A MEASURE OF SUCCESS: EXAMINING PROHIBITION IN 1920s USA

Michael Sweet
School of Law
Murdoch University

This thesis is presented for the degree of Master of Laws by Research
Murdoch University, 2017
Declaration

I declare that this thesis is my own account of my research and contains as its main content work which has not previously been submitted for a degree at any tertiary educational institution.

Michael Sweet 2017
Abstract

In 1919, a policy to ban alcoholic beverages was entrenched by Congress into the Constitution - the 18th Amendment. Congressmen Andrew Volstead proceeded to promote the enacting legislation in the United States House of Representatives, and the National Prohibition Act became law.

Does Prohibition deserve its overwhelming condemnation as a failure? How successful was the Act’s implementation?

After the introduction, part two discusses the theories and perceptions that serve to shape the debate over alcohol prohibition. To measure its success, the Act is then examined according to its outcomes - part three of the thesis assesses the anticipated increase in economic prosperity through the metrics of government revenue, business activity, workplace attendance, wages and sales figures.

Part four scrutinises the production and supply of alcohol, prison populations, drunkenness, crime rates and corruption.

The success of a reform is also found in how it shapes the nation. Prohibition’s economic and political effects are briefly noted, as is its influence upon policing and the judiciary.

The 21st Amendment repealing alcohol prohibition functioned to skew reporting of the Prohibition era, serving the purposes of ideologues and business opportunists. The thesis concludes that the reform was not defeated by any inherent impossibility, but rather by a lack of skilfully wielded political will.
Acknowledgments

Professor Jurgen Brohmer, Dean of Murdoch Law School provided the opportunity and patient supervision for this thesis to take place.

Dr Ciorstan Smark, senior lecturer at University of Wollongong’s Accounting and Finance School for advice on economics, structure and general inspiration.

Drs Gregory Jones and Graham Bowrey for workshopping and advice.

Professor Ed Arrington for his professional encouragement and personal time.

Professor J.C.R. Licklider for his 1962 vision of a ‘Galactic Network’ without which this thesis, in its reliance upon a vast array of Internet sources, could not have been written.
# Table of Contents

I INTRODUCTION ........................................................................................................... 2  
   Literature Review ........................................................................................................ 6  

II. THEORY ..................................................................................................................... 16  
   A Legal Theory ............................................................................................................. 16  
   B Economic Theory ..................................................................................................... 19  
   C Alcohol and health .................................................................................................. 27  
   D Alcohol and society ................................................................................................. 31  
   E Alcohol and the mind ............................................................................................... 34  

III ECONOMIC FACTORS ............................................................................................... 36  
   A Government Revenue ............................................................................................... 36  
   B Business losers from prohibition ........................................................................... 40  
   C Business winners from prohibition ......................................................................... 43  
   D Business winners after repeal ................................................................................ 49  
   E Prohibition and development .................................................................................. 51  

IV ENFORCEMENT ......................................................................................................... 53  
   A Introduction ............................................................................................................... 53  
   B The Act, and its Administration .............................................................................. 53  
   C State Federal Relations ......................................................................................... 66  
   D Punishing Production ............................................................................................... 75  
   E Policing ...................................................................................................................... 80  
   F Alcohol consumption ............................................................................................... 83  
   G Crime ......................................................................................................................... 97  
   H Violence .................................................................................................................... 100  
   I Corruption ................................................................................................................. 108  
   J Prisons ....................................................................................................................... 115  
   K The Judicial System ............................................................................................... 123  

V CONCLUSION ............................................................................................................... 129  
   Bibliography ............................................................................................................... 134
INTRODUCTION

[W]ith whom does the historical writer of historicism actually empathize. The answer is irrefutably with the victor.¹

Was Prohibition a success? If so, to what degree? If not, then why not? This thesis answers as comprehensively as practicable the question - to what measure, under the circumstances, did Prohibition achieve the aims of its legislators. This examination is undertaken with reference to the various claims regarding Prohibition made by authors both academic and mainstream. The thesis examines the anticipated outcomes, assessing the promised reduction in production and supply of alcohol, prison populations, drunkenness, overall crime rates, the incidence of violent crime, levels of corruption and judicial workloads. The thesis also examines the anticipated increase in government revenues, business activity, workplace attendance, wages and sales figures.

This thesis contends that success is contextual - the circumstances, the environment into which a reform is thrust greatly determines its outcome. The state of society is significant, as is the robustness of the legal system and its enforcement apparatus. Law-led reforms struggle to survive a hostile population and incompetent administration; similarly, legal initiatives thrive in a population that approves of the reform where the enacting legislation is skillfully implemented. The thesis examines the implementation of Prohibition in the context of its time without considering the politics of the reform or the ‘moral’ concerns that engendered the enacting legislation.

In 1919 congressman Andrew Volstead shepherded the National Prohibition Act through the House of Representatives, and such was his influence that the legislation came to be known as the Volstead Act. At that time the promise of Prohibition was great. Its advocates envisioned a better world, one without alcohol. In this future The National Prohibition Act of 1919 strengthens the country. A nationwide ban on alcoholic beverages improves the moral tone of the

¹ Walter Benjamin, James Luther Adams and Oldrich Prochazka, On the Concept of History (Classic Books America New York, 2009) VII.
population, productivity increases and the standard of living rises all over the country. A law prohibiting the consumption of alcohol modifies the behaviour of 120 million people, benefiting the nation and its constituents. Prisons close, the police force is largely made redundant . . .

That was the promise. Difficulties in enforcement marred the implementation of this sweeping reform. Since Prohibition’s implementation, numerous writings both mainstream and academic critically analysed these difficulties. In the end, the Amendment and the Act was repealed. What exactly did the National Prohibition Act fail to achieve? Ultimately, the Act failed to be politically convenient. In response, much as a television network ceases to broadcast a poorly rating TV show, politicians pulled it. In 1919, Congress amended the Constitution to legally entrench temperance. Uprooting this reform required another Amendment, the repeal of Prohibition in 1933.

Were a street poll conducted today most respondents when asked; “was drinking alcohol illegal during Prohibition?” would answer in the affirmative. The popularisation of Prohibition in the public mind, with its easily grasped stereotypes and now clichéd themes of speakeasies, gangsters and flappers, of dancing to black jazz bands and drinking intriguing cocktails, obscures the fact that alcohol prohibition was not absolute.

The USA’s federal government enacted The National Prohibition Act to curtail the manufacture, distribution and sale of alcoholic beverages with an ethanol content greater than 0.5% by volume. Personal consumption of alcoholic beverages on a national level in the USA is currently and has always been, legal. Alcohol consumption was not criminalised.

To place this in a modern context, at this time there exists worldwide (with 189 signatories) a complete ban on the production, distribution, sale and consumption

---

of the hallucinogen, lysergic acid (LSD).³ Was LSD to be treated the same way as alcohol in the USA during the 1920s, or even decriminalised whilst retaining sanctions under administrative law, there would be an uproar.⁴

Whilst statistics are extensively used in this thesis, some of the relevant data from the Prohibition era is unreliable or missing. In response, this thesis uses the device of quoting, sometimes profusely, anecdotal evidence from the Prohibition era. These quotes are chosen for their apparent veracity within the overall context of the evidence, a historiographic approach. This evidence is presented, as much as possible, without bias and in accord with the principles of grounded theory.

Lacking from this analysis is the intersection between politics, public opinion and law, the congruence between a moral code, a social code and the legal code . . . including the manner in which information is disseminated and codified by human society in general and the US culture in particular. Whilst these facets of the study are substantially written, it is beyond the scope of this Master's thesis. As such, this deficit represents an opportunity for further publication. This thesis is also not an examination of history per se, it does not contain a major explication of context - it is an examination of legislative effectiveness using an example from the past. For a good historical précis of Prohibition see Wayne Hall’s article.⁵

The chapter and section headings of this thesis are often followed by a short quote that seeks to frame the ensuing discussion. A conceit of the thesis is to place considerable emphasis upon context when examining any legal initiative. The quotes provide further context and indicate a desire to avoid any form of moral or philosophical absolutism.

Chapter II observes firstly the legal theories that influence our perception of what constitutes a successful reform. As alcohol is a product serviced by the beverage industry the thesis then scrutinizes the economic theory that influences the successful implementation of prohibitory law. The next three sections in chapter II discuss the controversial aspects of alcohol consumption that function to cloud the issue medically, socially and psychologically. These sections are necessary in that they inform the reader concerning the effects of alcohol using the best science available. In becoming aware of the social, psychological and medical effects of alcohol, this information predicts the consequences of a diminution in the alcohol supply.

Chapter III attempts to answer the question: to what extent did Prohibition fulfil its aims of wealth creation, profitable repurposing of infrastructure and human effort; and improve the standard of living as well as the quality of life for US citizens.

Chapter IV assesses the efforts made to enforce the Act administratively, judicially and through police activity. Analysis is provided using such metrics as are available from the time - alcohol supply, prison populations, alcohol consumption, drunkenness, judicial workload, crime statistics and evidence of corruption. Where the Act’s enforcement was difficult the reasons for this is explored, and trends affecting the operations of the enforcement apparatus are assessed. The instrumental role of Prohibition in shaping the US legal system is noted.

Chapter V provides the conclusion, indicating the direction for further research and summarising findings. The thesis determines that any disappointment in the Prohibition reform was more due to a lack of political will than any inherent impossibility of enforcement.
Literature Review

The failure of National Prohibition continues to be cited without contradiction in debates over matters ranging from the proper scope of government action to specific issues such as control of other consciousness-altering drugs, smoking, and guns. We historians collectively are partly to blame for this gap. We simply have not synthesized from disparate studies a compelling alternative to popular perception.6

This thesis is an attempt to synthesise from disparate studies a more accurate and compelling assessment of the relative success of the prohibition “experiment”. As a meta-synthesis, it distils from over 450 sources both academic and mainstream the available evidence, to answer the question: did Prohibition legislation succeed in its purpose, and if so to what extent? What factors determined this relative success or failure? In this, the thesis is unique.

As a meta-synthesis, the thesis is a literature appraisal carefully assessing the relevant writings and studies in the field for veracity and consistency with theory. This section, a literature review within a literature analysis, evaluates the opinions and biases of the writers providing information upon which the substance of this thesis depends. As thought leaders directing popular perceptions of Prohibition, these writers share the responsibility for how such reforms are viewed in the world today.

Much of the material written concerning this era is historical - an exercise in the recording of happenings rather than analyses based on academic rigour. A primary responsibility of historians is accuracy to events. The conclusions of historians concerning Prohibition appear more in the form of statements about how good or bad the historian considers something is . . . determinations based on personal opinion rather than fact.

Most of the writers in this field base their objections to the 18th Amendment on moral, political and ideological grounds. It seems that, in general, writers are less interested in the degree of success that Prohibition achieved, and more concerned with whether or not it should have succeeded. Their conviction,

---

clothed in sociological and economic enquiry, is that the state should limit the degree of interference exercised over the lives of its citizens. It is a plea for freedom from restraint, for the ability to decide how they wish to live. It reflects a nobility of purpose.

This thesis has no such purpose. It concerns itself only with the question: to what measure did the National Prohibition Act of 1919 succeed in achieving its legislative intent? In the introduction of this thesis there is the quote ‘with whom does the historical writer of historicism actually empathize. The answer is irrefutably with the victor’. This writer is not an historian, and is agnostic regarding matters of politics, ideology and morality. Such contemplations are not relevant to the narrow scope of this thesis.

Libertarian economist Mark Thornton provides the most comprehensive assessment of Prohibition available. In his study Thornton declares “The failure of Prohibition”, describing it as ‘an embarrassment . . . ’.\(^7\) Thornton speaks to further aspects of Prohibition, saying that:

‘(T)he "noble experiment" -- was undertaken to reduce crime and corruption, solve social problems, reduce the tax burden created by prisons and poorhouses, and improve health and hygiene in all America. The results of that experiment clearly indicate that it was a miserable failure on all counts.’\(^8\)

Thornton’s analysis is of considerable assistance in understanding Prohibition. In some respects however, it is flawed. Studies discussed later in this thesis indicate that petty and violent crime reduced in frequency whilst others, namely crimes against the Prohibition statutes, were created – thus increasing crimes of this ilk (Chapter IV:H). The saloon, commonly perceived as a major source of corruption, was removed from public life (Chapter IV:F). Institutional corruption did not feature as an object of the reform - although evidence indicates that the brewing companies actively worked to corrupt the process of prohibition.\(^9\) There is evidence of a reduction in alcohol-fuelled social problems (Chapter IV:F).

\(^7\) Mark Thornton, *The Economics of Prohibition* (University of Utah Press, 1991) 5.
\(^9\) Ernest B Gordon and Alcohol Information Committee., *Brewers and ‘Billionaires’ Conspire against the Working Classes* (Robert E. Corradini, 1930) <catalog.hathitrust.org/Record/003572964>.
There is no evidence of an increase in poor, unhealthy or unhygienic people - the 1920s was a period of general prosperity and accordingly enhanced well-being (Chapter III:A). Prison populations experienced growth due to the increasing number of criminal statutes (Chapter IV:J). It is difficult to say whether, in reducing alcohol consumption, there was a definite reduction in this growth as the statistics available are insufficiently precise.

Thornton’s ideologically driven account of Prohibition, discussed in detail later in this thesis, ignores any evidence to the contrary. As professor of history, Jack S. Blocker Jr. writes:

Perhaps the most powerful legacy of National Prohibition is the widely held belief that it did not work. I agree with other historians who have argued that this belief is false: Prohibition did work in lowering per capita consumption. The lowered level of consumption during the quarter century following Repeal, together with the large minority of abstainers, suggests that Prohibition did socialize or maintain a significant portion of the population in temperate or abstemious habits.62 That is, it was partly successful as a public health innovation.10

As an example of the usefulness of these studies, Blocker’s main assertion supporting his argument for a culture change of drinking in the US after Prohibition is the continued low levels of alcohol consumption after Repeal. This argument is not supported by the evidence when viewed in context, as discussed in section IV:F.

The following statements from eminent researchers further illustrates the disparate, yet surprisingly similar, legacy points of view . . .

Professor of American history Richard Hofstadter in his much-acclaimed book ‘The Age of Reform’ scorned prohibition as symptomatic of

   rural-urban conflicts and the ethnic tensions in American politics . . . not merely an aversion to drunkenness and to the evils that accompanied it, but to the immigrant drinking masses, to the pleasures and amenities of city life, and to the well-to-do classes and cultivated men. 11

Professor Hofstadter centres his criticism of Prohibition on the classist and racist elements of the reform. He perceives the manner in which the prohibition initiative

10 Blocker Jr, above n 6.
transformed American society as divisive, trivialising the real needs of the American people... "Prohibition," Hofstadter concludes, "was a means by which the reforming energies of the country were transmutated into mere peevishness."  

Professor of history David Kyvig concurs concerning the classist elements of the Prohibition Act:

If nothing else, the economics of prohibition substantially reduced drinking by lower-class groups. Thus prohibition succeeded to a considerable degree in restraining drinking by the very social groups with whom many advocates of the law had been concerned. The success of national prohibition in curtailing the consumption of alcohol by the working class is discussed in section IV:F.

Professor of History and Psychology John C. Burnham presents a more positive view of Prohibition:

Contrary to myth, Prohibition was substantially successful. The saloon, the disreputable public drinking place, disappeared - the obvious goal of the Anti-Saloon League. Moreover, despite the many legal sources of intoxicating beverages, the per capita consumption of alcohol declined by the early 1920s to only a fraction (well under half) of the amount consumed in 1910. Medical conditions associated with alcohol consumption declined even more precipitously than total quantities drunk, and social conditions also showed definite changes. Billions of dollars formerly spent on alcoholic beverages went into other consumer goods such as automobiles.

Burnham is substantially correct in his assertions. The political power of the saloon was smashed, alcohol consumption declined (at least at first), alcohol psychosis and cirrhosis declined (at least at first), social conditions improved and there is evidence of a benefit to the economy - all these matters are covered in the relevant sections of this thesis (IV:F, II:A).

American political scientist Howard Lee McBain focuses his critique of Prohibition on the underwhelming popularity of this reform. McBain quotes 18th

---

12 Law, Alcohol, and Order: Perspectives on National Prohibition - 1985, Page Iii by Steven Goldberg, Willam F. Swindler, Paul L. Murphy, Rayman L. Solomon, Humbert S. Nelli, Mark H. Haller, Mark Keller, Mark Edward Lender. | Online Research Library: Questia  
13 D E Kyvig and H F Jeffers, Repealing National Prohibition (Kent State University Press, 2000) 25  
century Irish writer Oliver Goldsmith: “Those laws which preserve to themselves the greatest love and observance must needs be best . . .”\(^\text{15}\) Tested by this measure, of the “love and observance” it preserves to itself, McBain declares that ‘national prohibition is of a certainty not “best.” It is not even good.’\(^\text{16}\) This appears to be a concern over a perceived unpopularity of the prohibition initiative.

In a similar vein, despite admitting the reduction in drinking by lower social socio-economic groups, Kyvig joins in on the clamour of condemnation: “In hindsight, abolition of the Eighteenth Amendment appears inevitable, the logical outcome of a foolish, unpopular reform.” As indicated by the findings of this thesis Prohibition was neither inevitably doomed to failure, necessarily foolish nor of widespread unpopularity. McBain and Kyvig speak to the unpopularity of the Prohibition Amendment, yet this ‘unpopular’ amendment was passed by over a two-thirds majority in Congress and ratified within fifteen months by the legislatures of forty-five of the forty-eight States.\(^\text{17}\)

David Hanson, Professor of Sociology concurs in condemning Prohibition, citing a widely held view that “… Constitutionally mandated Prohibition is widely recognized as having been a disastrous failure . . .”\(^\text{18}\) From whence comes this wide recognition? Perhaps historian Claudine Burnett can shed some light on this . . .

Burnett cites with approval popular filmmaker Ken Burns’ criticism of Prohibition:\(^\text{19}\)

Prohibition turned law-abiding citizens into criminals, made a mockery of the justice system, caused illicit drinking to seem glamorous and fun, encouraged neighborhood gangs to become national crime syndicates, permitted government officials to bend

and sometimes even break the law, and fostered cynicism and hypocrisies that corroded the social contract all across the country. Thugs became celebrities, responsible authority was rendered impotent. Social mores in place for a century were obliterated. Especially among the young, and most especially among young women, liquor consumption skyrocketed, propelling the rest of the culture with it. 20

This is a comprehensive and sensationalist criticism of Prohibition. In citing a filmmaker (however accomplished) Burnett courts the populist trap of public perception. Filmmakers seek to sell films and historians seek to sell books. Each of Burns’ statements is examined in this thesis, and their significance weighed. The evidence, as seen in the body of this thesis, produces a more nuanced picture of Prohibition than that projected by filmmaker Ken Burns.

Journalist and historian Edward Behr makes this pronouncement of Prohibition:

In its simplistic determination to strike at the root of a "social evil" without any thought of the consequences, or of the means required to enforce it, Prohibition was a striking example of the American propensity to believe that society was infinitely malleable and that all it would take to rid America of its blemishes and turn it into a promised land would be a few well-meaning laws.

Edward Behr’s assertion is simplistic and incorrect. There are many who did consider the consequences and voiced their advice. 21 Provisions were put in place for enforcement. Whilst the reform was significant in character it was but an extension of that which was in place at both a local and state level. As explored in chapter IV:B, the Act was carefully thought through and the best that could be politically achieved at that time. Unfortunately, the politics of Prohibition are beyond the scope of this thesis.

Behr stresses the intersection between law, morality and politics. 22 Behr goes on to write that Prohibition:

also embodied a number of righteous beliefs in the perfectibility of human nature and the legitimacy of the moral imperative to improve the health and well-being of the masses whether they liked it or not that revealed a perennial American naiveté of the type embodied by successive generations of idealist-politicians. 23 (italics mine)

22 this author has partly written an explication on the intersection between the legal system and morality titled "Law In The National Interest", however this is at a doctorate level and beyond the scope of this master’s thesis
Kyvig also characterises National Prohibition as ‘a righteous effort to deal with the serious social problem of alcoholic overindulgence.’ 24 (italics mine) This statement represents a denunciation of law as a moral agent. The act of decrying moral idealism in law is in itself a value, or moral, judgement that is irrelevant to the narrow scope of this thesis.

Historian Andrew Sinclair shares this view of the National Prohibition Act: “Prohibition sought to regulate human morality and human habits”.25 Sinclair goes on to characterise Prohibition as the product of a more traditional point of view, one inconsistent with the increasing modernity of American society: ‘It was a part of the whole process, the last hope of the declining village. It was less of a farce than a tragedy, less of a mistake than a proof of changing times.’26

Hofstadter agrees, writing that Prohibition was an exercise in ‘public self-castigation’ a ‘reaction against personal and physical indulgence and material success’ - in his opinion a reform inconsistent with the aspirations of a modern developed society.27 Historians grappling with providing an explanation for the incidence of the Prohibition reform often characterise the Act as consistent with an archaic morality. Sections II:C-E of this thesis demonstrate that a desire for alcohol prohibition is a natural consequence of the enormous social and personal cost of alcohol consumption, a cost with national economic consequences.

As is seen as in this thesis, Prohibition was neither a farce, a tragedy nor a mistake. The framers of the National Prohibition Act of 1919 were aware of the danger that Prohibition could be seen as a sumptuary law.28 The Act was acknowledged as a compromise, a balancing act between states, between churches, between industrialists and farmers, between political idealists of one

---

24 Kyvig and Jeffers, above n 13, 3.
26 Ibid 5.
27 Hofstadter, above n 11, 289.
28 See Chapter IV:B
stripe and those of another. The process of politics does not necessarily produce perfect laws.\textsuperscript{29}

Sinclair goes on to speak of the lessons of Prohibition: ‘The fine frenzy of a minority, a long period of indoctrination, a powerful pressure group, and a state of national fear can cause the adoption of an ill-considered reform.’ \textsuperscript{30} Hofstadter shares this misconception, describing the push for Prohibition as a ‘moral frenzy’ designed to ‘to moralize private life through public action’.\textsuperscript{31}

Characterising the well-considered convictions of the prohibitionists as a frenzy is unkind; the push for Prohibition originated with a temperance movement 1810s and developed over a century. \textsuperscript{32} Calling the prohibitionists’ education campaign ‘indoctrination’ displays a lack of understanding of the manner by which information disseminates in society. The anti-saloon league (ASL) was a single issue ‘powerful pressure group’ petitioning government for change much as many such groups, such as the gun lobby, do today. This is in no way extraordinary, but for being the first to achieve such widespread success in promoting reform. Finally, to say that there was a state of national fear is hyperbole.

Sinclair goes on to say ‘But the success of an unpopular change is illusory, a mere string of words on a document. Enforcement is all.’\textsuperscript{33} Sinclair is clearly of the opinion that enforcement was lacking, yet as professor of criminal justice Mark Moore says:

\ldots the conventional view of Prohibition is not supported by the facts \ldots Prohibition did not end alcohol use. What is remarkable, however, is that a relatively narrow political movement, relying on a relatively weak set of statutes, succeeded in reducing, by one-third, the consumption of a drug that had wide historical and popular sanction.\textsuperscript{34}

\textsuperscript{30} Sinclair, above n 25, 416.
\textsuperscript{31} Hofstadter, above n 11, 287.
\textsuperscript{33} Sinclair, above n 25, 416.
In 1968 social historian, John Burnham wrote:

In the last years of prohibition it became very easy - at least in some areas with large populations - to obtain relatively good liquor. Many people, relying on their memories, have generalized from this later period, after about 1925, to all of the prohibition years and have come, falsely, to the conclusion that enforcement was neither real nor practical. Over-all one can say that considering the relatively slight amount of effort put into it, enforcement was surprisingly effective in many places, and particularly in the early years.\(^{35}\)

Burnham is an exception. Most academic writers agree that the National Prohibition Act was an abysmal failure.\(^{36}\) This spectrum of academic thought almost invariably approves the view of the Association Against the Prohibition Amendment (the AAPA, a lobby group active in the late 1920s in the lead up to Repeal) that Prohibition is and was always destined to be a disaster. From the evidence of their writings, this statement is made for several reasons - an ideological opposition to the reform, a pervasive ‘common sense’ approach modulated by populist media reports, and reasonable conclusions based upon faulty evidence. Enforcement effectiveness is discussed in chapter IV of this thesis.

The above quotes indicate the dominance of incomplete studies that promote a limited understanding, a mischaracterisation and misinformation, a decrying by righteous ideologues of a righteous ideology of which they do not approve. For this reason, the conclusions drawn by academics in the field are relevant only in the manner by which they reflect and are reflected by public opinion. In contrast, this thesis takes only the information provided, weighs it for veracity and consistency with theory, assesses the historical context and provides conclusions based on the principles of grounded theory.

Burnham says: ‘the prohibition experiment, as the evidence stands today, can more easily be considered a success than a failure.’ \(^{37}\) Each of the aforementioned authors portray a picture of Prohibition from the distinct points of


\(^{36}\) Hall, above n 5.

\(^{37}\) Burnham, above n 35.
view of their disciplines, much as the parable of blind men feeling an elephant. Each man feels the elephant (trunk, leg, tail et cetera) and describes the beast from that distinct point of view, thereby missing or distorting the whole picture. A conceit of this thesis is that it attempts, in a multidisciplinary approach, to portray with the best possible precision the ‘elephant in the room’ of Prohibition.

---

38 ‘Blind Men and an Elephant’
II. THEORY

‘[A]t large’ philosophising which is not addressed to any particular system or practice of criminal law is, like a map of imaginary terrain, not an exercise in criminal law theory but rather an exercise in philosophising itself.  

A Legal Theory

This section examines views of law, and shows how these constructions function to affect writers’ reporting of legal matters. Populist reporting tends towards the simplistic - if something is designated as ‘wrong’, then people simply should not do it – a Calvinist perspective. Academic analyses tend to be more nuanced, looking to degrees of success rather than a binary point of view where any transgression of a law indicates failure. This examination is undertaken with reference to The National Prohibition Act of 1919, also known as the Volstead Act.

Blackstone in 1765 described the law as a set of moral standards, ‘a rule of civil conduct prescribed by the Supreme power in a state commanding what is right, and prohibiting what is wrong’. In 1925, the Chief Justice of North Carolina described the law and its legal institutions, saying ‘The best friend you have is the law of North Carolina. It protects you the day you are born; it surrounds you and shields you as long as you live, and it stands sentinel and guard at your tomb.’ Continuing this theme, Walzer in 1983 said, ‘we need to develop the idea that security is a public good, available to all citizens within a political community on account simply of their membership of that community’.

---

This view promotes law as a stabilising influence that regulates the action of all the players in society. Its attraction is positivist, law you can trust: ‘being governed by rules that are fixed, knowable, and certain’.\(^{44}\) This viewpoint tends to prefer literal interpretations of the law – accordingly, a law’s purpose is determined from an examination of the ‘letter of the law’, its text. In this legal model, the sovereign wields power through the filter of law, as expressed in the popular dictum, ‘a government of laws and not of men’.\(^{45}\) In this perspective police, the enforcement arm of government, simply enforce the rules laid down by decree. This leads to the impression in public culture that there should be full enforcement of the law, as is right and proper.\(^{46}\) In this version of the law, its enforcement is not capricious nor does it victimise the powerless . . . as a benevolent friend the law plays its important hegemonic function of managing expectations.

Other writers contest the concept of law as our ‘friend’. Skolnick and Dombrink in 1978 promoted an ethical view of the law, writing that: ‘The utility or propriety of a criminal law is not measured in votes but in shared values’.\(^{47}\) Friedman in 1985 placed this in a political context when he said that general legal culture is composed of the ‘attitudes and values held by people who exert explicit or implicit pressure on the legal system.’ Friedman considers that general legal culture does not reflect simply the ‘culture of the man and woman in the street’ but also ‘rich and powerful people’.\(^{48}\) In this frame of reference each person has a stake in the exercise of law and exerts influence upon the legal system according to their relative power and intent.

From this viewpoint, legal initiatives are an exercise by various powerful players in advancing their interests at the expense of other stakeholders.\(^{49}\) Using this


\(^{46}\) Ericson, above n 44.

\(^{47}\) Jerome H Skolnick and John Dombrink, ‘The Legalization of Deviance’ (1978) 16(2) *Criminology* 193.

\(^{48}\) LM Friedman, *Total Justice* (Russell Sage Foundation, 1985)

metric, rather than seeking to characterise the ‘Prohibition Experiment’ as a blunder by well-meaning legislators, the reform is a shift in the power and reach of self-interested institutions within society. By this measure, a law is a success or failure from an individual perspective, determined by whether a particular stakeholder finds that the law is beneficial or detrimental to their interests. From this perspective lawmaking is an anarchic political process akin to a fight in a bag of cats.

From a Foucauldian point of view the law is an impersonal mechanism that maintains the exercise of power and administers populations as part of an overall strategy of control called ‘governmentality’. In this frame law is an oppressive yet sustaining tool to maintain the compliance of a population, serving the interests of government and its various constituents. Examining the underlying interests of government and the fundamental purpose of law is beyond the scope of this thesis.

From a simplistic legal perspective an act is wrong if a law decrees it to be so. From this viewpoint a law’s success can be measured according to whether the wrong action continues to be practised - if this transgression endures then that law is not a success . . . it has not ‘stamped out’ the aberrant practice.

Legal writers’ perception of Prohibition, its relative merits and degree of ‘success’, are influenced by what concept of law holds sway in their minds - and accordingly the lens through which the events from 1919 to 1933 are viewed.

This thesis does not use an Aristotelian, Calvinist or politically anarchic frame as the metric of success - it measures the National Prohibition Act’s effectiveness by the degree to which compliance was achieved. The metrics by which most scholars measure the success of the National Alcohol Prohibition Act are the reduction in production and supply of alcohol, prison populations, drunkenness,

overall crime rates, the incidence of violent crime, levels of corruption and judicial workloads. These metrics are evaluated in following sections.

From an antithetical point of view, the measure of a law’s success is not to be found in the degree to which antisocial behaviour is reduced, but rather to what measure prosocial behaviour is encouraged.\(^{51}\) In this model, the law is aspirational, seeking to guide and inspire the citizenry toward socially beneficial activity - law achieves degrees of success according to the measure by which harmonious and productive behaviour is promoted.\(^{52}\) Such productive behaviour has as its metric general prosperity; measured using economic tools such as examining government revenues, business activity, absentee rates, wages, sales figures and population growth as examined in later sections.

The success of enforcement practices in promoting Prohibition is not to be found in absolute terms, but rather within the context of the environment in which the enforcement apparatus functions. To gain an understanding of the difficulty that the enforcement arm of government experienced in implementing Prohibition, and thus the degree of its success, it is unfortunately relevant and necessary to consider economic theory.

**B Economic Theory**

Prohibition is designed to curtail the production, exchange, and consumption of a good with the ultimate goal of extinguishing it.\(^{53}\)

The goal of extinguishing trade in a particular good or service is aspirational - human nature dictates that there will always be a level of deviant behaviour despite executive interest in its eradication. What can be achieved is behaviour minimisation. In the words of Mark Thornton: ‘The amount of resources devoted

---


\(^{53}\) Thornton, The Economics of Prohibition above n 7 73.
to the enforcement of prohibition will (with a given penalty structure) determine the degree of risk placed on market participants and therefore the effects prohibition will have on production and consumption’.54

Laws cost money to administer and enforce. In return, laws should provide a payoff to the people ruled by that legal system. Econometrics affords the measure by which that prosperity is judged. Economics is able to model human activity in terms of productive and distributive value. One way to evaluate a reform is through its influence upon the economic value of human activity, the economics of a country.

Governments levy economic activity to fund their activities - without revenue a vast system of coordination and oversight slows down and stops. Modern government is dependent upon taxation systems, and taxation is dependent upon exchange - whether that is a trade in goods, or services. Profitable trade allows the accumulation of capital, and capital enables individuals and groups to wield vast economic and social power. These well-capitalised groups operate as powerful stakeholders capable of influencing the shape of legislation and ultimately the effectiveness of its implementation.

This section examines the economic factors that influence the ease with which a prohibition may be implemented. Once the economic environment is assessed, econometric tools allows the examination of law enforcement using cost benefit analysis - a calculation as to how effective enforcement practices will be in modifying the target population’s economic behaviour, and at what price. Enforcement also affects the prohibited product in its production, distribution and sale, changing its characteristics and profit structure.

Prohibition with a capital P was a policy devoted to reducing the supply of alcoholic beverages. In this context, its success is measured by the degree of difficulty experienced by producers seeking to supply that particular product to market. Prohibition as a supply reduction policy had little immediate impact on

54 Ibid
demand - tastes or incomes of consumers were not directly affected. As supply decreased the price of the product rose, and price sensitive consumers demanded a lesser quantity. Some consumers decided that the price point was too high or the difficulty of obtaining the product too prohibitive and so abstained from purchasing. Other consumers purchased less frequently or in lesser quantity. Consumers with the resources to continue previous patterns of consumption continued to support the market in the prohibited good.

A study of the ‘heroin drought’ in Australia in the year 2000 reveals a little of the demand elasticity of drugs - the cost of a gram of heroin rose 75%, along with a corresponding drop in the perceived purity of the substance. This resulted in a drop in use amongst the respondents to the study of 36%. This represents a price elasticity relationship to demand of -0.48, meaning that for every 1% increase in the cost of heroin, demand reduced by about half a percent. This compares to modern analyses of alcohol demand-related price elasticity, which sets the coefficient at around -0.3. Given that the average behavioural effect of interventions is -0.24 this means that alcohol is only slightly more responsive than normal to price intervention.

The following graph may be of interest to those who are trained in economics:

---

Banning a substance can be analysed according to the costs versus the benefits of that ban. In its most simplistic terms the cost of a product versus the cost of enforcement gives the marginal cost of prohibition. Enforcement also has a diversionary cost - every dollar spent on prohibition enforcement means one less dollar that can be spent on alternative public policies such as national defence, housing for the homeless, or employment programs. If taxes are increased to fund prohibition enforcement, individuals will have less to spend on food, medical insurance, and leisure.

At the declaration of Prohibition, theory indicates that the use of excess law-enforcement capacity will have a significant effect on marginal users of the product, making expenditures on Prohibition enforcement highly effective. Initially enforcement resources will be diverted away from policies of lesser importance and enforcement will therefore be obtainable at a low cost. After these initial conditions, the price of additional enforcement will increase, its productivity decline, and the cost of expending resources increase. A 1990 study indicated

---

58 Thornton, The Economics of Prohibition above n 7 74.
that increased efforts to suppress illegal drugs resulted in decreased enforcement efforts against property crime and thus an increase in it. For example, as more resources are devoted to prohibition enforcement, property crimes such as burglary become less risky and therefore increase in number. As complete enforcement is impractical, administrators of the National Prohibition Act of 1919 will seek a cost-effective level of enforcement.

\[\text{Marginal Costs} = \text{Marginal Benefits}\]

\[\text{Level of Prohibition Enforcement}\]

The Traditional Approach for Determining the Optimal Level of Prohibition Enforcement.

Prohibition established an entrepreneurial gambling environment rather than one containing fixed and knowable costs such as tax. Participants who were caught faced lost revenue, fines, confiscations, and jail terms. Those not caught reaped large monetary profits. All the participants in the market incurred the costs of risk bearing. Sellers set their price point by evaluating the penalties and the likelihood of capture and conviction. In this calculation, the price of the product may be

---

60 Thornton, The Economics of Prohibition above n 74.
61 Ibid 76.
considered as composed of three parts - the cost of procurement and distribution, the profit margin, and a prohibition surcharge to cover risk.

In general, prohibitive statutes consistently define the illegalised product in terms of minimum potency rather than on a gradential scale. Penalties are usually more severe according to the weight (or volume) of the shipment. Since penalties are based on weight, suppliers reduce the attributes that are not penalised when separated from the product. For instance it will be more risk-versus-reward effective to ship highly potency liquor with only 50% water by volume rather than beer that is 95% water by volume, as water does not attract a prohibition ‘tax’ - although shippers may expect to be fined on the entire quantity of the beverage.

Enforcement of prohibition functions via surveillance. To avoid capture it is necessary to conceal the shipment. Whilst surveillance takes many forms, the size of the shipment is a basic factor. Size is related to volume and will act as a constant per-unit tax. This provides entrepreneurs an incentive to ship liquor of increased potency. These factors combine to increase potency and result in a higher shipped price. This explains the increase in the strength of the illegal liquor found when Prohibition enforcement agencies interdicted shipment.

This relationship is indicated by the graph below:
Observers of modern-day drug prohibition have noted that illegalisation tends to drive out weaker and milder forms of drugs, and to increase the availability and use of stronger and more dangerous drugs. So often has this been reported that many analysts speak of it as an ‘iron law’ of drug prohibition. This ‘law’ holds because milder drugs are commonly bulkier, harder to hide and smuggle, and less remunerative. It is therefore in the interest of drug entrepreneurs to do business in more compact and potent substances. For example, current interdiction efforts are most successful at capturing boats carrying bales of marijuana; therefore, many drug smugglers turn to smuggling cocaine or heroin because it is easier and far more lucrative than smuggling cannabis.

Higher potency reduces the overall effectiveness of law enforcement because it means that smaller quantities represent greater effective amounts of the product. Higher-potency drugs are thought to be more dangerous and produce a greater risk to the health of the user. However, variance in the potency of a product poses a greater risk. In a 1989 study on the relegalisation of drugs James Ostrowski

---

62 Thornton, above n9.
claimed that 80 percent of the 3,000 deaths per year associated with heroin and cocaine were the result of the illegal nature of the market, not drug use as such. In an illegal marketplace the potency of a product is not fixed, consumers have less reliable information about potency and added ingredients, and the producers cannot be held legally accountable for their product.

Thornton argues that the higher price for illegal substances results in more criminal activity. If the demand for an illegal substance is relatively fixed then altering price will affect consumer income-seeking behaviour. The level of prohibition enforcement increases the price of the prohibited product, and therefore the real income of addicts and habitual users falls. The decreased real income resulting from prohibition makes illegal income more attractive to consumers seeking to pay for their now more expensive consumer goods. Opportunistic and systemic criminal income seeking behaviour is the result. For instance, as the price of heroin increases, real income falls. At this lower level of income the relative rewards of illegal income are enhanced. In response to this the individual will become more criminally active. Therefore, prohibition will induce some illegal substance consumers into other illegal activities such as drug dealing or robbery.

In summary then, the expected negative economic result of prohibition for society is: new criminal marketing opportunities; increased substance use risk by releasing producers from regulation and the obligation to abide by legally set minimum safety standards; and a trend towards more highly concentrated products. The anticipated negative economic outcomes for government is a decrease in taxation and excise receipts whilst government spending on enforcement increases as government resources are diverted towards particular types of enforcement.

The positive economic results expected from Prohibition of alcohol were improved worker efficiency, less absenteeism, greater productivity and corresponding

65 Thornton, The Economics of Prohibition above n 7 33.
increased government tax receipts, decreased healthcare costs, and savings on enforcement with the removal of the criminogenic action of alcohol. Unfortunately these results are predicated upon certain assumptions about the physical, social and psychological effects of alcohol. Accordingly, the veracity of these assumptions is briefly assessed.

C Alcohol and health

Does alcohol affect health, and if so, in a positive or negative way? This question has been debated for centuries, and is central to the both the desire of legislators seeking agitating to curtail alcohol consumption as well as those seeking its continued supply. Is alcohol an evil substance that threatens us all, or does it have medicinal and social properties that makes imbibing a blessing?66

Controversy over the effects of alcohol consumption functions to cloud the issue medically, resulting in a mixed message from the medical establishment to politicians and constituents. In the 1920s the argument was vociferous, and even more controversial than climate change is today. The health effects of alcohol inform arguments regards productivity, medical costs, economic and social costs, and the politics of Prohibition. As this thesis is designed as the kernel of a policy document, modern research on the effects of alcohol in the body is explored in this subsection.

When used for beverage purposes alcoholic drinks contain mixtures of deconcentrated alcohol. The effects of alcohol rarely result in the overdose death of the imbiber. As a socially acceptable drug that is customarily taken in low doses the effects are subtler.

According to the World Health Organisation, an alcohol drinker has, on average, a shorter lifespan. The WHO estimates that the average worldwide decrease in

---

life span due to alcohol is two years per hundred users of alcohol. To interpret these statistics - on average, the use of alcohol reduces the working life span of a drinker by seven days. This is in contrast to tobacco smokers who on average reduce their useful life span by 17 days.\(^{67}\)

For the purposes of comparison between a country with alcohol regulation and one with complete prohibition there follows alcohol statistics on the United States and the Islamic Republic of Iran. The yearly death rate in the United States from alcohol is 1.6 persons per year for every 100,000 people, a figure almost double that of Australia at 0.9 but half of Austria at 3.4.\(^{68}\) The official death rate from alcohol in Iran is zero, although this may be underestimated for ideological reasons.

To test this assertion, consider the statistics generated by the World Health Organisation. The WHO estimates that 14.9 per 100,000 American men die from cirrhosis of the liver each year of which 60% is attributable to alcohol, about 14 times that of the Islamic Republic of Iran.\(^{69}\) The WHO attributes approximately 1 in 8 road traffic accidents involving American males to alcohol. In the Islamic Republic of Iran that figure is considerably less, about one in 29.\(^{70}\) This indicates that a country with reasonably effective alcohol prohibition has as much as a quarter of the problem drinkers of the USA.

The Lancet in 2010 classified alcohol, of all of the drugs used throughout the world, as that drug which does the most harm.\(^{71}\) Minimising the damage of alcohol to the American people is a valid concern of the United States government, and of most countries throughout the world.

---

\(^{70}\) Ibid.
Alcohol is without doubt a dangerous substance capable of harming human health. Yet some studies have indicated that low to moderate use of alcohol can produce neutral or positive outcomes for the imbibers. At the turn of the millennium, it became popular to consider that there may be a health benefit from a moderate consumption of alcohol. The graph below indicates that consuming alcohol is healthier than abstention - even for those who consume six standard drinks per day, or about a bottle of wine.

---

72 Drugs That Cause Most Harm: Scoring Drugs | The Economist  

73 M T Streppel, M C Ock’e, H C Boshuizen, F J Kok, D Kromhout, ‘Long-Term Wine Consumption Is Related to Cardiovascular Mortality and Life Expectancy Independently of Moderate Alcohol Intake: The Zutphen Study.’  
[https://hal.archives-ouvertes.fr/hal-00477884/document].


Later examinations of the evidence have thrown doubt upon this assertion, to the extent that it is no longer an accepted wisdom. Once problem drinkers who become abstemious for medical reasons are taken out of the equation, the apparent benefits of moderate alcohol consumption disappear.\(^\text{76}\)

---


---
Alcohol - a substance linked to liver failure, cancer and behaviours resulting in injury and death. A substance that, in studies from as late as 2004, appeared to provide protection against coronary heart disease and mortality from all causes.\(^{77}\) It is little wonder that alcohol facts are controversial - a ‘wicked’ knowledge.\(^{78}\) Note that the latest studies indicate that alcohol contains zero health benefit, absolutely none. Alcohol beverages of any kind are in no way a ‘health food’.

Given that the above information it is possible to confidently predict that a diminution of the alcohol supply will result in greater productivity, decreased medical, economic and social costs, decreased harm to others and self, and in general a more harmonious, safer, and more abundant society. Is there any benefit to alcohol whatsoever? This question is examined in the next two subsections.

### D Alcohol and society

‘One drink is too many and a thousand is not enough’ — Alcoholics Anonymous aphorism.\(^{79}\)

There is also a controversy as to whether alcohol is of social and economic benefit or detriment. This section briefly examines this debate.

Measuring the social value of alcohol is difficult. Some studies have attempted to render the social cost of alcohol in economic terms. The obvious losers from alcohol-related crime are the victims. An apparently straightforward approach to measuring the social cost of crime is to add up the damage to victims. Crime victims lose property, incur medical expense, miss time from work, and experience pain, suffering, disability, and residual fear, all of which they would

---


\(^{78}\) T Stockwell et al, ‘How Good Is the Science?’ (2012) 344 *BMJ* e2276  
[<http://www.bmj.com/cgi/doi/10.1136/bmj.e2276>].

\(^{79}\) B Hamilton, *Getting Started in AA* (Hazelden, 1995)  
pay something to avoid if they could. In principle, we could try to calculate the direct financial as well as the ‘willingness-to-pay’ costs associated with the non-monetary losses from victimisation to determine the total damage. It is debatable whether it makes much sense to ask someone, “What would you be willing to pay not to be bashed?” still less “What would you be willing to pay not to be raped?”

Nevertheless, it is possible to assess alcohol use in a prosaic fashion, and present quantifiable monetary losses. In 2010, the Australian Government collected close to AU$8.6 billion from alcohol taxation. The total costs to Australian society of alcohol-related problems in 2010 is estimated at AU$14.352 billion. Of this, $2.958 billion (or 20.6%) represents costs to the criminal justice system, $1.686 billion (or 11.7%) comprises costs to the health system, $6.046 billion (or 42.1%) involve costs to Australian productivity and $3.662 billion (or 25.5%) are costs associated with traffic accidents. This estimate of total costs, however, does not incorporate the negative impacts associated with someone else’s drinking, estimated at $6.807 billion. Taxation revenue therefore recovers only 2/5 of the overall economic cost of alcohol consumption to the Australian society.

The alcohol tax revenue in the United States for the year 2000 was estimated at US$8.14 billion, rising to only $9.92 billion in 2014. The cost of alcohol from a health perspective was estimated in 1998 at US$185 billion. More than 70 percent of the estimated costs of alcohol use for 1998 were attributed to lost productivity ($134.2 billion) including losses from alcohol-related illness ($87.6 billion), premature death ($36.5 billion); and crime ($10.1 billion). The remaining estimated costs included health care expenditures ($26.3 billion, or 14.3 percent of the total), such as the costs of treating alcohol abuse and dependence ($7.5

---

84 Ibid.
billion) and the costs of treating the adverse medical consequences of alcohol consumption ($18.9 billion); as well as property and administrative costs of alcohol-related motor vehicle crashes ($15.7 billion, or 8.5 percent); and criminal justice system costs of alcohol-related crime ($6.3 billion, or 3.4 percent).\textsuperscript{85}

By these figures, the United States of America is recovering less than 1/20 of the economic cost of alcohol consumption through direct tax revenue. Note that the ancillary benefits of the alcohol industry - tourist revenue, employment and employee income tax benefits, company and corporate tax derived from the entertainment, hotel, club, restaurant, accommodation and liquor retailer industries are not included in this calculation. Not included is a quanta of the social benefits of drinking, even of heavy drinking - better conversational and joke-telling abilities, improved sexual encounters and more energy to stay up late partying and dancing.\textsuperscript{86}

There has been little investigation of the social benefits of alcohol consumption, reflecting perhaps an anhedonism bias in Western research. A 2012 study indicated that alcohol consumption enhances individual and group-level behaviors associated with positive affect, reduces individual-level behaviors associated with negative affect, elevates self-reported bonding and facilitates bonding during group formation.\textsuperscript{87}

It is difficult to obtain an overall benefit analysis of alcohol, with quantification of benefits particularly abstruse. Social costs and benefits vary, with the seen benefit or detriment depending upon the viewpoint, interests and investment of the stakeholder concerned. This skews the calculation of the socio-economic cost benefit analysis of alcohol consumption, and the ‘knowledge’ derived becomes


unreliable. Without doubt, however, the social impost of alcohol is huge. The allure of alcohol that causes it to function as a personal and social lubricant is examined in the next section.

**E Alcohol and the mind**

Is alcohol sinner or saint? Alcohol is seductive yet socially problematic, at once offering relaxation and social ease whilst simultaneously sponsoring aggression and violence. What is it about this substance that causes people to respond to its administration in such different, even wicked, ways?

The social effect of alcohol is best explained through the theory of ‘alcohol myopia’. People under the influence of alcohol find their attention restricted to the salient, immediate aspects of experience. Alcohol also reduces the brain’s processing capacity so that a greater proportion of this capacity has to be devoted to the demands of immediate, ongoing activity. Accordingly, when a drinker is doing something that requires attention and thought, alcohol myopia pressures him or her to attend to and think about that activity over less immediate worries. This means that during intoxication, a drinker may not have the processing resources to engage in a salient, ongoing activity like watching TV and at the same time brooding over his or her worries.

In effect, alcohol intoxication restricts the range of cues that we can perceive in a situation. When we are drunk, we simply attend to and encode fewer available cues, internal as well as external. Alcohol intoxication also reduces our ability to process and extract meaning from the cues and information that we do perceive. In social situations, alcohol can be a positive blessing - reducing anxiety whilst increasing spontaneity. In these same situations perceived slights can be intensified, causing the immediacy of anger to erupt into spontaneous violence.

---


Consuming alcohol creates in the imbiber an impoverished version of reality in which the breadth, depth, and time-line of our understanding is constrained. This state of short-sightedness causes superficially understood, immediate aspects of experience to have a disproportionate influence on our behavior and emotions – ‘a state in which we can see the tree, albeit more dimly, but miss the forest altogether’.  

Alcohol functions to disinhibit otherwise inhibited impulses. The immediacy of experience trumps considerations of verity, significance, and effects in both the present and future.

Is alcohol sinner or saint? Ethanol is at once saint and sinner, lubricating social activities whilst simultaneously encouraging the cruellest abuses, as is discussed in section IV.H: Violence. A plethora of stakeholders in Prohibition advanced the view that alcohol is a daemon’s brew - sacramental or demonic depending upon perspective and the power of the prevailing opinion of the time. Alcohol is and has always been a controversial drug. The psychology of alcohol demonstrates why.

With this perspective in mind it is possible to confidently predict that a diminution in the alcohol supply will cause a reduction in unpremeditated, domestic and mob violence, petty crime, and ensuing prison populations. Racist actions and abuses should decrease as should all manner of thoughtlessness.

All of the preceding information sets the stage for an examination of Prohibition’s costs and benefits. Alcohol use damages health, has a large economic and social cost and increases the criminogenic potential of the population whilst simultaneously, in great moderation, is health neutral. Alcohol also relaxes and provides some social benefit; the alcohol business generates huge incomes when all its ancillary industries are considered, and employs millions. The degree to which the positive or negative effects of enforced alcohol abstinence dominated the American nation during the 1920s is examined in the following sections.

90 Ibid.
III ECONOMIC FACTORS

A Government Revenue

In 1916, there were 1300 breweries producing full-strength beer in the United States; 10 years later there were none. Over the same period, the number of distilleries was cut by 85%, and most of the survivors produced little but industrial alcohol. Legal production of near beer used less than one tenth the amount of malt, one twelfth the rice and hops, and one thirtieth the corn used to make full-strength beer before National Prohibition. The 318 wineries of 1914 became the 27 in 1925. The number of liquor wholesalers was cut by 96% and the number of legal retailers by 90%. From 1919 to 1929, federal tax revenues from distilled spirits dropped from $365 million to less than $13 million, and revenue from fermented liquors from $117 million to virtually nothing.⁹¹

Reforms are of particular significance when they affect government revenue. This section examines the impact of liquor laws upon the government’s balance sheet, revealing this as a significant factor in any reform.

In 1862, the US Federal government adopted the Internal Revenue Act. This Act taxed liquor to support the Union war effort and was significant for temperance leaders in that it allowed future arguments with antiprohibitionists to include reasoning that abolishing such legislation would cost the federal government money. Kansas Senator Samuel C. Pomeroy decried the Act as a "national licensing law" and called instead for national prohibition, the first such public call recorded. The tax proved so lucrative that soon after the law's passage the liquor tax comprised almost one fourth of federal government revenue.⁹² By 1875, one-third of federal revenues came from taxing alcoholic beverages.⁹³

After the 1895 case Pollock v. Farmers' Loan and Trust Company it required an amendment to the Constitution before Congress could levy a national income tax.⁹⁴ After ratification of the 16th Amendment in 1913 income tax was a viable alternative to liquor taxation for raising revenue, thus making prohibition possible. By the fall of 1917, income tax was the chief source of federal government revenue. Income tax's ability to raise substantial government revenue reduced the cost to Congressmen of voting for prohibition in December 1917: liquor tax

---

⁹¹ Blocker Jr, above n 6.
⁹³ Okrent, above n 23 30.
revenues lost because of Prohibition were trivial in comparison with the rapidly growing revenues derived from individual and corporate income taxes. With these funds, politicians could redistribute wealth in the manner required to secure re-election votes and contributions.

INCOME & PROFITS TAX RECEIPTS SHARE OF TOTAL GOVERNMENT REVENUES

Nevertheless, lost income became sizable. According to Okrent, the USA’s near neighbour was able to benefit greatly from Prohibition, where ‘liquor export taxes accounted for some 20 percent of all Canadian revenue collections ... in 1929, Canada’s alcohol export tax brought in twice as much as its income tax’.96

The USA did manage to collect some revenue from the liquor trade during Prohibition. Okrent quotes the 1929 Prohibition commissioner, a chemist named James M. Doran, as saying that in Prohibition’s first nine years the government had spent some $141 million on all forms of enforcement while collecting more than $460 million in fines, penalties, and taxes.97

During the 1920s, and especially the early 1930s, repeal advocates argued that ending prohibition would result in a windfall of revenues from taxes on alcohol sales and from money saved on enforcement.98 In a 1930 interview with Prohibition Commissioner Doran, he said; ‘... rough guesses, convince me that the booze bill of the average American adult before Prohibition was about $17 a

---

96 Okrent, above n 21 342.
97 Ibid, 331.
98 Levine and Reinarman, above n 63.
year. At present I believe this bill to be at least $35 a year, something over twice as much. That is how the bootleg barons get $3 billion a year ...’

The AAPA agreed, declaring in the pamphlet ‘Prohibition and the Deficit’ that: ‘by the end of 1931 annual liquor tax collections since 1920, if national prohibition had not intervened, should have totalled practically eleven billion dollars’. A platform of the AAPA was that, with revenue from an alcohol tax, repeal of the 18th Amendment should result in a lowering of the income tax rate. Whilst this did not eventuate for those in the higher tax bracket, it was an argument that attracted sizable contributions from its more well-heeled members.

The Great Depression of 1929 was a convincing argument to politicians that Government needed new sources of revenue - or perhaps to return to old ones. In 1932 the Democrats called for repeal of the Eighteenth Amendment in order ‘to provide therefrom a proper and needed revenue.’ Prohibition interfered with Congress’s ability to redistribute wealth. Without first legalising alcohol, Congress could not easily collect tax revenues from liquor production and sales. Openly collecting taxes on bootleg liquor without repealing the Eighteenth Amendment would have too blatantly flouted the intent suggested by that Amendment’s addition to the Constitution.

On December 5, 1933 the 21st Amendment, repealing the 18th, was ratified. Even though many states remained dry or severely limited the sale of alcohol, in the year of repeal 2% of federal government revenues were raised from liquor taxes. In 1934, the government collected $258,911,332 in alcohol taxes - nearly 9% of total federal revenue, rising to 13% by 1936. Liquor taxation was not a perfect substitute for income taxation . . . liquor taxes following repeal did not fully compensate for reduced income tax revenues.

101 Boudreaux and Pritchard, above n 95.
102 Ibid.
103 Okrent, above n 21 362.
The revenue from income tax allowed the government to dispense with the alcohol excise and paved the way to Prohibition. The industrialists in the AAPA supporting repeal hoped that the revenue from alcohol taxation would win them lower income tax rates after Prohibition’s end. Income tax rates did fall, for all but the top earners. The levy paid by most workers earning $2,000 to $3,000 annually dropped by a full 20 percent in the years immediately following Repeal. Much of the liquor revenue was treated by government as additive, helping to pay for new initiatives in the second half of Franklin Roosevelt’s first term.\(^{104}\)

Extrapolating Prohibition to the ‘war on drugs’, Boudreaux and Pritchard wrote this about politicians, saying that

our analysis and common experience suggest that Congress is unlikely to repeal the drug laws simply because they do not achieve their publicly stated goal. Failure is by no means fatal to a social program when the government is running the show. As a strategic matter, we suggest that opponents of drug prohibition highlight the revenues that Congress could extract from a legalized trade in drugs. If our analysis is correct, money, not second thoughts about the war on drugs, will be the motive if and when Congress rethinks its policy.\(^{105}\)

To paraphrase Boudreaux and Pritchard, it is never a good idea to get between a politician and the bag of money that can be used to woo powerful stakeholders or marginal voters - whether achieved through discretion in handing out funds or targeted tax cuts. A lesson from Prohibition is that policy changes are not motivated by what nice people should want, but rather by electoral issues.

Was the National Prohibition Act of 1919 of net benefit to US government revenues? Did government revenue rise with higher employment, higher wages, greater productive output and thus greater taxation revenue as a direct result of Prohibition? In 1926 the economist Professor Irving Fisher wrote:

I have found that, beginning with prohibition, wages, the fluctuations of which had never exceeded 4% above or below the average level for 28 years, rose to a new level 28% above the old. Further it was found that profits had risen, and that savings achieved substantially greater growth in this prohibition period. Out of this 28% increase in wages and profits, I have ascribed only five to Prohibition.\(^{106}\)

\(^{104}\) Ibid.

\(^{105}\) Boudreaux and Pritchard, above n 95.

Fisher in 1926 declared that Prohibition added $6 billion to incomes each year,\textsuperscript{107} worth $82 billion or about 4.5% of total income tax receipts in today's money.\textsuperscript{108} Unfortunately, it is difficult to isolate the effects of national alcohol abstention from other economic trends of the time. Until the economic crash of 1929 the 1920s was a period of high growth in credit availability and consumer spending. Other than Mr. Fisher's economic analysis there are only anecdotal accounts of Prohibition's positive effects, as examined further in section III.C. \textit{Business winners from prohibition.}


It is as the "great business experiment" and as the "great business asset" that the American people must approach the 18th Amendment if it is to be ultimately and completely enforced in this nation. The moral side must be made subservient to the practical business side...\textsuperscript{109}

To what degree did Prohibition benefit business? The next sections discuss that practical business side in terms of the stakeholders who were the losers and winners from the implementation of Prohibition. The degree to which their individual losses or gains impacted upon the general weal is also considered.

\textbf{B Business losers from prohibition}

Prohibition destroyed businesses, destroyed jobs and devastated the way of life of millions of people. With the stroke of a pen, assets worth billions were made into millions. Traditions proudly held by people from many countries, practices that traditionally celebrated and controlled the use of alcohol were rendered underhand and illicit. Can this disruption to the culture and lifestyle of so many

\textsuperscript{107} Ibid, 164.
\textsuperscript{108} Real GDP and GNP <http://www.huppi.com/kangaroo/GDPreal.htm>.
people possibly be considered a successful consequence of the National Prohibition Act?

There was discussion of compensation at the advent of Prohibition. Nationwide, the liquor and beer industries represented nearly $1 billion in invested capital, in combination the nation’s fifth largest industry. The influential magazine New Republic said any dry who argued against compensation was ‘exactly as mindful of property interests . . . as the Russian Bolsheviki.’ 110 At the time that national prohibition was being debated there occurred in 1917 the Russian Revolution, overthrowing the landholding nobility. American holders of land and capital were naturally concerned over any move by government that might violate their right to the continued possession of property.

In 1922 Episcopalian Reverend W. A. Crawford-Frost preached from the pulpit supporting this view, saying:

The Volstead Act robbed thousands of men whose capital was invested in what they considered to be an honorable industry and one that promoted the health and happiness of mankind on the whole, even though five per cent injured themselves by it. It robbed them by taking away their property from them without compensation. It robbed their employees of their living by throwing them out of work. It robbed the taxpayers, who now have to pay out of their own pockets by compulsion the billions of dollars that were formerly spent cheerfully and voluntarily by the users of alcoholic beverages.111

The Episcopalian sect of Protestantism was dominated by those who were ‘well off’ - it was not a working class institution.

Some were more sanguine about the loss of property rights. Representative Daniel E. Garrett of Texas said, ‘I doubt if any man deplores more than myself that the institution of slavery ever existed in this country . . . as it has been with human slavery, so shall it be with alcoholic liquors.’ Therefore, he argued, the liquor and beer interests ‘must pocket their loss just as our fathers had to pocket theirs when you took their niggers away from them. That is all there is to it.’112

Section 4 of the 14th Amendment specifically prohibited compensation for the loss

110 Okrent, above n 21 92.
111 Ibid.
112 Ibid, 93.
or emancipation of any slave. Representative Garrett’s statement, coming as it does from a southern state that desired to keep slaves as property, can be seen as part of the struggle between South and North - Southerners were not the main holders of alcohol production facilities. This struggle is further examined in section IV.C: State Federal Relations.

Compensation for the liquor industry was not forthcoming, but for different reasons to those which resulted in the emancipation of slaves without due payment. The Supreme Court followed the 1887 ruling in Mugler v. Kansas: ‘A prohibition upon the use of property for purposes that are declared by valid legislation to be injurious to the health, morals, or safety of the community is not an appropriation of the property for the public benefit’. In Hamilton v. Kentucky Distilleries & Warehouse Co. (1919) 251 U.S. 146, Brandeis, writing for a unanimous Court, upheld a wartime ban on the sale of liquor against the claim that the ban constituted an unconstitutional taking of private property. The ruling was almost opposed by Justice Holmes who balked on 'Due Process' - the principle that, while property may be regulated by the government to a certain extent, if regulation goes too far, it will be recognised as a taking. Mugler v. Kansas’s ruling was reiterated in the 1920 case Jacob Ruppert v. Caffey.

Despite the vain hope of some brewers that mid-strength beer could be declared non-intoxicating, the entire alcohol beverage industry was crushed. There was no compensation, the cost of which would have made the Prohibition reform prohibitively expensive. The underlying raison d'être for the existence of law and the institutions of society is their operation to further the public interest, a concept beyond the scope of this thesis. In Mugler v. Kansas the Supreme Court ruled that once the legislature decrees that an activity is contrary to the public interest

117 Jacob Ruppert v. Caffey, U. S. Atty., et al. (1920) 251 U.S. 264.
then that activity may be extinguished without compensation to those whose property interests are damaged by the cessation of the activity.

The extent to which the advent of Prohibition was injurious to the American public is difficult to gauge. Whilst the brewing and distilling industries may have been concentrated in ownership the alcohol production, distribution and sales network employed a large number of people. Interestingly, employment data is not available for this period. Recorded discussions over the destruction of the alcohol beverage industry reflect little interest in the many people who lost their livelihoods; nevertheless, an extrapolation can be made. In 2010, one estimate of the beverage industries’ employment levels was about 4 million people.118 If the proportion of the population employed in this industry is retrogressively maintained then in 1919 the beverage industry directly employed over 1% of the US population.

The reformers, of course, argued that the cessation of spending on alcoholic products would lead to a growth of jobs in other areas. According to this argument even the industrial plant, distribution and sales systems of the alcohol industry would not be a complete loss to the economy. Some stakeholders would step into the breach to capitalise upon the losses of their brethren, as discussed in the next section.

C Business winners from prohibition

One hundred and ten millions of people do not continue to make fools of themselves for long. They are the most prosperous people under the sun, not because they have the gold but because they have not the drink.119

In 1895 Asa Candler, the owner of the Coca-Cola Company began running advertisements in newspapers that said, ‘Drink Coca-Cola, the Great National Temperance Drink, Delicious and Refreshing’. Candler used the term ‘soft drink’

119 David Lloyd George, from a speech in London, October, 1925 in E Ball et al, above n8 114.
to distinguish Coca-Cola and other mineral water leisure drinks from drinks containing alcohol.\textsuperscript{120} The soft drink industry grew rapidly. In 1900 there were 2,763 soft drink manufacturers collecting more than $23 million dollars in revenues. By 1919, total sales revenues surpassed $135 million.\textsuperscript{121} Given that government lost $352 million in revenue from alcohol, taxes on soft drinks did a little to make up the difference.

Tea merchants, soda fountain manufacturers, candy manufacturers, car dealers, ice cream venders, members of the motion picture industry and those in other leisure trades generally supported Prohibition, thinking a ban on alcohol would increase sales of their products.\textsuperscript{122} Sadly, from the onset of Prohibition the many investors in breweries took a considerable loss, some selling their assets to soft drink entrepreneurs for as little as ten cents to the dollar. A very few brewers converted their machinery themselves, reopening as soft drink producers. After sales plummeted, and local and state temperance regulation intensified, Galveston Brewing Company closed in 1916. During the next two years, the GBC converted its brewing equipment to produce soft drinks and in 1918, the Southern Beverage Company opened its doors with its new product, Triple XXX Root Beer.\textsuperscript{123}

The primary source of motivation for commercial stakeholders in favour of prohibition was productivity. Of concern to businessmen was the increasing use of machinery in industry - the intemperate worker, once merely inefficient, threatened profitability through industrial accidents. For safety reasons many industrial concerns did not employ problem drinkers. The American Railway Association enforced ‘Rule G’, which called for the dismissal of operating employees who drank on duty or even frequented saloons. A number of other

\textsuperscript{120} Shon R Hiatt, Wesley D. Sine, and Pamela S. Tolbert. ‘From Pabst to Pepsi: The Deinstitutionalization of Social Practices and the Creation of Entrepreneurial Opportunities’. \textit{Administrative Science Quarterly} 635 <http://asq.sagepub.com/content/54/4/635.short>.  
\textsuperscript{121} Ibid.  
\textsuperscript{123} Hiatt, Sine, and Tolbert, above n 120.
businesses followed suit in the widespread belief that sobriety and industrial safety were inseparable.\textsuperscript{124}

The cost of alcohol was also perceived as a factor in driving up wages. In 1914 Dr. Thomas Darlington, a former New York City health commissioner who had gone to work for the steel industry’s trade association, said: ‘the use of liquor has a direct bearing upon wages; if a man is addicted to alcohol he wants more money for the family’.\textsuperscript{125} Mr. Clarence S. Darrow in 1909 explained this tension between the needs of industry and that of the working man:

There is a law governing wages which says that wages tend to come down to the lowest price that will keep men alive and permit them to propagate their kind. They have to be kept alive in order to do the rich man’s work, and they have to raise a family so that the rich people in the next generation can have their work done.\textsuperscript{126}

As Munger & Schaller wrote, ‘industrialists had morals on their tongues, but labor productivity on their minds’.\textsuperscript{127}

In section III: A this thesis explored the effect of productivity gains on government revenue, however it is worth reprising. The results of Prohibition appear to validate the industrialists’ point of view. Economic success in the 1920s was also \textit{popularly} associated with temperance:

It is plain that the economic gain due to prohibition is enormous. Professor Fisher of Yale estimates this to be a total gain of $6,000,000,000 annually - that is, six thousand million dollars to be placed on the credit side of the ledger every twelve months, or five hundred million every month.\textsuperscript{128}

A growth in sales receipts appeared to support this estimate:

Woolworth's sales in 1925 were 42 per cent of the total sales for the six years prior to prohibition, Kresge's were 61 per cent, Kress' 44 per cent, and McCrory's 64 per cent. . . . It must be admitted that the bulk of the sales in the 5 and 10 cent stores is made to the laboring people, and the enormous increase in sales reflects the greatly improved economic condition of our workers and their families.\textsuperscript{129}

\textsuperscript{124} Burnham, above n 35.
\textsuperscript{125} Okrent, above n 21 51.
\textsuperscript{126} Joseph Debar, \textit{Prohibition : Its Relation to Temperance, Good Morals and Sound Government : Selections from the Writings of Men, Who Have given Thought and Study to This Question from the Standpoint of Both Theory and Practice} ([publisher not identified], 1910).
\textsuperscript{128} Ibid 120.
\textsuperscript{129} Ibid 115.
Anecdotal evidence abounded of productivity gains due to Prohibition, as is consistent with the theories discussed in chapter II will. President of the Illinois Steel Company, E. J. Buffington, attributed the prohibition law with being one of the principal causes of a new steel production high record in March 1925. Buffington also said, ‘The men, because of prohibition, are more contented, and homelife is improved. The women tell us that they receive more money for the home and for clothing and for other domestic uses, and everybody seems to be happy.’ Buffington turns from considerations of his workers to the state of the industry:

Our opinion of the influence of prohibition upon our employees is that the employees report for work with greater regularity, resulting in a decrease in the percentage of labor turnover; that the average efficiency of employees has increased; that personal injuries, due to accidents at the mills, have decreased, and the average economical condition of employees’ families is improved.130

In a similar vein, a 1925 report by Simms & Coventry Ltd, tinplate manufacturers claimed: ‘Prohibition has increased the efficiency of American workmen by 20 per cent’.131

Joseph Gusfield applied the term ‘moral athleticism’ to describe the ideology of the temperance movement, an ideology finding its expression in improved industrial might, and better consumer outcomes for workers and merchants.132

Richard H. Scott, president of the Reo Motor Car Company in Michigan wrote:

Instead of dulled minds, unsteady muscles, and jumping nerves after the holiday of Saturday afternoon and Sunday, the workers began the week on Monday with full power. . . Prohibition created new markets for our products. New standards of living were set nineteen per cent higher than when Prohibition arrived, according to Secretary [of Commerce Herbert] Hoover. Instead of a pail of beer, the worker bought oil and gasoline. Better homes, better furniture, better clothes, more amusement were demanded. The wage check that once went into the bartender’s till began to travel to the local merchant.133

130 Debar, above n 126 114.
131 Ball et al, above n 128.
Absenteeism was a metric by which much of the initial success of Prohibition was measured. Whilst there are no figures for absenteeism before Prohibition, there is much enthusiastic anecdotal evidence. Worker absenteeism was considered a primary cause of a lack of economic efficiency – a major industrialist told Prohibition Commissioner Haynes, ‘before the Volstead Act, we had 10% absenteeism after pay day. Now it is not over 3%.’

Henry Ford wrote to the Pictorial Review, saying:

With booze in control we can count on only two or three effective days work a week in the factory - and that would destroy the short day and the five-day week which sober industry has introduced. When men were drunk two or three days a week, industry had to have a ten or twelve-hour day and a seven-day week. With sobriety the working man can have an eight-hour day and a five-day week with the same or greater pay. ... I would not be able to build a car that will run 200,000 miles if booze were around, because I wouldn’t have accurate workmen. To make these machines requires that the men increase their skill.

R.H. Scott, general manager of the Reo Motor Car Company, agreed:

Under the open saloon plan, large numbers of our employees would be absent from one to three days following each pay day. This left many machines idle, and disorganized our production to such an extent that provision had to be made to make up for the inefficiency of the employees who were absent on account of drunkenness.

D. Seltzer, general manager, Ohio Cultivator Company, also reported:

We have now (1922) in our employ a number of men who were habitually off from one to three days after each pay day and their records now show that they have missed practically no time for over a year.

Henry M. Leland of Detroit said:

For years previous to the passage of this Amendment (Eighteenth), on each Monday morning there were from three hundred to five hundred men absent endeavoring to sober up from the effects of the Saturday night and Sunday drinking and debauchery. This was a most serious and difficult situation to handle and keep the plant operating advantageously.

When the Amendment was adopted, Mr. Leland was head of the Lincoln Automobile Company. Of this period, he says, 'Immediately after it (Eighteenth

---

134 Behr, above n 23 149.
135 Ibid, 150.
136 Debar, above n 126 112.
137 Ibid.
Amendment) went into effect, this Monday morning delinquency was entirely eliminated. Monday morning became like any other morning - the men all at work.\footnote{138}{Ibid 112-113.}

W.T. Beatty, president of the Austin Manufacturing Company, Chicago, wrote in 1922:

When I see the long row of doggerel saloons that partially surrounded our own and other factories but a year or two ago and think of the low-browed gang that contended with our working men for their wages before they could get home with them to their families, and the scenes of violence and crimes of every sort which occurred on pay nights, I am amazed that any decent intelligent man should want to return to such conditions.\footnote{139}{Ibid 111-112.}

Alcohol was also associated with industrial unrest. John G. Cooper, Ohio Congressman and a member of the railroad union wrote,

Alcohol is a mighty inflammable substance. Put it in the mind of a worker with a grievance and something is going to burn. Too often it was the worker who got burned. Strikes are costly. They are the ultimate weapon of labor, just as war is the ultimate weapon of nations, but today we arbitrate instead of striking and we are making steady advances toward industrial justice. The chip fell from labor’s shoulder when the beer pail dropped from labor’s hand.\footnote{140}{The North American Review, above n 133.}

As the decade wound down the positive effects of Prohibition eroded. A 1930 survey asked industrialists about the absence or tardiness of workers on Mondays and the days following paydays. Of the 287 responses less than half felt that there was considerable improvement in absenteeism. One-third of the respondents who did detect decreased absenteeism did not attribute this improvement to Prohibition. Some employers even reported higher absenteeism and did attribute this increase to Prohibition. One employer is reported as saying ‘the stuff available to labor, and there is plenty of it, is so rotten that it takes the drinking man two or three days to get over his spree’.\footnote{141}{Thornton, The Economics of Prohibition above n 7 25.}

The lack of verifiable data on productivity and absenteeism makes a precise evaluation of the effects of Prohibition in these areas difficult; however, anecdotal evidence appears to indicate that absenteeism decreased in the years
immediately after enactment, then grew as other, more poisonous sources of alcoholic beverages came online. This is consistent with the health effects of alcohol, as discussed in II:C. The tenor of the times appears to indicate that productivity followed the same pattern as absenteeism, also consistent with theory. There is only Professor Fisher’s evidence and Woolworths figures as to the effect of Prohibition on spending, although the soft drink industry certainly experienced high growth during this period. The effects of Prohibition as a reform were intertwined with a period of general economic exuberance before the black dog of the Great Depression seemingly invalidated previous arguments over the economic effect of Prohibition.

**D Business winners after repeal**

After Repeal of the 18th Amendment, there is little data on absentee rates, levels of productivity or healthcare costs. It was a confused time of economic depression, government cutbacks and Roosevelt’s New Deal. What we do know is that from 1934 the alcohol beverage industry became increasingly dominated by a few large players, perhaps because of state government regulation. In the hurly-burly of countrywide calamity, concerns over alcohol use ‘fell off the radar’. Perhaps this is also due to the AAPA and the alcohol beverage industry who were successful in ‘controlling the narrative’ and making alcohol prohibition a dead issue.

Businessmen moved with the times. On December 5, 1933, Utah became the thirty-sixth state to ratify the Repeal amendment, removing the federal government’s authority to enforce Prohibition. Less than twenty-four hours later waitresses served beer in the dining room at Henry Ford’s Dearborn Inn outside Detroit. Four years earlier Ford had vowed to shut down his factories if drink ever came back. The New York Times said that this ‘caused many of those present to speculate on what Mr. Ford’s future policy would be.’ Less than three months later
Henry Ford’s began an advertising campaign touting the suitability of Ford trucks for the booming brewery business.\textsuperscript{142}

Of the 1,345 American brewers who had been operating in 1915, 31 resumed operations within three months of the return of legal beer - primarily the big companies that had retooled production for ice cream or cheese or malt syrup. Beer, as a bulky and perishable product, required quick and local distribution. This produced a more diverse industry nationally, yet still monopolised by region or area. Although several hundred firms returned to the business in the ensuing years, a consolidation of the market occurred such that by 1935 five companies controlled 14 percent of the market. By 1958, their market share reached 31 percent; by 2009, further consolidation produced three survivors owning 80 percent.\textsuperscript{143}

Distillers experienced similar consolidation. By the end of the 1930s roughly four-fifths of all distilled liquor made in the United States was manufactured by four corporations. Why this level of industry consolidation? Levine and Reinarman consider that regulatory agencies prefer to deal with a few large corporations - such consolidation makes their operations easier to police and agreements with industry players can be reached with greater alacrity and ease. These few players are more likely to agree to keep the image of the industry clean and respectable. This form of monopolisation was not unique to the alcohol beverage industry - most major American industries went through a period of consolidation that resulted in increasing domination by a few large corporations. From the time of the National Recovery Act at the start of the New Deal, federal government policy acted to encourage such concentration. If the alcohol industry was exceptional, it is only in how quickly many small producers were overtaken by a few dominant ones.\textsuperscript{144}

The centralisation of power within the industry as well as the spread of the perception that ‘Prohibition was a failure’ effectively inoculated the industry

\textsuperscript{142} Okrent, above n 21 357.
\textsuperscript{143} Ibid 358.
\textsuperscript{144} Levine and Reinarman, above n 63.
against contemporary social movements such as Mothers Against Drunk Driving (MADD) that might function to damage the profitable operation of these businesses.\textsuperscript{145} The business winners after repeal were those few, large well-resourced beverage producers who had survived Prohibition such as Pabst, Miller and Busch. It is incorrect to consider that bootleggers who were able to keep and consolidate their gains leveraged their fortunes to become some of the foremost families in American life. The Kennedy family’s interest in the liquor business operated from the time of Repeal; the only other family to achieve its enduring fortune during Prohibition was that of Sam Bronfman, and he was Canadian.\textsuperscript{146}

The post-repeal environment was one that sought to avoid the excesses of the pre-Prohibition era, and government did this through regulation. A regulated environment, as opposed to one that allows more laissez-faire operations, favours a centralisation of ownership. The larger a corporate entity, the easier and more cost-effective is its dealings with regulatory regimes. Whilst a regulatory environment tends to stifle innovation and create barriers to new market entries, it also favours large players and a concentration of capital - interestingly, this is an antidemocratic outcome.\textsuperscript{147} The post-Repeal environment then may be considered as one that fostered a slightly more tyrannical state - a matter outside the scope of this thesis.

\textit{E Prohibition and development}

This section argues that a prohibition environment reduces economic activity, growth and development in states that practice policies that limit mutually beneficial exchanges. Whilst the evidence for this is scanty, it represents a point for further investigation.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{145} Hiatt, Sine, and Tolbert, above n120.
\item \textsuperscript{146} Okrent, above n 21 367.
\end{itemize}
\end{footnotesize}
Antiprohibitionist Joseph Debar in his essay ‘The Effects of Prohibition on the Development of States’ examined evidence from Census reports and cherry picked the following results:

Among States ... similarly situated geographically, and with the same density of population per 242 square mile, the prohibition States have shown during the period in which they were subject to the law an increase in population much smaller than that of the non-prohibition States. The decrease in growth in the newer States of Iowa, Kansas, South Dakota and North Dakota ... is most remarkable, since all the conditions of those States ... were of the character most conducive to rapid development.

Debar goes on to write:

Iowa, which had increased in population 36 per cent, between 1870 and 1880, under license, increased only 17 per cent, between 1880 and 1890, under prohibition, while in Kansas the increase in growth fell from 173 per cent., between 1870 and 1880, under license, to 43 per cent between 1880 and 1890, and to less than 4 per cent, between 1890 and 1900, under prohibition. The increase in population in South and North Dakota, between 1880 and 1890, when they had license, was over 278 per cent. Prohibition went into effect in these States in 1890.\textsuperscript{148}

Perhaps a free trade of goods and services in mutually beneficial exchanges aids development, and a restrictive regime decreases the economic attractiveness of an area to potential migrants. This question is, however, beyond the scope of this thesis.

This thesis will now speak to the enforcement side of Prohibition in its economic and social practicality, of public sentiment, and administrative capacity.

\textsuperscript{148} Debar, above n 126 242-243.
IV ENFORCEMENT

By means of a wise police, the sovereign accustoms the people to order and obedience. 149

A Introduction

This chapter discusses the important factors affecting an efficient enforcement of the Act. It also examines the metrics by which enforcement is measured, and assesses Prohibition’s likely real effect upon the statistics and reports of the time.

Various issues functioned to degrade effective enforcement of the National Prohibition Act. For political reasons the Act was poorly administered. For further political reasons the Act’s implementation was flawed. These influences functioned to diminish but not abolish the expected gains flowing from the 18th Amendment. This was seen in the eventually mediocre operation of the Act and its effect upon drunkenness and levels of alcohol use, its effect upon crime and in particular violent crime, and its flow-through effects upon prison populations and judicial workloads. The politics of Prohibition provided opportunities for corruption - in the end, if the Act is to be seen as a failure then that failure is one of political will rather than some inherent impossibility of enforcement. This is explored in the following sections.

B The Act, and its Administration

The elimination of disorder will be the function of the police. 150

The aims and success of legislation are inseparable from its execution. This thesis employs the premise that the goal of law enforcement is compliance, and the actions and effects of compliance officers are an indissoluble part of a legislative initiative. Those who are non-compliant with the law are ‘deviant’, and

149 E de Vattel, Traduccion de Fernando Murillo Rubiera; Vease Le Droit Des Gens Ou Principes de La Loi Naturelle Appliquee a La Conduite et Aux Affaires Des Nations et Des Souverains (Londres, 1768) 162.
physically arresting this deviance is the role of the police. Traditionally, ‘deviance’ is considered an integral part of human nature - in 1910, the antiprohibitionist Joseph Debar wrote: ‘The fruit of only one tree in the Garden of Eden was forbidden, yet Adam and Eve ate of that tree’. The 1920s enforcement of Prohibition describes the management of those deviating from compliance with a new law, the National Prohibition Act. This section will examine the important role of popular acceptance in a widespread reform such as the Prohibition, and explore the difficulties the Act experienced in its administration.

When examining the popular acceptance of a law, perhaps most of all it is the behavioural qualities of the target population that functions to determine criminal law efficacy. To quote Mark Kleiman:

In a group of generally well-behaved individuals, enforcement can concentrate on a small number of miscreants, delivering swift and certain sanctions, and the resulting high probability that any offense will lead to punishment will make misbehavior an unattractive option. The same amount of enforcement attention applied to a badly behaved population will lead to only delayed and sporadic punishment, because the level of offending will “swamp” the enforcement response. As individuals learn that the most likely result of offending is getting away with it, offense rates will tend to rise, aggravating the inadequacy of the enforcement response. Both high and low levels of offending will be self-sustaining, and increases and decreases in offending levels will tend to be self-reinforcing.

Prohibition was a reform seeking to change the pattern of behaviour of many people. An old therapists’ joke illustrates the difficulty: ‘How many psychologists does it take to change a light bulb? Answer: just one, but the light bulb really has to want to change.’ In the opinion of Episcopal Church clergyman Reverend William A. Wasson:

Law enforcement is, in the long run, dependent on public sentiment. Moreover, public sentiment, in order to make itself felt, must be active, alert and persistent. A mere vague wish that the law be enforced is not enough. The wish must be followed up by well-organized effort.

Wasson goes on to say: ‘A stringent, harsh sumptuary law, like prohibition, could not be enforced unless it had on its side an almost unanimous public sentiment,

152 Kleiman, above n 80.
vigilant and well-organized’. The apparatus of hegemonic propaganda performs the task of organising public sentiment. Enforcing that hegemony is a role shared by police, bureaucracy, religious bodies, employers and labour unions - indeed any locus of governmentality can be engaged to impose order and discipline. The National Prohibition Act was not implemented in an environment of unanimous public sentiment.

As the 18th Amendment was undergoing ratification Yale Professor of Law, soon to be Chief Justice and ex-President William Howard Taft presciently wrote that the Amendment:

will be adopted against the views and practices of a majority of people in many of the large cities ... The business of manufacturing alcohol, liquor and beer will go out of the hands of law-abiding members of the community and will be transferred to the quasi-criminal class.

This is precisely, of course, what occurred.

There were difficulties in enforcement, and in generating a national system of policing Prohibition. In 1928 Political scientist McBain wrote, ‘a gigantic national police force is antipathetical to our federal scheme of things. Such a force is nevertheless the plain logic of national prohibition.’ Unfortunately, the plain logic is that a huge national enforcement body, later to briefly become part of the Federal Bureau of Investigation, takes time to train and build. As said the Wickersham Commission: ‘The subjects of federal penal legislation had been relatively few and either dealt with along well settled common law lines, or narrowly specialized. There was no federal police power ... Inadequate organization and equipment have resulted.’

The one year delay between the passing of the National Prohibition Act and its implementation was spent setting up some of the new law enforcement

154 Okrent, above n 21 108.
155 McBain, above n 16 34.
machinery, for which Congress had earmarked $3 million, equivalent to US$41 million in today’s money. As a sense of comparison, this allocation is about what buyers paid in one day a few months later for muskrat pelts at the St. Louis fur auction.\textsuperscript{157} The delay in implementation also provided officers of the Customs and Internal Revenue Services opportunity to train for their new duties. In terms of manpower, the new Prohibition Unit (soon to be called the Prohibition Bureau) recruited a mere 1,500 agents.\textsuperscript{158} Similarly, in 1920 the entire Coast Guard fleet consisted of twenty-six inshore vessels, some converted tugboats, and twenty-nine cruising cutters.\textsuperscript{159}

American geography contributed significantly to the Coast Guard’s difficulties in enforcing prohibition. The USA boasts almost 12,000 miles of Atlantic, Pacific and Gulf shoreline, abounding in inlets, much of it adjacent to unoccupied tracts offering every facility to the smuggler. Chief sources of supply from the outside are immediately accessible along nearly 3,000 miles of boundary on the Great Lakes and connecting rivers. There are 3,700 miles of land boundaries running along Canada and Mexico. The terrain of valleys, mountains, lakes and swamps in relatively close proximity to cities allow illicit liquor manufacturers steady and profitable markets for their produce.\textsuperscript{160}

The National Prohibition Act provisions also complicated the work of the Bureau. Whilst agents of the bureau were responsible for tracking down the illegal production of alcohol, the Volstead Act reinforced the federal statute relating to search and seizure by adding a clause making issuance of any warrant dependent on proof that the liquor was for sale. No matter how much liquor a person had at home, no matter how it was obtained or what use was intended, agents had to have positive evidence that a commercial transaction was involved.\textsuperscript{161} This burden made proving an offence difficult. Why did the foremost lobby group driving the 18th Amendment, the Anti-Saloon League (ASL), choose to add this proviso? The answer is in perceived public sentiment.

\textsuperscript{157} Okrent, above n 21 112.
\textsuperscript{158} Behr, above n 23 180.
\textsuperscript{159} Okrent, above n 21 144.
\textsuperscript{160} The Wickersham Commission Report on Alcohol Prohibition, above n 156.
\textsuperscript{161} Aaron and Musto, above n 100.
Whilst possession of liquor illegally obtained was unlawful, the act of drinking was maintained as privileged. The league and other defenders of the 18th Amendment wished to avoid any suggestion that they supported sumptuary laws – ‘Laws made for the purpose of restraining luxury or extravagance’. The provision also addressed a popular concern over ‘the dry snooper and killjoy on the prowl to mind someone else's business’. Whilst the capacity to surveille and then ‘mind someone else’s business’ is an important characteristic enhancing the hegemonic power of civil society, the ASL did not consider that public sentiment was as yet in favour of empowering the snooping killjoy to prosecute the cause of Prohibition.

Coordination of prohibition forces is an important factor in effective enforcement. The Commissioner of the Internal Revenue Service, in his Annual Report to the Secretary of the Treasury for the fiscal year ending June 30, 1919 wrote:

No law can be effectively enforced except with the assistance and cooperation of the law-abiding element. The Bureau will accordingly put into operation at once the necessary organization to cooperate with the states and the public in the rigid enforcement of the prohibition law, and appeals to every law-abiding citizen for support. This contemplated end requires the closest cooperation between the Federal officers and all other law-enforcing officers, state, county, and municipal.

As discussed in section IV.C: *State Federal Relations*, this cooperation was not universally forthcoming.

Modern media myths perpetuate the idea that Prohibition enforcement was a corrupt occupation rife with danger. Despite the inadequacy of organisation, the enforcement arm was not idle during Prohibition nor was its work exceptionally dangerous. Going by the number of Prohibition kills and a population of about 120 million people in 1928, the policing of Prohibition was a reasonably safe affair as the following figures indicate. The records of the Prohibition Bureau list the names of 126 persons, mostly citizens, who were killed by prohibition officers from

---


163 Aaron and Musto, above n 100.

January 16, 1920, to May 15, 1928. During this same period, 49 prohibition and 2 narcotic officers were killed. The records of the Immigration Bureau disclose the names of 7 immigration officers killed and, while there is no record of the number killed by immigration officers, a conservative estimate places the figure at approximately 100, mostly aliens, who were shot near the Mexican border. In the customs service the records include the names of 8 officers killed in gunfights or in pursuing persons alleged to be violating the prohibition law. Twenty-one persons were killed by customs officers. The records of the United States Coast Guard disclose the names of 4 guardsmen killed, and 5 persons killed.\textsuperscript{165} Overall this is about 240 people over an eight year period (excluding aliens), or about 30 people per year killed as a result of drug and alcohol prohibition activity - about half of whom were enforcement officers.

Compare this with modern times. In 2012, the US population was about 314 million. In 2012, internal drug enforcement activity resulted in the reported death of 63 people, and only eight of these were enforcement officers.\textsuperscript{166} Whilst the population increased over 2 ½ times in a period of 84 years the number of people killed through Prohibition-style policing has doubled. On a per capita basis 1920s Prohibition drug and alcohol enforcement was only slightly more dangerous than in the present day. These figures do not reflect a Hollywood induced perception of the 1920s as a bloody and lawless period. It does however indicate that for enforcement officers modern USA is considerably safer than the USA of Prohibition, and somewhat less safe for civilians involved in the trade of prohibited substances.

We may also compare the comparative expenditures on drug and alcohol Prohibition between the 1920s and the present day. In 1927 United States District Attorney Buckner, of New York, estimated that it would require an appropriation of at least $75,000,000 a year to restrain the commercialised alcohol supply


\textsuperscript{166} psmith, Who Was Killed in America’s Drug War Last Year? (3 January 2013) StoptheDrugWar.org <http://stopthedrugwar.org/chronicle/2013/jan/02/who_was_killed_americas_drug_war>. 
industry in the State of New York.\textsuperscript{167} This amount, US $1 billion in today’s money, was considered a prohibitive sum. In 1930 the Wickersham commission stated that the only increase required:

is that there should be 60 per cent more agents and 60 per cent more storekeeper-gaugers, that the number of prohibition investigators and special agents should be doubled, that there should be a proportionate increase in the Customs Bureau, and in the equipment of all enforcement organizations, and that the number of assistant district attorneys should be increased.\textsuperscript{168}

The following table of appropriations and expenditures includes the appropriations for the narcotic unit, which was operated as a part of the Prohibition Unit or Bureau but with separate personnel. The appropriation for the narcotic unit averaged about 10 percent of the total.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
Year & Total appropriations & Total expenditures & Total unexpended \\
\hline
1920 & $3,100,000.00 & $2,965,522.09 & $134,477.91 \\
1921 & 7,100,000.00 & 7,034,517.87 & 65,482.13 \\
1922 & 7,500,000.00 & 7,327,074.51 & 172,925.49 \\
1923 & 9,250,000.99 & 8,994,390.49 & 255,610.50 \\
1924 & 9,000,003.83 & 8,456,606.41 & 545,307.42 \\
1925 & 11,331,770.00 & 10,499,255.50 & 842,514.50 \\
1926 & 11,050,000.00 & 10,904,981.78 & 55,018.22 \\
1927 & 13,272,445.00 & 12,464,836.91 & 807,608.09 \\
1928 & 13,320,405.00 & 12,938,622.49 & 381,782.51 \\
1929 & 13,752,000.00 & 13,645,239.17 & 106,820.83 \\
1930 & 14,985,744.00 & 14,948,799.89 & 36,944.11 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{1} These figures are taken from an annual publication of the Treasury Department "Combined Statement of Receipts, Disbursements, Balances at End of the United States" and represent balances of each appropriation adjusted as of June 30, 1930, except as noted.

\textsuperscript{2} Includes $800,000.00 transferred to War Revenue for the enforcement of Title 1 of the National Prohibition Act.

\textsuperscript{3} This is the amount shown in Annual Report of Commissioner of Prohibition for 1930 as expended, and includes estimate of commitments outstanding and unpaid June 30, 1930.

\textsuperscript{4} Estimated subject to adjustment. Actual cash balances reported by Treasury Department, Division of Bookkeeping and Accounts, as of June 30, 1930 are: For the 1929 appropriation, $70,062.05; for the 1930 appropriation $65,520.88; 1929-30 deficiency appropriation $670,730.65.

These figures do not represent the total expenditures for prohibition enforcement. The expenditures for the Bureau of Customs, Coast Guard and other services directly or indirectly connected with prohibition enforcement many of which have


been necessarily increased to a greater or less extent to meet the additional burdens imposed by the National Prohibition Act, do not appear in the above figures.

To obtain an idea of the comparative expenditures, at its highest point in 1930 the United States federal government spent approximately US$15 million on narcotic and alcohol prohibition enforcement, an amount worth approximately US$200 million in 2014.\(^{170}\) In 2014 the appropriations request from The Drug Enforcement Authority was US$2 billion.\(^{171}\) The US population in 1930 was approximately 123 million people.\(^{172}\) By 2014 the population was approximately 320 million persons, a growth of 260%. Expenditure on federal substance prohibition grew 1000%. By this measure the US Federal government, in real terms, is spending approximately 4 times as much per capita on enforcing the prohibition of illegal drugs and alcohol as it did in 1930.

These 2014 figures do not include the concurrent enforcement by the individual states of America, states where drug-related incarcerations are approximately 16% of the prison population.\(^{173}\) Miron in a 2008 study estimated the total cost of drug enforcement expenditure in America at $41.3 billion, an amount worth $3.8 billion in 1930’s money.\(^{174}\) The ‘prohibitive sum’ of $75 million (now equivalent to $1 billion) a year cited by Attorney Buckner to restrain the commercialised alcohol supply industry in the State of New York is comparable to today’s expenditure on drug control. An amount in 1927 that indicated the impracticality of alcohol prohibition enforcement is today regularly spent, year after year, on drug prohibition.

\(^{170}\) Inflation Calculator <http://www.calculator.net/inflation-calculator.html>.


The perspective that hiring more police, making more arrests and incarcerating more people will reduce crime is challenged by Dills, Miron, and Summers in their work ‘What Do Economists Know about Crime?’ In this article the authors provide various explanations as to the limited effect of incarceration on criminal deterrence, saying: ‘it might be that some criminals do not regard prison as worse than life outside or view the negative impacts on their future lives once released as small.’ Accordingly, the deterrence model may have limited impact: ‘Criminals may be people with high discount rates and/or myopic preferences, in which case the threat of future punishment should play a relatively small role.’ They conclude that, ‘increases in the standard deterrence variables have small or perverse effects over the relevant range’.\footnote{Dills, Miron and Summers, ‘What Do Economists Know about Crime?’ (National Bureau of Economic Research, 2008) \url{http://core.ac.uk/download/pdf/6646341.pdf}.} Michel Foucault theorised that incarceration has as its primary purpose, not deterrence or rehabilitation, but the production of a more easily managed population of delinquents, a matter beyond the scope of this thesis.\footnote{M Foucault, Discipline and Punish: The Birth of the Prison (Knopf Doubleday Publishing Group, 1977) \url{https://books.google.com.au/books?id=09cPAQAAMAAJ}.} Nevertheless, detection and apprehension of lawbreakers continues to be a core element in controlling antisocial behaviour.

The value of enforcement is in its ability to promote order and obedience. Police only value-add if their activity significantly changes behaviour. Amongst its other aims, Prohibition’s purpose was to reduce drunkenness, crime, and violence - essentially Prohibition sought to reduce the base criminogenic potential of the population and its consequential stress on the US judicial system. Subsequent sections of this thesis explore how effective the legislation was in reducing these measurable factors.

Administrative instability marred implementation of the Act. At its inception, an Assistant Secretary of the Treasury supervised the Prohibition Bureau, the Customs Bureau and the Coast Guard. Five persons held that office between January 1920 and April 1925. For eight months during that period, the position was vacant, with no one explicitly supervising the prohibition forces or
coordinating the three services.\textsuperscript{177} A cornerstone of the Act was the policy of concurrent enforcement between the local state police forces and federal officials, yet cost administration and responsibilities for enforcing prohibition was often so poorly coordinated that local police were confused about their enforcement priorities.\textsuperscript{178}

Even in states that had been vigorously enforcing Prohibition before the National Prohibition Act there were difficulties in implementing the law. The 1929 Wickersham Commission stated:

Virginia has been a zealous prohibition state since 1914. There is not only a stringent state law reinforcing the federal law, but also a special state enforcing machinery for which considerable appropriations have been made annually. The testimony is uniform that the federal administrator has been more than ordinarily efficient and determined. The state officers likewise have been under exceptional pressure to do their whole duty. They state that the state machinery of enforcement is as efficient as it can be made within the practicable limits of expenditure. It works in entire harmony with the federal agencies. The number of convictions under the state law is impressive, and of seizures thereunder no less so. Yet the number of arrests for drunkenness in Richmond has been growing steadily and has increased by more than one-third in five years. Also the testimony shows that the amount of liquor in circulation has grown steadily. Prices tell the same story. It cannot be said that there is a reasonably effective enforcement in Richmond, and the evidence as to Norfolk and Roanoke is to the same effect.\textsuperscript{179}

As may be expected, Prohibition was more effective in smaller communities. The Wickersham Commission writes, ‘Enforcement is at its best in the rural communities in those states where there was already long established state prohibition before the National Prohibition Act.’ The Commission contrasts areas where economic opportunity exists in allowing recreational beverages:

In certain localities where there is a large tourist business enforcement fails because of the insistence of business men and property owners that tourists be given a free hand. In such places there is not merely no state enforcement and no state cooperation, but all attempts at enforcement are substantially precluded by public opinion.\textsuperscript{180}


\textsuperscript{180} Ibid.
This finding reflects the modern-day commercial experience - where there is money to be made in a manner that does not introduce substantial liabilities to the businesses involved, then that commercial activity will be pursued with vigour.

The National Prohibition Act’s implementation is a textbook example of a legislative response to a societal problem that generates other social problems.\(^\text{181}\) Solutions to the problems were one-shots where policymakers discovered failings in their implementation strategy, devised further solutions that caused further problems, and so on. The Act experienced changes in both the statute and in the enforcing organization. In eleven years, Congress amended or added to the statute in important particulars four times. The central organization as set up originally was radically changed twice. In July 1921, the office of supervising federal prohibition agent was abolished, and enforcement placed under the aegis of 48 state directors. The occupants of these positions changed constantly - 184 men were in and out of these 48 positions during the years 1921 to 1925, at which time the office was abolished.

Staffing of the Prohibition Bureau did not proceed without flaw. The enforcement agents, inspectors and attorneys, as was authorized in section 38 of the National Prohibition Act, were appointed without regard to the Civil Service rules.\(^\text{182}\) These appointments were significant as this meant that prohibition agents did not have to abide by the civil services stringent rules. Instead, local politicians appointed agents, with the consequential opportunities for corruption.\(^\text{183}\) One Congressman declared of these inadequately trained agents that: ‘If prohibition can only be enforced by the use of sawed-off shotguns in the hands of irresponsible Government agents, then indeed, we have reached the high tide of fanaticism


\(^{183}\) Behr, above n 23 83.
\footnote{The Wickersham Commission Report on Alcohol Prohibition, above n 179.}
\footnote{Ibid.}
\footnote{Behr, above n 23 157.}
This issue is further examined in section IV.I: \emph{Corruption}.

The National Prohibition Act imposed a huge change in the way some Americans did business. The Act also regulated the production of industrial alcohol and gave to the administrative supervisors of that industry the powers of granting, renewing, and revoking permits. A system of administrative tribunals was set up to pass on what amounted to very important property rights. In the words of the Wickersham Commission: ‘The operation of administrative tribunals of all kinds, necessary as they obviously are, is giving serious concern, largely because of their lack of technique and lack of experience and the inherent difficulty of providing effective control’.\footnote{Ibid.} Not only does this administrative system provide opportunities for corruption, it also requires the imposition of new structures of control with a steep learning curve for those responsible for the oversight of that system. Over the first 11 years of Prohibition the system of permits in connection with industrial alcohol were changed three times.\footnote{Ibid.} The federal government, in its implementation of the National Prohibition Act, was required to conceive entirely new structures of oversight and control. That there were ‘teething troubles’ in instituting these structures is not surprising - federal law enforcement was called upon to involve itself in the areas of life previously left unregulated, or entirely the province of the states.

The inexperience of those charged with administrative oversight of industrial alcohol is evidenced in the example of a Philadelphia cigar maker who, in the process of making cigars, had spent $480 on alcohol in the previous eighteen years obtained an official permit for 420,000 gallons of alcohol a year. This quantity was more than enough to soak all the cigar tobacco leaf in the world, the Prohibition Bureau later claimed.\footnote{Behr, above n 23 157.} There were thousands of fly-by-night manufacturers of hair-restorers, skin conditioners, and other toilet preparations.
smelling of whiskey, gin, or rum who suddenly required large amounts of industrial alcohol. According to the Wickersham Commission:

The diversion of industrial alcohol was extensive in the earlier years of prohibition, and appears to have reached its maximum at about 1925 and 1926. As other sources of domestic supply have been developed this has decreased. Smuggling reached its highest point at about 1926. With the development of less costly means of domestic supply smuggling has gradually decreased until it is now in large measure confined to the more expensive foreign wines and liquors, purveyed to people of means.  

Had the propaganda and education component of hegemony done its job, public sentiment would have been sufficiently in favour of Prohibition that enforcement would have encountered far less difficulty in achieving its function. Citizen surveillance, ‘dobbing in one’s neighbour’, would have been as acceptable to the population as modern day narcotics prohibition. Drinking would have been the province of losers and social misfits, corresponding to the attitude towards ‘junkies’ and ‘ice addicts’ in evidence today.

To summarise, the enforcement infrastructure to implement Prohibition was inadequate and poorly resourced, the Act did not enjoy nationwide popularity, the legislation was difficult to enforce and had a number of exceptions, and the Act’s administration lacked competence and consistency. Despite this, the Act was only a little more dangerous to enforce than present day narcotics prohibition, putting the lie to Hollywood tropes of a Prohibition bloodbath.

A major factor in the effectiveness of legislation is governed by the bureaucracy responsible for administering it. The reformers of 1919 made an unrealistic assessment of the financial, human capital and technological resources required for effective implementation of their program. The political will was lacking to allocate credible resources to implement the legislation. Reformers lacked understanding of how these allocations would be channeled to achieve their aims - resources were uselessly expended both internally and externally as turf wars erupted between competing organisations, stifling the coordination and cooperation required to implement reform.  

---

inefficiency marred the implementation of the National Prohibition Act would be an understatement.

Why was there such a high level of organisational inefficiency? The Act had as one of its clauses a provision for ‘concurrent enforcement’ of Prohibition between state and federal. As the states had apparatus to enforce local legislation, it made sense that the states should extend their operations to a concurrent enforcement of national alcohol prohibition. One factor contributing to Prohibition’s organisational inefficiency was the underwhelming cooperation extended by many states to federal authorities. The next section examines this difficulty.

C State Federal Relations

G L Cleaver, the Former State Superintendent of Secret Service, and Former State Prohibition Commissioner, of Inglewood, California in 1929: ‘In answer to a question about the practicability of prohibition, one of our greatest statesmen answered, “We do not know yet, because enforcement has never been tried.”’

A stakeholder in any federal legislative initiative is the states. The balance of powers doctrine pits the reserved powers of the states against the centralised power of the federal government. Under the Constitution of the United States of America, matters exclusive of trade, national economics and international relations are reserved to the many individual states making up the nation of the USA. Matters pertaining to criminal law are considered the province of these states. The 18th Amendment altered this arrangement and inserted a nationwide, not just interstate, restraint of trade in alcoholic beverages – Prohibition. To many in the states this represented a power grab by the Federal government that greatly altered the power dynamic, favouring centralised government. This section examines that conflict.

<http://www.brookings.edu/~/media/Research/Files/Papers/2010/2/implementation%20analysis%20weaver/02_implementation_analysis_weaver.pdf>.

Control of alcoholic beverages had always been the province of the states. In 1847, in the License Cases, Chief Justice Taney wrote:

If any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.

Forty years later, in Mugler v. Kansas, the Court reiterated that states had 'the acknowledged right ... to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government'.

The popularity of an outright prohibition of alcohol widely varied between states; the Wet vote was 90% greater than the Dry vote in 6 states (Washington, Colorado, Kansas, North Dakota, Ohio, and Kentucky), but less than 40% of the Dry vote in Maine, Utah, Wyoming and Idaho. So whilst the Dry vote was high on a nationwide level, at the individual and largely independent state level a significant proportion of the states found the idea of national prohibition decidedly unpopular. This is evidenced by the degree of inaction of some states in enacting and financing their own concurrent enforcement legislation of Prohibition.

Nation, a popular US countrywide magazine, opined in 1919 that if the Eighteenth Amendment were overthrown 'the right of self-government which the Constitution guarantees to the people of all the States will continue unimpaired' but that if the Amendment were sustained, 'that right will perhaps disappear so far as the police power is concerned, and the way be opened for a Federal centralization practically complete'.

These fears were in some aspects realised. National Alcohol Prohibition was the first federal initiative seeking to control the details of everyday life, yet the federal government lacked the institutional structures necessary to independently implement the Eighteenth Amendment. Congress was forced to attempt to

---

191 Zywicki and Agarwal, above n 150.
193 Post, above n 115.
conscript state law enforcement resources, an act provoking sustained controversy about the proper boundary between state and national sovereignty. Both supporters and opponents of Prohibition struggled to understand how the Eighteenth Amendment's radical enlargement of federal authority could be reconciled with the ideals of federalism. Many Americans came to reject the idea that the national government ought to be involved in detailed police regulations seeking to control the minutiae of everyday life.\footnote{Ibid.}

In 1923, Woodrow Wilson asked Justice Brandeis of the High Court to draw up a ‘statement of principles’ about Prohibition for the Democratic Party. Brandeis interpreted the Eighteenth Amendment’s reference to ‘concurrent power’ to signify that the American people ‘recognized fully that the law could not be enforced without the co-operation of the States with the Nation . . . The intention was that each government should perform that part of the task for which it was peculiarly fitted.’ Brandeis postulated that: ‘The Federal Government's part is to protect the United States against illegal importation of liquor from foreign countries and to protect each State from the illegal introduction into it of liquor from another State.’ In so saying, Brandeis acknowledges: ‘To perform that part of the task effectively requires centralized, unified action and the employment of the large federal powers and resources.’ The job of a state, by contrast, was to police ‘the illegal sale within it of liquor illegally manufactured in it’ for that is a task for which State Governments are peculiarly fitted; and which they should perform. Relieving the States from the duty of performing this task, said Brandeis, ‘violates our traditions; and threatens the best interests of our country’.\footnote{Ibid.}

Federal judge Henry Priest agreed with Brandeis:

by this Amendment, we have introduced a radical change in the organic structure of our federal Government. We have commissioned it to legislate upon the purely local and domestic affairs of every community in every state of the Union, and have expressly denied to them the power all communities have been accustomed to exercise for more than a century and a quarter ... to regulate their conduct according to their own conceptions of propriety.\footnote{Henry S Priest, ‘The Eighteenth Amendment an Infringement of Liberty’ (1923) 109 Annals of the American Academy of Political and Social Science 39.}
Brandeis's account of federalism turns on principles of institutional design; it postulates that national and state governments should each be assigned duties commensurate with their institutional competencies. Brandeis interpreted the 'concurrent power' provision of the Eighteenth Amendment to divide state from federal authority along lines of instrumental capacity. In accordance with this view, the constitutional question was not whether prohibition should be enforced, but which level of government could best enforce it.¹⁹⁷

Brandeis's principles and the ghost of National Alcohol Prohibition combine in the modern era in the form of national drug prohibition. In 2012, it is estimated that there were 1,552,432 arrests for drug abuse violations,¹⁹⁸ resulting in about 98,000 federal incarcerations and 200,000 state incarcerations.¹⁹⁹ The US's national drug enforcement body, the Drug Enforcement Authority (DEA), whilst viewing itself as primarily working at a national rather than local level,²⁰⁰ is nevertheless empowered by the enabling Act to concurrently enforce drug prohibition.²⁰¹ The level of agreement forged between federal and state governments over the prosecution of drug prohibition has resulted in concurrent enforcement proceeding in a relatively uncontroversial manner. How is it that the federal government orchestrated such unprecedented cooperation?

Marijuana and its derivatives, opiates, including laudanum, and coca derivatives were freely available before and to a great extent during Prohibition. The first signs of regulation appeared with The Harrison Narcotics Tax Act of 1914 (marijuana was classed as a narcotic) restricting the manufacture and distribution of opiates, including laudanum, and coca derivatives in the US. Opiates were still available medicinally, though treatment with narcotics to manage addiction was made illegal.²⁰² These provisions were strengthened with the Uniform State

---

¹⁹⁷ Post, above n 115.
Narcotic Act of 1932, a federal initiative to encourage state cooperation with a national scheme to control narcotics. Federal government had learnt from Prohibition - the necessity for uniform state enforcement of federal criminal law initiatives led to years-long propaganda initiatives encouraging the states to enlist their enforcement apparatus in the prosecution of narcotic crimes. This was ultimately successful as by 1937 every state had enacted some form of legislation relating to marijuana, and 35 of the then 47 states had passed the Uniform Act pertaining to narcotics.

In the 1920s such cooperation had not been forged. Maryland Governor Albert C. Ritchie advanced the position that the Eighteenth Amendment ... does not mean that the States are legally or morally obliged to exercise their concurrent power of enforcement. No State is called upon to provide enforcement machinery for the Federal income tax law or the narcotic law or the Mann act or any other Federal enactment that I know of ... Why, then, should any State be obligated to set up State machinery to enforce just one out of all the thousands of Federal laws - the Federal prohibition law - merely because the Eighteenth Amendment says that it has the power to do so? The state of Maryland never enacted a state enforcement code. As one observer noted: The Marylander is quite willing to yield even respect and obedience to a law he believes oppressive, provided it was passed by his own people, but his innate sense of independence resents the effort of Kansans to impose a law on him through what he believes to be a smug piece of sanctimonious humbuggery.

This controversy may be partly attributed to the novelty of concurrent enforcement. Justice Sutherland, who two years before his appointment to the Court was an elected senator, noted that in 1920 nobody ‘in either house of

---

206 Post, above n 115.
207 Okrent, above n 21 141.
208 Post, above n 115.
Congress had the slightest idea what was intended by the idea of "concurrent power" in Section 2 of the Eighteenth Amendment'.

In 1923, New York repealed its antiliquor statute, the Mullan-Gage law. In discussing his decision not to veto the repeal, Governor Smith essentially adopted Maryland Governor Ritchie's position. He asserted that he was 'entirely unwilling to admit the contention that there was put upon the State, either by the Eighteenth Amendment [or] the Volstead act ... any obligation to pass any law adopting into the State law the provisions of the Volstead act.' The Eighteenth Amendment was 'not a command but an option. It does not create a duty'. Any other conclusion, Smith contended, would be inconsistent with 'the supremacy of the Federal Government in its own sphere and the sovereignty of the several States in theirs', which is 'one of the great elements in the strength of our democracy'.

Some states exercised their capacity to avoid unpopular federal law. In 1928, political scientist Professor Howard McBain described the process by which the states seek to circumvent constitutional amendments such as the 'dignified, deliberate, open' procedure to nullify the 15th that sought to enfranchise Negroes through the regular processes of law. Unfortunately, writes McBain 'the nullifiers of the eighteenth amendment cannot proceed in orderly fashion.' McBain goes on to say:

it is difficult to see how any state law could be enacted that would successfully outwit the prohibition amendment and national enforcement act. The most that any of the states have done, or can do at present, is to refuse to have any enforcement law of their own - a policy that has been pursued by New York, Maryland, Nevada, and Montana.

In other states alcohol prohibition remained legally in force but only federal resources were used to implement the Act. The Wickersham Commission writes:

Illinois, which had prohibition prior to the Eighteenth Amendment, adopted in 1923 an act modeled on the National Prohibition Act intended to establish a uniformity of state and federal laws on the subject. But state appropriations for enforcement of prohibition, which were made for a time, have ceased, and the survey made by direction of the

\[209\] Ibid.
\[210\] Ibid.
\[211\] McBain, above n 16 22.
United States Commissioner of Prohibition in 1930 says frankly that ‘a breakdown of state enforcement work is apparent’.\(^{212}\)

By 1927, only eighteen of the forty-eight states were appropriating money for the concurrent enforcement of the Volstead Act.\(^{213}\)

![Dry vs Wet States Map](image)

The map above shows the evolution during the time of Prohibition of state-based statutes banning local alcohol use.\(^{214}\)

Secretary of the Treasury Andrew Mellon in his 1926 report described the tension between state and federal governments:

> The Treasury felt with respect to local law enforcement that too much responsibility had been placed upon the Federal Government. Even in those States which already had satisfactory State laws, and in which local machinery for enforcement had been provided, citizens and officials were looking to the Federal forces for the performance of police duties which were purely local. This misinterpretation of jurisdiction, while perhaps natural and for that reason excusable, proved a serious hindrance to the successful enforcement of the national prohibition law. Were the Federal Government to accept this responsibility, it must organize large police forces in the various communities, and, in addition, must provide adequate judicial machinery for the enforcement of the laws.

---


\(^{213}\) Burnham, above n 35.

disposition of the local cases - an interference by the Federal Government with local
government which could not be other than obnoxious to every right-thinking citizen.\textsuperscript{215}

Sen. Bingham agreed:

\ldots the framers of the original Constitution specifically considered and rejected a general
federal police power to enact sumptuary legislation \ldots which would deal with the habits
of the people, with what they ate, drank, and wore, and recognized that this moral
regulation was properly a matter for local communities.\textsuperscript{216}

Between 1921 and 1929, Assistant Attorney General Mabel Walker Willebrandt
led the Justice Department’s attempt to coordinate the prosecution of Prohibition
charges. Willebrandt estimated that in New York State there were some 3,000 state
police, a 17,000-strong city police force, 113 state Supreme Court judges, and 62
county prosecutors. From the end of 1923 onward, they refused to enforce
Prohibition laws. This did not mean that in these states Prohibition no longer
existed. What it did mean is that federal agencies, and the highly corrupt
Prohibition Bureau, could no longer enlist the aid of these state authorities in their
fight against bootlegging.\textsuperscript{217}

John Philip Hill, a ‘wet’ representative in Congress from Maryland wrote: ‘I should
like to see the Eighteenth Amendment repealed, power being retained by the
Congress to protect the states from outside interference with their local laws \ldots’\textsuperscript{218}

After repeal in 1933 most questions regarding alcohol devolved to the states.
Seven continued with prohibition, though five of these declared beer to be non-
intoxicating; twelve states decided to permit liquor, but only for home
consumption; twenty-nine states allowed liquor by the glass.\textsuperscript{219} All states
regulated alcohol consumption to varying degrees. Some states instituted an
Alcohol Beverage Control Board to oversee these mandates.

The Alcohol Beverage Control (ABC) laws that the states did adopt were designed
in part to curb the most notorious abuses of the pre-Prohibition era. Restrictions

\footnotesize{\textsuperscript{215} Sidney J Spaeth, ‘The Twenty-First Amendment and State Control Over Intoxicating Liquor:
\textsuperscript{216} Zywicki and Agarwal, above n 150.
\textsuperscript{217} Behr, above n 23 366.
\textsuperscript{218} The North American Review, above n 133.
\textsuperscript{219} Aaron and Musto, above n 100.}
were imposed on hours and days of sales in an effort to diminish the seductive pull of the saloon upon the breadwinner that took him away from his domestic obligations. Sunday closings were observed; liquor could no longer be sold on election days: the 'tied-house', where a public house is required to buy at least some of its beer from a particular brewery or company, was banned – tied-houses were blamed for inciting extreme forms of consumption behavior. Visibility requirements were instituted; in some states, they mandated that bars be open to public inspection, in others they kept the spectacle of the drinking act safely hidden from the eyes of children or decent citizens.\textsuperscript{220}

In return, the state received valuable revenues. A 1940 trade magazine underscored the industry's own promotion of these benefits:

\begin{quote}
A little child is playing happily in the streets of a big city. With all the strength of a twelve-year-old, he throws the ball against the side of a building. It bounces off his hand on the rebound. Quickly the youth runs after the ball into the middle of the street. Brakes screech wildly. One anguished scream rends the air. Johnny lies unconscious beneath the wheels of a big truck, his two legs broken. Were it not for alcoholic beverages, Johnny might go through life a helpless cripple. Thanks to the revenue derived from liquor taxes, however, the state has been able to build and maintain a large hospital just for cases like this.\textsuperscript{221}
\end{quote}

The power dynamic of federated states appears to favour over time the centralisation of power. Under its external affairs power the US government actively pursued international treaties restricting trade in narcotics. The federal government then used the satisfaction of these treaties as a basis for federal legislation controlling the internal trade in and use of narcotics. It is this sort of circular use of power that functions to increase the influence of the federal relative to the state governments. Some state government officeholders will resist the diminution of states’ rights compared to federal power, following the separation of powers doctrine. National narcotics prohibition is the exception (though this exception is being whittled away by such initiatives as state-based medical marijuana laws) to a tradition of state resistance to federal encroachment of their reserved powers. It is clear that in any federal government initiative the States are

\textsuperscript{220} Ibid.
\textsuperscript{221} Ibid.
highly interested stakeholders that function to determine the success or failure of national reform.

Despite the lack of overwhelming public and state support, did Prohibition manage to significantly reduce the production and supply of alcohol? This question is examined in the next section.

D Punishing Production

[P]unishment must be regarded as a retribution that the guilty man makes to each of his fellow citizens, for the crime that has wronged them all.  

It is accepted wisdom regarding Prohibition that the enforcement apparatus of government was unable to control the production and supply of alcoholic beverages. To what degree is this accurate, and if so why? The factors controlling the success of Prohibition criminal enterprise is here examined.

Entrepreneurs desiring to take advantage of continued demand for alcohol used the 12 months grace period to prepare for Prohibition. Senator Bruce in 1927 is quoted as saying: ‘During the first twelve months after it took effect it looked as if it might work ... But in an incredibly short period an entire underworld for the manufacture, sale and distribution of drink was called into being...’ From this statement, and from other reports and statistics from the time of Prohibition it appears that there is a grace period of about a year or as much as two during which alcohol prohibition had a significant effect upon the population. This represents the amount of time required to build production (or importation), distribution and sales networks. Other substances may have differing prohibition grace periods depending upon the difficulty of manufacture and supply.

---

222 Foucault, above n 176 109.
223 Beman, above n 167 80.
According to the Act homemade ciders, wines and cordials were protected by law unless they were offered for sale. It was legal to serve a guest in your home with an alcoholic beverage, and soon issues as to what constituted a ‘home’ and how to determine who was a ‘guest’ became important. Small bootlegging operations prospered, protected by this proviso, complicating the enforcement of the Act. Bootleggers were also able to redistil denatured alcohol (grain alcohol to which substances had been added to make it unfit for consumption), removing these substances by boiling and condensing and then colouring and flavouring the beverage to disguise its origin.

Twenty months after Prohibition became effective, the Internal Revenue Bureau, later the Prohibition Bureau, reckoned that bootlegging had become a one billion dollar business, and a senior official urged the government to take steps to recover $32 million from bootleggers in excess profits taxes. The Bureau claimed that Americans consumed 25 million gallons of illegal liquor in 1920 and noted that the new Prohibition Unit had released another 30 million gallons to consumers for medicinal purposes.225 Unfortunately for government revenues, taxing income that was not supposed to exist was a politically unpopular move - except perhaps in the much-publicised case of Al Capone.226

Californian entrepreneur and winemaker Bertha Beringer had the foresight to see Prohibition coming well in advance and switched production from making wine to making ‘raisin cakes’. These cakes converted into wine after being submerged in water for 21 days. Presentations were held to sell the cakes at which customers were urged not to ‘accidently’ carry out the process. The label bore the warning (or advertisement) ‘Caution; Will ferment and turn into wine’. Due to these entrepreneurial activities, before long Californian grape production was up tenfold.227

225 Behr, above n 23 317.
227 Behr, above n 23 86.
Alcohol is produced from corn and cane sugars inexpensively and with ease. Unlike the ‘sour mash’ method the addition of yeast allows this process to take place with little odour or residue, thus simplifying concealment of moonshiner and household distiller operations from the surveillance of the law, and making it difficult for the officers of the law to locate and suppress such illicit manufacture of liquor.\(^{228}\) The availability of precursor materials is a fundamental factor in the efficacy by which the production of an illegal end-product survives the scrutiny of enforcement officials.

The difficulty in suppressing the manufacture of alcohol is similar to the present day suppression of ‘meth lab’ activity in the production of a form of methamphetamine known as ‘ice’.\(^{229}\) Small-scale ice production facilities are able to generate huge profits in a manner generally free from surveillance.\(^{230}\) A difference is that the precursor chemical for alcohol generation is sugar, a freely available substance whilst ice requires a restricted substance found in cold and flu medications - pseudoephedrine or phenylephrine.\(^{231}\) Alcohol distillers during Prohibition also faced a difficulty in that the measure of their output was of a different order of magnitude - litres (or pints) rather than the grams by which methamphetamine labs measure their production. The volume of an item is a significant factor in the ability to escape surveillance during production and distribution as was discussed in section II.B: *Economic Theory*.

The Wickersham Commission made a succinct summary of the situation that developed during Prohibition:

The improved methods, the perfection of organization, the case of production, the cheapness and easy accessibility of materials, the abundance of localities where such plants can be operated with a minimum risk of discovery, the ease with which they may

---

\(^{228}\) Beman, above n 167 73.


be concealed, and the huge profits involved have enabled this business to become established - to an extent which makes it very difficult to put to an end.  

The techniques and technologies of surveillance that exist today were not available to the burgeoning Prohibition Bureau of the 1920s.

An additional difficulty was that the Volstead Act reinforced the federal statute relating to search and seizure. The Act added a clause making issuance of any warrant dependent on proof that the liquor was for sale. No matter how much liquor a person had at home, no matter how it was obtained or what use was intended, agents had to have positive evidence that a commercial transaction was involved. Such a requirement functioned to permit home manufacture, both for personal use and as a cottage industry organised as part of large criminal networks. Small stills were set up by bootleggers in apartments much as meth labs operate today.

Clearly criminal entrepreneurs benefited from Prohibition. A submission to the Sub-Committee of the U.S. Senate Judiciary Committee, April, 1926, made by the Joint Legislative Committee for Modification of the Volstead Act, quoted District Attorney Buckner of New York as estimating the money value of the alcoholic liquor fabricated from redistilled denatured alcohol in the states of New York and Pennsylvania alone to be more than $3,600,000,000 a year. Federal Prohibition Administrator Frederick C. Baird, of the Pittsburgh district, estimates the value of the moonshine products of the stills he had captured in his district, in an eight-month period, to be in excess of $2,000,000,000 a year. The overall estimate of the value of the unlawful output of alcoholic liquor in these territories alone, not including any smuggled liquors, was approximately $5,600,000,000 a year, ‘about four times the value of all alcoholic liquors consumed in the United States before prohibition’. Whilst DA Buckner’s figures should not be taken at face value, it would appear that criminal enterprise took full advantage of the demand for alcohol and its elevated price to make large profits from the business of selling liquor.

---

232 Wickersham Commission, above n212.
233 Aaron and Musto, above n 100.
234 Beman, above n 167 70.
The ease with which alcohol was manufactured is evidenced by the 172,000 stills or parts of stills captured in 1925. According to further evidence presented by the Joint Legislative Committee for Modification of the Volstead Act, the number captured year after year has increased rather than diminished, and that the federal administrator of prohibition admitted that not one still in ten in actual operation is captured by the agents of the Government. The stills and parts of stills were captured in vastly greater numbers in so-called ‘dry’ states than in ‘wet’ states, proving conclusively that where it is more difficult to obtain smuggled or diverted whisky the demand is supplied by local manufacture.\footnote{Ibid 72.}

The increase in domestic supply was so great that by the late 1920’s that the price of hard liquor in northern California fell below the point at which it was profitable to run beverages in from Canada by ship.\footnote{Burnham, above n 35.} This led Major Chester P. Mills, Former Prohibition Administrator, Metropolitan District, New York to state in 1929: ‘Statistics show that under 2 percent of the liquor consumed is imported.’\footnote{Chester P Mills, ‘The Winning Plan’ in Durant, above n 109 381.} Cities were awash with alcohol wrote newspaperman Malcolm Bingay: ‘It was absolutely impossible to get a drink in Detroit unless you walked at least ten feet and told the busy bartender what you wanted in a voice loud enough for him to hear you above the uproar’.\footnote{Okrent, above n 21 129.}

Licit supplies of a substance, such as medicinal and sacramental alcohol, were also sourced to illicit ends. Prohibition allowed any church to apply for Sacramental wine. It was not long before many people successfully applied to the government for licences, claiming that their houses happened to be a church with a congregation of thousands. Many genuine religious establishments also took advantage of Prohibition to supply the more secular needs of their flock.\footnote{Behr, above n 23 87.}

Thornton tells us that:

Prohibition also led many people to drink more ‘legitimate’ alcohol, such as patent medicines (which contained high concentrations of alcohol), medicinal alcohol, and sacramental alcohol. The amount of alcoholic liquors sold by physicians and hospitals doubled between 1923 and 1931.\footnote{Mark Thornton, ‘Alcohol Prohibition Was a Failure’, above n 8.}
This statement misrepresents the significance of these sources of beverage alcohol.

Local illicit manufacture of alcohol was by far the most significant source of bootleg beverages. In 1926 Anheuser-Busch was selling more than six million pounds of malt syrup annually to ‘home brewers’, a level the company would maintain until Prohibition’s end despite the explosive growth of large-scale, organised brewery operations in some cities in the mid- to late twenties. ‘If you really want to know’ Gussie Busch told an interviewer decades later, ‘we ended up as the biggest bootlegging supply house in the United States’.  

Alcohol has been produced for millennia through easily sourced local ingredients. Its appeal is transnational and pervasive. The equipment required for production is licit and easily available. The techniques to produce fermented beverages and their distillates are well known. Into this environment was thrust a fledgling regulatory regime that was ill-prepared and under-resourced in its efforts to command the respect of potential bootleggers. That this enforcement apparatus was able to interdict, undermine and restrict production and supply of alcohol in any substantial manner for as long as it did is perhaps surprising. The degree to which the nature of enforcement itself changed in its efforts to interdict alcohol supply is addressed in the next section.

E Policing

Law, then, acts as an interface through which governmental decisions can take effect by adjusting the operations and arrangements of the disciplinary mechanisms.  

How can policing act to command the respect of potential lawbreakers? Policing is at its most effective when it functions as a deterrent - once police have to

---

241 Okrent, above n 21 251.
intervene in a situation, this constitutes a failure of hegemonic control. Perhaps the most effective policing is found in the concept of ‘community policing’. William Blackstone theorised that police should build upon ‘the rules of propriety, good neighbourhood, and good manners’. Sir Robert Peel told his men that the ‘ability of the police to perform their duties is dependent upon public approval of police actions’. Today, studies show that police officers feel more of a sense of isolation from the public. They see themselves not as agents of or equals to other citizens, but as a group with authority over the general population. This transition is thought to have occurred during the Prohibition era when policing became highly paramilitary. The question as to which style of policing is more effective, community or paramilitary, was discussed by writers during Prohibition. This section makes brief mention of this controversy.

In the essay ‘Unusual and Tyrannical Methods Ineffective’ (author unknown) reprinted by antiprohibitionist Joseph Debar the limits of policing is explored through the example of Vermont, a state adopting Prohibition in 1852. The uncertain popularity of this law was exemplified when in 1853 a recommendation that the law be repealed was voted down by 91 to 90. As public sentiment was inadequately in favour of Prohibition this led to enforcement difficulties. In response, the Vermont legislature alienated certain citizens’ rights in favour of greater police power. The police were authorised to conduct warrantless searches, penalties were made more severe, and the chancery courts could declare a suspected liquor sellers’ place of business a ‘nuisance’ without jury trial. Under what was called ‘The Disclosure’ every man arrested for intoxication must disclose to the satisfaction of the judge the place where and the person from whom he secured liquor, and if he did not so disclose he could be committed to jail - violating the principle that no man shall be bound to give evidence against himself. In modern times, this principle has been rendered moot through the process of plea-bargaining, a matter discussed in section IV.K: *The Judicial...

\[244\] Ibid.
System. Under ‘The Disclosure’ any man found drunk, or simulating drunkenness, could declare that he obtained his drink from anyone with whom he might be at enmity, and his word was by law a proof superior to any denials or testimony by friends that the accused might offer. The unknown author declared that over 50 years the statutes regarding Prohibition became as voluminous as those applying to all other crimes and misdemeanours, yet difficulties in compliance remained.\footnote{Debar, above n 126 277-282.}

The Volstead Act contained provisions for nuisance (s21) and conferred the burden of proof regarding possession of alcoholic beverages upon the possessor (s33). The Act never went so far in its provisions as that enacted by the State of Vermont, although the methods employed by Prohibition enforcement officers set the stage for a shift from community policing to the more paramilitary style commonly practised in the US today. The adversarial nature of Prohibition enforcement, with increasingly organised and well-resourced criminal networks facing off against government agents, may have been a turning point for police.

A lesson from Prohibition is that paramilitary policing is required where enforcement is difficult, and ‘tyrannical’ methods are all that remain of the tools that police can employ to enforce the law. This indicates a failure in the propaganda element of hegemony where the population is insufficiently supportive of a governmental policy. Police are part of this propaganda effort as proponents of the idea that ‘the best friend you have is the law’, employing such means as community engagement and the present-day plethora of television programs promoting the idea that enforcement officials are the friendly yet firm proponents of peace in the war against deviance.

Community policing may thus be considered more ‘democratic’, whilst paramilitary policing more tyrannical. The shift towards a more paramilitary style of law enforcement indicates a movement in the balance of power between democracy and despotism. Prohibition significantly increased the power of the state, and whilst Prohibition was repealed much of the machinery of power
instituted during this period remains - as is indicated by the style of present-day US police power. 1920s Prohibition failed to win the overwhelming popularity required to enforce a law through community policing, and left enforcement agencies with little recourse but to respond with ever greater levels of force in its efforts to stamp out the consumption of beverage alcohol.

\[\text{F Alcohol consumption}\]

A Prohibition trope is that drinking alcohol became, if anything, more common during Prohibition - part of the culture of the ‘Roaring 20s’. With what effectiveness was Prohibition police power employed to curtail the consumption of alcohol? This section explores the manner in which Prohibition changed alcohol consumption, and for whom. Drinking is examined using statistics available on grain and sugar sales, rates of alcohol psychosis and cirrhosis of the liver, arrests for drunkenness and anecdotal reports. These statistics are examined in the context of the time, a perspective that provides a more nuanced viewpoint than that put forward by scholars in the ‘alcohol prohibition was a failure’ tradition.

The main evidence of alcohol consumption comes from a 1932 study by Clark Warburton, “The Economic Results of Prohibition”.246 No figures are available on sales of liquor during Prohibition and the graph below is considered a reasonable estimate.

---

It is a mistake to assume that alcohol consumption was decreasing ‘naturally’ before Prohibition. The above graph appears to show a reduction in alcohol consumption in the years before 1919. The reason for this reduction is that the First World War from 1914 to 1918 was actively prosecuted in Europe. During this time, the USA and its people were encouraged to ‘stand by the Allies’. This support was evidenced by such measures as grain sales to England. Refraining from consuming intoxicating beverages during this time was considered patriotic, thus making grain available for export that would otherwise be converted into beer and spirits. As a result, alcohol use decreased.

Congress passed various measures to reduce national alcohol consumption during the First World War. This culminated in August 1917 with the Lever Food and Fuel Control Act banning production of distilled spirits for the duration of the war and the War Prohibition Act of November 1918 forbidding the manufacture and sale of intoxicating beverages (more than 2.75% alcohol content) until the
end of demobilisation. The decline in alcohol consumption between 1910 and 1919 is mainly attributed to these legislative initiatives.

To what degree the depression of alcohol consumption before Prohibition was also a result of increased taxation is debatable: ‘taxes rose from $0.50 per proof gallon to $1.10 in 1894, where the rate remained until just prior to Prohibition when it rose first to $3.20 (then $6.40) for beverage and $2.20 for non-beverage spirits’. The American Statistical Association writes that for each increase in tax, ‘consumers would have for a time at least reduced their use of spirits, but the past leads us to think that these results would have been only ephemeral and that in a few years the receipts into the treasury would have indicated the restoration of normal conditions’. With the above in mind, it is more accurate to take the 1910 alcohol consumption figure as the baseline from which any drop in consumption should be measured.

Warburton’s conjectural synthesis of figures was admittedly rough but they were refined in 1948 by E M Jellinek. Even more recently, Joseph Gusfield re-examined both these studies and concluded that:

Prohibition was effective in sharply reducing the rate of alcohol consumption in the United States. We may set the outer limit of that at about 50 percent and the inner limit at about one-third less alcohol consumed by the total population than had been the case ... [before Prohibition] in the United States.

One method used to assess the degree of heavy alcohol consumption is by determining the level of alcohol psychosis. In 1922 James V. May, one of the most eminent American psychiatrists, reviewed recent hospital admission rates for alcoholic psychoses and wrote:

With the advent of prohibition the alcoholic psychoses as far as this country is concerned have become a matter of little more than historical interest. The admission

---

250 Aaron and Musto, above n 100.
rate in the New York state hospitals for 1920 was only 1.9 percent [as compared with ten percent in 1909-1912].

Clearly wartime alcohol prohibition was successful in reducing alcohol consumption. Admissions to state mental hospitals for disease classified as alcoholic psychosis fell from a wartime low of 10.1 per 100,000 in 1919, to 3.7 in 1922, rising to 4.7 by 1928.

A more accurate assessment of alcohol consumption may come from economists Miron and Zwiebel. In 1991 they established that ‘alcohol consumption fell sharply at the beginning of Prohibition, to approximately 30 percent of its pre-Prohibition level’ and by the time of Repeal had risen ‘to about 60–70 percent of its pre-Prohibition level’.

Geoffrey Miron went on to conduct a 1999 study using cirrhosis of the liver as his sole metric, and revised his findings. Taking the entire period of prohibition as a block of time, Miron says:

Prohibition exerted a minimal effect on the per capita consumption of alcohol. Indeed, many specifications, including some of those most defensible on a priori grounds, show positive effects of Prohibition on cirrhosis and, by implication, alcohol consumption. Even the most extreme of the estimates that allows for addiction and rationality implies that Prohibition caused less than a 15 percent decline in cirrhosis relative to its non-Prohibition value.

Whilst cirrhosis of the liver is associated with heavy drinking, Miron’s analysis attempts to compensate for this and address levels of more moderate consumption.

---

251 Burnham, above n 35.
252 Aaron and Musto, above n 100.
INSET (shaded area): Per capita alcohol consumption for the years 1935 to 1999, illustrating the link between alcohol consumption and cirrhosis mortality.255

There is no precise correlation between the global rate of alcohol consumption and cirrhosis of the liver. For instance, the peak of alcohol consumption in 1982 does not correspond to the peak of the cirrhosis death rate that occurred in 1976, whereas a previous peak of consumption in 1945 led to deaths in 1949. A study by Gary Jensen in 2000 considers that cirrhosis was underreported in the years leading up to Prohibition and over reported during the Prohibition years, thus skewing calculations based upon this metric.256

Whether we accept Miron’s analysis or prefer to accept psychosis or grain and sugar sales as the metric to estimate alcohol consumption, what all the studies agree upon is that consumption fell sharply at the beginning of Prohibition, then gradually rose as increasingly sophisticated production and supply networks

came online. If Miron is correct in his conjecture that consumption rose to exceed pre-Prohibition levels, perhaps the psychological effect of illegality itself is significant. Morris Markey explained in The New Yorker, writing just two weeks after Repeal:

I went over to the Ambassador Hotel one afternoon for cocktails. We were four men, all told. We sat there for three hours, and drank three cocktails each - one an hour. And all of us remarked how impossible such temperance would be in any speakeasy we have ever known. In the speakeasies there was always a tension, a pressure to drink and keep on drinking, even after appetite had faded completely.²⁵⁷

These men in their speakeasies reinforce the classist nature of Prohibition legislation. Observers are unanimous in concluding that the greatest decreases in consumption occurred in the working class. Warburton, in comparing alcohol consumption in the period of 1911 to 1914 with that during the prohibition years 1927-1930 concluded: ‘the per capita consumption of beer has been reduced about 70 per cent ... the per capita consumption of wine has increased about 65 per cent, ... [and] the per capita consumption of spirits has increased about 10 per cent’.²⁵⁸ From 1890 to 1915, beer consumption exceeded that of spirits. Spirits consumption fell after repeal while beer consumption rose. By 1935 the alcohol consumed from beer again equalled that from spirits, and by 1945 Americans were getting 50 percent more of their total alcohol from beer than from ‘hard liquor’.²⁵⁹

Beer was overwhelmingly the drink of the working man and Prohibition may have priced the poor out of the alcohol market. One estimate of prices in 1928, when the average family earned $50 a week, is that a pint of beer cost 40 cents, 6 times more expensive than 12 years earlier; gin was $5.90 a quart, 5 times more expensive; and whiskey was $7.00, 4 times more expensive.²⁶⁰ This increase was not due to inflation - price inflation over the decade of the 1920s was approximately zero.²⁶¹ Miron sagely advises that the available data does not allow

²⁵⁷ Okrent, above n 21 374.
²⁵⁹ Levine and Reinarman, above n 63.
²⁶⁰ Aaron and Musto, above n 100.
computation of the average price actually paid, and that it is possible that prices failed to rise substantially.\(^{262}\)

Martha Bensley Bruere in 1927 wrote ‘Does Prohibition Work? A Study of the Operation of the Eighteenth Amendment Made by the National Federation of Settlements, Assisted by Social Workers in Different Parts of the United States’. Bruere surveyed social workers across the country and the overwhelming impression, even taking account of urban immigrant areas where prohibition laws were flouted, was that working people drank very much less than before and that prohibition had substantially improved conditions among low-income Americans. Workers had shared in the prosperity of the 1920’s and moved up the social scale, although the common belief of the time is that the money that formerly went to support the saloon now was used to pay for the workers’ new automobiles and radios.\(^{263}\) Reports of welfare agencies from around the country overwhelmingly indicated a dramatic decrease among their clients of alcohol-related family problems during Prohibition.\(^{264}\)

A statement by William S. Kenyon to the Wickersham Commission supports this view:

The old liquor laws aimed to control the public nuisance feature of drinking and failed. The present law, in our mining towns at least has largely corrected that failure. There is some moonshine liquor, some home-brew, and some bootleg, but the old days of the pay-day whoopee are gone. What drinking there is, is under cover, the practice of drinking up a whole month’s pay, and challenging the world to mortal combat has passed. A drunken miner in public is so rare a sight that when it happens one would think a dancing bear had come to town, and even his chance acquaintances rally to get him out of sight.\(^{265}\)

Cornelia James Cannon, a prolific essayist on progressive causes, in an article titled ‘Prohibition and the Younger Generation’ wrote:

The flaunting defiance of the law against alcohol in our large cities cannot be dissociated from the defiance of all other law in those crowded, inchoate centers, and should not blind us to the decencies and conformities in our smaller communities where

\(^{262}\) Miron, above n 254.

\(^{263}\) Burnham, above n 35.

\(^{264}\) Aaron and Musto, above n 100.

the Eighteenth Amendment brings additional strength to an enforcing public opinion...

This statement is consistent with a perception that alcohol consumption was lower in the less urbanised areas of the USA.

Whiting Williams, a vice-president of a Cleveland steel company had for many years gone in disguise among the working people of several areas in connection with handling labor problems. In testifying before the Wickersham Commission Williams said:

most of the people who are writing and talking most actively about the prohibition problem are people who, in the nature of things, have never had any contact with the liquor problem in its earlier pre-prohibition form and who are, therefore, unduly impressed with the changes with respect to drinking that they see on their own level; their own level, however, representing an extremely small proportion of the population. The great mass who, I think, are enormously more involved in the whole problem, of course, in the nature of things are not articulate and are not writing in the newspapers.

The reportage of the times self-selected itself to the upper classes. The types of people likely to consort with the writers of the day were not of the lower classes and reporters almost never knew about the previous drinking habits of the masses. Journalists and other observers reported honestly that they saw ‘everyone’ drinking.

A measure commonly used to assess the level of alcohol consumption is drunkenness. The Rev. Floyd W Tomkins, D.D., LL.D. of Philadelphia presents some figures in support of Prohibition and concludes: ‘Comparing the last “wet” year with 1921, we find a decrease of approximately 50 per cent in the arrests for drunkenness.’ This, in an environment of increased police vigilance and decreased tolerance of drunkenness, is quite an achievement. In a 1927 publication one chief of police said: ‘Before prohibition we hardly arrested anybody who was drunk. Now we bring in even those who smell of liquor.’

---

266 The North American Review, above n 133.
267 Burnham, above n 35.
269 Beman, above n 167 142.
The astonishing drop in arrests for drunkenness, illustrated so graphically above, was not to last. The Moderation League in 1928 reported: ‘Since then there has been an increase every year, so that by 1926 there were more arrests for drunkenness than in any year except the 1916 war boom peak.’\footnote{Ibid.} The report went on to say: ‘Arrests for drunkenness in 1914 in the 403 places [measured in the statistics] were 531,574, reached the war boom peak of 563,792 in 1916, dropped to 237,101 in 1920 and rose in 1926 to 559,074. Substantially the same rise occurred in the 534 places - increasing from 281,561 in 1920 to 664,101 in 1926’\footnote{Ibid.}

The statistics recorded for arrests relating to Prohibition are skewed by the metric driving the activities of enforcement officers. In Washington State, the district officers vigorously enforced the liquor ban through many arrests. By one internal account, the agents in Washington made over 7,000 arrests before 1927.\footnote{Richard F Hamm, ‘Olmstead v. United States: The Constitutional Challenges of Prohibition Enforcement’ [2010] Federal Trials and Great Debates in United States History <http://www.fjc.gov/public/pdf.nsf/lookup/olmstead.pdf/$file/olmstead.pdf>}. In an effort to achieve impressive statistics - numbers of arrests made, for instance -
the Prohibition Bureau might spend its energy pursuing two hundred people with a pint each rather than chasing down a single big-time mobster who was selling his goods to two hundred speakeasies.\textsuperscript{274}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{arrests_for_drunkness_in_washington_d_c.png}
\caption{ARRESTS FOR DRUNKNESS IN WASHINGTON D.C.}
\end{figure}

In April 1926, the Joint Legislative Committee for Modification of the Volstead Act was convened. Evidence presented before a Sub-Committee of this U.S. Senate Judiciary Committee concurred with the above findings:

Authenticated statistics ... reveal a progressive and continuous increase in arrests for drunkenness from 1920, the first year of constitutional prohibition, to 1925 inclusive. Arrests for drunkenness began to decline in practically all cities of the United States in 1917 and continued to drop rapidly during 1918 and 1919, and during the period of this decline in arrests for public intoxication, milder beverages, such as beer and wine, were the principal drinks readily available for public consumption. By 1924 the arrests for drunkenness in the principal cities of the United States were practically as great in number as in 1916 and 1917, when they reached the high peak, and available reports show that in 1925 they had gone higher than the preprohibition peak.\textsuperscript{276}

Even allowing for greater vigilance on the part of the arresting officers it appears that in the urban centres drunkenness fell at the beginning of Prohibition and then rose to at least match pre-Prohibition levels.

\textsuperscript{274} Okrent, above n 21 252.

\textsuperscript{275} New York Moderation League Inc, above n 224.

\textsuperscript{276} Beman, above n 167 69.
Since all beverage alcohol supply was now illegal, both the formal and informal controls of consumption were relaxed. Aspects of drinking that had been regulated, such as the hours where consumption and supply can take place, the age of consumers and the socially acceptable level of drunkenness were now unstructured. In a submission to the 1926 Senate Hearings, Rev. Francis Kasaczun is recorded as saying:

Never in my occupation as a Catholic clergyman have I found children drinking hard liquors. I have never found the youth, anywhere from fourteen years old to eighteen or nineteen that drank hard liquors. And now you see children drink. You see them drunk. I have seen them drunk myself. There were a few children found drunk in the schools of the towns, public schools, and had bottles of it in their pockets. Last year there was a girl in the town arrested drunk. About two weeks ago there was a boy in another small suburban town that was caught on the street drunk. The school-teachers have been complaining about children coming to school under the influence of liquor. Before [Prohibition] the men drank. Now the women are drinking and the children are drinking.277

The difficulty of alcohol prohibition enforcement is evidenced in the state of Kansas that had state prohibition since 1880, the first state to write a prohibition on alcohol into its constitution. The preponderant sentiment in that state was for strict enforcement of the law and the state statute was more restrictive than the National Prohibition Act. In March 1930 a prohibition survey of Kansas was made by direction of the United States Commissioner of Prohibition. A map contained in that survey set forth the situation county by county, marking enforcement as ‘bad’ or at most ‘fair’ in the counties containing the chief cities of the state, as ‘bad’ in the mining regions and as ‘fairly normal’ in the remainder of the state. It marked enforcement in the chief city of the state as ‘fair’ because there was no evidence of ‘big open saloons’; but admitted that there is ‘considerable evidence of liquor traffic’ and that ‘bootlegging is persistent’.278 Not even the most trenchantly temperate state in the USA could keep many of its citizens from imbibing whilst the rest of the nation was awash with alcohol.

Prohibition did not end alcohol use. A narrow political movement relying on a relatively weak set of statutes succeeded in reducing by perhaps one-third the consumption of a drug that had wide historical and popular sanction.

277 Beman, above n 167 107.
278 Wickersham Commission, above n 212.
Unfortunately, as the above studies indicate, it is impossible to estimate with any accuracy the level of alcohol consumption during Prohibition.

From the statistics and reports available, there appears a classist element in Prohibition era alcohol consumption. The reduction in alcohol use was most prominent amongst the poor. Perhaps this was the intention of the reformers who initiated National Prohibition, and such evidence as is available indicates that the poorest people experienced an improvement in their lives up to the Great Depression of 1929. It is difficult to determine how much of this was due to the economic boom of the 1920s with its associated increase in living standards, and what was due to diminished ‘escape spending’ on alcohol and an improved family life.

Was the reduction in alcohol consumption maintained after Repeal? It was 10 years before alcohol consumption approached pre-Prohibition levels. Why did it take so long for Americans to resume full throtted drinking? One answer can be found in statistics - consumption only measured taxable alcohol, and it seems a reasonable assumption that illicit alcohol production did not cease following Repeal. Another answer is in economic austerity - in the words of Robert Higgs: ‘What we can say with confidence is that as of 1940, the economy had not yet recovered fully from the Great Depression’.279 People simply did not have the money to spend on luxury items. There was no long-term ‘culture change’ in the consumption of alcoholic beverages.

The reform, in its impact upon drunkenness, may overall be considered a partial success. The demographic of those who drank shifted away from the poor towards those more well off; from rural to urban; and to an extent to minors. Drinking became more underhand, perhaps more frantic with an aura of anxious underworld activity and stolen moments. Consumption at first greatly decreased, and then slowly increased until by the end of the 1920s levels of drinking approached pre-Prohibition levels. Bootleg alcohol was at first expensive, but prices dropped as sources of supply increased and distribution networks were put in place. The cost of bootleg decreased until alcohol was only slightly more expensive than before Prohibition.

**From alcohol to narcotics**

This small subsection briefly alludes to the hypothesis that drug and alcohol addiction are interchangeable. It is commonly asserted that the people who enjoy the mind altering effect of drugs such as alcohol will turn to other psychoactive

---

medications should be the source of supply of their habitual drug diminish - the Gateway hypothesis. Thornton quotes physician F. E. Oliver who reported in 1872 on several studies that showed that consumption of opiates and other narcotics increased dramatically when the price of alcohol rose or when prohibitions were enforced. Oliver claimed that the use of narcotics was also common among the membership of total abstinence societies.

Allen L Benson in 1926 reprinted the report of a committee appointed by the Foreign Policy Association during Prohibition to investigate this matter. The report is quoted as saying:

During the last few years, frequent statements have appeared in newspapers and periodicals to the effect that prohibition of alcohol in the United States has led to an alarming increase in drug addiction. With a view to checking the accuracy of these reports, we communicated with the heads of all government bureaus in touch with narcotic supervision, police directors in representative cities, prominent physicians experienced in the treatment of drug addiction, and prison physicians. Without exception, the replies received state that prohibition has had no effect whatever on drug addiction in the United States.

If Benson’s account is to be believed, Prohibition did not result in a transfer of consumption from alcohol to other drugs. The alcohol Gateway hypothesis has been increasingly controversial since its popular introduction in 1975. Indeed, it is discredited. Prohibition enforcement, from what evidence is available, resulted in neither more nor less consumption of narcotics, and the concern over diversionary drug use appears more an ideological construct than a reflection of reality.

---


285 Beman, above n 167 138.


Actually no statistics from this period dealing with crime are of any value whatsoever in generalizing about crime rates.\textsuperscript{288}

This section examines the effect of Prohibition upon crime. What evidence is available suggests that there was no ‘crime wave’. Organised crime and street gangs existed before Prohibition as they do in modern times. There was no evidence of a rising general disrespect for the law. Again, the evidence suggests that the rising crime rate in the 1920s was more perception than reality, more ideological than actual.

Thorsten Sellin’s 1931 work on crime rates (cited above in 1968 by Burnham) strongly suggests that statistical documentation of crime during Prohibition is unreliable.\textsuperscript{289} In 1933, two criminologists Edwin H. Sutherland and C. H. Gehlke reviewed these admittedly inadequate statistics, and concluded that: ‘there is no evidence here of a “crime wave”, but only of a slowly rising level.’\textsuperscript{290} This rise does not reflect an increase in the criminogenic potential of the population, a matter discussed in section IV.J: Prisons.

Those who seek to confirm ideological positions often cite Prohibition crime rates. In 2012, Bowers and Robinson wrote, ‘Once the criminal justice system lost its moral credibility with a public that routinely drank alcohol, it lost it normative force with them in areas other than alcohol consumption. Crime rates rose generally.’\textsuperscript{291} Bowers and Robinson sought to equate rising crime rates with a decrease in appreciation for the force of law. As one substantiation for this theory they cite the work of libertarian scholar Mark Thornton and an anti-prohibition campaigner of the 1920s Charles Hanson Towne, the latter providing cherry picked statistics.

\textsuperscript{288} Burnham, above n 35.


\textsuperscript{290} Burnham, above n 35.

from the period. Yet despite the impression generated by excited news reports during Prohibition, there was no crime wave.

George Gordon Battle, a New York attorney active in the New York Democratic Party, takes a position on Prohibition crime from a less ideological perspective. In his 1925 essay, 'The Effect of Prohibition upon Crime' Battle writes:

I believe that the Prohibition laws are regarded as in a class by themselves. Very few of our people feel any obligation to observe these laws. But I do not observe that this habitual violation of the Prohibition statutes carries with it any general contempt of law. I believe that the great majority of men and women pay no attention to these statutes, but are as obedient as formerly to other laws.

There was no crime wave.

In a manner consistent with numerous other studies, poverty and social stability appear to be the main determining factors in crime. When Dull and Giacopassi in 1986 analyzed liquor laws and density of alcohol outlets in Tennessee counties, they found that a negative relationship existed between alcohol availability and a variety of deleterious behaviors and conditions, including suicide and homicide. When they analyzed density of alcohol outlets and Uniform Crime Reporting statistics in 37 Tennessee cities, significant zero-order correlations between outlet density and crime were found, but when the effects of other variables were held constant, through regression analyses, alcohol outlets were found to be of secondary importance, with poverty and the percentage of minority population in each city being the best predictors of crime. The more serious alcohol-related crimes increased according to the greater proportion of persons living in comparative poverty as well as for those who were identifiably ethnic.

In the idealistic words of Clarence Darrow, delivering a speech in 1909:

You can cure crime in one way, and only one. Abolish monopoly! Give men an opportunity to live! Let no man beg for a job! Destroy poverty! Give men light and air and food, and the jails will vanish and be a nightmare of the past! (Prolonged applause).

---

292 The North American Review, above n 133.
294 Debar, above n 126 183.
Methods to destroy poverty are the subject of much ideological controversy and beyond the scope of this thesis. Suffice to say that if poverty is tied to inequity then its destruction will not occur in the near future.

One assertion is that Prohibition saw the inception of street gangs. Thornton writes,

In the process of providing goods and services, those criminal organizations resort to real crimes in defense of sales territories, brand names, and labor contracts. That is true of extensive crime syndicates (the Mafia) as well as street gangs, a criminal element that first surfaced during Prohibition.295

Evidence indicates that street gangs ‘surfaced’ well before Prohibition. Street gangs were not a new occurrence - they were an urban phenomenon of mainly immigrant children who grew up ostracised from mainstream American society. These gangs were known to be active around the turn of the century - before the advent of Prohibition.296

Stergios Skaperdas of the Department of Economics, University of California has this to say about extensive crime syndicates: ‘The American Mafia, or Cosa Nostra, traces its origin to the Sicilian Mafia. It expanded rapidly during the time of alcohol Prohibition (1920-33).’297 It was not only the mafia that expanded their businesses during Prohibition. Al Capone expanded his commerce from gambling and prostitution to bootlegging during the 1920s.298

Organised crime and street gangs did not surface during Prohibition. Apparently, what happened was that in the 1920’s the long existent ‘underworld’ became publicised and romanticised. The gang crime wave, in other words, was the invention of enterprising journalists feeding on some sensational crimes and

---

298 Thornton, The Economics of Prohibition above n 7 117.
situations and catering to a public to whom the newly discovered ‘racketeer’ was a covert folk hero.\textsuperscript{299}

In summary, evidence available indicates that there was no ‘crime wave’. Prohibition violation did not induce a disrespect for law in general. It is still contentious as to whether Prohibition raised the levels of violence. The next section will examine violence with reference to modern theories and findings on the relationship between violence, enforcement, prohibitions and alcohol.

\textbf{H Violence}

We do find one theory that is consistent with the aggregate time series and cross-country data on crime: the view that enforcement of drug prohibition encourages violent dispute resolution.\textsuperscript{300}

Did national alcohol prohibition cause levels of violence to rise? The Prohibition crimes that made the news in the 1920s, the shootings, car chases and assaults were in the main the result of competing business interests. The organisations that managed the production, distribution and sale of alcoholic beverages could not avail themselves of mainstream justice. Accordingly, persons involved were occasionally compelled to resort to alternate dispute resolution practices - displays of force, compulsion and retribution. Clarence Darrow provides a good explanation of the bootleggers’ dilemma:

The business pays very well but it is outside the law and they can’t go to court, like shoe dealers or real-estate men or grocers when they think an injustice has been done them, or unfair competition has arisen in their territory. So they naturally shoot.\textsuperscript{301}

If an objective of Prohibition was to reduce the levels of violence in society then such a strategy is flawed in theory. Rigorous studies by Miron give this conclusion:

The hypothesis that enforcement of alcohol and drug prohibition plays an independent and substantial role in increasing violence by encouraging its use in the resolution of commercial disputes is entirely consistent with the evidence.\textsuperscript{302}

\textsuperscript{299} Burnham, above n 35.
\textsuperscript{300} Dills, Miron and Summers, above n 175.
\textsuperscript{301} Okrent, above n 21 276.
\textsuperscript{302} Jeffrey A Miron, ‘Violence And U.S. Prohibitions Of Drugs And Alcohol’ <http://www.nber.org/papers/w6950>.
According to Miron’s theory, Prohibition should have increased levels of violence.

The extent to which Prohibition affected the metrics of criminalised behaviour is explored by many academic writers. Homicide is considered one of the best measures for societal violence because the levels of reporting and recording of this particular form of violence is extremely high. For this reason, homicide statistics are often used for their perceived level of reliability. The graph below describes a link between enforcement of prohibition and homicidal violence.

The results presented above illustrate that over the past century, the major fluctuations in the U.S. homicide rate have been positively associated with fluctuations in the enforcement of alcohol and drug prohibition.\textsuperscript{304} Niskanen in a


\textsuperscript{304} Miron, above n 254.
1994 study indicates that an increase in overall enforcement increases the level of all forms of recorded crime. Niskanen says that: ‘More police appear to increase the reported crime rate, but that observed effect is probably due to a strong effect of the number of police on the percentage of crimes reported.’ That is, when there are more police more crimes are reported to those police. Interestingly, Niskanen goes on to say that ‘an increase in police appears to have no significant effect on the violent crime rate ...’

Levin’s 1998 analysis of crime rates indicates that, once the reporting bias is taken into account increasing police numbers has a net positive affect in decreasing levels of crime, although this is variable depending upon the type of crime. Property crime tends to be less spontaneous and more calculated than violent crime, and so more amenable to deterrence than crimes against the person.

Violent and property crime rates per 100,000: 1932 to 2006.

Statistics for these offences since Prohibition do not as clearly follow Miron’s theorem, and statistics diverge from 1990 for reasons beyond the scope of this thesis to explain.

In enforcing a ban on alcoholic drinks, it appears that law enforcement can expect levels of violence, particularly homicidal violence, to rise. Criminalising beverage alcohol severs alcohol marketers from formal dispute resolution systems and it seems a reasonable conclusion that ‘the homicide rate rose during Prohibition due to an increase in non-legal forms of conflict resolution resulting from the emergence of black markets and organized crime tied to alcohol’.  

Thornton declares that Prohibition was responsible for a rise in homicides and violent crime.  

Professor Mark Moore declares to the contrary that ‘violent crime did not increase dramatically during Prohibition. Homicide rates rose dramatically from 1900 to 1910 but remained roughly constant during Prohibition’s 14 year rule.’  

Academic opinion is divided, yet the graph that Thornton uses to demonstrate his point appears so authoritative:

In 2000 Jensen performed a general analysis of murder rates from 1900 to 2000 and, after correcting for under-reporting of homicides before 1930, found that

---

308 Asbridge and Weerasinghe, above n144.
310 Moore, above n 34.
Prohibition was correlated negatively with liver cirrhosis mortality and correlated positively with the murder rate – an analysis that appears to agree with Thornton.\textsuperscript{312} However, Thornton’s assertion is not reflected in more detailed statistical analyses of homicide rates. For instance, in 2009 Asbridge & Weerasinghe analysed trends in murder rates in Chicago between 1920 and 1930 using police reports on all homicides in the city. They examined detailed reports that distinguished between deaths that involved alcohol use by the offender or the victim, occurred in a bar or involved disputes between alcohol black market participants - and those that were not. They found that the overall murder rate in Chicago increased during Prohibition but alcohol-related homicides remained roughly constant.\textsuperscript{313} This study appears to indicate that whilst homicides increased, the conditions created by Prohibition were not driving that increase.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{National and Chicago homicide rates, 1890–1930}
\end{figure}

If Prohibition related crime was pushing the homicide rate higher, why did the rate continue to be higher than pre-Prohibition levels three years after repeal?

\textsuperscript{312} Jensen, above n 256.
\textsuperscript{314} Ibid.
Perhaps Depression-era tensions were behind a thirst for murder or, as Jensen suggests, organised criminal groups fighting for control over emerging markets for untaxed liquor. Nevertheless, the link between Prohibition and homicide appears tenuous.

David Teasley in 1992 provided this twist on the data:

age-adjusted homicide rates for whites changed very little during the Prohibition era, scoring 6.2 per 100,000 in 1921, then dropping less than one point downward, and returning to 6.0 per 100,000 in 1931. According to a special report by the Public Health Service, National Office of Vital Statistics, the white rate never rose higher than 6.2 (1921) and dropped back to the 1920 figure of 4.9 in 1935.

Teasley delivers this conclusion: ‘The slight increase in white homicides is not in keeping with the traditional image of Prohibition as a particularly crime-ridden era.’

Teasley also provides data that indicates a rise in non-white victims of violence:

In a study of historical trends in violent crime in the United States during this period, Ted Robert Gurr concurs with the argument that the murder rate rose but maintains that the increase was probably due mainly to a rise in the number of black homicides. The age-adjusted death rates for non-white homicide victims in 1920 was 29.2 compared to 4.9 for whites. The non-white rate continued to rise, reaching a rate of 46.5 in 1934 before falling.

Non-white people made up a small and decreasing proportion of those incarcerated, indicating that white people were the main murderers of blacks:

Data provided by the Bureau of Justice Statistics reveal a fairly stable balance in the percentage of federal prison admissions by race. In 1927, federal prison admissions were 84% white and 14% black; in 1932 and 1933, they were 88% white and 10% black. Blacks during this period comprised a little less than 10% of the U.S. population.

Teasley’s data appears to indicate a rise in the murder of nonwhites during the 1920s, but in all only a slight increase in the overall reported rate of homicides.

Teasley is not alone in his analysis of the data. Owens in 2011 considered that: ‘The apparent national trend in homicides during prohibition was driven instead

---

315 Jensen, above n 256.
317 Ibid.
318 Ibid.
by urbanization and the changing demographic composition of the population.’ Owens determined this despite her results supporting the economic theory of underground markets being associated with violence:

When alcohol markets were criminal (but alcohol consumption per se was not illegal) the political unpopularity of alcohol temperance was positively related to the homicide rate. However, even taking this underground into account, the net effect of criminalizing alcohol was to reduce, not increase, homicides, plausibly through reduced alcohol consumption. Systemic violence is an important source of harm associated with drug use. At the same time, systemic violence in the market for alcohol does not appear to have been a major cause of crime in the 19th century.³¹⁹

Owens reiterates this conclusion in another study where she says that

In most states, dry laws were in fact associated with reductions in the homicide rate. The net negative effect of temperance on homicides, even in the presence of a growing underground market, is due to the strong positive relationship between alcohol consumption and aggression.³²⁰

Detailed data analyses indicate that the criminogenic potential of underground markets is counterbalanced by the criminogenic potential of alcohol: ‘existing data provide no evidence that individuals used lethal force to resolve disputes over alcohol on a large enough scale [to] outweigh the reduction in psychopharmacological violence’.³²¹

Owens tests this hypothesis against the records on lynchings.

Using data on county level dry ordinances and organized violence against black southerners, we show that local restrictions on the availability of alcohol reduced the incidence of lynching. Not only was the approval of a dry ordinance associated with a discrete drop in the probability that a lynching occurred, the likelihood that a lynching occurred fell each successive year that alcohol sales were banned.³²²

If any determination can be made of the wobbly statistics perhaps it is this - the sorts of crimes which cause disturbance to the usual way of life of most people in the United States, that being petty crimes that ‘disturb the peace’, initially declined. ‘Dr. Fabian Franklin noted that according to one measure, crime had

---

³¹⁹ Owens, above n 192.
³²¹ Owens, above n 192.
³²² Bleakley and Owens, above n 320.
decreased 37.7 percent between 1910 and 1923.’ These statistics also show variance in the type of crime...

theft of property increased 13.2 percent, homicide increased 16.1 percent, and robbery rose 83.3 percent between 1910 and 1923, while minor crimes (which were large in number) such as vagrancy, malicious mischief, and public swearing decreased over 50 percent. 323

Available statistics do not support the theorem that alcohol prohibition caused a rise in violent crime when viewed on a per capita basis. If the incidence of petty crime is included, statistics indicate that the rate of crime fell during the period – notwithstanding the new Prohibition crimes that had been introduced involving the production, distribution and sale of alcoholic beverages. The diminution in supply of beverage alcohol is positively associated with a reduction in violent crime.

Of all recreational drugs, alcohol seems unique in the magnitude of its potential to increase overall levels of violence. Of all drugs, alcohol’s criminogenic impact outweighs the criminogenic impact of prohibition enforcement. A comparison may be made to the impact of prohibitive enforcement on drug markets, as examined in a 2010 study. This study concludes that:

in 9 (82%) of the studies that employed regression analysis of longitudinal data, a significant positive association was observed between drug law enforcement increases and increased levels of violence. Only one study (9%) reported no significant association (i.e., no beneficial or negative impact) between drug law enforcement and violence.

The article went on to review two qualitative studies on health harms among illicit drug users in the open-air illicit drug market in Sydney, Australia:

In these studies, the authors observed that, as dealers exited the illicit drug market, those willing to work in a high-risk environment entered, and street dealing thereby became more volatile. Further, the authors noted that the increased volatility associated with street dealing resulted in a higher number of violent disputes, which have contributed to an increase in murders and non-fatal shootings among individuals involved in the illicit drug trade. 324

In this example enforcement intervention in the drug market resulted in violence far exceeding the potential of the drug’s criminogenic violence.

324 Wood, above n 303.
In summary it appears that one drug, alcohol, functions to increase the levels of violence in the population. Studies also indicate that drug law enforcement increases overall levels of violence. If a primary objective of the US national alcohol prohibition reform was to reduce the small everyday acts of violence in the community, and some of the larger ones as well such as lynching, then this succeeded. This reduction was achieved despite the rise in violence that occurred because of the bootlegging business and enforcement practices to quash this commerce. On balance, what data is available indicates that the USA during the period of Prohibition was a more peaceful society punctuated with newsworthy acts of violence.

Violence is not the only metric by which a reform’s success is measured. Entrepreneurial illegality generates income that is used to reduce the burden of doing business in a civilised society under the rule of law. The process by which such entrepreneurs achieve this reduction is called corruption, a practice examined in the next section.

1 Corruption

Speakeasy: from the practice of speaking quietly about such a place in public, or when inside it, so as not to alert the police and neighbors.

This section examines corrupt behaviour in the context of enforcement, and the perception that Prohibition produced large-scale corruption. Corruption manifests as the illegitimate search for privilege and gain by a person using the power of their public office. Corruption is distinguished from a person negligent or incompetent in the discharge of the duties of their office. It is not necessarily an unintended consequence of a reform that it provides opportunities for corruption. This section will show that corruption, rather than being an ad hoc transaction


between criminal entrepreneurs and government appointees, is a direct means of rewarding the faithful for their support. Corruption is also a means by which members of government exercise and increase their power - in the case of Prohibition one way in which government achieved this was by creating the Prohibition Unit (PU).

Wayne Wheeler, the ASL’s major power broker, created the Prohibition Unit with a budget of only three million dollars. Rather than putting the PU agents under the authority of the state department also known as the civil service, as was standard practice for federal enforcement officers, PU agents were under the authority of the Treasury. Andrew Volstead, the man who introduced the National Alcohol Prohibition Act to Congress, said that civil service protection guarantees ‘the offices would be filled with Wets that we could not get rid of’.\(^{328}\)

Even so, Wheeler’s choice to exclude PU agents from the civil service might appear bewildering. Prohibition agents did not have to abide by the civil services stringent rules. Appointments of agents would not be in the hands of non-partisan government officials. Instead, power of appointment was given to local politicians. In effect, this meant that each prohibition agent had to adhere to their appointee’s political whims. To become a prohibition agent in most of the country required no qualifications other than the endorsement of a prominent local politician, an ASL member or friendly congressman.\(^{329}\)

The League used enforcement jobs to reward their faithful troops and ‘dry’ politicians went along with the ASL to ensure the League’s support at their re-election.\(^{330}\) US House Of Representatives member John W. Harreld of Oklahoma (for one) openly admitted that his reelection prospects were directly tied to his ability to appoint the enforcement agents in his state. Many wet members of Congress also took turns at what Senator George Norris of Nebraska called ‘the political pie counter.’ Okrent quotes an officer of the National Civil Service League

\(^{328}\) Okrent, above n 21 112.

\(^{329}\) Behr, above n 23 83.

\(^{330}\) Okrent, above n 21 135.
as saying: ‘The plain fact is that the congressmen wanted this plunder’.

The ASL in seeking to avoid a plague of wet officers instead took on board incompetence and corruption, complete with a more welcome passenger - the ability to offer selective rewards to loyal agents.

Attorney General Daugherty told Congress in 1922 that the civil service was a ‘hindrance to the government’. Daugherty was part of a government led by President Warren G. Harding from 1921 to 1923. In the words of historian Frederick Lewis Allen in 1931, ‘The Harding Administration was responsible in its short two years and five months for more concentrated robbery and rascality than any other in the whole history of the Federal Government’. The Senate during Harding’s term as president had so much liquor that it was warmly referred to as ‘The Best Bar in Town’!, a hub for entertaining many of Harding's less scrupulous contacts. Whilst the civil service may have hindered his government’s ability to act without restraint, selective enforcement of Prohibition provided widespread opportunity for politicians to enhance their positions. It appears that, perhaps due to his presidential style, Harding experienced difficulty in controlling his government ... once telling a visitor ‘I knew this job would be too much for me’.

The nexus between the corruption of the enforcement arm of government and the political is unmistakable. For example, the infamous ‘Ohio gang’ of white collar criminals were granted immunity from prosecution on the basis that many of them had been close childhood friends of President Harding. Roy A. Haynes, Harding’s prohibition commissioner, said that bootleggers regarded an agent’s badge as ‘nothing but a license to make money ... Bootleggers bragged of top political connections with representatives in the department of Justice, the bureau of internal revenue and the prohibition unit itself’. Mabel Willebrandt in 1929 wrote, ‘No one who is intellectually honest will deny that there has not yet been

---

331 Ibid.
332 Ibid.
334 Behr, above n 23 153.
336 Behr, above n 23 105.
effective nationwide enforcement’ and that the influence of liquor in politics extended ‘up to the Cabinet and the White House in Washington’. According to Willebrandt, during Senate and House sittings ‘Senators and congressmen appeared on the floor in a drunken condition’.337

The spoils of Prohibition enforcement were not limited to politicians. State police forces were also able to share in the plunder. In Chicago serious enforcement efforts collapsed shortly after the revelation by the city’s mayor that an estimated 60 percent of the city’s police force was in the liquor business.338 Mabel Willebrandt figured that each of the thirty-two thousand speakeasies in New York probably paid a beat cop five dollars a day to keep the taps and the cash register open. This estimate was low for establishments located in midtown Manhattan, where protection money could run to $150 a week, leading the operators of the Bath Club and other upmarket spots to form a sort of bribery collective, paying off the authorities from a common pool of money. Willebrandt said:

It is clear that if the police of New York City, and some of the politicians who control their appointments, are not collecting at least one hundred and sixty thousand dollars a day or sixty million dollars a year from the speakeasies alone, they are either very honest or very stupid. Take your choice! 339

The political nature of appointments led to corruption in the Prohibition Unit at the highest level. In Indiana a series of missives that became known as the ‘Dear Jerry Letters’ after they were leaked to a newspaper in 1921 revealed that the newly installed federal Prohibition director for the region instructed Indianapolis police chief Jeremiah Kinney to distribute any confiscated liquor to the director’s associates.340 The director was a political appointee.

At the trial of bootlegger Roy Olmstead, the prosecution convinced members of the Olmstead organization to testify for the prosecution. Federal agents, acting on a tip off from within Olmstead’s organisation, caught Roy Olmstead on Thanksgiving morning 1925 unloading liquor from a boat. One member of the organisation - and the probable source of the tip - Alfred Hubbard asked for and

337 Ibid 53.
338 Okrent, above n 21 141.
339 Ibid.
340 Ibid.
received an appointment as a federal Prohibition agent in exchange for inside information. Of all the rewards for ‘snitching’ on his boss, why would Alfred Hubbard want a federal Prohibition job?

The maximum wage of $2,300 was very low even for the USA in 1921. From its inception, the Prohibition Unit experienced high turnover - by 1927 the PU, now called the Prohibition Bureau, had received its fourth chief administrator. At any one time, the total PU staff of administrators, agents and investigators, charged with the policing of illicit liquor trafficking across the entire United States, never numbered more than 4,500 men. Most agents' employment only lasted several months. Over the first 11 years of the Prohibition Unit (then Prohibition Bureau's) history, 17,972 men were employed, of whom 11,982 left the bureau without prejudice and 1,604 were dismissed for cause. ‘Separated without prejudice' means that their criminal involvement could not be proved. ‘Dismissed for cause’ meant that the officers committed offenses that could be proved but might not warrant sentencing, or that would involve costly, publicised trials. The low numbers employed in Prohibition duties meant that the spoils accruing from employment were concentrated in but a few prized positions. Alfred Hubbard, it would appear, was not prepared to forfeit his highly remunerative position in the Olmstead gang without having an unofficially well-paid federal job to be getting on with.

The profusion of corruption during the Prohibition years encouraged underworld crime bosses in their belief that anyone could be bought. ‘I just couldn’t understand that guy [La Guardia],’ said ‘Lucky’ Luciano to his ghostwriters. ‘When we offered to make him rich he wouldn’t even listen. ... So I figured: what the hell, let him keep City Hall, we got all the rest, the D.A., the cops, everything.’

Explaining how the system worked, George Remus the ‘king of the bootleggers’ told the St. Louis Post-Dispatch:

---

341 Hamm, above n 273.  
342 Teasley, above n 316.  
343 Behr, above n 2383.  
344 Ibid 241.
I never handed over the money personally, usually the go-between was the politician who had got the official his job. In that case, he sometimes got more out of it than the official himself... A greedier lot of parasites never existed... A few men have tried to corner the wheat market only to find that there is too much wheat in the world. I tried to corner the graft market, but I learnt there isn't enough money in the world to buy up all the public officials who demand their share of it.

Remus estimated that he spent half his gross earnings in bribes.345

Remus said that in his entire career he only came across two people who refused to be corrupted. One was Burt Morgan, the Prohibition director of Indiana, who 'could have had $250,000' to look the other way. The other was Sam Collins, the Kentucky Prohibition director, whom Remus offered $100,000 simply to quit his job and take up a far more remunerative appointment as the manager of a soft-drink plant. As state Prohibition directors, Morgan and Collins were each earning $4,600 a year.346

From the top, corruption in the Bureau ran all the way to the bottom. For example, a federal agent called Mellin was tapping a room in which Remus held meetings. 'One day alone, Remus had forty-four people in, and some of them were Federal prohibition agents or deputy marshals', Mellin wrote. 'He paid them an average of $1,000 apiece.' Mellin took his information to an official in Cincinnati, who said, 'Son, there are times when a man has to be practical in this business. It's only a few weeks to election, and the information you've dug up is political dynamite. The men you spied on - the agents and marshals - are political appointees. Go back to New York and forget it'.347

Corruption was not limited to the Bureau of Prohibition. The New York Times on January 7, 1927 reported that the crew of a Coast Guard patrol boat ran liquor ashore from 'Rum Row', helped the rum ships to do business, set erring skippers on their course and accepted money and whisky for their services.348 The Bureau of Customs, or parts thereof, also 'had its nose in the trough'.

345 Ibid 168.
346 Ibid 104.
347 Ibid 169.
348 Beman, above n 167 66.
The political feeding trough was not to last. Congress, by act of March 3, 1927 created in the Department of the Treasury two bureaus - a Bureau of Customs and a Bureau of Prohibition, each under a commissioner. The Secretary of the Treasury was authorised to appoint in each bureau one assistant commissioner, two deputy commissioners, one chief clerk, and such other officers and employees as he might deem necessary. The Bureau of Prohibition Act provided that the appointments should be subject to the provisions of the Civil Service laws and salaries fixed in accordance with the classification act of 1923. Prohibition agents became part of the civil service. Existing agents were so ill-qualified that three quarters failed to pass the necessary tests. In the reshuffle, the famously effective prohibition officer Izzy Einstein was fired, unofficially, because his success in tracking down Volstead Act breakers had upset one too many influential figures. In 1930, the Prohibition Bureau became part of the Department of Justice at which time the Wickersham Commission reported: ‘there has been an improvement in the efficiency and character of enforcement methods, since the enforcement unit was placed under Civil Service, and since the transfer of the unit to the Department of Justice’.

Imagine the perfect combination of opportunity for criminal entrepreneurs - laws to keep legitimate businessmen out of the industry, and corrupt or incompetent administrations to keep the cops and other enforcement officials off their backs. During Prohibition Congress and state legislatures passed laws banning alcohol whilst wet mayors and governors declined to enforce them. Contrast the policing of alcohol prohibition in the 1920s with the policing of illegal drugs in more modern times …

Today more than a dozen agencies are engaged in combating drug trafficking. The US national drug strategy is coordinated by the Office of National Drug Control Policy, a strategy calling for both supply reduction that includes

350 Behr, above n 23 157.
352 Okrent, above n 21 303.
interdiction, investigations, international action, prosecution, corrections, intelligence, and state and local assistance . . . and reducing demand through prevention and treatment to deal with the modern ‘drug problem’. Federal employees of participating agencies are under the civil service and are not political appointees. The organisational structure, its effectiveness and the types of employee problems faced by the Prohibition Bureau in the 1920s are not the same as those found in federal agencies participating in the national drug strategy today.\footnote{Teasley, above n 316.} There is a unanimity of purpose and precision of coordination not present in state and federal enforcement efforts of Prohibition times, yet for all this the ‘cost’ both socially and financially is enormous (see IV:B).

Economically well-developed countries may view themselves as substantially immunised against the corrupting influence of illegal entrepreneurial activity. Developing countries, to avoid corruption, ensure that there is a lack of opportunity for corrupt opportunities in their legislation - unless, of course, it is the intent of the legislators to frame law that provides kickbacks to politicians and their friends. The USA in the 1920s was a developing country.

\section*{Prisons}

The prison has been proposed as the solution to the problem it seems to create.\footnote{Theodore Caplow and Jonathan Simon, ‘Understanding Prison Policy and Population Trends’ [1999] Crime and Justice 63.}

This section examines the effect of Prohibition upon rates of incarceration, and seeks to further dispel the myth of Prohibition as a lawless period in US history. Statistics from the period are used to promote various ideologies - statistics that when placed in context do not endorse the conclusions of these scholars.

In 1991 Libertarian economist Mark Thornton presented various figures on Prohibition imprisonment:

\footnote{Teasley, above n 316.}

By 1932 the number of federal convicts had increased 561 percent, to 26,589, and the federal prison population had increased 366 percent ... The number of people convicted of Prohibition violations increased 1,000 percent between 1925 and 1930, and fully half of all prisoners received in 1930 had been convicted of such violations. Two-thirds of all prisoners received in 1930 had been convicted of alcohol and drug offenses.

In line with this – ‘Total federal expenditures on penal institutions increased more than 1,000 percent between 1915 and 1932’. Thornton attributes much of this increase to violations of the Volstead Act and other Prohibition laws.

Thornton and other scholars seek to present the following graph as evidence of the failure of Prohibition because of the seen increase in prison populations. This assertion is disingenuous for two reasons:

1. Federal prisons accommodated persons convicted of a federal crime. State prisons accommodated detainees under State law. The Volstead Act represented a significant expansion of Federal power in the area of criminal enforcement and incarceration. It follows that there will be more Federal prisoners.

2. A number of States that had been ‘dry’ before the Volstead Act were content to hand over the cost and responsibility of enforcement and punishment to the Federal Government. It follows that there will be an increase in numbers of prisoners under Federal jurisdiction.

---

Inmates at Sing Sing Prison: 1917-22

The rise in the population of Sing Sing Prison over five years is reflected in the overall Federal prison population. In 1920, federal prisons contained just over 5,000 inmates; ten years later there were over 12,000, more than 4,000 of whom were serving time for liquor violations - indicating an increase of about 3000 due to other causes.

The Volstead Act represented a substantial increase in the internal policing powers of the Federal government. Before Prohibition, Federal prisoners were incarcerated for such minor crimes as Federal mail fraud. It is in no way extraordinary that Federal prison populations should rise due to alcohol production, transport and sale being criminalised and this prohibition enforced. Such enforcement received more funds under an initiative of President Hoover in 1929, raising apprehension and conviction rates for that period.

---

357 Kyvig, and Jeffers, above n 13, 30.
358 Hall, above n 5.
Examining the Federal prison population numbers provides an incomplete picture of incarceration in 1920s USA. It is more accurate to look at the overall level of detainees. As the length of sentences given to offenders coming before county, state and federal courts increased, so too was there an overall increase in prison, local jail, and juvenile detention populations:

---

Nation-wide prison populations do not accurately reflect the level of criminalised behaviour. A more accurate depiction is one of incarceration rates:  

**Chart 1: Incarceration Rates, United States, 1925–2001**

![Chart 1: Incarceration Rates, United States, 1925–2001](image)

Source: Bureau of Justice Statistics, U.S. Department of Justice

**Chart 1a: US prisoner population (state and federal), 1925-1979**

![Chart 1a: US prisoner population (state and federal), 1925-1979](image)

---


A closer examination of the period reveals that incarceration rates trended higher during the years between 1925 and 1940, the only reversal being at the end of 1933 when prisoners jailed for Prohibition crimes were released. Whilst incarceration increased during the Prohibition years, note that rates of incarceration were higher in 1940 than at any time during the Prohibition years. Caplow and Simon attribute the second peak in incarceration rates that occurred later in the 1930s to a panic fed by the Depression and well-publicized crimes such as the Lindbergh kidnapping, which intensified federal efforts in crime control.363

From the graphs above it is clear that the rate of incarceration, whilst positively affected by Prohibition, did not increase during the 1920s significantly above the trend of the times. Given the criminogenic potential of alcohol, as mentioned in section II.E: Alcohol and the mind, the diminution of alcohol supply and thus consumption engendered an expectation that Prohibition should exert a negative effect upon prison populations. Prohibition did not result in so significant a decrease in offences resulting in incarceration that government could (as Reverend Billy Sunday prophesied) ‘turn our prisons into factories and our jails into storehouses and corncribs’.364

The increase in prison populations was not disproportionate to the period. During the late nineteenth and early twentieth centuries, there was a great rise in the number of acts which society chose to designate as criminal. Many acts formerly regulated by social or business customs, discipline being provided in the home or the church or recovery being had by civil action, were denounced by criminal legislation and turned over to enforcement officers. Laws regulating the sale of securities, laws governing the issuance of checks and other evidences of value were comparatively new in their creation. Many laws regulating traffic came with the development of the automobile. Large urban growths brought a multitude of laws regulating building, sanitation and health, which in earlier days were unnecessary. Improved means of communication and transportation brought

363 Caplow and Simon, above n 354.
364 Levine and Reinarman, above n 63.
people closer together and multiplied the frictions that seem to require governmental supervision.\textsuperscript{365}

Dean Pound observed, ‘of one hundred thousand persons arrested in Chicago in 1912, more than one half were held for violation of legal precepts which did not exist twenty-five years before’.\textsuperscript{366} The growth in urbanisation and government control mechanisms resulted in the criminalisation of large numbers of people who previously would have escaped official sanctioning and incarceration. This trend has continued to the present day, involving a reorienting of fiscal and administrative resources toward the criminal justice system at both the federal and state level. The result has been a more authoritarian executive, a more passive legislature, and a more defensive judiciary. \textsuperscript{367}

The image of Prohibition-era prisons crowded with bootleggers and gangsters is not borne out by the available statistics. Prohibition was a mere ‘blip on the radar’ of a popular trend criminalising and incarcerating large numbers of the US population. Whilst the federal prison population rose to almost one third of the state prison populations during Prohibition this population was maintained after the end of Prohibition, indicating that there were other factors in play. These factors continued to the extent that in 2003 the US was the leading incarcerator in the world, only being outdone by the Seychelles in 2016.\textsuperscript{368} \textsuperscript{369}

As the number of criminal statutes and the resulting number of criminal defendants swelled, court systems became overwhelmed, as discussed in the next section.

\textsuperscript{365} Justin Miller, ‘The Compromise of Criminal Cases’ (1927) 1 S. Cal. L. Rev. 1.
K The Judicial System

To enter a dominion is to place oneself under the protection of the violent power that is the prince. 370

This section examines the assertion that the judiciary was overloaded with Prohibition cases to the extent that the system became practically unworkable; and the effect this had upon the status of the judicial system as an institution. The judicial system is one means by which the State maintains discipline and order in a manner acceptable to both the propertied aristocracy and the masses. 371 In the words of 1920s ‘radical lawyer’ William Kunstler:

there is the disquieting thought that the legal subsystem itself is nothing more than the new tyrant’s most reliable weapon to ward off any seemingly potent threat to the continuation of yesterday into tomorrow. If the injunction and the conviction can achieve the same results as the rope and sword, judges are, after all, far more comfortable companions than executioners. And in the last analysis, due process of law is exactly what the high and mighty say it is. 372

The judicial process is not for everyone - judicial deliberations tend to be slow and time-consuming – a system highly consumptive of resources both intellectual and in manpower. It is a system to be used . . . judiciously, as seen in this section.

The inexperience of Prohibition officers was telling in the early days of Prohibition. Too often arrests were made and prosecutions instituted without sufficient evidence to justify them. There were many instances of unwarranted searches and seizures, resulting in the refusal by Commissioners to issue warrants of arrest, or in the dismissal of the prosecution by the courts. In some instances, the character and appearance of the prohibition agents were such that the United States attorney had no confidence in the case and juries paid little attention to the witnesses. Due to the metric by which they worked, prohibition agents sought to secure a large number of arrests or seizures rather than to bring to the District Attorneys carefully prepared cases of actual importance. The first seven years’

370 Simon, above n 367 33.
experience in enforcing Prohibition resulted in the prohibition forces achieving a poor reputation in the eyes of many of the United States attorneys and judges.  

Prohibition was unveiled during a period where the number of criminal statutes and thus criminal defendants greatly increased, overwhelming the court systems. This criminalisation necessitated plea bargaining’s emergence into mainstream criminal procedure and its rise to dominance. The number of federal convictions resulting from pleas of guilty rose from 50% to 72% between 1908 and 1916. Then, in 1919, a piece of legislation was passed that considerably increased judicial workloads and almost assured plea-bargaining’s preeminence. The Volstead Act guaranteed the right to a jury trial for anyone charged with a violation.

In 1920, 5,095 of the 34,230 cases terminated in the federal courts involved prohibition violation; during 1929, 75,298 prohibition cases alone were concluded. In New York, six judges and one magistrate were expected to dispose of fifty thousand cases annually. Emory Buckner, the United States Attorney for the southern district of New York, concocted a plea bargaining opportunity that became known as ‘Bargain Day’. Publicly promising to request light fines in exchange for guilty pleas, he invited defendants to the Old Post Office Building south of City Hall, where his staff, working with two federal judges, could process five hundred cases a day.

By 1925, pleas of guilty, without jury trials, accounted for over 90 percent of the convictions obtained in federal courts. The era of Prohibition functioned to accelerate a change in the whole US judicial system favouring plea-bargaining -

---

373 The Wickersham Commission Report on Alcohol Prohibition, above n 156.
376 Okrent, above n 21 264.
377 Kyvig and Jeffers, above n 13 30.
in 2011; Lindsey Devers estimated that between 90 and 95% of convicted defendants in the entirety of today’s US criminal justice system plead guilty.\textsuperscript{378}

Prohibition also saw a sharp rise in jury nullification, ‘the right to nullify on the basis of conscience in the name of the community’.\textsuperscript{379} In New York, the first 4000 arrests under the Mullan-Gage law, the concurrent state version of the Volstead Act, resulted in fewer than five hundred indictments, which led in turn to only six convictions and not even one jail sentence. Assistant District Attorney Mabel Willebrandt acknowledged, ‘juries will not convict if the punishment does not fit the crime’.\textsuperscript{380} Juries nullified the law in an apparent belief that no punishment was appropriate for breaking the liquor statutes.

William B. Smith, M.D. a Township Judge in Kernville, California wrote: ‘In this county, one of the largest in the second largest state of the union, a jury conviction has not been obtained in a liquor case in the last two years’. He continued: ‘Invariably in that group will be one or more men or women who have been violating the very law they are hearing’.\textsuperscript{381} In the same vein J. R. Taylor, a Former Prosecuting Attorney of Martinsville, Virginia wrote, ‘Because of this defect, judges and prosecutors, realizing the futility of going to trial with enemies of the law on the jury, have often accepted, by way of compromise, light punishments, because it was making the best of a hopeless situation’.\textsuperscript{382}

In modern times, there has been an apparent rise in juries nullifying marijuana cases in the USA.\textsuperscript{383} Whilst no statistics are available on the percentage of marijuana cases that are nullified by jury, some law firms are prepared to advise their clients in the use of this strategy.\textsuperscript{384} It is a common practice that ‘a judge will

\textsuperscript{380} Okrent, above n 21 264.
\textsuperscript{381} William B Smith, ‘Let Jury Majorities Decide’ in Durant, above n 109 454.
\textsuperscript{382} J R Taylor, ‘Dismiss Hostile Jurors’ in Durant, above n 109 474.
instruct a jury to apply the law as it is given to them whether they agree with the
law or not’. Advocating jury nullification to jurors is risky, as prosecutors
understandably disfavour such advice. Nevertheless as a grassroots force for
legal change, exercising the right to conscientiously refuse to convict an accused
charged with violating a perceived ‘bad law’ remains a powerful tool for those
seeking to drive reform. In the words of Paul Butler in The New York Times,
‘jurors need to know that they can say no’.

Prohibition was an extension of police power and the justice system was required
to grow with it. Kenneth Murchison stated this succinctly:

The Court contributed to the growth of doctrinal complexity in two ways. One was to
create new doctrinal categories by holding that the fourth amendment’s protection of
the home does not extend to ‘open fields’ that the amendment does not apply to the
taping of telephone conversations, and that the warrant requirement does not apply
to automobile searches. More commonly, the Court refined subcategories that had
remained undeveloped in pre-prohibition cases. For example, the Court expanded the
common law of arrest and struggled to define the scope of warrantless searches
conducted incident to such arrests. It also defined the degree of federal involvement
necessary to apply the fourth amendment to searches conducted in whole or in part by
state or local officers; it struggled to explain and to apply the probable cause standard
in a variety of circumstances; and it gave content to statutory and constitutional
provisions governing the issuance of search warrants.

In response to the difficulties in imposing Prohibition and the increased power of
organised crime to avoid legal consequences the court systems’ power to impose
justice upon the population was also increased. Whether this resulted in a more
‘just’ system in line with Rawls’ popular theories of distributive justice is debatable,
however it certainly made for a more tyrannical state.

The use of wiretap evidence in the prosecution of bootlegger Roy Olmstead was particularly controversial. Mabel Walker Willebrandt, who usually represented the government before the Supreme Court in Prohibition-related cases, refused to represent the government at oral arguments against Olmstead because she opposed the use of wiretap evidence. Following Justice Taft’s decision in Olmstead, more and more commentators concluded that Prohibition had become a threat to the rule of law in the United States. According to The Nation, the Court had endorsed a kind of ‘lawlessness’ in a misguided effort to enforce Prohibition. A leading business newspaper called wiretapping a ‘dirty business’ - the business of unacceptable federal intrusion into the lives of constituents. Even a leader of the Anti-Saloon League protested the acceptance of wiretapping, fearing that the practice would turn public opinion against Prohibition.391

Such practices did turn the general consensus against Prohibition. The feeling that the state was losing its battle against bootleggers, the rise in drunkenness, and the perception of a crime wave sponsored by alcohol all contributed to a feeling of failure. The large number of persons accused of the new crimes of alcohol manufacture, distribution and sale necessitated a high throughput of cases. The rise in plea-bargaining changed the balance between liberty and control in favour of more authoritarian police practices and exacerbated the practice of paramilitary policing rather than a more community-based style of public engagement.

In summary, based upon the expenditure of resources and reduction in civil liberties Prohibition cannot be seen as a success for the judiciary. In terms of expanded judicial powers and a greater access to authoritarian tools to exercise despotic rule Prohibition was a triumph. Common people exercising their right to jury nullification brought the legitimacy of the justice system into disrepute - the system works best when accepted hegemonomically, its participants unconsciously expressing their submission to not only ‘how things are’ but accepting that this is ‘how they should be’. This includes the system of plea-bargaining where often

391 Hamm, above n 273.
innocent people, to spare themselves the rigours and uncertainty of a jury trial, will plead guilty to a lesser charge or accept a lesser sentence - the province of the common folk. More well-resourced persons accused of a crime will exercise their power to escape conviction - the rigours of a jury trial being enough punishment for anyone of a higher social status. The criminal justice system, it would appear, requires an enormous throughput of the accused to achieve its present level of social control.
V CONCLUSION

Was Prohibition a success? Absolutely - at first. By all the metrics that matter - production and consumption, homicide and violence, petty crime and family life, drunkenness and health, economic prosperity and industrial safety . . . Prohibition achieved its stated aims. The results achieved in reducing the supply of alcohol is consistent with theory. Alcohol is a damaging drug with clear health and cognitive detriments to the imbiber. Liquor disinhibits the user, reduces capacity for social niceties and makes internal urgings more primal. Alcohol’s stress relieving and social lubricant effects in no way balance these detriments.

Prohibition appears to have increased industrial productivity in its early years, and contributed to the general rise in the standard of living of people throughout the USA before that nation’s plunge into economic depression from the end of 1929. It is difficult to measure the degree to which Prohibition directly contributed to economic growth. Costing Prohibition’s benefits represents an interesting avenue of enquiry for the economically inclined, though the data upon which such a calculation is based may no longer be in evidence.

The positive effects of alcohol prohibition diminished during the years that the National Prohibition Act was in effect. Under-resourcing, state and federal rivalry and a general lack of coherent political will marred the Act’s implementation. The US government was required to build a large interlinked structure of social control, and there were failures both administratively and in policing. The underwhelming public support for Prohibition affected both police and judicial functioning. Policing methods moved from community-based initiatives to a more paramilitary style. Plea-bargaining became more common as the court system sought to reduce its workload. This trend continued such that the USA, amongst all countries, is preeminent in the use of trial waivers.\(^\text{392}\)

Given the requirement for a jury trial of all those accused of Prohibition offences, public opinion attained greater sway. Juries discovered their ability to nullify a law, and there arose a fear for societal stability and the institutions of order. The fear that disrespect for one law may bleed over into disrespect for all laws is unfounded. There is no evidence that this occurs. People, it would seem, are able to distinguish between laws they wish to support and those they do not.393

There is no doubt that Prohibition provided opportunities for corrupt behaviour. The initial bureaucratic arrangements guaranteed that it would be so. These arrangements rewarded politically faithful subordinates and contributors with opportunities for graft, opportunities that in the highly remunerative illegal alcohol trade encouraged abuses of power. Prohibition provided general incentives for all government officials touched by the alcohol trade to indulge in corruption.

The economics of prohibition changed the way alcohol entrepreneurs did business. Alcohol consumption data (such as is available) suggests that an initial drop was followed by a rise as the period continued - the ban on beverage alcohol production, distribution and sale did not increase the price of alcohol sufficiently to deter consumption. Those who drank tended to consume spirits rather than beer because producers favoured distributing spirits rather than the riskier bulky beverages such as wine and beer. These changes in consumption patterns contributed to the lack of sustainably achieved positive health outcomes in some areas - alcohol-induced scarring of the liver known as cirrhosis became as frequent as before Prohibition, and people died from consuming commercially poisoned industrial alcohol.

Initially, Prohibition decreased government revenue and in the end failed to restrain much of alcohol’s social cost whilst adding an additional burden of enforcement expense. Much of the initial gains made by Prohibition evaporated by the turn of the decade. 1920s alcohol prohibition was difficult to implement - under-resourcing, state and federal rivalry and a general lack of coherent political will marred the Act’s enforcement. Nevertheless, given the enormous social cost

393 See chapter V.G: Crime
of alcohol, a cost that is not balanced by the prosocial effects of alcohol consumption, even those remaining gains can be considered sufficient to justify the continued implementation of alcohol prohibition.

A rigorous examination of Prohibition disfavours the view that the National Prohibition Act of 1919 lacked success in achieving its stated aims and objectives. Academic works that focus, for instance, upon federal imprisonment rates as proof of a ‘crime wave’ are mistaken. There was no crime wave. Prohibition functioned to decrease the rate of crime in general, as its proponents said that it would. Productivity increased slightly; family, home and community life became safer and calmer than it would have been without the intervention of Prohibition.

The repeal of Prohibition frames its public perception as a failure. Admitting that a national reform, proudly embedded into the Constitution, was so poorly designed, implemented and advertised that it had to be repealed thirteen years later does not bolster the nation’s perception of its character. It plays far better to say that a national prohibition of alcoholic beverages is inherently unworkable and against the interests of the public. This thesis indicates that, given favourable conditions, alcohol prohibition should be little more difficult to enforce than the interdiction of other drugs.

The ‘noble experiment’ of Prohibition was not so singular as to never be repeated - national drug prohibition has been operating with a qualified level of success since 1937. A plethora of studies indicate that it is difficult to justify the present regime of drug prohibition on health or economic grounds, a matter beyond the scope of this thesis.394 Nevertheless, the enormous unrecovered cost of alcohol to the US nation presents a forceful argument for this particular drug’s prohibition. Alcohol’s estimated social costs of $185 billion (p32) far exceed the present costs of enforcing drug prohibition at $41 billion (p56). Were taxation receipts diverted

<394 See, e.g., Caitlin Elizabeth Hughes and Alex Stevens, ‘A Resounding Success or a Disastrous Failure: Re-Examining the Interpretation of Evidence on the Portuguese Decriminalisation of Illicit Drugs: A Resounding Success or a Disastrous Failure’ (2012) 31(1) Drug and Alcohol Review 101.
from drug to alcohol prohibition the US could reap a large net economic and social benefit.\textsuperscript{395}

Prohibition’s repeal in 1933 functioned to skew the reporting of this period of history. The reason for this is a very human one. As quoted at the start of this thesis: ‘... with whom does the historical writer of historicism actually empathize. The answer is irrefutably with the victor’.\textsuperscript{396} The victory of anti-Prohibition forces has allowed, to an extent, the rewriting of history.

It is understandable that so many writers both academic and mainstream decry the 1920s reform of alcohol prohibition. Reporting bias changed the weighting and availability of data both during and after the era of Prohibition. Prohibition became a poster child for those writers seeking to promote an unrestricted trade in goods and services, individual ‘freedoms’, and entrenched investment structures. Accordingly, the general tenor of information available to the researcher tends to favour these ideologies and interests.

Despite the facts not being in evidence in this thesis (being beyond the narrow scope possible in a Masters), researching this area reveals the reason alcohol prohibition ultimately failed to endure. It was the lack of unified political will to promote and enforce the National Prohibition Act. The government and other hegemonic forces in the US did not speak in a united voice over the issue of alcohol prohibition. Their narrative surrounding the banning of alcohol was diffuse, and a large proportion of the public remained unconvinced of Prohibition’s benefits. Accordingly, the Act was insufficiently popular and the US did not commit the resources required to successfully prosecute this initiative. The intersection between the politics of Prohibition and law represents a rewarding avenue of research arising from this thesis.

\footnote{395 See, e.g., National Drug Intelligence Center (U.S.), \textit{The Economic Impact of Illicit Drug Use on American Society} (U.S. Department of Justice, National Drug Intelligence Center, 2011) \<https://books.google.com.au/books?id=S7evnQEACAAJ>.\footnote{396} Benjamin et al, above n 1.}
Perhaps Charles Whitebread best describes the politician’s view of Prohibition in his speech to the California Judges Association 1995 annual conference. Defining the attitude of the 1919 Congress as it enacted Prohibition, he said ‘And as soon as it passed, what do you think they said? "Well, what do you know? Success. Let's have a drink.”’ 397

Bibliography

A Articles


Collingwood, Jane, Alcohol Consumption and Genetics | Psych Central (17 May 2016) <http://psychcentral.com/lib/alcohol-consumption-and-genetics/0004943>
Collins, John, ‘Governing the Global Drug Wars’ <http://eprints.lse.ac.uk/47122/>


Futterman, Craig B, Chaclyn Hunt and Jamie Kalven, ‘“They Have All the Power”: Youth/Police Encounters on Chicago’s South Side’ <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2860351_code249436.pdf?abstractid=2754761 &mirid=1>

Gilmore, Eugene A, ‘Liberalizing the Volstead Act’ (1932) 18 Iowa L. Rev. 22


<http://dx.doi.org/10.1162/002219505323382942>


<http://cf.linnbenton.edu/artcom/social_science/clarkd/upload/The%20Founding%20Fathers---Hofstadter.pdf>


<http://jleo.oxfordjournals.org/content/early/2014/10/22/jleo.ewu015.abstract>


Hughes, CE and A Stevens, ‘What Can We Learn From The Portuguese Decriminalization of Illicit Drugs?’ (2010) 50(6) British Journal of Criminology 999


Miller, Justin, ‘The Compromise of Criminal Cases’ (1927) 1 S. Cal. L. Rev. 1


Morgan, Howard Wayne and Howard Wayne, Yesterday’s Addicts: American Society and Drug Abuse, 1865-1920 (University of Oklahoma Press Norman, Oklahoma, 1974)


Paquet, Gilles, States, Communities and Markets: The Distributed Governance Scenario <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.571.1896&rep=rep1&type=pdf>


Streppel, M T, M C Ock’e, H C Boshuizen, F J Kok, D Kromhout., ‘Long-Term Wine Consumption Is Related to Cardiovascular Mortality and Life Expectancy Independently of Moderate Alcohol Intake: The Zutphen Study.’ [2009] (63 (7)) Journal of Epidemiology and Community Health 534 <https://hal.archives-ouvertes.fr/hal-00477884/document>


‘The A. M. A. and the Volstead Act’ (1927) 26(6) California and Western Medicine 808


Van Hout, Marie Claire and Tim Bingham, ‘Responsible Vendors, Intelligent Consumers: Silk Road, the Online Revolution in Drug Trading’ (2014) 25(2) International Journal of Drug Policy 183

Van Zile, Caroline, ‘Community Policing in New Haven: Social Norms, Police Culture, and the Alleged Crisis of Criminal Procedure’


Vattel, E de, Traduccion de Fernando Murillo Rubiera; Vease Le Droit Des Gens Ou Principes de La Loi Naturelle Applique a La Conduite et Aux Affaires Des Nations et Des Souverains (Londres, 1768)


Weatherburn, Don and Jones, Craig and Freeman, Karen and Makkai, Toni, The Australian Heroin Drought and Its Implications for Drug Policy (NSW Bureau of Crime Statistics and Research, 2001)


Williamson, KM, ‘The Effects of Varying the Rate of the Tax on Spirits’ (1920) 17(132) Quarterly Publications of the American Statistical Association 451


B Books

Allen, Martha Meir, Alcohol, a Dangerous and Unnecessary Medicine: How and Why; What Medical Writers Say (Department of Medical Temperance of the National Woman’s Christian Temperance Union, 1900) <http://www.gutenberg.org/ebooks/26774.epub.images?session_id=9071b9013107d4ed738713baee892aa5e814d61c>


Benjamin, Walter, James Luther Adams and Oldrich Prochazka, On the Concept of History (Classic Books America New York, 2009)

<https://ebooks.adelaide.edu.au/b/blackstone/william/comment/comment.epub>


Buenker, John D and Joseph Buenker (eds), *Encyclopedia of the Gilded Age and Progressive Era* (Sharpe Reference, 2005)


Debar, Joseph (ed), *Prohibition: Its Relation to Temperance, Good Morals and Sound Government: Selections from the Writings of Men, Who Have given Thought and Study to This Question from the Standpoint of Both Theory and Practice* ([publisher not identified], 1910)


Durant, W C, *Law Observe: Shall the People of the United States Uphold the Constitution?* (Durant award office, 1929)


Okrent, Daniel, Last Call: The Rise and Fall of Prohibition, 1920-1933 (Scribner, 2010)


Peters, Rudolph, Crime and Punishment in Islamic Law Theory and Practice from the Sixteenth to the Twenty-First Century (Cambridge University, 2005)


Pound, R and R Christenson, Criminal Justice in America (Transaction Publishers, 1997)


Ritchie, Albert Cabell, The Enforcement of the Eighteenth Amendment and the Volstead Act from the Point of View of the Individual States (Association Against the Prohibition Amendment, 1929)

Robinson, Neal, Discovering the Qur’an: A Contemporary Approach to a Veiled Text (SCM Press, 2003)


Towne, C H, *The Rise and Fall of Prohibition: The Human Side of What the Eighteenth Amendment and the Volstead Act Have Done to the United States* (Macmillan, 1923)  
http://archive.org/details/risefallofprohib00town


Warburton, Clark, *The Economic Result of Prohibition* (Columbia University Press, 1932)


### C Reports


http://www.nap.edu/openbook.php?record_id=114


*Changing Behaviour: A Public Policy Perspective* (Australian Public Service Commission, 2007)  


Graycar, Adam et al, ‘Drugs and Law Enforcement: Actions and Options’ [2002] *South Australian Drugs Summit. Canberra: Australian Institute of Criminology*


Hakkarainen, Pekka et al, *Discussing drugs and control policy: comparative studies on four Nordic countries* (Nordic Council for Alcohol and Drug Research, 1996)


**D Cases**

*Banco Nacional de Cuba v. Sabbatino* (1964) 376 U.S. 398

*Hamilton v. Kentucky Distilleries & Warehouse Co.* (1919) 251 U.S. 146

*Hawke v. Smith (No 1)* (1920) 253 US 221

*Jacob Ruppert v. Caffey, U. S. Atty., et al.* (1920) 251 U.S. 264

*Leisy v. Hardin,* (1890) 135 U.S. 100

*Mugler v. Kansas* (1887) 123 U.S. 623

*Pollock v. Farmers’ Loan and Trust Company* (1895) 157 U.S. 429

*United States v. Berkeness* (1927) 275 U.S. 149

**E Legislation**

*Constitution of the Commonwealth of Massachusetts,* 1780 <https://malegislature.gov/Laws/Constitution>


**F Other**


21 May 1914, Page 8 - at Newspapers.com <http://www.newspapers.com/image/78157695/>


About the Mises Institute (10 June 2014) <https://mises.org/page/1448/About-The-Mises-Institute>

Abraham Lincoln’s Temperance Address of 1842 (31 October 2014) <http://www.abrahamlincolnonline.org/lincoln/speeches/temperance.htm>

Abraham Lincoln’s Temperance Address of 1842 (31 October 2014) <http://www.abrahamlincolnonline.org/lincoln/speeches/temperance.htm>


Alcohol Death Rate By Country (8 September 2014) <http://www.worldlifeexpectancy.com/cause-of-death/alcohol/by-country/>


Anti-Federalist Party : Kullee (11 November 2013) <http://kullee.myblog.it/archive/2012/01/18/anti-federalist-party.html>

Avalon Project - Notes of the Secret Debates of the Federal Convention of 1787, Taken by the Late Hon Robert Yates, Chief Justice of the State of New York, and One of the Delegates from That State to the Said Convention (14 October 2013) <http://avalon.law.yale.edu/18th_century/yates.asp>

BAC Charts Blood Alcohol Calculator <http://bloodalcoholcalculator.org/bac-charts/>


Beecher, Henry Ward- Quote About Equality, God , Labor Force, oppression will all will, working Class <http://politicalquotes.org/node/25346>


Brown, David L, Seven Reasons Christians Should Not Drink (February 2002) <http://www.logosresourcepages.org/Believers/drinking.htm>


Capone Convicted Of Dodging Taxes; May Get 17 Years <http://www.nytimes.com/learning/general/onthisday/big/1017.html>


*Drinking in America: A History* <http://www.hoboes.com/Politics/Prohibition/Notes/Drinking/>


*Drugs That Cause Most Harm: Scoring Drugs | The Economist* <http://www.economist.com/blogs/dailychart/2010/11/drugs_cause_most_harm>

*Dry vs Wet States* <http://alt-reality.deviantart.com/art/Dry-vs-Wet-States-153257524>


*Economic Contributions of the Distilled Spirits Industry | DISCUS* <http://www.discus.org/economics/>


History of the Non-Medical Use of Drugs in the United States
<http://druglibrary.org/schaffer/history/whiteb1.htm>

How Liquor Taxes Led to Big Government (3 January 2013) Frontpage Mag

Implementing Legislation For 1919 Prohibition Of Intoxicating Beverages
<http://www.lectlaw.com/files/stf03.htm>

‘Incarceration in the United States’
<https://en.wikipedia.org/w/index.php?title=Incarceration_in_the_United_States&oldid=738356827>


Lights, Camera... Alcohol? | Neuroanthropology <http://neuroanthropology.net/2009/05/29/lights-camera-alcohol/>


Mackenzie, John, Condensed Temperance Facts for Christians : With Remarks on Ancient and Modern Wines and Malt Liquors (Trubnek and Co, 1868)
<http://archive.org/stream/condensedtempera00mack/condensedtempera00mack_djvu.txt>


Mann, Jim, British Drugs Survey 2014: Drug Use Is Rising in the UK – but We’re Not Addicted (5 October 2014) the Guardian <http://www.theguardian.com/society/2014/oct/05/-sp-drug-use-is-rising-in-the-uk-but-were-not-addicted>

Marihuana: The Devil’s Weed! (1936 Drug Propaganda Movie) YouTube
<http://www.youtube.com/watch?v=7YBk4JW7bSc>

mathscinotes, The Drinking History of the US (12 July 2013) Math Encounters Blog
<http://mathscinotes.com/2013/07/the-drinking-history-of-the-us/>

‘Material Safety Data Sheet: Methylated Spirits’

McMahon, Tim, Inflation and CPI Consumer Price Index 1920-1929 (2017)

Medew, Julia, How Much Is Your Hangover Costing the Economy in ‘Sick Days’? (11 August 2015) The Sydney Morning Herald


<http://www.nytimes.com/1989/10/16/opinion/actually-prohibition-was-a-success.html>

Motorist Sentenced to 80 Lashes for Drink Driving <http://7daysindubai.com/news-13088/>


Murphy, Kim, Juries Are Giving Pot Defendants a Pass (24 December 2010) Los Angeles Times

Mustafa, Awad, Lawyer Warns Liquor Licensing Laws ‘Apply to All’ (27 December 2010) The National

Nagourney, Adam, Attacking Drugs, Dole Takes On Entertainment Industry (19 September 1996)

Narberth Civic Association, Our Town, Narberth, PA (February 12, 1932) (1932)
<http://archive.org/details/OurTownNarberthPA19320212>

Narcotic Drugs and Psychotropic Substances, opened for signature 20 December 1988, 1582 UNTS 95, entered into force 11 November 1990, Chapter VI No. 19


Oklahoma Farmer (Guthrie, Okla.), Vol. 15, No. 25, Ed. 1 Wednesday, October 17, 1906 <http://gateway.okhistory.org/ark:/67531/metadc88123/m1/16/zoom/>

Omaha Daily Bee (Omaha [Neb.]) 1871-1922, August 15, 1909, Editorial, Image 14’ (1909/08/15) 6 <http://nebnewspapers.unl.edu/lccn/sn99021999/1909-08-15/ed-1/seq-14/>


Prohibition and the 18th Amendment. <http://www.rustycans.com/history/prohibition.html>

Prohibition in the United States - Wikipedia, the Free Encyclopedia <http://en.wikipedia.org/wiki/Prohibition_in_the_United_States>

Prohibition Legal Definition <http://www.duhaime.org/LegalDictionary/P/Prohibition.aspx>

Prohibition Pictures <http://diglib.lib.utk.edu/t/text/gifcvtdir/0014_000052_000216_0000/0014_000052_000216_0001.jpg>

Prohibition: Timeline | PBS [http://www.pbs.org/kenburns/prohibition/prohibition-nationwide/timeline/#]


psmith, Who Was Killed in America’s Drug War Last Year? (3 January 2013) StoptheDrugWar.org [http://stopthedrugwar.org/chronicle/2013/jan/02/who_was_killed_americas_drug_war]


Reagan’s Template | The Carleson Center for Welfare Reform [http://theccwr.org/reagan-template.html]


Skoglund, Nancy Galey, University of Rochester Library Bulletin: The ‘I’m Alone Case’ A Tale from the Days of Prohibition | RBSCP (Spring 1968) [http://rbscp.lib.rochester.edu/1004]


Sutton, Mike, BestThinking / Thinkers / Science / Social Sciences / Sociology / Mike Sutton (Blog) - The Bootleg Myth Is Bust: More Etymology Dysology Uncovered (22 February 2013) [https://www.bestthinking.com/thinkers/science/social_sciences/sociology/mike-sutton?tab=blog&blogpostid=20326]


The Disappearing Trial (2017) Fair Trials [https://www.fairtrials.org/campaigns/the-disappearing-trial/]

The Eighteenth Amendment (12 December 2012) archive.is [http://archive.is/61hh]

Changing Behaviour: A Public Policy Perspective (Australian Public Service Commission, 2007)


