after relying on her client's (presumed) technical expertise about whiskey-making and attaching the image files sent over from the graphic designer, she signs the boilerplate blanket attestation at the bottom of the TTB's one-page application form.<sup>260</sup> TTB approves the label and the company begins using them.

In their excitement to share their new product, the company's founders make exaggerated, or at least simplified, craft claims. The NDP model, they tell themselves, is just too complicated to explain to their new patrons or to other local craft businesspersons they're now connecting with. Even if they could explain it, how could the farm-to-table restaurant down the street possibly capture that idea on their all-local-ingredients cocktail menu? It's easier to simplify and romanticize the story, even analogizing their enterprise to microbrewing.

258 See Ury, *Complete List*, *supra* note 36.

259 Hafner, *supra* note 18 ("Though Templeton Rye is not distilled according to the Prohibition recipe, Bush and Underwood on Wednesday framed their whiskey as a tribute to and celebration of the town of Templeton and its legendary bootlegging past, not a product from it").

260 That attestation reads, "Under the penalties of perjury, I declare: that all statements appearing on this application are true and correct to the best of my knowledge and belief; and, that the representations on the labels attached to this form, including supplemental documents, truly and correctly represent the content of the containers to which these labels will be applied. I also certify that I have read, understood, and complied with the conditions and instructions which are attached to an original TTB F 5100.31, Certificate/Exemption of Label/Bottle Approval. I consent to the return of processed applications in the manner indicated on this application and set forth in the applicable instructions." TTB Form 5100-31—Application for and Certification/Exemption of Label/Bottle Approval (10/17/2016), <https://www.ttb.gov/forms/f510031.pdf> [hereinafter TTB Form 5100-31].

Eventually, however the inconvenient details of their MGP sourcing catches up with them; they're exposed in the press or even sued. They're now forced into the uncomfortable position of explaining to their supporters, and themselves, how their artisanal aspirations led them so far astray.

### C. Modest Suggestions for Reform

What can be done to curb the Potemkin phenomenon? The battle is being fought on multiple fronts, from class-action lawsuits, to calls to better staff and fund the TTB so it can enforce existing regulations, to proposed regulatory amendments, to efforts at better industry self-policing.<sup>261</sup> But lawsuits haven't always succeeded,<sup>262</sup> and even when they have, they're a piecemeal, "whack-a-mole" approach to the Potemkin Pandemic. Industry self-policing efforts have inherent limitations and have been criticized.<sup>263</sup>

While a fully staffed and funded TTB might spot every Potemkin and get them to include the existing "Distilled in [state X]" disclaimer, that would make the label legal, but it would help only those consumers who already know what that language means. For most, though, the disclaimer would do little to overcome the rhetorical impact of Potemkin bottles' overall design, or consumers' own desires to believe the myth the label is selling.

Proposed changes to the regulations themselves have also been met with skepticism,<sup>264</sup> a skepticism sharpened once one accounts for the strong pull of rhetoric and narrativity. But this article's arc wouldn't be

<sup>261</sup> See, e.g., Letter from a coalition of beverage associations to the Senate urging full funding for the TTB (Sept. 5, 2014), [https://www.nbwa.org/sites/default/files/Beverage\\_Industry\\_Coalition\\_TTB\\_Funding\\_Letter\\_to\\_Senate.pdf](https://www.nbwa.org/sites/default/files/Beverage_Industry_Coalition_TTB_Funding_Letter_to_Senate.pdf) (arguing for full funding for the TTB); *Craft Certification*, AMERICAN DISTILLING INSTITUTE, <http://distilling.com/resources/craft-certification/> (industry self-policing proposal); Emen, *supra* note 35 (noting proposed regulatory changes); Chuck Cowdery, *The Movement to Enforce 5.36(d) Is Growing*, THE CHUCK COWDERY BLOG (July 15, 2014), <http://chuckcowdery.blogspot.com/2014/07/the-movement-to-enforce-536d-is-growing.html> (calling for better enforcement of existing regulations); *Association Proposes Ethics Code for Craft Spirits Producers*, THE CHUCK COWDERY BLOG (Sept. 4, 2014), <http://chuckcowdery.blogspot.com/2014/09/association-proposes-ethics-code-for.html> (describing and critiquing proposed ethics code).

<sup>262</sup> See *supra* note 223 and sec. IV discussion of Templeton's post-settlement revised label and 10-year-old rye bottle design.

<sup>263</sup> For example, the American Distilling Institute created a "craft certification program" and sought federal registration for a "craft certification mark" but abandoned that latter effort. *Craft Certification*, AMERICAN DISTILLING INSTITUTE, <http://distilling.com/resources/craft-certification/> (program); U.S. Trademark Application Serial No. 85856253 (filed Feb. 21, 2013, abandoned Dec. 10, 2013). As for the program itself, in Cowdery's opinion, "nobody uses" or "cares" about that craft certification, and, even if they did, as a form of "self-certification," the approval process is akin to "no certification at all." Email from Chuck Cowdery to Derek Kiernan-Johnson (Nov. 30, 2017) (copy on file with author). Additionally, certification marks are also tricky to design and place in a way that reaches consumers. See Kyle Kastranec, *Craft Beer Enters the Upside Down—A Design Analysis*, GOOD BEER HUNTING (July 5, 2017), <http://goodbeerhunting.com/blog/2017/7/5/craft-beer-enters-the-upside-down-a-design-analysis-of-the-new-ba-indie-logo> (analyzing this design problem with respect to craft beer). Furthermore, even if a stringently regulated, carefully designed, and well-placed certification mark did appear on bona-fide craft bottles, consumers would probably still not see that mark on *Potemkin* bottles unless they were looking for it. There's also the slippery, some would say useless, term "craft" itself. E.g., Kinsey Gidick, *When It Comes to Cocktails, Is It Time to Kill the Word Craft?*, CHARLESTON CITY PAPER (Aug. 17, 2016), <https://m.charlestoncitypaper.com/charleston/is-it-time-to-kill-the-word-craft/Content?oid=6111707>.

complete without at least the hope of a happy ending. So two suggestions for cabining narrativity and rhetoric follow.

The first reform, aimed at potential accidental Potemkins (and their lawyers), would require Potemkins to better know, and truthfully describe, their product. The TTB's current application form for bottle-label approvals is a less than a page long and requires only a blanket attestation.<sup>265</sup> A revised form might better visually encourage deliberative responses while also drawing upon the cognitive advantages of check-listing<sup>266</sup> by breaking things down more explicitly. Applicants could, for instance, be required to outline and attest to the truth of the product's components and character:

- where the grains used in the whiskey came from;
- where the whiskey was distilled—not just which U.S. State but in which specific distillery, by registered DSP number;
- where the whiskey was aged—again, not just the state but specific warehouses;
- where water used to reduce the whiskey to bottling proof came from (i.e., was it just filtered municipal tap?);
- if the whiskey, like Templeton's,<sup>267</sup> contains flavoring additives, which ones and how much?
- where the whiskey was bottled.

The list could go on, requiring applicants to disclose and attest to details about the type of yeast used, type of wood used for aging, barrel entry proof, number of barrels used, and so on. At some point the amount of detail would be too much, creating the backfire risk, common in contracting, of the reader's seeing a waterfall of information with individual boxes to initial and deciding that, rather than read all the text, they'll just initial each line. Requiring too much detail might reveal company trade secrets worth protecting. Despite startups' possible ignorance of the information sought in such a form, for an industry as regulated as whiskey, and for tasks as dangerous as distilling and wood-aging, requiring producers to report such details is a low bar.

<sup>264</sup> See Charles L. Cowdery, *Revised Rules for Whiskey Labeling? Proceed with Caution*, R STREET (Aug. 1. 2016), <http://www.rstreet.org/2016/08/01/revised-rules-for-whiskey-labeling-proceed-with-caution/>; Chuck Cowdery, *Rule Writing Is Not a Job for Amateurs*, THE CHUCK COWDERY BLOG (Aug. 3, 2016), <https://chuckcowdery.blogspot.com/2016/08/rule-writing-is-not-job-for-amateurs.html>.

<sup>265</sup> TTB Form 5100-31, *supra* note 260.

<sup>266</sup> See ATUL GAWANDE, THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT (2010); Shankar Vedantam, *The Trick to Surviving a High-Stakes, High-Pressure Job? Try a Checklist*, HIDDENBRAIN (Oct. 30, 2017), <https://www.npr.org/2017/10/30/559996276/the-trick-to-surviving-a-high-stakes-high-pressure-job-try-a-checklist>. For an exploration of the benefits of checklists for legal writers and the technique's broader implications for lawyering, see Jennifer Murphy Romig, *The Legal Writer's Checklist Manifesto: Book Review*, 8 LEGAL COMM. & RHETORIC: JALWD 93 (2011).

<sup>267</sup> Cowdery, *Flavoring is Legal*, *supra* note 25.

Admittedly, a longer, more detailed form would only compound the staffing shortage at TTB, making it even more likely that application reviews would continue to depend on the honor system. But TTB agents reviewing the application forms wouldn't be the only audience for this information and attestations. Industry watchdogs, as well as bona-fide competitors across town, could check TTB database filings and alert the agency to false reports. Concrete, false attestations on applications would also give class-action lawyers hard evidence with which to build their cases.

Besides curbing the Potemkin Temptation by improving the form's visual design, a revised form could also draw upon the power of narrative. Above the newly enumerated attestations, the form could feature a short, maybe paragraph-long, narrative about why the information requested is important and what the consequences for lying on the form might be. The page on the TTB website where the label-approval form is downloaded and submitted could also feature short stories about these matters. By revealing the existence of "Potemkin" NDPs to some industry participants—such as its lawyers who don't specialize in whiskey—such stories might "stick" just enough to spark a longer, more critical conversation about the label-application attestations. Although far from a complete cure, focus-on-the-form efforts might help reduce the number of Potemkins who slip through the system and make it easier to catch those that do.

A second reform, aimed not at the label-approval form but at the labels themselves, might also help. Rather than allow Potemkins to continue to quietly whisper "distilled in [state name]" in a quiet corner of the label behind the bar code, whiskey labels would have to feature something more comprehensive and prominent, like the "nutrition facts" boxes on packaged foods. Such a box would—in standard, readable typography and background color chosen by the TTB rather than selected strategically by each producer—reproduce key information from the revised application form, such as where the grains came from, where the whiskey was distilled, where it was aged, and where it was bottled. Thus at least some consumers who had been drawn in by the visual rhetoric of a front label and the narrativity of a back label might, upon noticing this new information box, be encouraged to check their initial impressions and engage their more critical faculties.<sup>268</sup>

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<sup>268</sup> In other words, they would be encouraged to "think slow," that is, to switch "to a slower, more deliberate and effortful form of thinking." See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 13 (2011). For an illuminating exploration of how Kahneman's concept helps explain judicial decision making, see Linda L. Berger, *A Revised View of the Judicial Hunch*, 10 *LEGAL COMM. & RHETORIC: JALWD* 7–12 (2013).

However, as with too many boxes on a TTB form, too much information on a label could risk consumers' becoming overwhelmed and glossing over the whole thing, as some perhaps do with today's detailed "nutrition information" boxes on food labels. So the list would have to be short as well as designed to catch the eye in that moment after a consumer has taken a bottle off the shelf but before they've put it in their shopping cart.

Unlike the current "distilled in state [X]" disclaimer, which appears only on Potemkin bottles, and the proposed "craft certification mark,"<sup>269</sup> which would appear only on bona fide bottles, this information box would appear on both, facilitating comparative shopping and making the Potemkins' more complicated disclosures stand out.

There are, of course, limits to what mandatory labelling disclosures can achieve. Junk food and cigarettes show that. And this reform would do little to change encounters with Potemkin whiskeys chosen and enjoyed in places where the bottle is nowhere in sight, such as on restaurant menus or cocktail lists.

Nevertheless, these two proposals—expanding the label-approval form and adding a pithy nutrition-facts-style box to whiskey labels—might improve the status quo. This craft moment has its dangers, but American whiskey has faced challenges before—from outright rebellion at the country's founding, to the rise of the rectifiers in the nineteenth century, to Prohibition and the Vodka Age. It will find its way through this current struggle. And if it doesn't, like the imported beer of the 1980s, the rest of the world makes great whiskey, too.<sup>270</sup>

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<sup>269</sup> *Craft Certification*, *supra* note 263.

<sup>270</sup> See, e.g., the archive of World Whiskies Awards (currently through 2017) at WORLD WHISKIES AWARDS, <http://www.worldwhiskiesawards.com/>; Stuart, *Jim Murray's Whiskey Bible 2017—The Winners*, THE WHISKY EXCHANGE (Oct. 17, 2016), <https://blog.thewhiskyexchange.com/2016/10/jim-murrays-whisky-bible-2017-the-winners/>.