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## Eavesdropping on History: Olmstead v U.S and the Emergence of Privacy Jurisprudence during Prohibition

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Eavesdropping on History: *Olmstead v. U. S.* and the Emergence of Privacy  
Jurisprudence during Prohibition

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A Thesis presented to the Graduate Faculty  
of the College of William and Mary in Candidacy for the Degree of  
Master of Arts

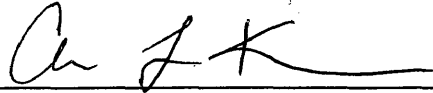
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The College of William and Mary  
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## APPROVAL PAGE

This Thesis is submitted in partial fulfillment of  
the requirements for the degree of

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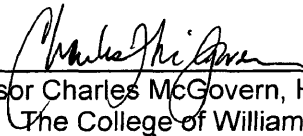
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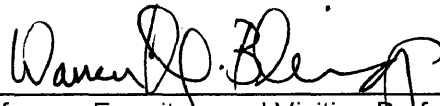
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## ABSTRACT PAGE

Roy Olmstead (1886-1966) made millions by smuggling Canadian whisky into Seattle during Prohibition. He was the defendant in the first wiretapping case to reach the U. S. Supreme Court. Before getting to the Supreme Court, Olmstead was tried in the federal courts in Seattle for conspiracy to violate the Volstead Act (the enabling legislation of the Eighteenth, or Prohibition, Amendment).

Olmstead v. United States reached the Court in 1928. In it, the Justices held that wiretapping did not qualify as a search and seizure protected by the Fourth Amendment, and so did not necessitate a warrant. The court was split 5-4, with Chief Justice Taft writing the majority opinion and Justices Brandeis and Holmes writing separate dissents. It was in this case that Brandeis, in his dissent, first articulates the notion of a “right to be let alone”—the right to privacy.

A fresh look not only at his case from start to finish, but also the circumstances surrounding it, will allow consideration of the overzealousness of law enforcement officials, the emergence of criminal business enterprises, the new technologies and their use (or misuse) by law enforcement, and how these factors combined during Prohibition to create the historical moment when privacy would begin to be discussed by the Court.

This paper uses the Olmstead case as a lens through which to view these peculiar circumstances of Prohibition and the way they brought the issue of privacy to a head. While Olmstead was eventually overturned, Brandeis’s dissent is often cited in modern cases exploring issues of the limits of government intrusion into personal privacy when attempting to enforce drug legislation.

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## **Dedication**

To my grandparents - Olive Kalar Krouse and H. Leonard Krouse – and my mother – Mamie Woodruff Krouse.

## Acknowledgements

Thanks to my committee – Cindy Hahamovitch, Charlie McGovern, and Warren M. Billings for their insight and patience.

To the Alcohol and Drug History Society for the opportunity to present a portion of this paper at the June 2011 conference. To Professor William Rorabaugh for his comments on the paper. To Fred Smith for insisting that I respond to the Call for Papers.

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To the teachers who have inspired me over the years – especially Bill Kennedy, Jim Davis, Terry Guerin, and Carl Bradley.

To the friends who have helped me on my way, from the early days – Sarena, Judy, Brian, Jocelyn, Chinwe, Daniel, Corina, and Dave – the college years – Karen (Wilson Angerer), Kathy and Jesse, Selena, Sue, Brooke, Karen (Whitworth Ladymon), Katie, Emily, Scott, Krista, Sarah – law school – Heather and Ammon, Todd, Henrik, Jay, Ashley, Alina and Sean, Rich, Lee and Kristin, Meredith – graduate school – Kelly, Bryce, Brandon, Libby, Laurel, Kate, Abigail, Jeff, Kaitlyn, Thomas, Drew, Alix, Chris and Karim, Lindsay, Lucie, Michael, Amanda – and beyond – Scott, Richard, Bonnie, Pete and Kerrie, Ian (Fleming), Chris, Jason, Paul, Kelley, Kelly, Amanda, Fiona, Michael and Rebecca, Anna, John, Matthew, Alan, Dave, Carolyn, Jodie, Ian (Townsend).

And thank you to Neal Krouse and the rest of the Gang.

Prohibition. 1920-1933. At its best, it was a time of wild abandon, with speakeasies, jazz, and G-men. At its worst, it was a time of widespread disregard for federal law, endemic corruption of politics and law enforcement, and innocents caught in the crossfire of ruthless gangsters. Public perception of the Prohibition law, the agency designed to enforce that law, and the criminal enterprises that emerged to evade the law all contributed to an escalating judicial exploration of the Fourth Amendment.<sup>1</sup> The contours of the “search and seizure” provision of the Amendment developed in tandem with the actual practices of law enforcement officials that investigated and arrested violators of the Prohibition laws. A social and legal environment emerged that tested the limits of government intrusion physically and theoretically into the life of a citizen. Eventually, in 1928, the United States Supreme Court began to discuss privacy as a right protected by the Fourth Amendment. This paper will examine the public response to the Prohibition law, the law enforcement apparatus that was legislated to enforce Prohibition, and the criminal enterprises that developed in the 1920s. It will explore the interconnections between these developments and Supreme Court Justice Louis Brandeis’s assertion in 1928’s *Olmstead et. al. v. United States* that privacy should be protected by law.

In the case of *Olmstead v. U.S.*, which the Supreme Court decided in 1928, Associate Justice Louis Brandeis articulated the right to privacy for the first time in federal jurisprudence. The escalating controversies surrounding the Prohibition law and enforcement of that law led the case to the Court. *Olmstead* was the first wiretapping

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<sup>1</sup> “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. Amend. IV.



case to reach the Supreme Court, where the Court, in a 5-4 decision, held that federal officers could, without a warrant, install a wiretap and use the evidence obtained with it in prosecution, so long as the officers did not physically trespass on the defendant's property. Though Brandeis wrote the dissent in the case, and the Court found in favor of the government, Brandeis's "right to be let alone" later became the cornerstone of privacy law.<sup>2</sup>

Nicknamed 'king of the bootleggers,' Roy Olmstead managed his criminal enterprise without violence and intimidation.<sup>3</sup> For four years before he was arrested in 1924, Olmstead controlled the majority of liquor entering Seattle and supplied most of the Pacific Northwest. Rumrunning was his business; he had investors, lawyers, boats, over seventy-five employees, properties, and a complex network of international contacts and contracts dedicated to the enterprise. He made over \$200,000 a month in his heyday, and kept millions of people supplied with liquor that was cheaper and safer than that supplied to the rest of the country.<sup>4</sup> He did not dabble outside of booze-running; he did not allow his crew to carry weapons; he had no ties to gambling, prostitution, and murder. As a result, his case uniquely placed the investigation, arrest, prosecution, and conviction of Olmstead squarely within Prohibition law.

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<sup>2</sup> *Olmstead et. al. v. United States* 277 U.S. 438 (1928).

<sup>3</sup> *New York Times*, "Seattle Dry Chief and Aides Indicted," May 27, 1930.

<sup>4</sup> In the Supreme Court opinion, Chief Justice Howard Taft described Olmstead's "conspiracy of amazing magnitude to import, possess and sell liquor unlawfully. It involved the employment of not less than fifty persons, of two seagoing vessels for the transportation of liquor to [from] British Columbia, of smaller vessels for coastwise transportation to the State of Washington, the purchase and use of a ranch beyond the suburban limits of Seattle, with a large underground cache for storage and a number of smaller caches in that city, the maintenance of a central office manned with operators, the employment of executives, salesmen, deliverymen, dispatchers, scouts, bookkeepers, collectors and an attorney. In a bad month sales amounted to \$176,000; the aggregate for a year must have exceeded two millions of dollars." *Olmstead v. U.S.* 277 U.S. 438, 455-456.

Histories of temperance and alcohol in America from the time of the Founding Fathers through modern times have been written by many scholars.<sup>5</sup> Many historians have focused on the temperance movement and the events leading up to Prohibition.<sup>6</sup> Others have concentrated on the politics and mechanisms leading to the repeal of the Eighteenth Amendment.<sup>7</sup> Works devoted entirely to Prohibition exist, but are general in nature. Each of these general histories has a section on issues of enforcement, and some even dedicate a few pages to Olmstead, either the man or the court case.<sup>8</sup>

There are also several social histories of Prohibition and life during the 1920s. The earliest, Frederick Lewis Allen's 1931 *Only Yesterday: An Informal History of the 1920s*, offered a unique perspective in that it was written just after the period it covers. Allen acknowledged that he could not benefit from the hindsight from which historians usually engage. He did, however, have the insight of contemporaries that he used to

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<sup>5</sup> For a history of alcohol consumption from 1790 to 1840, see W. J. Rorabaugh, *The Alcoholic Republic: An American Tradition* (Oxford: Oxford University Press, 1979). For studies that broadly sweep through the history of alcohol in America, see Andrew Barr, *Drink: A Social History of America* (New York: Carol and Graf Publishers, Inc., 1999), Catherine Gilbert Murdock, *Domesticating Drink: Women, Men, and Alcohol in America, 1870-1940* (Baltimore: Johns Hopkins University Press, 1998) and Mark Edward Lender and James Kirby Martin, *Drinking in America: A History* (New York: The Free Press, 1982).

<sup>6</sup> For the intersection between temperance, politics, status, and class, see Joseph R. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (Urbana: University of Illinois Press, 1963). For an economic history of the temperance movement that also encompasses prohibition, see John J. Rumbarger, *Profits, Power, and Prohibition: Alcohol Reform and the Industrializing of America, 1800-1930* (Albany: State University of New York Press, 1989). For links between the campaign for national Prohibition and Progressive reforms, see James H. Timberlake, *Prohibition and the Progressive Movement, 1900-1920* (Cambridge, MA: Harvard University Press, 1963) and Ann-Marie Szymanski, *Pathways to Prohibition: Radicals, Moderates, and Social Movement Outcomes* (Durham, NC: Duke University Press, 2003).

<sup>7</sup> David E. Kyvig focused on the legal processes and political support necessary for repeal in *Repealing National Prohibition* (Kent, OH: Kent State University Press, 2000). Kenneth D. Rose studied women's instrumentality in repeal in *American Women and the Repeal of Prohibition* (New York: New York University Press, 1996).

<sup>8</sup> Norman H. Clark, *Deliver Us From Evil: An Interpretation of American Prohibition* (New York: W. W. Norton and Company, 1976) no mention of Olmstead. Thomas M. Coffey, *The Long Thirst: Prohibition in America: 1920-1933* (New York: W. W. Norton and Company, 1975) no mention of Olmstead. John Kobler, *Ardent Spirits: The Rise and Fall of Prohibition* (New York: Putnam, 1973) 327-332. Edward Behr, *Thirteen Years that Changed America* (New York: Arcade Publishing, 1996) 137-139, 221.

write about the things that mattered to people during the 1920s, “the fads, fashions and follies of the time, the things which millions of people thought about and talked about and became excited about and which at once touched their daily lives.” When he wrote his book, Prohibition had not yet been repealed. The picture he painted of the popular impression of the Prohibition experience is what was written at the beginning of this paper – gangsters, corrupt and inefficient government agents, intemperance by many; in short, he portrayed a public that was frustrated with the “Noble Experiment.”<sup>9</sup>

The “coalescence of a modern culture” is the subject of Lynn Dumenil’s 1995 *The Modern Temper: American Culture and Society in the 1920s*. She evaluates the experiences of African Americans, immigrants, and native-born ethnic peoples in the development of this modern culture. She describes an “erosion of community and personal autonomy in the face of an increasingly nationalized and organized society.” “The growth of corporate power, the developments reshaping politics, the transformation of work, and the emergence of mass consumer culture dramatically reshaped American life,” she writes.<sup>10</sup> Prohibition was a way for some to “impose cultural unity on an increasingly heterogeneous and complex society.”<sup>11</sup> For this reason, she concludes, “controversy over the amendment and its enforcement infused the political debates of the decade.”<sup>12</sup> For the entirety of the 1920s, Prohibition lay at the center of debates over public and private power, class, and religious, racial, and ethnic identities.

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<sup>9</sup> Frederick Lewis Allen, *Only Yesterday: An Informal History of the 1920s* (New York: Harper and Row, 1931) x. Often attributed to Herbert Hoover, this moniker for Prohibition is a corruption of a phrase Hoover used in a 1928 speech: “a great social and economic experiment, noble in motive and far-reaching in purpose.” Herbert Hoover, *The New Day: The Campaign Speeches of Herbert Hoover* (Stanford, Calif.: Stanford University Press, 1928) 29.

<sup>10</sup> Lynn Dumenil, *The Modern Temper: American Culture and Society in the 1920s*, Eric Foner, ed. (New York: Hill and Wang, 1995) 12-13.

<sup>11</sup> Dumenil, *The Modern Temper*, 226.

<sup>12</sup> Dumenil, *The Modern Temper*, 234.

In his *Daily Life in the United States, 1920-1940*, David E. Kyvig focuses on the lived experiences of Americans, noting that differences in such experiences depended on diverse geographic, economic and social worlds.<sup>13</sup> Kyvig frames his chronicle of daily life with the “easily observable sign” that Americans were entering a “new era” – the Eighteenth Amendment.<sup>14</sup> Prohibition was a facet of daily life, whether in the context of technology, dating, music, immigration, literature, film, or urbanization.

Joshua Zeitz writes about the women who were influential in the 1920s in *Flappers: A Madcap Story of Sex, Style, Celebrity, and the Women who Made America Modern*. The ‘age of the flapper’ is “the story of America in the 1920s – the first ‘modern’ decade, when everyday life came under the full sway of mass media, celebrity, and consumerism, when public rights gave way to private entitlements, and when people as far and wide as Muncie, Indiana, and Somerset, Pennsylvania, came to share a national standard of tastes and habits.”<sup>15</sup> Zeitz wrote about the women and men that created the image of the flapper, the women that lived as flappers, and those who embodied that image in the culture industries. One of the defining features of the flapper was “flout[ing] the rules of Prohibition.”<sup>16</sup> These social histories remind us that the alcohol and Prohibition permeated the daily lives of Americans.

Despite this rich work on the Prohibition Era, Roy Olmstead’s story has not yet been investigated deeply by historians, though Olmstead and the court case are present in much of the literature. *Whispering Wires: The Tragic Tale of an American Bootlegger*, by Philip Metcalfe, is the only work entirely dedicated to Olmstead, but is deeply flawed

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<sup>13</sup> David E. Kyvig, *Daily Life in the United States, 1920-1940* (Chicago: Ivan R. Dee, 2002).

<sup>14</sup> Kyvig, *Daily Life*, 3.

<sup>15</sup> Joshua Zeitz, *Flapper: A Madcap Story of Sex, Style, Celebrity, and the Women Who Made America Modern* (New York: Three Rivers Press, 2006) 9.

<sup>16</sup> Zeitz, *Flapper*, 117.

as Metcalfe used no citations and changed information and testimony to help the narrative.<sup>17</sup> Norman H. Clark's *The Dry Years: Prohibition and Social Change in Washington* devoted a chapter to Olmstead called "The Rumrunner." These eighteen pages are the most thorough historical account of Olmstead's activities.<sup>18</sup> Walter F. Murphy approached the case from a political science perspective in his book, *Wiretapping on Trial: A Case Study in the Judicial Process*. He uses *Olmstead* to "illustrate how the judicial process frequently operates as a part of the more general process of public policy making."<sup>19</sup> Kenneth M. Murchison discusses the legal significance of the *Olmstead* case at length in *Federal Criminal Law Doctrine: The Forgotten Influence of Prohibition*, but Olmstead's story was relegated to a mere page of introduction to the case study.<sup>20</sup>

There are also a few works on wiretapping or privacy. Most well-known is *The Eavesdroppers*, by Samuel Dash, Richard F. Schwartz and Robert E. Knowlton. This book was written as a result of an investigation sponsored by the Pennsylvania Bar Association in 1956. The book reviews the practice of wiretapping by law enforcement and private individuals. It then summarizes the actual tools used by wiretappers and both the federal and state laws associated with wiretapping. Although it is useful in learning about the mechanics of actually tapping a phone, its usefulness in this study is limited

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<sup>17</sup> Philip Metcalfe, *Whispering Wires: A Tragic Tale of an American Bootlegger* (Portland, OR: Inkwater Press, 2007).

<sup>18</sup> Norman H. Clark, "The Rumrunner," *The Dry Years: Prohibition and Social Change in Washington* (Seattle: University of Washington Press, 1965) 161-178.

<sup>19</sup> Walter F. Murphy, *Wiretapping on Trial: A Case Study in the Judicial Process* (New York: Random House, 1965) 9.

<sup>20</sup> Kenneth M. Murchison, *Federal Criminal Law Doctrines: The Forgotten Influence of Prohibition* (Durham, NC: Duke University Press, 1994) 65-68.

since it is temporally based so long after the Prohibition period.<sup>21</sup> *Privacy on the Line: The Politics of Wiretapping and Encryption*, by Whitfield Diffie and Susan Landau, is more relevant. The chapter on “Privacy Protection in the United States” discusses the evolution of legal protections privacy in America since colonial times. This chapter also discusses at length how the concept of privacy is embedded in American (and international) legal culture, and the reasons why privacy is so important. There is also a chapter specifically dedicated to wiretapping and how it evolved from eavesdropping and letter opening, which then traces the law and jurisprudence pertaining to wiretapping.<sup>22</sup>

The legal-historiography of the *Olmstead* case centers on the privacy rights touched on by Chief Justice Howard Taft (in the majority opinion) and Associate Justice Louis Brandeis (in his dissent). Most legal scholars have since sided with Brandeis’s belief that privacy is not bounded by physical space and that law enforcement should not be allowed to enter citizens’ private sphere even remotely. Some contemporary writers found Taft’s opinion valid in arguing that a physical trespass is necessary to prompt a constitutionally-protected privacy right – but – Brandeis’s dissent is still cited today (as good law, since *Olmstead* was overturned in 1967). A Lexis-Nexis search revealed nearly 2,500 law journal articles citing this case, on such varied topics in privacy law as employers accessing employees’ internet or email accounts, sexuality in the home, pornography, children accessing adoption records, investigation of drug and smuggling operations, and government surveillance technology in the wake of 9/11.<sup>23</sup>

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<sup>21</sup> Samuel Dash, Richard F. Schwartz, and Robert E. Knowlton, *The Eavesdroppers* (New York: Da Capo Press York, 1971).

<sup>22</sup> Whitfield Diffie and Susan Landau, *Privacy on the Line: The Politics of Wiretapping and Encryption* (Cambridge, MA: MIT Press, 2007) 141-204.

<sup>23</sup> *Olmstead v. U.S.* 277 U.S. 438: “The Fourth Amendment [is not] violated against a defendant unless there has been an official search and seizure of his person, or such seizure of his papers or his tangible

Olmstead, and *Olmstead*, are embedded within the literature of Prohibition, as are the issues surrounding enforcement of the Volstead Act and the resulting implications for the rights guaranteed under the Fourth Amendment. This paper serves to pull the scattering of commentary on these issues from disparate sources, and directly confront the Prohibition-Era Fourth-Amendment jurisprudence within its historical context.

The National Prohibition Act, or Volstead Act, was passed over presidential veto on October 27, 1919.<sup>24</sup> This was the enabling legislation for the Eighteenth Amendment – the Prohibition Amendment, which was ratified on January 16, 1919.<sup>25</sup> The Volstead Act went into effect in January of 1920. The law outlawed the sale, manufacture, or distribution of alcohol for beverage purposes, with alcohol defined as anything above .05 percent alcohol by volume (ABV). Significantly, the Act prohibited neither the purchase nor possession of alcohol.

After Prohibition became law, many Americans simply kept drinking. In fact, according to Edward Behr, there was “an almost immediate, nationwide change in drinking habits” as Americans seemed to embrace drinking. According to Behr, defying

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material effects, or an actual physical invasion of his house or ‘curtilage’ for the purposes of making a seizure. We think, therefore, that the wiretapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.” (Taft writing for the majority) *Olmstead v. U.S.*, 277 U.S. at 455-456; “They [the makers of the Constitution] conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.” (Brandeis dissenting) *Olmstead v. U.S.*, 227 U.S. at 478-479.

<sup>24</sup> 41 U.S. Stat. 305, Title II: PROHIBITION OF INTOXICATING BEVERAGES, Sec. 3: “No person shall... manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this Act.” The Act did permit the manufacture and sale of sacramental alcohol and alcohol for non-beverage purposes – sacramental wine, industrial alcohol, and medicinal alcohol. It also allowed the home production of fruit-based fermented beverages (i.e. ciders and wine), so long as they were “non-intoxicating.” For these beverages, the Act did not specify an ABV as ipso facto intoxicating.

<sup>25</sup> U.S. Const. Amend. XVIII, Sec. 1: “After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.”

the law “became the thing to do, among students, flappers, and respectable middle-class Americans all over the country.”<sup>26</sup> In New York City, the popular press printed “weekly quotes for cases of scotch, gin, and other spirits, noting when enforcement pressures had driven prices up, and when a glut of supplies meant bargains were to be had on the black market.” Lois “Lipstick” Long reviewed the various speakeasies across the city in her column for *The New Yorker*. When Gustav Boess, the mayor of Berlin, visited New York City in 1929 he asked James J. Walker, mayor of New York City, “When does the Prohibition law go into effect?” It had been in effect for nearly ten years.<sup>27</sup> The image projected by the media was that drinking was rampant. “Magazines and movies implied that plenty of drinking was taking place,” wrote Kyvig.<sup>28</sup> Novels like *The Great Gatsby* and films like *Flaming Youth* gave the impression that no one was obeying Prohibition.<sup>29</sup> Both historians and contemporaries debated whether or not consumption of alcohol increased during Prohibition, but the character of drinking was perceived to have changed, to have become a flagrant act of defiance.<sup>30</sup>

When the Eighteenth Amendment was sent to the states for ratification in 1919, it was unclear if a majority of the country actually supported the Amendment. Chief Justice William Howard Taft predicted that the Eighteenth Amendment would be

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<sup>26</sup> Behr, *Prohibition*, 89.

<sup>27</sup> Michael A. Lerner, *Dry Manhattan: Prohibition in New York* (Cambridge, MA: Harvard University Press, 2007) 1, 48. Zeitz, *Flapper*, 98-103.

<sup>28</sup> Kyvig, *Daily Life*, 25.

<sup>29</sup> F. Scott Fitzgerald, *The Great Gatsby* (New York: Scribner, 1925). *Flaming Youth*, directed by John Francis Dillon (1923).

<sup>30</sup> Part of the problem is the difficulty in assessing consumption when there is no record of sales. Deaths from cirrhosis of the liver declined during Prohibition, which indicates decreased consumption, but is not probative. The Wickersham Commission felt that drinking probably increased, especially by young people and women. National Commission on Law Observance and Enforcement, *A Report of the National Commission on Law Observance and Enforcement Relative to the Facts as to the Enforcement, the Benefits, and the Abuses under the Prohibition Laws, both Before and Since the Adoption of the Eighteenth Amendment to the Constitution*, 71<sup>st</sup> Cong. 3<sup>rd</sup> sess., House Document No. 722. (Government Printing Office: Washington, 1931) 22.



incorporated into the Constitution, “against the views and practices of a majority of the people in many of the large cities and in one-fourth or less of the States.”<sup>31</sup> His prediction was realized. It is uncertain whether the Amendment would have been ratified had there actually been a popular vote. Though ratification was successful; the amendment was never submitted to a referendum. In fact, Ohio attempted to submit the question to its citizens, and the United States Supreme Court found that this violated the Constitution. Under Article V of the Constitution, Congress has the discretion to submit an amendment for ratification by either state legislatures or conventions. The Eighteenth Amendment was sent to state legislatures for ratification, not the citizens of the states.<sup>32</sup> And so, as Kyvig wrote, Prohibition began with an “image of a reform achieved by undemocratic means.”<sup>33</sup> Whether or not the Amendment would have passed by popular vote in each state, a significant minority of the population that disagreed as Volstead went into effect.

There were practical reasons to disobey the law. The Volstead Act put thousands out of work, with no provisions for employing the waiters, bartenders, saloon owners, brewers, transporters, and warehouse owners who had made their living from the manufacture, transportation, or sale of alcohol. In 1915, there were 1,345 breweries operating in the United States.<sup>34</sup> In 1913, liquor manufacturers employed 62,920 people;

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<sup>31</sup> National Commission on Law Observance and Enforcement, *Enforcement of the Prohibition Laws: Official Records of the National Commission on Law Observance and Enforcement Pertaining to Its Investigation of the Facts as to the Enforcement, the Benefits, and the Abuses under the Prohibition Laws, both before and since the Adoption of the Eighteenth Amendment to the Constitution, 71<sup>st</sup> Cong., 3d. sess., Senate Document 307*. 5 vols. (Washington: Government Printing Office, 1931), vol. V, 201.

<sup>32</sup> *Hawke v. Smith* 253 U.S. 251 (1920).

<sup>33</sup> Kyvig, *Repealing*, 14-16.

<sup>34</sup> Martin Stack, “Local and Regional Breweries in America’s Brewing Industry, 1865 to 1920” *The Business History Review*, Vol. 74, No. 3 (Autumn, 2000), 435-463, 449.

there were 100,000 bartenders and 68,000 saloon keepers employed in 1910.<sup>35</sup> While a few wealthy people were affected, notably the owners of breweries, the economic burden of Prohibition fell on the working class, who overwhelmingly opposed Prohibition.<sup>36</sup>

Frank Duffy, the General Secretary of the United Brotherhood of Carpenters and Joiners of America, estimated that more than 95 percent of workers “are opposed to these laws and also to their enforcement, believing them to be a curtailment of their guaranteed rights.”<sup>37</sup> Daniel J. Tobin, General President of the International Brotherhood of Teamsters, Chauffeurs, and Helpers in Indianapolis, added that “the working people of America... have a feeling that their freedom has been somewhat interfered with by legislation.”<sup>38</sup> Not only did they disagree with Prohibition, but workers were most likely to be arrested and charged with Prohibition violations. Edward Behr asserts that “Prohibition agents concentrated their efforts on those they could *not* shake down; that is, the poor, the barely literate, the recent immigrants least able to defend themselves.” While he emphasized this “two-tier” justice as being a product of wealthy violators’ immunity to prosecution, it was also a deliberate attack on the lower class.<sup>39</sup>

Many working class Americans saw Prohibition as a project of the wealthy to control the poor, branding the lower class criminals while the upper class had cocktail

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<sup>35</sup> L. Ames Brown, “Economics of Prohibition” *The North American Review*, Vol. 203, No. 723 (Feb., 1916), 256-264, 263. Deets Pickett, “Prohibition and Economic Change” *Annals of the American Academy of Political and Social Science*, Vol. 163, Prohibition: A National Experiment (Sep., 1932) 98-104, 101.

<sup>36</sup> Annheuser-Busch diversified and sold off or rented out real estate to survive Prohibition; Pabst also diversified, bought a soft drink company, and merged with a malt product corporation; Schlitz sold off two thousand properties. Over half of the brewers operating in 1918 closed. The ones that survived had ample cash reserves to diversify. Maureen Ogle, *Ambitious Brew: The Story of American Beer* (Orlando, FL: Harcourt, 2006) 183-188. In a national *Literary Digest* poll in 1922, workingmen favored modification of the Volstead Act by more than nine to one. Larry Engelman, “Organized Thirst: The Story of Repeal in Michigan,” in *Alcohol, Reform and Society: The Liquor Issue in Social Context*, Jack S. Blocker, Jr., ed. (Westport, Conn.: Greenwood Press, 1979) 171-210, 172.

<sup>37</sup> NCLOE, *Enforcement*, vol. 3, 290.

<sup>38</sup> NCLOE, *Enforcement*, vol. 3, 274.

<sup>39</sup> Behr, *Prohibition*, 241.

parties. In *Profits, Power, and Prohibition*, John J. Rumbarger found that “the liquor question itself was the ideological creation of America’s dominant social class seeking to expand its hegemony over the lives of the country’s propertyless masses.”<sup>40</sup> The wealthiest members of society did not feel the effects of Prohibition as strongly because they simply ignored the law. William Stayton, member of the Association Against the Prohibition Amendment, wrote that “the workman has long believed that the campaign for national prohibition was financed by the employer for the purpose of increasing output.”<sup>41</sup> Rumbarger demonstrated that this was true. According to Allen, “among the prosperous classes which set the standards of national social behavior, alcohol flowed more freely than ever before.”<sup>42</sup> When prices of alcohol increased 500 to 600 percent, the wealthy could afford the increase.<sup>43</sup> The laws were strictly enforced in ethnic and working-class communities, while the wealthy could join an exclusive club, pay off enforcement officers, and hire an effective litigator in the rare instances that they were targeted.<sup>44</sup>

These ideological rationales helped to reinforce the disparity in impact on different economic and social classes. Michael A. Lerner described Prohibition as a “fourteen-year-long cultural conflict over the nature of American identity.”<sup>45</sup> While the mostly Anglo/white upper class supported or rejected Prohibition easily, ethnic and racial minorities viewed the dry movement as a “crusade in bigotry.”<sup>46</sup> Dry crusaders spoke

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<sup>40</sup> Rumbarger, *Profits, Power, and Prohibition*, 188.

<sup>41</sup> W. H. Stayton, “Our Experiment in National Prohibition. What Progress Has It Made?” *Annals of the American Academy of Political and Social Science*, Vol. 109, Prohibition and Its Enforcement (Sep., 1923), 26-38, 31.

<sup>42</sup> Allen, *Only Yesterday*, 96.

<sup>43</sup> Kyvig, *Daily Life*, 22.

<sup>44</sup> Lerner, *Dry Manhattan*, 110-112.

<sup>45</sup> Lerner, *Dry Manhattan*, 3.

<sup>46</sup> Lerner, *Dry Manhattan*, 30, 3.

and wrote in anti-immigrant rhetoric, blasting German breweries, Jewish and Italian wine-drinking, and Irish whiskey. They never effectively distanced themselves from this bigotry.<sup>47</sup> According to Lynn Dumenil, the problems of “crime, prostitution, and violations of prohibition” became “associated in the old-stock mind with immigrants and African Americans.” She described the impetus for the passage of the Eighteenth Amendment as “inseparable from the nativism and anti-Catholicism deeply embedded in nineteenth-century political culture.” By the twentieth century, the “battle for prohibition” had become “an ethnic conflict.” She describes prohibitionists as “overwhelmed by immigrant masses whose religion, language, values – especially of sexual morality, drink, and leisure – seemed so much at odds with mainstream values.” Dry crusaders hoped that the Volstead Act would “coerce assimilation” to “Protestant middle-class values.”<sup>48</sup> Even if ethnic and racial minorities chose to not obey the law, Joseph Gusfield wrote, it was these crusaders’ “culture that had to be evaded... and morality that was transgressed.”<sup>49</sup> Ethnic and racial Americans fully comprehended the Prohibition law and its enforcement as an attempt to “police the habits of the poor, the foreign-born, and the working class.”<sup>50</sup> Resistance to what they viewed as an attempt to annihilate their culture took many forms, but “resistance to the dry laws became a form of protest against the cultural authority of Protestant drys who presented themselves as the defenders of all things genuinely American.”<sup>51</sup> Flouting Prohibition, ethnic Americans “asserted their own identity” in the face of “the ultimate nativist reform.”<sup>52</sup> For these

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<sup>47</sup> Lerner, “Brewers of Bigotry,” *Dry Manhattan*, 96-126.

<sup>48</sup> Dumenil, *Modern Temper*, 239, 227-8.

<sup>49</sup> Gusfield, *Symbolic Crusade*, 122.

<sup>50</sup> Lerner, *Dry Manhattan*, 96.

<sup>51</sup> Lerner, *Dry Manhattan*, 100.

<sup>52</sup> Dumenil, *Modern Temper*, 30.

Americans, the Eighteenth Amendment and the Volstead Act were invading not just their physical home, but attacking and intruding on their cultural identity and the expression of that identity.

Many Americans saw the Amendment as an intrusion on their personal life choices, whether those choices were linked specifically to cultural identity or simply freedom. Underlying the unpopularity of the act was the nature of the Eighteenth Amendment itself. It is the only Constitutional amendment that is framed in terms of a prohibition, not a right.<sup>53</sup> And because of this, people saw the law itself as invading their privacy. This sentiment was widespread across society. In 1922, Fabian Franklin published *What Prohibition Has Done to America*. Once a professor of mathematics at Johns Hopkins University and then associate editor of *The New York Evening Post*, Franklin presented the Eighteenth Amendment as a “Constitutional monstrosity” and a “degradation of the Constitution.”<sup>54</sup> Working men voiced similar opinions – that “their freedom has been somewhat interfered with by legislation,” that the laws and their enforcement were “a curtailment of their guaranteed rights under the Bill of Rights and other sections of the Constitution,” and that it “infringes on personal liberty.”<sup>55</sup> Wickersham Commission member Henry W. Anderson wrote in his addendum to the official Report that citizens “feel that the present law attempted too much – went too far

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<sup>53</sup> While the Thirteenth and Fourteenth Amendments effectively circumscribed citizens’ actions, they are framed in terms of granting rights.

<sup>54</sup> Fabian Franklin, *What Prohibition Has Done to America* (New York: Harcourt, Brace, and Company, 1922) 9, 11.

<sup>55</sup> NCLOE, *Enforcement*, vol. 3, 273-274 (Daniel J. Tobin, the General President of the International Brotherhood of Teamsters, Chauffeurs, and Helpers). NCLOE, *Enforcement*, vol. 3 290 (Frank Duffy, General Secretary of the United Brotherhood of Carpenters and Joiners). NCLOE, *Enforcement*, vol. 3, 261 (Adolph J. Fritz, Secretary of the Indiana State Federation of Labor).

in its invasion of personal rights.”<sup>56</sup> The law’s “impairment of constitutional guarantees of individual rights” was part of the declaration of the Women’s Organization for National Prohibition Reform at their first convention.<sup>57</sup> According to David Kyvig, the Eighteenth Amendment brought “the federal government into people’s daily lives in a fashion never before experienced in peacetime.”<sup>58</sup>

Not only did the law seem to reach invisibly into people’s homes, but the Prohibition agents physically infringed on people’s liberty. In its incorporation statement the Volunteer Committee for Lawyers, an organization of lawyers dedicated to the repeal of the Eighteenth Amendment, reasoned that national Prohibition had allowed the government to resort to “improper and illegal acts in the procurement of evidence and infringement of such constitutional guarantees as immunity from double jeopardy and illegal search and seizure.”<sup>59</sup> These concerns were not unfounded. William S. Kenyon, a member of the Wickersham Commission, wrote that “public sentiment against the prohibition laws has been stimulated by irritating methods of enforcement, such as the abuse of search and seizure processes, invasion of homes and violations of the Fourth Amendment to the Constitution, entrapment of witnesses, [and] killings by prohibition agents.”<sup>60</sup> Wickersham Committee member Paul J. McCormick went further, calling the Bureau’s enforcement methods “fanatical, illegal, and corrupt.”<sup>61</sup> Kyvig describes law

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<sup>56</sup> NCLOE, *Report*, 91. The National Commission on Law Observance and Enforcement was called the “Wickersham Commission.” This was a Senate Commission tasked in 1931 with investigating “the enforcement, the benefits, and the abuses under the Prohibition laws.”

<sup>57</sup> Kyvig, *Repealing National Prohibition*, 123 (citing Transcript, WONPR first convention, WONPR Papers. – Women’s Organization for National Prohibition Reform Papers, in Alice Belin du Pont files, Pierre S. du Pont Papers. Eleutherian Mills Historical Library. Wilmington, DE).

<sup>58</sup> Kyvig, *Daily Life*, 3.

<sup>59</sup> Kyvig, *Repealing National Prohibition*, 128 (citing Voluntary Committee for Lawyers’ incorporation statement published in *New York Herald-Tribune* on January 23, 1929).

<sup>60</sup> NCLOE, *Report*, 120-122.

<sup>61</sup> NCLOE, *Report*, 155.

enforcement during the Prohibition years as “more aggressive and intrusive” and “assuming new powers.”<sup>62</sup> A 1927 article in the *Yale Law Journal* found that “more than 700 cases involving the admissibility of illegally obtained evidence [had been] reported” since 1920. “The number of liquor cases turning upon the rule ha[d] increased from four during the first year [of Prohibition] to more than 220 during the past year.”<sup>63</sup>

Often search warrants were granted based on dubious information, even on the basis of a mere anonymous tip or perjured testimony.<sup>64</sup> Roy Haynes recounts a story of two Prohibition agents who threatened to shoot an unarmed teenager in their custody. Three women were about to attack the agents with an iron bar, a rolling pin, and “a bit of rough lumber.” They ceased their attack to save the life of the boy.<sup>65</sup> In the investigation and arrest of George Remus, a federal agent entered Remus’s hotel suite in Columbus, Ohio, inserted a microphone in the wall, and proceeded to transcribe everything that happened in the room.<sup>66</sup> Major Maurice E. Campbell, Prohibition Administrator for the Eastern District of New York, recounted raiding a club without a warrant and destroying all of the furniture inside – he termed this “confiscating” the property – which was allowed if the person had not paid taxes on the liquor they sold.<sup>67</sup> In 1931, the Chief, Division of Schools, Bureau of Prohibition, described “a lack of knowledge combined with the inexperience of many of the officers” resulting in... illegal searches and seizures.”<sup>68</sup>

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<sup>62</sup> Kyvig, *Repealing National Prohibition*, 35.

<sup>63</sup> Osmond K. Fraenkel, “Recent Developments in the Law of Search and Seizure,” 13 *Minn. L. Rev.* 1 (1928).

<sup>64</sup> Rose, *American Women and the Repeal of Prohibition*, 49-50.

<sup>65</sup> Haynes, *Prohibition Inside Out*, 26-27.

<sup>66</sup> Behr, *Prohibition*, 168.

<sup>67</sup> Kobler, *Ardent Spirits*, 236-7.

<sup>68</sup> Harry M. Dengler, “Training of Prohibition Enforcement Officers in the United States” *The American Journal of Police Science*, Vol. 2, No. 1 (Jan-Feb., 1931) 45-51, 1.

In addition to questionable searches, seizures, and arrests, Prohibition enforcement took its toll on civilian and enforcement personnel. The reported number of civilian and federal officers killed “incidental to operations” in enforcing the Volstead Act was 286 from 1920-1930.<sup>69</sup> It is nearly impossible to estimate the number of civilians killed by state and local officials; estimates range from eight hundred to thirteen hundred people. Many of these civilian deaths were due to the incompetence of the agents. Explanations for individual killings included poor aim at a tire, tripping, or the suspicion that the civilian was carrying a weapon. Some were even shot in the back while fleeing.<sup>70</sup> As an example of these acts of “self-defense: “An Agent Rudolph Brewer attempted to arrest seventy-year old Charles Gundlacht. Gundlacht fired at Brewer, wounding his knee. Brewer fired back and hit Gundlacht’s foot. “As he lay on the ground begging for mercy, Brewer stood over him and put a bullet through his head.”<sup>71</sup>

These violations of the Constitution were due in large part to the inexperience and ineffectiveness of the federal agents of the Prohibition Bureau who were charged with enforcing the Prohibition laws. Originally under the aegis of the Treasury Department, the Bureau was consistently understaffed, its agents underpaid, underqualified and often corrupt. For these reasons, the turnover rate within the Bureau was extraordinarily high, further eroding its efficiency. The Bureau’s mandate – to stop the sale and trafficking of liquor throughout the United States – was impossible given these circumstances. This became more apparent, and in 1931 President Herbert Hoover appointed the National Commission on Law Observance and Enforcement (the “Wickersham Commission” or

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<sup>69</sup> NCLOE, *Enforcement*, 491.

<sup>70</sup> NCLOE, *Enforcement*, 491-515.

<sup>71</sup> Kobler, *Ardent Spirits*, 288-289. For more anecdotes, see 289-294.



NCLOE) to investigate problems of law enforcement in general, and specifically the Volstead Act.<sup>72</sup>

The Prohibition Bureau was created in 1921 with an appropriation of 6.35 million dollars; by 1924 its appropriation had increased to 8.25 million dollars, and 12.7 million dollars by 1930.<sup>73</sup> This funding could not support enough personnel, nor could it adequately compensate those who did work for the agency.<sup>75</sup> The 1931 Wickersham Commission investigation found that “the activities of the bureau have been cut to fit a sum established at Washington rather than fit the known requirements of the task to be accomplished.”<sup>77</sup> The Wickersham Commission finally recommended “substantial increase” in federal appropriations.<sup>78</sup>

In 1924, 1,652 agents were assigned to patrol the entire United States, over 3.5 million square miles and a population of just over 106 million people.<sup>80</sup> While Congress expected that local agencies would also investigate and prosecute offenders, it was still geographically impossible for this number of men to patrol even the United States’ borders, much the less its interior. As Allen put it: “If the whole army of agents in 1920 had been mustered along the coasts and borders – paying no attention at the moment to medicinal alcohol, breweries, industrial alcohol, or illicit stills – there would have been one man to patrol every twelve miles of beach, harbor, headland, forest, and riverfront.”<sup>81</sup>

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<sup>72</sup> While scholars disagree on the merits of the final Report of the Commission, the research and data that was collected is useful in detailing the Prohibition experience and these documents will be used to support the contentions put forth in this paper. Doek-Ho Kim, “‘A House Divided:’ The Wickersham Commission and National Prohibition,” PhD diss., State University of New York at Stony Brook, 1992.

<sup>73</sup> NCLOE, *Enforcement*, Vol. 2, 216-291.

<sup>75</sup> NCLOE, *Enforcement*, vol. 5, 452.

<sup>77</sup> NCLOE, *Enforcement*, Vol. 2, 128.

<sup>78</sup> NCLOE, *Report*, 83.

<sup>80</sup> [http://www.census.gov/history/www/through\\_the\\_decades/fast\\_facts/1920\\_fast\\_facts.html](http://www.census.gov/history/www/through_the_decades/fast_facts/1920_fast_facts.html), accessed 20 February 2011. NCLOE, *Enforcement*, Vol. 2, 208.

<sup>81</sup> Allen, *Only Yesterday*, 216.

It was just not mathematically possible for this small force to succeed if significant numbers of people violated the Act. Anderson wrote in his addendum to the report, “If the people...send into action for its enforcement...a small force of from 1,000 to 1,500 underpaid men against a lawless army running into tens of thousands, possessed of financial resources amounting to billions, ready to buy protection at any cost, the people must expect unsatisfactory results and heavy moral casualties.”<sup>82</sup>

When the Wickersham Commission published its Report, it recommended increasing the number of agents in the Bureau by 60 percent.<sup>84</sup> This report was published in 1931, when number of agents working for the Bureau had been increased to over 2,500.<sup>85</sup> Agents were not only overwhelmed by the vastness of the country, but also the scope of the responsibilities delegated to the Prohibition Bureau. These included “policing the nation’s borders for illegal smuggling; making raids and arrests for alcohol sales; licensing the manufacture, storage, and distribution of industrial alcohol; regulating the supply of medicinal alcohol; and monitoring the dispensation of sacramental wine.”<sup>86</sup> As Allen illustrated, there were barely enough agents to monitor the borders. Lerner noted that the Bureau was the “largest nonmilitary federal law enforcement body in the country,” but the prevalence of alcohol and widespread violation of the law made the size of the Bureau inadequate to effectively enforce the law.<sup>87</sup>

As Wickersham Commission member Henry Anderson alluded, the agents of the Prohibition Bureau were also underpaid for this difficult and often dangerous work. “The agents’ salaries in 1920 mostly ranged between \$1,200 and \$2,000 [below the mean

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<sup>82</sup> NCLOE, *Report*, 12, 16, 97. See also Kobler, *Ardent Spirits*, 271.

<sup>84</sup> NCLOE, *Report*, 64-65.

<sup>85</sup> NCLOE, *Enforcement*, 208.

<sup>86</sup> Lerner, *Dry Manhattan*, 64.

<sup>87</sup> Lerner, *Dry Manhattan*, 65.

income of \$2,500].<sup>88</sup> Again, Allen's eloquence is striking: "Anybody who believed that men employable at thirty-five or forty or fifty dollars a week would surely have the expert technical knowledge and the diligence to supervise successfully the complicated chemical operations of industrial alcohol plants or to outwit the craftiest devices of smugglers and bootleggers, and that they would surely have the force of character to resist corruption by men whose pockets were bulging with money, would be ready to believe in Santa Claus, perpetual motion, and pixies."<sup>89</sup> The salary was not high enough to attract people qualified for the technical aspects of the job or experienced in law enforcement and investigation. The agents were paid far less than the average American, yet were expected to resist when presented with ways to offset their meager income.

The Wickersham Commission Report attributed the low caliber of men that applied to work for the Bureau to these low salaries. "The salaries of prohibition agents were too low to be attractive. There has been much criticism of the character, intelligence, and ability of many of the force originally appointed."<sup>91</sup> The agents were often unqualified to perform law enforcement tasks. On April 1, 1930, according to the Wickersham Commission, "half the present force were [sic] totally inexperienced in police or investigative work."<sup>92</sup> It was not until after 1926 that the Prohibition Bureau became subject to civil service testing. When active Prohibition agents were subjected to

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<sup>88</sup> The majority of the agents in 1920 (839 of 943) were paid between \$1,200 and \$2,000 per annum. NCLOE, *Report*, 12, 16. The New York Police Department, also with a reputation for corruption, paid its officers an average annual salary of \$1,900. Lerner, *Dry Manhattan*, 82.

<sup>89</sup> Allen, *Only Yesterday*, 216.

<sup>91</sup> NCLOE, *Report*, 12. In 1926, George Wickersham testified to the Senate Committee that "the character of the personnel in many respects was very undesirable." Senate Committee on the Judiciary, *Investigation of Prohibition Enforcement*, 71<sup>st</sup> Cong., 2<sup>nd</sup> sess., 1930, 211, 3.

<sup>92</sup> NCLOE, *Enforcement*, Vol. 2, 33n10.

their first civil service exam, 70 percent of the examinees flunked.<sup>93</sup> Prior to that time cronyism placed men in positions for which they were unqualified. Lerner described some of the first appointees in New York City as “dishwashers, baseball players, boxing managers, shopkeepers, and returning veterans.”<sup>94</sup> These agents obtained their positions through their political connections, as a reward for service to the party. Others were given positions because of their dedication to the temperance movement. Henry S. Dennison, Wickersham Committee member, characterized these appointees as “a combination of fanatics and crooks.”<sup>95</sup> Agents Izzy Einstein and Moe Smith arrested five-thousand violators in the five years they worked, a full fifth of the prohibition cases prosecuted in New York City up to 1926, yet they were fired because they were making their coworkers look incompetent.<sup>96</sup>

That the agents were underpaid and underqualified contributed to corruption within the Bureau. George Wickersham commented to a 1926 Senate Committee investigating law enforcement: “When you...[consider] that the extraordinary temptation to which very ordinary men, men of very ordinary caliber, put into positions for which they had no previous training, were subjected, I think it is a remarkable thing not so much that there was corruption, but that there was any limit to the corruption.”<sup>98</sup> A culture of graft surrounded all of Prohibition enforcement. The agents saw their quarries living a lifestyle that made their already low government pay seem paltry. A police officer or

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<sup>93</sup> Kobler, *Ardent Spirits*, 279. The Prohibition Bureau did not require civil service examinations until June 4, 1927. Only 4,504 passed the examination, approximately one-third of those taking it. Of these, 2,526 were declared ineligible for character, personality or fitness. (NCLOE, *Enforcement*, Vol. 2, 17-28, 228).

<sup>94</sup> Lerner, *Dry Manhattan*, 66.

<sup>95</sup> NCLOE, *Enforcement*, vol. 2, 61.

<sup>96</sup> Kobler, *Ardent Spirits*, 294-295. Einstein and Smith were also accused of flagrant Constitutional violations, but this was not the reason for their dismissal. Coffey, *The Long Thirst*, 99.

<sup>98</sup> Senate Committee on the Judiciary, *Investigation of Prohibition Enforcement*, 10-11.

Prohibition agent could increase their income by 25 percent by collecting only five dollars a week from just one person or establishment. The actual graft amounts collected were often far more. In New York City, the going rate for tipping off a liquor dealer or saloon owner was from fifty dollars to five hundred dollars.<sup>99</sup> In Philadelphia, policemen were paid monthly “salaries” by the liquor interests dependent on their rank: seventy-five dollars to district captains, fifty dollars to district detectives, and twenty-five dollars to street sergeants.<sup>100</sup> If the payment was made to ignore a large-scale transaction the amount offered could be 20,000 dollars or more.<sup>101</sup> One Agent Kerrigan estimated that an agent could easily increase his income to between 40,000 and 50,000 dollars a year.<sup>102</sup> The temptation was too much for many to withstand, as Wickersham noted to the Senate Committee: “It is putting an undue strain on an every-day sort of individual to put him in a position where he has got a salary large enough to enable him to live with a family in ordinarily decent circumstances and expose him to the temptation that by turning his back he can obtain a sum large enough to keep him in comfort.”<sup>103</sup>

Just because the temptation existed, it doesn’t necessarily mean that agents were corrupted. But the records of the Prohibition Bureau prove otherwise. Edward Behr, in *Prohibition: Thirteen Years that Changed America*, broke down the corruption numerically: between 1920 and 1930, some 11,926 agents (out of a force of 17,816) were ‘separated without prejudice’ [from the Bureau] because their criminal involvement could not be proved, and another 1,587 were ‘dismissed with cause.’<sup>104</sup> Tip offs to criminals

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<sup>99</sup> Lerner, *Dry Manhattan*, 68, 82.

<sup>100</sup> NCLOE, *Enforcement*, Vol. 5, 205.

<sup>101</sup> Lerner, *Dry Manhattan*, 69.

<sup>102</sup> Kobler, *Ardent Spirits*, 277.

<sup>103</sup> Senate Committee on the Judiciary, *Investigation of Prohibition Enforcement*, 10-11.

<sup>104</sup> Behr, *Prohibition*, 153.

and speakeasy owners were so common in the New York City office of the Bureau, that it cut its outgoing telephone service when a raid was about to be initiated “to stop tips from being phoned out by agents on the take.”<sup>105</sup> John Kobler, in *Ardent Spirits: The Rise and Fall of Prohibition*, noted that, from 1920-1930, almost 12 percent of persons who worked for the bureau were dismissed for cause.<sup>106</sup>

Mabel Walker Willebrandt, an Assistant Attorney General for the United States from 1921 to 1929, was in a unique position to observe the enforcement of the Volstead Act. After she left office, she wrote *The Inside of Prohibition* as a way to convey to the public her perspective on the ineffectiveness of enforcement. She wrote of the problems in enforcement due in part to the corruption within the Prohibition Bureau: “In the six years from 1920 to 1926 more than seven hundred and fifty prohibition agents were dismissed from the force for delinquency or misconduct. Among the charges which were brought were extortion, bribery, solicitation of money, illegal disposition of liquor or other property, intoxication, assault, the making of false reports, and theft. Sixty-one other officers and employees were dismissed for acts of collusion or conspiracy to violate the very law they had sworn to protect!”<sup>107</sup> The Senate noted in 1931 that corruption was improved over time by the “continuous sifting out” of corrupt agents, “giving the employees a better status under the civil service,” and “by giving them better compensation.”<sup>108</sup> But the ineffectiveness that accompanied the corruption damaged the public reputation of the Bureau early in Prohibition; improvement could not change the lingering impression that the Bureau was corrupt, inefficient, and ineffective.

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<sup>105</sup> Lerner, *Dry Manhattan*, 68, 69.

<sup>106</sup> Kobler, *Ardent Spirits*, 277.

<sup>107</sup> Mabel Walker Willebrandt, *The Inside of Prohibition* (Indianapolis: Bobbs-Merrill Company, 1929) 111.

<sup>108</sup> Senate Committee on the Judiciary, *Investigation of Prohibition Enforcement*, 10.

There are many individual instances of shocking corruption that contributed to this impression. A Philadelphia Prohibition director, in 1921, helped remove seven hundred thousand gallons of whiskey, with a street value of four million dollars, from government-bonded warehouses. His case was discharged when the evidence disappeared.<sup>109</sup> A congressman in Pittsburgh served a jail sentence for allowing four thousand cases of bonded whiskey to fall into the hands of bootleggers. He was reelected with the help of the Anti-Saloon League because of his dry voting record.<sup>110</sup> A federal grand jury in Pittsburgh indicted: two police magistrates, two legislators, five ward chairmen, the superintendent of police, fourteen police inspectors, five patrolmen and one constable.<sup>111</sup> Lerner chronicles other instances: the Bureau's "administrator of Chicago and its chief agent in 1923; its director for Ohio in 1925; in 1927 its former administrator of Buffalo, his former assistant, and several agents active and retired; its deputy administrator of Fayetteville, North Carolina, and six agents, its former chief of the New York Druggist Permit Division."<sup>112</sup> While anecdotal, these instances make clear that corruption ran throughout the Bureau – from agent, to administrator, to director.

The difficulty of the job, the low pay, the corruption – all of this contributed to the excessive amount of turnover in the Prohibition Bureau. Between 1920 and 1925 the lowest rate of turnover was 14.83 percent of personnel; the highest was 76.15 percent.<sup>113</sup> The Wickersham Commission found that "no organization could function efficiently and

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<sup>109</sup> Behr, *Prohibition*, 153.

<sup>110</sup> Behr, *Prohibition*, 154.

<sup>111</sup> NCLOE, *Enforcement*, vol. 5, 211-2.

<sup>112</sup> Kobler, *Ardent Spirits*, 274..

<sup>113</sup> NCLOE, *Report*, 16. NCLOE, *Enforcement*, vol. 2, 206. The exact numbers of turnover are: 1921 – 74.55%; 1922 – 47.36%; 1923 – 47.69%, and 1924 – 28.80%. (NCLOE, *Enforcement*, vol. 2, 206). Compare this with the 3% turnover in the Secret Service in 1929-1930. In the same year the Prohibition Bureau had a turnover of 28.01% (NCLOE, *Enforcement*, vol. 2, 206, 213); NCLOE, *Enforcement*, vol. 2, 216-219.

harmoniously in such a state of upheaval, with its leadership continually shifting and its plan of field organization subject to constant revision.”<sup>114</sup> For comparison, in 1929-1930 the Prohibition Bureau had a turnover of 28.01 percent, while the Secret Service was 3 percent in the same year and post-office inspectors 2.47 percent.<sup>115</sup>

The ineffectiveness of the Bureau caused by corruption was compounded by the lack of assistance from other law enforcement agencies. There was an expectation at the outset that the Bureau agents would be helped in their monumental task by “local law enforcement agencies, the Coast Guard, the U.S. Customs Service, and other agencies.”<sup>116</sup> The help that Congress had predicted or expected when it enacted Volstead was not forthcoming. Federal agencies that were expected to cooperate were specifically the Coast Guard, Customs, and the Department of Justice. The first two were “organized for a totally different purpose from the prevention of the inflow of liquor... and not anxious to be drawn into the problem of prohibition.”<sup>117</sup> Allen describes these agencies’ assistance as “unenthusiastic.”<sup>118</sup> The Department of Justice was obligated to prosecute these cases investigated by the Bureau, but was continually frustrated in its efforts to secure convictions. The corruption in the Bureau and illegal methods used by agents led to evidence being excluded, witnesses unable to testify, and the impeachment of testimony by untrustworthy Bureau agents. The Bureau agents rendered many cases unwinnable.

The Coast Guard had the same issues of graft that seemed to surround everything to do with Prohibition. Coast Guard captain Frank J. Stuart was paid two thousand

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<sup>114</sup> NCLOE, *Report*, 16, 64, 97.

<sup>115</sup> NCLOE, *Enforcement*, vol. 2, 206, 213.

<sup>116</sup> Lerner, *Dry Manhattan*, 65. Allen, *Only Yesterday*, 218.

<sup>117</sup> Senate Committee on the Judiciary, *Investigation of Prohibition Enforcement*, 12.

<sup>118</sup> Allen, *Only Yesterday*, 217-218.



dollars for letting liquor boats land near Montauk.<sup>119</sup> The Coast Guard struggled to enforce Prohibition laws. International maritime law set a three-mile boundary: outside of this the Coast Guard did not have jurisdiction over a vessel, unless that ship was in contact with shore.<sup>120</sup> Generally this meant that unless the Coast Guard actually saw small boats pulling up to the large ships that were essentially floating warehouses, they did not have jurisdiction to board the vessel, impound it, or seize the cargo. In addition, most of the smaller boats that carried the alcohol to shore were faster than the Coast Guard ships, with locally experienced captains that could, given a small headstart, easily outrun the Coast Guard. As late as 1931, government officials were noticing the underequipped Coast Guard vessels, recommending an “increase in mechanical equipment such as: (a) Radios for the interception of the smugglers’ messages, and (b) airplanes for scouting purposes;” they also recommended “faster boats” and silencing devices.”<sup>121</sup>

Like the Prohibition Bureau, Customs officials were woefully understaffed to deal with importation of liquor. In 1926, Customs had only one hundred seventy patrolmen for the entire length of the land borders with Canada and Mexico.<sup>122</sup> These agents were expected to halt what the Department of Commerce estimated was forty million dollars worth of liquor entering the country.<sup>123</sup> General Lincoln C. Andrews, appointed

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<sup>119</sup> Behr, *Prohibition*, 143.

<sup>120</sup> This law changed to approximately twelve to twenty miles offshore, or an hour’s sail. James Barbican, *Confessions of a Rum-Runner* (Mystic, CT: Flat Hammock Press, 2007) 125. For more on Rum Row and the Coast Guard, see Harold Walters, *Smugglers of Spirits: Prohibition and the Coast Guard Patrol* (Mystic, CT: Flat Hammock Press, 2007) and Robert Carse, *Rum Row: The Liquor Fleet that Fueled the Roaring Twenties* (Mystic, CT: Flat Hammock Press, 2007). For more on Rum Row generally, see Alastair Moray, *The Diary of a Rum-Runner* (Mystic, CT: Flat Hammock Press, 2007) and Frederic F. Van de Water, *The Real McCoy* (Mystic, CT: Flat Hammock Press, 2007).

<sup>121</sup> NCLOE, *Enforcement*, vol. 2, 186, 189.

<sup>122</sup> NCLOE, *Report*, 13-14.

<sup>123</sup> Allen, *Only Yesterday*, 217-218.

Assistant Secretary of the Treasury assigned in 1925 to supervise Customs, Coast Guard, and Prohibition, estimated that he would need a force of at least 1,500 agents to adequately patrol both borders.<sup>124</sup> And, again, corruption was a problem. United States Attorney John R. Watkins led a 1931 investigation into Customs officials in Detroit that was expected to bring indictments against one hundred Customs agents. This had happened before in Detroit, when in one year 175 men were fired. There were only 129 inspectors working in Detroit; this was a turnover of more than 135 percent. Watkins estimated that one half of the liquor smuggled from Canada was done so with the help of Customs inspectors, who were collecting approximately 1,700 dollars per month in bribes.<sup>126</sup>

As one particular example of non-cooperation, in Florida, there were forty-four fruit fly quarantine stations, all federal, though often operated by state officials. All vehicles that passed through the station were searched for fruit that might carry the Mediterranean fruit fly out of Florida. Customs officials “reported instances of car seizures, involving large quantities of contraband [liquor] that had been previously searched and passed with a Government seal by fruit-fly inspectors.”<sup>128</sup> Here, it would have been quite simple and effective for the quarantine stations to arrest and/or seize the liquor in transport, but it was not done.

Before the Prohibition Bureau was relocated to the Department of Justice, the Treasury Department investigated offenses and the Department of Justice prosecuted the offenders. Attorney General Mitchell pushed for the move, saying that it would “make a

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<sup>124</sup> NCLOE, *Report*, 13-14.

<sup>126</sup> NCLOE, *Enforcement*, vol. 5, 213-4.

<sup>128</sup> NCLOE, *Enforcement*, vol. 4, 120.

closer coordination between the detection and the prosecution” of these offenses.<sup>129</sup>

Prohibition agents would pursue a criminal with little thought of ensuring a successful prosecution. They were, as already noted, untrained. Cases were often dismissed because the agents did not follow Constitutional procedures in investigating and arresting violators.<sup>130</sup> Lerner writes of one effect of this misconduct: “Any time an arresting police officer or Prohibition agent was dismissed from the force, prosecutors quickly dropped all pending cases involving the implicated officer... The United States Attorney’s office was forced to dismiss cases because evidence had been improperly or illegally seized, or, on occasion, because evidence and case files had disappeared from the Bureau of Prohibition headquarters.”<sup>131</sup> The Department of Justice and the federal court system felt the heavy burden of the Prohibition law. If every violator “arrested during a single month... demanded a jury trial, every federal judge available for prohibition cases would be occupied for a year.”<sup>132</sup> Even though this scenario did not actually occur, the case load nevertheless began to overwhelm the federal courts. Volstead violations were 65 percent of the federal cases heard in the 1920s. In 1921, the federal courts handled 29,114 cases of prohibition violation. In 1932, it was 65,960. By 1930, 49 percent of federal prisoners were there for Volstead violations; up from 7 percent in the early 1920s.<sup>134</sup> Prosecutors often used their discretion to not take cases to

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<sup>129</sup> Senate Committee on the Judiciary, *Investigation of Prohibition Enforcement*, 31.

<sup>130</sup> Kyvig, *Repealing National Prohibition*, 35.

<sup>131</sup> Lerner, *Dry Manhattan*, 91. See also, Kyvig, *Repealing National Prohibition*, 35.

<sup>132</sup> Kobler, *Ardent Spirits*, 283.

<sup>134</sup> Kyvig, *Daily Life*, 178.

trial that they deemed trivial or likely unwinnable because of search and seizure issues or suggestions of corruption.<sup>135</sup>

Successful enforcement of Prohibition also required coordination with foreign nations. Prior to Prohibition, Great Britain and Canada had exported substantial amounts of alcohol to the United States. It was not in their best financial interest to cease exportation and lose the profits from American purchasers, but politically it was essential to maintain at least an appearance of respect for American laws. British alcohol was rerouted to the Bahamas or Bermuda or Canada. These Caribbean island nations, and some Canadian islands like St. Pierre and Miquelon, suddenly became warehouses for British liquor ultimately destined for the United States.<sup>136</sup> From there, the liquor was transported to Florida or the infamous Rum Row off the Eastern seaboard of the United States and then onto American shores. Captain Bunting, a rumrunner operating out of Nassau, described the system: “We get the stuff shipped out from England to Nassau in the ordinary way. It is paid for and the Bahamas Government gets the duty it imposes. We employ labour in the island and we have brought prosperity to a poverty-stricken place. We unload it from the big boats and load it up again on rum-runners like mine. It goes up off the American coast, breaking no American or English law, for we keep in international waters.”<sup>138</sup> Indeed, many Bahamians became wealthy from American

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<sup>135</sup> Lerner, *Dry Manhattan*, 87. The plea bargain system became a mainstay of the federal courts during Prohibition. Judges would often have “bargain days” to help clear their dockets where defendants could plead guilty, pay a fine, and avoid jail time. Kobler, *Ardent Spirits*, 283.

<sup>136</sup> For information on Great Britain, the Bahamas, and Prohibition, see Gertrude “Cleo” Lythgoe, *The Bahama Queen: Prohibition’s Daring Beauty* (Mystic, CT: Flat Hammock Press, 2007). Also about the Bahamas, and including information on St. Pierre, is H. De Winton Wigley, *With the Whiskey Smugglers* in Gertrude “Cleo” Lythgoe, *The Bahama Queen: Prohibition’s Daring Beauty* (Mystic, CT: Flat Hammock Press, 2007). Originally published by Daily News Ltd, London, in 1923. For the effects of the eighteenth amendment on diplomacy with Great Britain, see Lawrence Spinelli, *Dry Diplomacy: The United States, Great Britain, and Prohibition* (Lanham, MD: Rowman and Littlefield Publishers, 2008).

<sup>138</sup> Wigley, *With the Whiskey Smugglers*, in Lythgoe, *The Bahama Queen*, 31.

Prohibition. Individuals could make vast fortunes in a short amount of time – Roland T. Symmonette made 1 million dollars in three years; this rumrunner became the first Bahamian premier in 1964. The Bahamian government also reaped the benefits: revenue from liquor imports and re-exports went from 81,049 pounds in 1919 to 1,065,899 pounds in 1923.<sup>139</sup> According to Daniel Okrent, this revenue “brought Nassauvians into the twentieth century. After the completion of a sewage system, a 2,300-volt generator, a modern wharf..., a newly dredged harbor, and miles of resurfaced roads and streets..., the colony’s British governor, Sir Bede Clifford, said it would be appropriate to erect near the statues of Christopher Columbus and Queen Victoria a third one: a monument to Andrew J. Volstead.”<sup>140</sup>

Great Britain also continued to export to Canada, where the liquor was redirected to American buyers. How this liquor and Canadian alcohol reached the United States depended upon the law in the particular Canadian province where the alcohol was held. Canada was experimenting with legislating control of alcohol contemporaneously with the United States. Instead of national prohibition, Canada developed a system like the local option laws that had preceded Prohibition in the United States, whereby each province voted on its own legislative schema. Two territories, Prince Edward Island and Nova Scotia, were under self-imposed Prohibition. In the other seven, government controlled the sale of alcohol. In Saskatchewan, Ontario, and New Brunswick the government maintained a monopoly on the sale of all alcohol – “sold only in sealed packages at Government stores and may not be consumed in a public place.” British Columbia, Alberta, Manitoba, and Quebec had the same system for hard liquor but not

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<sup>139</sup> Michael Craton and Gail Saunders, *Islanders in the Stream: A History of The Bahamian People*, vol. 2 (Athens, GA: University of Georgia Press, 1998) 240, 238.

<sup>140</sup> Daniel Okrent, *Last Call: The Rise and Fall of Prohibition* (New York: Scribner, 2010) 160.

beer or wine, which was purchased by the glass at licensed taverns, beer parlors or (in Quebec) shops.<sup>141</sup> British Columbia allowed, until 1928, for private importation.<sup>143</sup> There was no restriction in Canadian law on selling liquor to persons within the United States. The only impediment to exporting to the United States was the government excise tax, and an a 20 dollar surcharge imposed on alcohol destined for the United States. According to Canadian records, in 1921 whiskey exports to the United States were 8,335 gallons; by 1928, whiskey exports had reached 1,169,002 gallons.<sup>145</sup> In 1921, 195,498 gallons of malt liquor were exported to the United States; in 1927, the total was 3,888,815 gallons.<sup>146</sup> Foreign-made liquors were also re-exported from Canada to the United States. In 1920, only 127 gallons of spirits were re-exported; in 1928, it was 243,305 gallons.<sup>147</sup> In 1919 the value of all imported liquor was 295,502 dollars. By 1923, it was 12,931,819 dollars. And in 1929, 38,311,336 dollars.<sup>148</sup> The Canadian government benefited financially from both the importation and exportation of alcohol. In 1918 the combined excise and customs duties on alcohol netted the Canadian government 15,617,190; by 1928 it was 49,805,291.<sup>149</sup> These numbers only account for the alcohol tracked by customs via the twenty-dollar surcharge.<sup>150</sup> Provincially, British Columbia made 294,969 dollars in 1919, but 2,765,009 dollars in 1928. By 1928, Quebec and Ontario were making over 7 and 8 million dollars, respectively.<sup>151</sup> As for re-exports, in 1920 Canada re-exported 4,179 gallons of liquor, 18 gallons of malt beverage,

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<sup>141</sup> NCLOE, *Enforcement*, vol. 1, 373.

<sup>143</sup> NCLOE, *Enforcement*, vol. 1, 434.

<sup>145</sup> NCLOE, *Enforcement*, vol. 5, 221.

<sup>146</sup> NCLOE, *Enforcement*, vol. 5, 221.

<sup>147</sup> NCLOE, *Enforcement*, vol. 5, 246.

<sup>148</sup> NCLOE, *Enforcement*, vol. 1, 378-9.

<sup>149</sup> NCLOE, *Enforcement*, vol. 1, 379.

<sup>150</sup> Kobler, *Ardent Spirits*, 254.

<sup>151</sup> NCLOE, *Enforcement*, vol. 1, 379.

and 641 gallons of wine. In 1928, it re-exported 247,506 gallons of liquor, 634 gallons of malt beverages, and 150,056 gallons of wine.<sup>152</sup>

Canadian Customs officials did share information with their American counterparts about these shipments, and the transfer of information increased as politicians negotiated heightened assistance.<sup>153</sup> Still, many bootleggers would avoid the surcharge by forging shipping documents. And often the information arrived in the United States too late to arrest the importers.<sup>154</sup> Roy Haynes, Prohibition Commissioner, complained that their cargo was often “consigned to Mexican ports which it never reaches, surreptitiously landed on the coast of Washington, Oregon, and California.”<sup>155</sup> These shipments were not disclosed to officials in the United States, as they were, at least on paper, not destined for American customers. This amounted to a significant amount of the traffic from Canada. David Kyvig estimated that one million gallons of Canadian liquor came into America each year from 1920-1930 – 80 percent of Canada’s production.<sup>156</sup>

Not only were Prohibition agents expected to coordinate with the federal agencies and foreign nations, in order to be effective they had to coordinate with state apparatuses.

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<sup>152</sup> NCLOE, *Enforcement*, vol. 1, 414.

<sup>153</sup> NCLOE, *Enforcement*, vol. 1, 229-285 (“Correspondence between the Governments of Canada and the United States relative to commercial smuggling across the border”).

<sup>154</sup> In 1925 Canada and Mexico signed agreements that required them to inform American Customs agents of any shipments bound for the United States. Kobler, *Ardent Spirits*, 254.

<sup>155</sup> Roy A. Haynes, *Prohibition Inside Out* (Garden City, NY: Doubleday, 1923) 149. He described the procedure: “It may be ordered at a brewery or distillery and consigned ‘for export’ to a certain [fictitious] man in the United States. A big bootlegger... goes in person to the brewery or distillery, places the order, names the consignees, and even the power boats on which the liquor is to be shipped... Payment may be made either there or on delivery at the wharves, but usually is made at the time the order is placed. All the formalities of export are attended to, including the issuance of insurance papers... Clearance papers are made out in due form, and approved by Canadian customs officials. Clearance fees are paid by each small liquor boat in accordance with Canadian laws, and the revenue, from these fees and from taxation on liquor sales, is considerable.” Haynes, *Prohibition Inside Out*, 90-91.

<sup>156</sup> Kyvig, *Repealing National Prohibition*, 21.

By 1929 there was no state legislation enforcing Prohibition in New York, Nevada, Montana, Wisconsin, and Maryland. Maryland had never enacted any state enforcement statute. Illinois residents twice voted in referendums to repeal its state laws, but the Illinois Senate prevented repeal.<sup>157</sup> Governor Albert C. Ritchie, of Maryland, expressed the frustrations of these state governments: “The eighteenth amendment gives the Federal Government and the several States concurrent *power* to enforce it by appropriate legislation. Some contend very earnestly that this imposes a concurrent *obligation* to enforce, --that the power implies the duty.” He went on to explain Maryland’s position on the matter: “Federal officials are bound to enforce Federal laws and State officials are bound to enforce State laws, but neither Nation nor State is bound to enforce the laws of the other... We are under no duty to help and relieve the Federal government of the burdens and cost it has assumed under the Volstead law by making that law a Maryland measure and setting up our own State machinery to enforce it, and thus making the people of Maryland share its burdens and its costs; and we decline to do it.”<sup>158</sup> The refusal to enact state laws or to use state officers to enforce federal laws was a matter of federalism. But it was also a matter of economics. Prior to Prohibition, revenue from liquor taxes had, for most city and state governments, amounted to a significant portion of their operating budget.<sup>160</sup> State and city governments resented using their funds to enforce Prohibition and prosecute violators, when they had lost such a significant portion

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<sup>157</sup> NCLOE, *Enforcement*, vol. 5, 163-164. Both Illinois referendum passed with over 60 percent in favor of removing state prohibition laws.

<sup>158</sup> NCLOE, *Enforcement*, vol. 5, 264. For a similar rationale for the repeal in New York of the Mullen-Gage law in 1923, see Kyvig, *Repealing National Prohibition*, 55-58.

<sup>160</sup> Leslie Gordon, in 1930, wrote of the economics of repeal. “If the liquor now sold by bootleggers was legally sold, regulated, and taxed, the excise income would pay the interest on the entire local and national bonded indebtedness and leave more than \$200,000 for other urgently needed purposes.” *The New Crusade* (Cleveland, 1932) xxi-xxii, cited in Engelwood, “Organized Thirst,” in *Alcohol, Reform and Society*, Jack S. Blocker, Jr., ed., 183.



of their operating expenses when Volstead was passed. Prohibition restricted federal revenue as well. From 1873 to 1917, the revenue on spirits was 23 percent of the nation's tax receipts.<sup>161</sup> As an indication, the first six months of 1933 brought the federal government 54.1 million dollars in revenue from beer alone.<sup>162</sup> On the state level, New York lost 22.6 million dollars it collected under liquor taxes, more than a quarter of the state budget.<sup>163</sup> Locally, as an example, Atlanta's liquor tax generated 48.6 percent of its revenue before it instituted Prohibition.<sup>164</sup> Washington State, when it began collecting revenue after Prohibition, amassed 8.6 million dollars in revenue. The same year, 1936, total revenue from state taxes was 50 million dollars.<sup>165</sup> Many localities refused to allow Prohibition to drain their already limited resources; only eighteen states allocated any money at all to enforcement state or national Prohibition laws. "By 1927 their [these state governments'] financial contribution to the cause was about one-eighth of the sum they spent enforcing their own fish and game laws."<sup>166</sup>

Even in those states that had local legislation obligating state and local officers to enforce prohibition, cooperation was often not forthcoming or logistically possible. For the same economic reasons that some states opted out of Prohibition, local enforcement agencies often could not afford time-consuming and expensive investigations of liquor trafficking. Local officers were a part of the community in which they worked, and would often, according to Nelson Johnson, "obstruct federal officials attempting to secure

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<sup>161</sup> Richard F. Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880-1920* (Chapel Hill: University of North Carolina Press, 1995) 46, citing Tun-Yuan Hu, *The Liquor Tax in the United States, 1791-1947*, Columbia University Monographs in Public Finance and National Income, no. 1 (New York: Graduate School of Business, Columbia University, 1951) endpiece.

<sup>162</sup> Ogle, *Ambitious Brew*, 202.

<sup>163</sup> Lerner, *Dry Manhattan*, 51.

<sup>164</sup> Hamm, *Shaping the Eighteenth Amendment*, 97, citing James M. Wright, *The License System of the City of Atlanta* (n.p.: Harper Printer Co., 1964) 237.

<sup>165</sup> Clark, *The Dry Years*, 244.

<sup>166</sup> Rose, *American Women and the Repeal of Prohibition*, 47. Allen, *Only Yesterday*, 218.

compliance with Prohibition.”<sup>167</sup> They had no interest in arresting their family and friends for minor violations of the prohibition laws. Sometimes these local officers were violating Volstead themselves. Corruption was also common with state and local officials. Joseph Blasey, International Secretary Treasurer of the Journeyman Stonecutters’ Association of North America, summed up what he considered the “workingman’s view” of the situation. “Most of these [places where liquors can be purchased] are running without interference by the police, which would lead one to believe that they are getting protection in some way. If the civilian population knows of these conditions and where these speak-easies are, surely it can not be said that the police and other authorities do not know of them and where they are located.”<sup>168</sup> The public witnessed blatant violations of the Volstead Act, and both the federal agents and local enforcement officials did not investigate and prosecute offenders. To many it seemed that Volstead’s failure did not stem from an inability to enforce the law.

Those officials, local, state, or federal, who did try to enforce the law faced the burgeoning business of crime. The Volstead Act created an opportunity for criminals already active in gambling, prostitution, and racketeering to become quickly and immensely wealthy. Prohibition Commissioner Roy Haynes entitled the eighth chapter of *Prohibition Inside Out* “Enforcement and the Big Violator.” He describes the illicit liquor organizations as “aping” legitimate business.<sup>170</sup> Lynn Dumenil, in *Modern Temper: American Culture and Society in the 1920s*, likened the bootleggers’ operations to the “output system” of “early industrial manufacturers” – they “organized networks of

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<sup>167</sup> Nelson Johnson, *Boardwalk Empire: The Birth, High Times, and Corruption of Atlantic City* (Medford, NJ: Medford Press, 2002) 87.

<sup>168</sup> NCLOE, *Enforcement*, vol. 3, 288-289.

<sup>170</sup> Haynes, *Prohibition Inside Out*, 102.

home stills as part of their production and distribution system.”<sup>171</sup> Whether their method was to get liquor off the floating warehouses of Rum Row on the east coast, over the Canadian border at Detroit or other points of entry, across the waterways separating Canada and the United States, or across the border with Mexico, criminals used existing drug networks and created new networks to transport liquor into and around the country. Criminal enterprises also produced and distributed domestic liquors and beers. Doing so required physical space and equipment, trucks for transport, and many employees. Many of these organizations kept careful records, even hiring accountants and lawyers. Often it was these records that led to successful prosecution.

Today a lawful business will take into account the risks and costs inherent in its operation, mostly by taking out insurance policies to help defray the costs of litigation. The criminal enterprises of the Prohibition era operated with full knowledge that their products might be seized by the government. This was factored into their purchasing, pricing, and planning. The Wickersham Commission noted that these syndications are “not deterred by the occasional seizure of a carload of liquor or confiscation of a boat or truck. The business has been established on the basis of a definite risk of seizure.”<sup>172</sup> Even the prospect of being fined or sent to prison was a calculated risk. Haynes wrote that “fines are considered merely an element of business expense. Imprisonment, although inconvenient, is not regarded by some as sufficient to warrant passing up a fortune which will await them when the prison sentence is over.”<sup>173</sup> This ability to absorb loss and still be profitable and operational is part of what made these criminal enterprises difficult to shut down for even the most honest, well-trained enforcement

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<sup>171</sup> Dumenil, *Modern Temper*, 233.

<sup>172</sup> NCLOE, *Enforcement*, vol. 2, 151.

<sup>173</sup> Haynes, *Prohibition Inside Out*, 103.

agent. And this organization and seeming impenetrability is what inspired federal agents to use techniques like wiretapping.

The inadequacy of the federal machinery that existed to enforce Prohibition and the corruption endemic to the Prohibition Bureau created near chaos. Lack of training, lack of funding, lack of cooperation from other federal agencies, states, and countries – these factors led Prohibition agents, whether in good faith or not, to try new techniques and often act overzealously to investigate and arrest these seemingly well-organized violators of the Volstead Act.

These investigative and enforcement methods were then tested by the Supreme Court, which issued a series of opinions that transformed the interpretation of the Fourth Amendment. Governor Albert C. Ritchie of Maryland essentially catalogued the Supreme Court's Fourth Amendment decisions during Prohibition:

Our houses are no longer our castles... we can be halted and searched as we go about our lawful adventures, and can be hectorred, browbeaten and even cold-bloodedly shot down, - all in the name of the law... If all this is not the nullification of supposedly inalienable rights and liberties, what is?<sup>210</sup>

He saw each of these decisions as an infringement on liberty, as did the public. Each decision brought the judiciary closer to acknowledging that there was a line at which the government should not intrude into a citizen's personal life or personal space – that the Constitution grants a right to privacy. During Prohibition the Court never actually acknowledged this right. It consistently found that the government had not violated the Fourth Amendment.<sup>211</sup> The cases decided under the Fourth Amendment increasingly circumscribed individual citizens' rights and gave federal agents more leeway. Supreme

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<sup>210</sup> NCLOE, *Enforcement*, vol. 5, 270.

<sup>211</sup> An actual right to privacy was not acknowledged by the Court until 1965, with its decision in *Griswald v. Connecticut*, 381 U.S. 479 (1965).

Court Justices began, in *Olmstead*, to question what the Fourth Amendment was meant to protect. In his dissent, Brandeis articulates for the first time, with three of his brethren concurring, that the Fourth Amendment implicates more than the protection of physical places, tangible objects, and the corpus of a person. He posited that the Fourth Amendment should guarantee the individual the right to be let alone.

The Fourth Amendment to the Constitution provides that “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”<sup>212</sup> Prior to Prohibition, jurisprudence related to this Amendment was limited to a few cases. *Boyd v. United States*, decided in 1886, was the leading case that extended Fourth Amendment protection to a government action that did not constitute physically entering a property. The government mandated by statute that a suspect provide certain paperwork to the government. This paperwork, if produced by the suspect, would incriminate that suspect. The Supreme Court held that this demand was a search and seizure within the meaning of the Fourth Amendment because the production of the paperwork forced the suspect to incriminate himself, in violation of the rights protected by the Fourth Amendment. In future cases, the government would have to produce a warrant to search for that paperwork. Just because the government did not physically enter the office where the paperwork was located, did not mean that no search occurred. In 1914, in *Weeks v. United States*, the Supreme Court held that the admittance into evidence of papers and records seized from a defendant’s house when there was no arrest warrant for that defendant or search warrant for the premises and no permission

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<sup>212</sup> U.S. Const. Amend. IV.

given to the officers to enter was a violation of the Fourth Amendment. This is known as the “exclusionary rule:” the Fourth Amendment prohibits the use in trial of evidence that was obtained in an unconstitutional search and seizure. In 1920, *Silverthorne Lumber Company v. United States* extended the Fourth Amendment protections to corporations and their offices, papers, and effects. From these cases the Court crafted its opinions in *Olmstead* and the other cases decided during Prohibition. During Prohibition, the Court in effect created an entire field in Constitutional doctrine.

Kenneth Murchison characterized the years from 1920-1929 as “A Doctrinal Explosion” in Fourth Amendment jurisprudence, with the Court issuing twenty opinions that addressed Fourth Amendment concerns during the first ten years of Prohibition. Murchison found that throughout Prohibition the Court increasingly “divided over controversial enforcement practices but [was] still willing to tolerate the intrusive practices necessary to catch serious violators.”<sup>213</sup> Kyvig found that, during the 1920s, the “Court’s opinions substantially strengthened the machinery for enforcing law and order... [creating] the image of a government prepared to engage in more aggressive and intrusive policing practices than ever before.” This was done specifically to enforce the Prohibition law.<sup>214</sup>

The first Prohibition-era case that addressed Fourth Amendment issues was *Gouled v. United States* (1921), in which the Justices opined that the Fourth and Fifth Amendments are to be liberally construed by the courts.<sup>215</sup> An intelligence officer entered Gouled’s house pretending it was a social call. He then took papers from the house without Gouled’s knowledge or permission. In its decision, the Court prohibited

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<sup>213</sup> Murchison, *Forgotten Influence*, 73.

<sup>214</sup> Kyvig, *Repealing*, 35.

<sup>215</sup> *Gouled v. United States* 255 U.S. 298, 303 (1921).

federal officers from entering and searching a premises by “stealth, through social acquaintance, or the guise of a business call” if they did not have a warrant.<sup>216</sup> It also excluded from trial any evidence obtained in this manner.<sup>217</sup> While *Gouled* was not a Prohibition case, it was a prelude to the cases decided under the Fourth Amendment in the context of investigating and enforcing Prohibition laws. The Court set a precedent that, at least in theory, it would interpret the Fourth Amendment liberally “to prevent stealthy encroachment upon or ‘gradual depreciation’ of the rights secured by them [the Fourth and Fifth Amendments], by imperceptible practice of the courts or by well intentioned, but mistakenly overzealous, executive officers.”<sup>218</sup> The Court acknowledged that there was unlimited potential for the Fourth Amendment to limit citizens’ rights. Throughout the 1920s, the Court repeatedly interpreted the Amendment in favor of law enforcement and not the people, specifying various exceptions to the warrant requirement and limiting the physical and metaphorical reach of the Amendment’s protection.

The next case in which the Court tackled the Fourth Amendment was *Hester v. United States*. In 1924 the Court defined the “open fields” surrounding a house as exempt from the protections of the Fourth Amendment. The Bureau agents positioned themselves on land about one hundred yards from the Hester house. From this vantage point, they observed a man drive toward the house. They then saw Hester come outside and give the man a bottle. The agents sounded the alarm, and the man threw aside the bottle. The agents arrested Hester. The Court was unanimous in its opinion that the possibility that the agents had trespassed on Hester’s land did not implicate the warrant requirement of the Fourth Amendment. The agents’ actions did not amount to a search,

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<sup>216</sup> *Gouled v. U.S.* 255 U.S. 298, at 305.

<sup>217</sup> *Gouled v. U.S.* 255 U.S. 298, at 306.

<sup>218</sup> *Gouled v. U.S.* 255 U.S. 298 at 304.

and the confiscation of the containers was not a seizure, as they were discarded. Here the Court limited the protections of the Fourth Amendment to the actual building, and not to the entire property owned by the defendant.<sup>219</sup>

In 1925's *Carroll v. United States*, the Court outlined an automobile exception to the warrant requirement which has survived to the present day.<sup>220</sup> Agents stopped and searched a vehicle driven by persons they suspected were illegally transporting alcohol from Detroit. After tearing back a seat cushion, agents found sixty-eight cases of liquor. The whiskey was seized and the suspects arrested. Chief Justice Taft noted the impracticality of securing a warrant before the vehicle moved. The Court granted an exception to the warrant requirement in cases where officers "have reasonable or probable cause for believing that the automobile has contraband." While *Carroll* does create an exception to the warrant requirement, giving enforcement officers the ability to search and seize under new circumstances, it also creates an expectation of privacy in one's automobile. Before officers make a warrantless search or seizure of an automobile, they must have "reasonable or probably cause" that contraband goods are inside. The search cannot be made unless the officer can justify his reasons for searching *that* automobile at *that* time.

Part of the argument rejected by the Court in *Carròll* was that the search of the vehicle fell under the "search-incident-to-arrest" exception to the warrant requirement that had already been drawn by the Court. This exception (still a part of Fourth

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<sup>219</sup> *Hester v. United States*, 265 U.S. 57 (1924). The "curtilage," or area immediately surrounding a structure like a house, is protected by the Fourth Amendment. In the majority opinion in the *Olmstead* case, the Court referenced this protection, but the Court did not legally define curtilage until 1987 in *United States v. Dunn*, 480 U.S. 294 (1987).

<sup>220</sup> The exception also applies to "a search of a ship, motor boat, or wagon for contraband goods where it is not practicable to secure a warrant because the vehicle can be quickly moved." *Carroll v. United States* 267 U.S. 132, 150 (1925).



Amendment law) allows an officer to arrest a suspect and search the suspect and the area within his immediate control, if the officer has witnessed the suspect committing a crime. Since the officers did not stop the vehicle because they had witnessed a known violation of the law, but stopped it because of a reasonable suspicion, the search was not incident to the arrest; the arrest took place after the search. The Court, in a 1925 narcotics case, did not extend the search-incident-to arrest-exception to the premises of a defendant if the defendant was not arrested in that premises. Agnello was arrested several blocks from his home. After the arrest, officers searched his home and seized evidence. In this situation, the Fourth Amendment protections require the officers to get a search warrant for the residence.<sup>221</sup>

In *Marron v. United States*, another Prohibition case decided in 1927, the Court refined the search-incident-to-arrest exception further. A warrant was issued to search a property leased by Marron, specifying that the officers were looking for “intoxicating liquors and articles for their manufacture.” When agents searched the premises, several persons were “being furnished intoxicating liquors.” The person supplying the liquor was arrested. The agents conducted their search, seizing items specified in the warrant. They also seized a business ledger that they had discovered in a closet. The Court was very clear that the search warrant alone did not give the agents authorization to seize the ledger, as it was not specified in that warrant. However, the arrest for a crime committed in the presence of the agents allowed a search of the premises “to find and seize the things used to carry on a criminal enterprise.” Agents were entitled to search “all parts of the premises used for the illegal purpose,” so long as the area was in the “immediate possession and control” of the person arrested. Again, the Court circumscribed some

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<sup>221</sup> *Agnello v. United States*, 269 U.S. 20 (1925).

rights while affirming others. A person's home could be thoroughly searched, if the homeowner was arrested on the premises while committing an illegal act (and the arresting officer has legally entered the premises to witness that act). However, the Court specifically limited the seizure of items pursuant to a valid search warrant to those items particularly described in the warrant.<sup>222</sup>

Prior to the *Olmstead* case, Fourth Amendment jurisprudence defining searches was limited. While the Court did acknowledge that "searching" did not necessarily entail physically entering a premises, it was clear that in order to enter a residence or premises a federal officer needed a search warrant. The officer could enter the "open fields" surrounding the premises without a warrant, but could not actually enter the premises itself. The search warrant itself had to be specific in identifying the place to be searched and the items to be seized. There were only two permissible ways to avoid this requirement: The search-incident-to arrest exception (and even then the officers could not search the home of the suspect unless the arrest took place in the home); and the "automobile exception," where automobiles, boats, and other vehicles able to move could be searched without a warrant if the officer reasonably suspected that the vehicle contained contraband.

*Olmstead v. United States* was decided in 1928; Murchison describes it as the Court's "most famous prohibition decision."<sup>223</sup> The issue decided by the Justices in the case was whether or not the warrantless wire tapping of a defendant's telephone line constituted an impermissible search or seizure under the Fourth Amendment – that is, whether wiretapping was either a "search" or a "seizure." This was the last case in which

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<sup>222</sup> *Marron v. United States*, 275 U.S. 192 (1927).

<sup>223</sup> Murchison, *Forgotten Influence*, 65-68, quote on 65.

the Court would test the contours of the Fourth Amendment during Prohibition. And again, as warned of in the *Gouled* decision issued at the beginning of the decade, the Court circumscribed the rights protected by the Amendment and gave law enforcement. It was here that Justice Brandeis wrote in his dissent of “the right to be let alone.”<sup>224</sup> Understanding how Roy Olmstead operated, how he was caught, and the case as presented to the court are necessary to understand the dilemmas faced by the Court when they heard the appeal in 1928.

Roy Olmstead started out his adult life with a career in the Seattle police force. In 1916 he was youngest member of the Seattle police force to achieve the rank of lieutenant.<sup>225</sup> He was married and had two children. The mayor was a close friend, as was William Boeing. However, in 1920, at age 34, he was arrested under the Volstead Act for the sale of liquor. The arrest and guilty plea cost him a five hundred dollar fine and his law enforcement career.<sup>226</sup> Undone as a cop, Olmstead dedicated himself his criminal enterprise. Realizing that the liquor underworld in Seattle was loosely organized and poorly managed and knowing that he could count on the friends he had made in the police department to look the other way, Olmstead set about organizing his own rumrunning operation.<sup>227</sup> With ten men each investing one thousand dollars and Olmstead matching that ten thousand, he had the capital to start his enterprise.<sup>228</sup>

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<sup>224</sup> Brandeis had already written about privacy law in an 1890 law review article that he co-authored with S. D. Warren. It was here that he inserted the concept into federal jurisprudence. “The Right to Privacy,” 4 Harvard Law Review 193 (1890). This phrase was picked up by Morris L. Ernst and Alan U. Schwartz in *Privacy: The Right to Be Left Alone*, (New York: Macmillan, 1962). The law review article was focused on the “right to be let alone” from the intrusions of the press and publication of photographs without consent, a tort. Melvin I. Urofsky, *Louis D. Brandeis: A Life* (Pantheon: New York, 2009) 100-102.

<sup>225</sup> Clark, *The Dry Years*, 162.

<sup>226</sup> Clark, *The Dry Years*, 163. Olmstead was arrested on March 22, 1920 unloading a tugboat. It is unclear if it was his operation, or if he was simply helping.

<sup>227</sup> Clark, *The Dry Years*, 162 (referring to the competition between rival gangs – Jack Marquett and the Billingsley brothers (Logan and Fred)). See previous chapters of Clark. Vandemeyer, later Olmstead’s

Olmstead partnered with Consolidated Liquor Exporters, liquor wholesalers in Canada, and schemed to avoid the twenty-dollar Canadian tax by drawing up the bills of lading as if the liquor was being transported to Ensanada, Mexico.<sup>229</sup> After being loaded, some of these boats went to small islands in Puget Sound, D’Arcy Island or Discovery Island or Portland Island, others headed out to sea.<sup>230</sup> Jack Rhodes, the captain of the ‘Eva B’ (one of Olmstead’s boats), testified “that [he] left Seattle for the purpose of going to Turn Point, Stuart Island, Washington, United States for a load of liquor; that the ‘Eva B’ received this liquor from another vessel somewhere near the International Boundary Line in the vicinity of Turn Point; that after they received the load of liquor the ‘Eva B’ went to Portland Island, British Columbia, in Canada, there to await nightfall and an opportunity of bringing her load safely into American waters.”<sup>231</sup> Smaller craft picked up shipments, ran them across the Puget Sound, and arrived in Seattle, sometimes on

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attorney, represented the Billingsleys in 1916, when Washington State enacted its dry law, – actually setting up a company that imported liquor from Cuba (at least on paper – the actual liquor was arriving from San Francisco). Clark, *The Dry Years*, 131-132. Note that Vandermeer was previously the prosecutor of King County.

<sup>228</sup> Clark, *The Dry Years*, 163. It is unclear from the court documents if there were ten or eleven investors, but “Roy was to get half and the other half was to be split equally.” *Erickson et. al. v. U.S. “Assignment of Errors”* 6. John McLean testified in the *Olmstead* trial that there were 11 men with Olmstead contributing 11,000 dollars. *United States v. Olmstead “Bill of Exceptions”* 8, Records of the District Courts of the United States. Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>229</sup> Clark, *The Dry Years*, 164. *United States v. Wilber E. Dow, et. at. “Proposed Amendments to the Defendants Proposed Bill of Exceptions”* 16a, 17, 18-19, 37 and *U.S. v. Olmstead “Bill of Exceptions of Roy Olmstead, et. al.”* 236, both in Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>230</sup> Clark, *The Dry Years*, 164, 165. The Canadian government kept D’Arcy Island as a leprosy station, insulating it from “curiosity.”

<sup>231</sup> *Erickson v. United States “Amended Assignment of Errors”* May 1926. 2-3, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

secluded beaches, but often at public docks.<sup>232</sup> The liquor was then offloaded onto trucks, one bearing a sign for “Occidental Bread,” one “Sausage, meats and Poultry,” and another a pastry symbol.<sup>233</sup> Then the liquor was taken to a farm on the outskirts of town that Olmstead purchased to use as a warehouse.<sup>234</sup> In Seattle, there was a central office with “telephones, typewriters, and office equipment. And one could at any time of the day order and pay for whiskey.”<sup>235</sup> Runners would pick up the liquor from the ranch, bring it to one of the depots in town – the Lenora Garage, for example. From there runner would deliver orders for customers that included private citizens, hotels, clubs, golf courses, businesses, and speakeasies.<sup>236</sup> Olmstead employed nearly one hundred people, including a lawyer (Jerry Finch) and at least two bookkeepers (Dick Bennett and Bernard Ward).<sup>237</sup> Olmstead provided the residents of Seattle with a varied supply of alcohol: Corby’s Rye Whiskey, White Horse Whiskey, Gilmore’s Royal, Old Parr, Catto’s Rose Label, John Haig Whiskey, Bullock & Lade, Johnny Walker Black and Red Label, King George VI Cream Label, Sandy McDonald and Thompson’s Whiskey, Gordon Gin, Gilby’s Dry Gin, Dewar’s Extra Special, Old Crow Rye Whiskey, Johnson’s

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<sup>232</sup> Clark, *The Dry Years*, 165. They often used Woodmont Beach. Liquor was unloaded at Superior Fish Dock, Jahn & Company Dock, Sunde & Olsen’s Shipyard, and the Lander Street Dock. *U.S. v. Wilber E. Dow* “Proposed Amendments to the Defendants Proposed Bill of Exceptions” 10, 14, 14a, 16.

<sup>233</sup> *Erickson v. U.S.* “Amended Assignment of Errors” 7, 12, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle. Whitney remembers the sign as “Fresh Meats, Sausages, Ham.” *U.S. v. Olmstead* “Bill of Exceptions” 17, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>234</sup> The Viele Ranch. *U.S. v. Olmstead* “Bill of Exceptions” 11-D, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>235</sup> *U.S. v. Wilber E. Dow, et. al.* “Proposed Amendments to the Defendants Proposed Bill of Exceptions” 5.

<sup>236</sup> These included the Puget Mill Company, the Seattle Golf & Country Club, and the Arctic Club. *U.S. v. Olmstead* “Bill of Exceptions of Roy Olmstead, Jerry L. Finch, Myer Berg, Ed Engdahl, John Earle, Cliff Maurice, Clarence G. Healy, Tom Nakagawa, and F. R. Brown” 235, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>237</sup> Clark, *The Dry Years*, 164: “scouts, transfer men, office men, salesmen, telephone operators, dispatchers, checkers, collectors, bookkeepers, and an attorney.” – federal court: 19 F. 2<sup>nd</sup> 849 (9<sup>th</sup> Cir., 1927). *U.S. v. Olmstead* “Bill of Exceptions” 9, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

Old Rye, King George Gold Label, Hennessy's Three Star Brandy, Cliquot Champagne, peach brandy, Usher's Green Stripe Whiskey, Chartreuse, red Curacao, Granny Taylor Whiskey, Mumm's Extra Dry Champagne, Gordon's Sloe Gin, and Benedictine.<sup>238</sup>

Olmstead could import two thousand to four thousand cases per trip. Avoiding the 20 dollar surcharge at this volume saved him thousands of dollars, a savings he passed on to his customers. While the rest of the country dealt with an astronomical rise in liquor prices, Olmstead's customers paid approximately only two dollars more per bottle than Canadian citizens. Even at this low price, Olmstead had earnings of over 200,000 dollars per month. Because he was buying in bulk and making an immense profit, Olmstead did not feel a need to dilute the alcohol with chemicals and flavorings, thus making him unique among bootleggers.<sup>239</sup> Prohibition Commission Haynes revealed that, nationally, less than 1 percent of the 60,000 samples of bootleg whiskey tested by the Prohibition Unit were pure whiskey. The rest "were contaminated – most of them by dangerous or poisonous substances."<sup>240</sup> In the first six months of 1923, there were 647 deaths from drinking poisonous liquor in Chicago, Cleveland, Detroit, and Philadelphia alone.<sup>241</sup> While the rest of the country was plagued by death and disease from the effects of diluted liquor, Olmstead's customers in Seattle were not. Norman Clark describes him as, "scrupulously guard[ing] the integrity of his products, selling without adulteration the liquor he brought from Canada."<sup>242</sup> This helped Olmstead succeed in Seattle.

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<sup>238</sup> *Olmstead v. U.S. "Bill of Exceptions" 55-57, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.*

<sup>239</sup> Clark, *The Dry Years*, 165.

<sup>240</sup> Haynes, *Prohibition Inside Out*, 186.

<sup>241</sup> Haynes, *Prohibition Inside Out*, 186-187.

<sup>242</sup> Clark, *The Dry Years*, 165.

Olmstead still had friends on the police force who would keep him and his employees from arrest and his liquor from seizure. These officers did not help simply out of friendship; Olmstead paid a significant amount to the department in bribes, and indeed without graft men like Olmstead could never have risen to power. Edwin T. Hunt, headquarters clerk of the Seattle Police Department at the time, said that the going rates for graft in Seattle were: fifty dollars per month per joint. This was due on the tenth of the month and split between the Dry Squad, the Chief of Police, and the Mayor. Any “joint” that did not pay was raided.<sup>243</sup> This graft was estimated to amount to between seventy-six and eighty thousand dollars per month for the Chief of Police and higher ups.<sup>244</sup> Lee Parker, deputy sheriff of King County from 1922 or 1923 through May 1926, helped Olmstead transfer loads of alcohol from the beaches to the ranch. He was paid 250 dollars a month for this work.<sup>245</sup> He was also tipped off by the police. Richard Fryant, Prohibition agent and wiretapper, testified that “Christy of the Dry Squad had called [Olmstead]... and told him that they were going to raid it.”<sup>246</sup> He paid off Coast Guard men to let his boats pass without incident.<sup>247</sup> He also had friends on the Canadian police force that helped smooth his export papers, and he bribed Customs officials in Canada and in the United States.

The individuals involved in Olmstead’s arrest were typical of the Prohibition period. Assistant Administrator of the Bureau for the Pacific Northwest, William M.

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<sup>243</sup> Gerald v. Close, “Memo,” June 19, 1931. Record Group 56. Box 1.

<sup>244</sup> “GRAFT,” May 8, 1931. Record Group 56. Box 1.

<sup>245</sup> *U. S. v. Wilber E. Dow*, “Proposed Amendments to the Defendants Proposed Bill of Exceptions,” 33, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>246</sup> *Olmstead v. U.S.* “Government’s Proposed Amendment to the Bill of Exceptions” 71, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>247</sup> *U.S. v. Wilber E. Dow* “Bill of Exceptions” 11-12, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

Whitney, headed the investigation under the watchful eye of Administrator Roy C. Lyle. Prior to joining the Bureau, Whitney had no experience in law enforcement; Roy Lyle failed his civil service examination in 1927.<sup>248</sup> Whitney was accused by Olmstead and other defendants of threatening the foreman of the grand jury, a client of Olmstead, with adding his name to the “bottom of the list” of defendants in the *Olmstead* case if he did not return the indictment without any changes.<sup>249</sup> And, shortly after the *Olmstead* case had been decided by the Supreme Court, Whitney and Lyle were indicted for “conspiracy to take a bribe” and conspiracy to violate the Volstead Act.<sup>250</sup> Roy Olmstead left McNeil Penitentiary and testified at their trial for the prosecution. They were found not guilty, but the evidence was far from conclusive.<sup>251</sup> By 1931, Lyle had become Supervisor of Permits for the Bureau of Industrial Alcohol and was under investigation for granting the Heinrich Brewing Company of Seattle a permit to manufacture wort, knowing that the Brewery intended to manufacture beer. Whitney was the legal counsel for the Heinrich Brewing Company, advising them and offering to represent anyone arrested. He was also under investigation.<sup>252</sup>

The Bureau located an inside man to help take down Olmstead in Al Hubbard. Facing the threat of prosecution, Hubbard offered to turn traitor, and Lyle made him an agent of the Prohibition Bureau. Hubbard was close to his prey: prior to joining the Bureau as an undercover agent, Hubbard had been living with Olmstead and his wife. He

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<sup>248</sup> Clark, *The Dry Years*, 178.

<sup>249</sup> *U.S. v. Olmstead* “Plea in Abatement” 4-5. Roy Olmstead. April 4, 1925, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>250</sup> *New York Times*, “Seattle Dry Chief and Aides Indicted,” May 27, 1930. Corwin and Fryant were also included in the indictment. Olmstead accused Whitney of being the master mind of the operation for which he had been imprisoned.

<sup>251</sup> Clark, *The Dry Years*, 211-215.

<sup>252</sup> R. A. Beman, “Letter to L. Dean Hickman,” July 14, 1932, “Letter to Bureau of Prohibition, D.C.,” January 10, 1932, and “Memo,” July 6, 1932. Record Group 56. Folder 45-A. Conspiracy to transport alcohol between California and Oregon.



designed and built the receiver for Olmstead's radio station that broadcast from his residence (KFOX – the first in Seattle).<sup>253</sup> Like others, this agent had no experience in law enforcement. He was accused of buying and selling alcohol while a Prohibition agent; he was accused of selling 8,000 cases of liquor at 1 dollar a case for his own profit.<sup>254</sup> Years after the Olmstead trial, Hubbard was still working for the Bureau, though in 1931 Charles A. Murphy, Agent in Charge, wrote that he “did not want anything to do with any case in which Mr. Hubbard would be revealed; that he was dynamite... [if] the informant should be Mr. Hubbard... we would undoubtedly lose the case.” By 1931, Hubbard had joined the system of corruption, “shaking down what liquor he could.”<sup>255</sup>

The last member of this team of agents was Richard Fryant. Previously the Deputy Sheriff of King County and a telephone lineman for ten years, Fryant had become a private investigator.<sup>256</sup> Fryant wiretapped Olmstead's office line at first to blackmail him. When Olmstead refused to pay the ten thousand dollars Fryant demanded, Fryant turned to Whitney and offered the wiretaps and the information available to him instead.<sup>257</sup> Like Hubbard, Whitney made Fryant a Bureau agent.<sup>258</sup> He set to tapping the phones at Olmstead's office, his co-conspirators' homes (Dick Elbro, Herbert Fletcher, Sid Green, and Mr. Parkhurst) and his lawyer's office (Jerry Finch).

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<sup>253</sup> Olmstead founded the American Radio Telegraph Company, Seattle's first radio station – KFOX. Clark, *The Dry Years*, 165. Clark, *The Dry Years*, 171 (Hubbard's appointment).

<sup>254</sup> *U.S. v. Wilber E. Dow*, “Proposed Amendments to the Defendants Proposed Bill of Exceptions” 1; “Bill of Exceptions” 1-2, both in Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>255</sup> Charles A. Murphy, “Letter,” Record Group 56. Box 1. Seattle Conspiracy.

<sup>256</sup> *Olmstead v. U.S.* “Bill of Exceptions” 121, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>257</sup> *Olmstead v. U.S.* “Bill of Exceptions” 149, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>258</sup> Clark, *The Dry Years*, 168.

Fryant tapped the three phones in the office at 1025 Henry Building in June 1924, Dick Elbro's home phone in July (11) 1924, Olmstead's home phone at the end of July (30) 1924, Finch's office at the beginning of August 1924, Herbert Fletcher's home phone in August (8) 1924, Sid Green's home phone and Mr. Parkhurst's home phone in September (9) 1924,<sup>259</sup> By 1931, this wiretapper/agent became known as "the first person contacted by bootleggers who desire to open protected 'joints' in King County."<sup>260</sup>

These were the men pursuing Olmstead. There was no evidence for their corruption at the time of the trial, but it is significant that the men who brought down one of the biggest rumrunners in the country later seemed dirtier than Olmstead himself.

Federal agents began listening to the conversations over the wiretap in June of 1924.<sup>261</sup> They had placed taps on Olmstead's home, Finch's office, the switchboard office of the operation, and several homes of members of the organization. Technology to tape the conversations did not exist at the time, so the federal agents would take turns listening in on Olmstead's conversations and taking notes.<sup>262</sup> Olmstead was aware that the lines were being tapped – his home, his office, his lawyer's office, and homes of his employees. Bill Smith called Charles S. Green's home (both defendants) and told the

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<sup>259</sup> *Olmstead v. U.S.* "Bill of Exceptions" 121, 134, 138, 142, 143, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>260</sup> Gerald V. Close, "Memo," June 18, 1931. Record Group 56. Box 1. Seattle Conspiracy.

<sup>261</sup> *Erickson v. U.S.* "Amended Assignment of Errors" 27, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>262</sup> Whitney's wife took the transcriptions and copied them into longhand and then typed them into what would be known in the trial as the Black Book. The original notes were not kept by the agents; they relied in court on the Black Book to refresh their recollections of specific conversations. During the trial, Olmstead's attorney, George Vandermeer, objected repeatedly to the use of the Black Book because there was no way to be certain that its contents were verbatim the conversations that took place because of the repeated copying of the transcriptions and disposal of the original notes. He also objected because he was not allowed to view the Black Book, as its contents were never admitted into evidence. While the appellate courts refused his appeal on these two issues, it is certainly debatable whether or not sustaining these objections was reversible error by the trial judge.

woman who answered “Roy had given instructions that all their lines had been tapped and to have no further conversations over any of the lines that would be of any importance... be careful what you say as this line is tapped by the Federals.”<sup>264</sup> On the basis of the information gleaned from the wiretapped phone calls, Whitney got a federal warrant to search Olmstead’s house for alcohol.<sup>265</sup> The conversations overheard via the wiretaps suggested that Olmstead was carrying on his alcohol distribution business from his home.<sup>266</sup> Search warrants were also served on Finch’s office, the business office of the organization, and the homes of other defendants.<sup>267</sup> On September 17, 1924, Whitney arrived with his wife and other agents while Olmstead and his wife were hosting a dinner party.<sup>268</sup> A thorough search turned up no alcohol, but the agents stayed in the Olmstead home. Whitney and his wife took turns calling Olmstead’s known friends and associates, pretending to be the Olmsteads. They told each person on the other end of the line that they were having a party and to come by with some liquor. As people arrived, they were arrested. At 2:30 in the morning, all of those arrested were taken to the Prohibition office for questioning.<sup>269</sup> Several of the people present at the party or who arrived after the

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<sup>264</sup> *Erickson v. U.S.* “Amended Assignment of Errors” 57, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>265</sup> Olmstead, via Jerry Finch, sued the government for damages resulting from this probable illegal search. *Olmstead v. D. H. Blair, et al.* “Complaint” 1-8. December 20, 1924. *Finch v. Revelle et. al.* “Brief” 1-4. All in Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>266</sup> *U.S. v. Olmstead* “Affdavit of Earl Corwin in Opposition to Petition to Suppress” 2, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>267</sup> *U.S. v. Olmstead* “Petition to Quash Search Warrant, Return Property and Suppress Evidence” ‘Exhibit C,’ (Search warrant for 3757 Ridgeway Place – the Olmstead residence), ‘Exhibit F’ (Search warrant for Room 1026 L. C. Smith Building – offices). All in Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>268</sup> *Erickson v. U.S.* “Amended Assignment of Errors” 49, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>269</sup> Another point of potentially reversible error is that Section 25 of the Volstead Act allowed a search warrant for a private home only on probable cause that there was a sale of alcoholic beverages within that residence. As no sale was taking place, and the search turned up no alcohol, the agents should have left the premises. *U.S. v. Olmstead* “Bill of Exceptions” 90-91. April 19, 1926. *U.S. v. Olmstead* Bill of

Whitneys' calls were listed on the arrest warrant. Those who were not were arrested because their presence at the house, which was putatively being used for the illegal distribution of alcohol, made them potential coconspirators. In all, there were ninety-one people listed as defendants in the *Olmstead* case, including his attorney.<sup>270</sup> Some of these defendants plead out; some fled to Canada; the rest were tried with Olmstead in Seattle.<sup>271</sup>

As Olmstead's own attorney was one of his co-defendants, another representative was needed.<sup>272</sup> Some of his employees had already hired George Vanderveer as their counsel, and Olmstead also became one of his clients as well.<sup>273</sup> Vanderveer had gained national recognition as a tenacious and brilliant attorney for his representation of the Wobblies, the members of the Industrial Workers of the World.<sup>274</sup> He had also gained a reputation in Seattle as an excellent defender of those tried on Volstead violations.<sup>275</sup> The trial began on January 19, 1926.<sup>276</sup> Vanderveer was a diligent and powerful orator who did all he could to both defend his clients at the trial and preserve the wiretapping issue for appeal. He intended to prove that "the tapping of a telephone line was injurious

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Exceptions of Olmstead et. al." 254. Testimony of Elsie Olmstead. Both in Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>270</sup> Clark, *The Dry Years*, 169.

<sup>271</sup> Clark, *The Dry Years*, 170.

<sup>272</sup> Clark, *The Dry Years*, 170. Jerry Finch actually remained as co-counsel for the defense, filing suit against the Pacific Telephone and Telegraph Company for allowing the wire taps to be placed. He also petitioned the court to return the evidence seized from his office, contending that the search and seizure violated Olmstead's attorney-client privilege. This suit was partially successful, as the court prohibited the evidence seized from Finch's office from use against Finch and Olmstead (but it was permissible to use it against the other eighty-nine defendants). Clark, *The Dry Years*, 170.

<sup>273</sup> There were 12 attorneys for the men on trial with Olmstead. *U.S. v. Olmstead* "Bill of Exceptions" 1-2, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>274</sup> Clark, *The Dry Years*, 170.

<sup>275</sup> Clark, *The Dry Years*, 131-132.

<sup>276</sup> *U.S. v. Olmstead* "Bill of Exceptions of Roy Olmstead, etc." 1, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

to the service rendered to the extent that it destroyed or impaired the privacy of the service to business and professional men and to the home, and that it opened up the possibility of stealing service, and it consumed a certain amount of the electrical energy on which the efficiency of the service depended.”<sup>277</sup> Judge Jeremiah Neterer admitted the evidence from the wiretapping. The jury found Olmstead and most of his co-defendants guilty on February 20, 1926.<sup>278</sup> Neterer found that the “user of a telephone has no property interest in it. He has a license to use it.” In addition, foreshadowing Chief Justice William Taft’s opinion for the majority when the case reached the Supreme Court, Neterer pointed out that “the wire carrying this message was not tapped within the house, - the home was not violated.”<sup>279</sup> On March 9, 1926, Olmstead was fined ten thousand dollars and sentenced to four years at McNeil Island Penitentiary.

Olmstead’s appeal to the Supreme Court hinged on the wiretapping issue. Though wiretapping was illegal in Seattle under a state statute, there was no federal legislation prohibiting agents from wiretapping or using evidence obtained from a wiretap at trial. However, the issue of wiretapping was contentious at the time, both for the public and within the federal government itself. For the public, wiretapping was viewed as yet another example of the government encroaching on personal liberty. For some in the federal law enforcement agencies, it was unethical. Mabel Walker Willebrandt, Assistant Attorney General at the time of Olmstead’s appeal, refused to represent the government in arguing the case before the Supreme Court. She believed

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<sup>277</sup> *Erickson v. U.S.* “Amendmed Assignment of Errors” 22-23, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>278</sup> *U.S. v. Olmstead* “Verdict” 1, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

<sup>279</sup> *U.S. v. Olmstead* “Opinion of the Court (On Motion to Supress wire-tapping conversations as evidence)” 1. January 18, 1926, Record Group 21. Boxes 369-372, National Archives and Records Administration – Pacific Alaska Region. Seattle.

that wiretapping is “a dangerous and unwarranted practice to follow in enforcing the law.” Others in law enforcement thought it was “an essential medium against the large liquor syndicate, and can not be replaced.”<sup>280</sup>

On first application, Olmstead’s appeal to the Supreme Court was denied in 1927. Soon after, other similar cases were appealed to the Supreme Court for review. In 1928, the Court accepted certiorari, agreeing to hear the appeal, for three cases, including *Olmstead*, on the limited review of the constitutionality of admission of the warrantless wiretapping evidence. The court split 5-4 upholding the verdict against Olmstead, with each of the dissenting justices writing a separate opinion.<sup>281</sup>

Chief Justice Howard Taft wrote the majority opinion, stating from the outset that the decision was, “confined to the single question whether the use of evidence of private telephone conversations between the defendant and others, intercepted by means of wire tapping, amounted to a violation of the Fourth and Fifth Amendments.” The opinion continued with a summation of the evidence against Olmstead, testified to at trial. He then summarized the existing Supreme Court doctrines applicable to the case. *Boyd v. United States* widened the scope of search and seizure, as protected by the Fourth amendment, to government actions not amounting to a physical search of property or seizure of materials therein. *Weeks v. United States* provided that evidence obtained by government officials without a valid search warrant was inadmissible at trial. Taft insisted that the language of the Fourth Amendment refers to material things seized and physical places searched. By this logic, “There was no searching. There was no seizure.

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<sup>280</sup> House Committee on Expenditures in the Executive Departments, *Wire Tapping in Law Enforcement*, 71<sup>st</sup> Cong., 3<sup>rd</sup> sess., 1931, 18-19.

<sup>281</sup> The case is referred to as *Olmstead et. al. v. United States*, but the cases decided in tandem were *Green et al. v. United States*, and *McInnis v. United States* (277 U.S. 438).

The evidence secured by the use of the sense of hearing and that only. There was no entry of the houses of [sic] offices of the defendants.” He differentiated the *Olmstead* case from others invoking the protection of the Fourth Amendment, writing that the Fourth Amendment is “not violated against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure.” The majority opinion held that “the wire tapping here disclosed does not amount to a search or seizure within the meaning of the Fourth Amendment.” Taft wrote that, even though the evidence may have been obtained unethically, this does not bar its admission at trial. He suggested at one point that the legislature, if it deemed wiretapping unethical, could create laws forbidding federal agents from collecting evidence in this manner, but the Court was unwilling to find wiretapping as constitutionally prohibited. He also notes that the Washington Wiretapping Statute, while making interception of telephone messages a misdemeanor, and thus criminal, it does not specifically bar the admission into evidence of those messages.<sup>282</sup>

Justice Brandeis wrote the most notable dissent from the majority opinion. In it he expounded on the privacy rights that would be embraced by the Court later in the twentieth century. His dissent that is often cited by those seeking protection under the Fourth Amendment from government interference in privacy rights of all kinds. He wrote in his dissent of the changing nature of technology, certainly beyond that envisioned when the Bill of Rights was first authored. And with these changes, “subtler

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<sup>282</sup> *Olmstead v. U.S.* 277 U.S. 438, 455, 468; *Boyd v. U.S.* 116 U.S. 616; *Weeks v. U.S.* 232 U.S. 383. “Curtilage” refers to the physical area immediately surrounding a house, but still on the property of the homeowner. The curtilage is within the scope of Fourth Amendment protections, whereas “open fields” are not.

and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.” Brandeis foresaw more technological advances that would allow government espionage to intrude further on individuals’ privacy. Brandeis remembered *Boyd* differently than Taft; he quoted from the *Boyd* decision, “The principles laid down in this opinion affect the very essence of constitutional liberty and security... they apply to all invasions on the part of the Government and its employees of the sanctities of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property.” After discussing the liberal application of *Boyd* to situations that did not involve a literal search or seizure, Brandeis launched into his oft-quoted passage.

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.... Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.



Brandeis also believed, that regardless of the Constitutional issues, the evidence should not have been admitted as it was obtained in violation of the state statute.<sup>283</sup>

Justice Holmes, concurred with Brandeis and wrote, “the Government ought not to use evidence obtained and only obtainable by a criminal act,” calling wiretapping “dirty business.”<sup>284</sup> He felt that *Weeks* should apply to this case: “the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of law.” Justice Butler dissented from Taft’s literal interpretation of the words of the Fourth Amendment, arguing instead that the Constitution should be interpreted “in light of the principles upon which it was founded.” He believed that there was a privacy interest in the communications and their transmission by telephone, and that the eavesdropping “constituted a search for evidence.” Justice Stone concurred with the opinions of Holmes, Brandeis, and Butler. He also noted that the Court may consider questions beyond the single issue upon which certiorari was granted.<sup>285</sup>

Brandeis met all of the concerns about the enforcement of Prohibition and the Volstead Act itself in his analysis. He wrote specifically that wiretapping technology allowed the government access to presumed personal conversations that should be afforded the protections of the Fourteenth Amendment. However, he locates the right to privacy conceptually, not determined by residence or property rights – the “material things” from which he distances his argument. It is liberty itself – “beliefs, thoughts, emotions” – that the Fourth Amendment should protect from governmental intrusion.

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<sup>283</sup> *Olmstead v. U.S.* 277 U.S. 438, 473, 474-5, 478, (Brandeis dissenting), citing *Entick v. Carrington*, 19 Howell’s State Trials, 1030.

<sup>284</sup> *Olmstead v. U.S.* 277 U.S. 469, 470, (Holmes dissenting).

<sup>285</sup> *Olmstead v. U.S.* 277 U.S. 469-471, 487, 488, (Butler and Stone dissenting).

Without being explicit, he puts the Volstead Act itself in conflict with the Fourth Amendment. Not only should citizens have an expectation that what happens in their home is protected, but they should also be afforded the “right to be let alone” from unreasonable government intrusion in all aspects of their life. Melvin I. Urofsky noted that Brandeis’s dissent shifted the emphasis [of the Fourth Amendment] from where the alleged wrong took place to how it affected the individual.”<sup>287</sup>

Looking at the reality of Prohibition enforcement in tandem with the Constitutional doctrine affords an opportunity to see the law and society interacting in a way that is often difficult to parse out. The sudden surge of Fourth Amendment cases was directly related to Volstead and its enforcement – the Court was forced to examine the Fourth Amendment in a way that it had not had to before Prohibition. The new circumstances of daily life created situations that tested the boundaries of a certain aspect of jurisprudence. This happens any time a case makes its way to the Court: the law never exists in a vacuum, completely separated from the society in which it evolves. However, the cases decided prior to the *Olmstead* decision, and *Olmstead* itself, all dealt with Volstead and its enforcement. All of these cases forced examination of the Fourth Amendment. The Court increasingly circumscribed the contours of exceptions to the search and seizure requirements. Finally, in *Olmstead*, four Justices agreed that the protections of the Amendment had been violated. Four wanted to explore the other side of the Amendment – the contours of the right protected, the line at which governmental intrusion was not acceptable. Those four wanted the assumption to be that a citizen has

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<sup>287</sup> Urofsky, *Louis D. Brandeis*, 631.

the right to be left alone.<sup>288</sup> While not enough to create the right to privacy at the time, this case was nonetheless decided by the slimmest of majorities possible. *Olmstead* was overturned in 1967 when the Court, in *Katz v. United States*, held that the Fourth Amendment protections apply when a person has an actual expectation of privacy that is “reasonable” by society’s standards. Physical trespass was not necessary for a government official’s actions to constitute an unconstitutional search – “the Fourth Amendment protects people, not places.”<sup>289</sup>

The significance of Prohibition itself to this evolution of Fourth Amendment jurisprudence is highlighted by the fact that these issues were not re-examined for years. Once the Twenty-First Amendment was ratified, and Prohibition enforcement was no longer an issue, there was not the same flood of cases created by the methods and circumstances of the Prohibition Bureau and the Prohibition law to force the Court to opine about the Fourth Amendment, or government overreaching, or privacy. And so, the evolution of Fourth Amendment doctrine slowed until the 1960s, when legal aid societies and bar associations began to concern themselves with the rights of the accused. After the 1920s, there was no similar temporal surge in cases that tested the Fourth Amendment, and no specific law being enforced. However, since the Eighteenth Amendment was repealed, most of the cases brought to the Supreme Court for Fourth Amendment violations are “vice” cases – gambling, pornography, but mostly drugs. Even *Katz* involved the FBI investigating a gambling ring. The Fourth Amendment is

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<sup>288</sup> Norman H. Clark roots these developing concerns for “individual civil liberty” and “private morality” in modernity itself – want-gratification demands protection for privacy. *Deliver Us From Evil*, 178. Ulofsky notes that Brandeis “argued that judges need to take the facts of modern life into account in their decisions.” *Louis D. Brandeis*, xi.

<sup>289</sup> *Katz v. United States* 389 U.S. 347, 347-8 (1967).

constantly tested in situations where the government oversteps boundaries to enforce a law and the law itself implicates privacy concerns.<sup>290</sup>

The nature of privacy has been constantly negotiated throughout the twentieth century. It is certainly the intent of the paper to encourage the reader to compare this analysis to modern discussions of the limits of government intrusion with the advent of new criminal organizations (the “terrorist” and the “drug czar”), a newly reorganized federal investigation and enforcement agency (Homeland Security), and public dissatisfaction with certain aspects of the laws this agency enforces (screenings in airports, widespread use of marijuana).<sup>291</sup> Investigative technologies continue to improve; the government practically has the ability to know the contents of every American communication made via the internet or telephone. Justice Brandeis articulated a concern with the limitations that the Fourth Amendment places on government intrusion into the private lives of its citizenry that still resonates nearly a century later – the contours of the “right to be let alone.”

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<sup>290</sup> *United States v. Jeffers*, 342 U.S. 48 (1951) – drugs; *Draper v. United States*, 358 U.S. 307 (1959) – drugs; *Mapp v. Ohio*, 367 U.S. 643 (1961) – gambling, pornography; *Aguilar v. Texas*, 378 U.S. 108 (1964) – drugs; *Beck v. Ohio*, 379 U.S. 89 (1964) – drugs; *Spinelli v. United States*, 393 U.S. 410 (1969) – gambling; *Adams v. Williams*, 407 U.S. 143 (1972) – drugs; *United States v. Robinson*, 414 U.S. 218 (1973) – drugs; *Gustafson v. Florida*, 414 U.S. 260 (1973) – drugs; *United States v. Havens*, 446 U.S. 620 (1980) – drugs; *Illinois v. Gates*, 462 U.S. 213 (1983) – drugs; *United States v. Place*, 462 U.S. 696 (1983) – drugs; *Colorado v. Bertine*, 479 U.S. 367 (1987) – drugs; *Murray v. U.S.* 487 U.S. 533 (1988) – drugs; *United States v. Sokolow*, 490 U.S. 1 (1989) – drugs; *Florida v. Wells*, 495 U.S. 1 (1990) – drugs; *Alabama v. White*, 496 U.S. 325 (1990) – drugs; *Florida v. Bostick*, 501 U.S. 429 (1991) – drugs; *Whren v. United States*, 517 U.S. 806 (1996) – drugs; *Minnesota v. Carter*, 525 U.S. 83 (1998) – drugs; *Bond v. United States*, 529 U.S. 334 (2000) – drugs; *Kyllo v. United States*, 533 U.S. 27 (2001) – drugs; *Board of Education v. Earls*, 536 U.S. 822 (2002) – drugs.

<sup>291</sup> Roy Olmstead served his four years at McNeil Island Penitentiary. Upon his release in May 1931, he took a job with a credit bureau. He became a Christian Scientist while in prison and after his release worked among the prisoners at McNeil Island. Clark, *The Dry Years*, 239. He was pardoned by President Franklin Delano Roosevelt on December 25, 1935. For a short description of his work as a Christian Scientist, see: <http://www.norcalchristianscience.com/2010/12/redemption-of-roy-olmstead.html>, accessed March 1, 2011.

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