A HUNDRED-YEAR HANGOVER: THE PROHIBITION ERA'S CRIMINAL PROCEDURE LEGACY

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I. INTRODUCTION

"[H]ard cases make bad law."[1] So do hard times, such as war – hot or cold wars, declared or undeclared wars, even metaphorical wars. But wars end, or, at least, go dormant. Supreme Court cases issued in wartime, on the other hand, outlive their origin stories due to inertia, stare decisis, the passive nature of Article III, or a combination of such factors.[2] A classic example, of course, is *Korematsu v. United States*,[3] which upheld an executive order requiring internment of Japanese-Americans during World War II and was not repudiated by the Supreme Court until 2019.[4]

A largely overlooked example of the "hard times, bad law" phenomenon is the Supreme Court's criminal procedure caselaw from the Prohibition Era—the nation's short-lived "war" on alcohol.[5] That thirteen-year interlude (1920–1933) in United States history was the product of the Eighteenth Amendment and of ensuing (almost overnight) federal legislation, including the Volstead Act, which criminalized the manufacture, sale, and transportation of almost all alcoholic beverages.[6] During Prohibition, the Supreme Court decided scores of criminal procedure cases, almost always siding with the government.[7] Unlike *Korematsu*, that body of law has never been repudiated by the Supreme Court; it endures and thrives today, notwithstanding the Eighteenth Amendment's 1933 repeal.[8]

The brunt of the impact has been in the Fourth and Fifth Amendment areas. From 1920 to 1933, the Taft Court decided twenty Fourth Amendment cases,[9] which still inform the current regime of search-and-seizure law. Among other highlights, the Taft Court fundamentally altered the existing law

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1. N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

2. *See* Edward B. Whitney, Doctrine of Stare Decisis, 3 MICH. L. REV. 89, 94 (1905). *See generally* Sepehr Shahshanani, *When Hard Cases Make Bad Law: A Theory of How Case Facts Affect Judge-Made Law*, 110 CORNELL L. REV. 963 (2025) (discussing implications of standing on opportunities to revisit precedent).

3. 323 U.S. 214 (1944), *overruled by*, Trump v. Hawaii, 585 U.S. 667 (2019).

4. *Id*. at 220, 223.

5. *See, e.g.,* United States v. Lanza, 260 U.S. 377, 382 (1922); Brede v. Powers, 263 U.S. 4, 10, 13 (1923); Hester v. United States 265 U.S. 57, 59 (1924). *See generally infra* notes 31–50 and accompanying texts (discussing similarities and differences between Prohibition and the late twentieth century war on drugs).

6. U.S. CONST. amend. XVIII (repealed 1933); *e.g.*, National Prohibition Act, ch. 85, tit. II, § 3, 41 Stat. 305 (1919) (commonly known as the Volstead Act for its lead proponent, Representative Andrew Volstead), *repealed by* Liquor Law Repeal and Enforcement Act, ch. 740, § 1, Pub. L. No. 74-347, 49 Stat. 872 (1935).

7. *See, e.g.*, *Lanza*, 260 U.S. at 382; *Brede,* 263 U.S. at 10, 13; *Hester*, 265 U.S. at 59.

8. *See infra* Part III; U.S. CONST. amend. XXI, § 1 (repealing the Eighteenth Amendment and ending national Prohibition in 1933).

9. KENNETH M. MURCHISON, FEDERAL CRIMINAL LAW DOCTRINES: THE FORGOTTEN INFLUENCE OF NATIONAL PROHIBITION 48 (1994).

of probable cause and by re-allocating probable cause determinations from the judiciary to the police, paved the way for the broad discretion police enjoy today. The Taft Court was also willing to overlook criminal and other unsavory conduct by law enforcement officers, forsaking the imperative of "judicial integrity" that prevailed both before Prohibition and then again briefly during the early years of the Warren Court.[10] Prohibition also begat the "dual sovereignty" doctrine, the mystical notion that a person owes "allegiance" to two distinct (state and federal) "sovereigns" and therefore can be prosecuted in both state and federal court for the same crime, notwithstanding the Double Jeopardy clause of the Fifth Amendment.[11]

Prohibition, which Professor Robert Post has described as the "greatest expansion of federal regulatory authority since Reconstruction," acquainted hundreds of thousands of Americans with the federal criminal justice system for the first time.[12] The consequent explosion of the federal courts' criminal caseload accelerated the systematic use of plea bargaining as a means of resolving cases, the predominant hallmark of our modern criminal procedure landscape.[13] Prohibition may not have directly led to the ultimate "triumph" of plea bargaining,[14] but Prohibition normalized the practice to a point of no return.

However, plea bargaining's triumph was not due to any direct action by the Taft Court. The Court said nothing about plea bargaining during the Prohibition era, which is, of course, not surprising inasmuch as a guilty plea—an agreement between a prosecutor and defendant and accepted by a judge—normally leaves the parties without a grievance to appeal.[15] Yet the Court had to know what was happening on the ground, as tens of thousands of new federal criminal prosecutions were being absorbed every year by the judicial system over which it presided.[16] The Court had, in fact, eased this absorption by ruling that Volstead Act violations were not "infamous" crimes under the Fifth Amendment, and could, therefore, be initiated without a grand jury

10. *See infra* Sections V.A, V.B.4.

11. *See Lanza*, 260 U.S. at 382.

12. *See* Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 2, 116–17 (2006).

13. *See generally* Milton Heumann, *A Note on Plea Bargaining and Case Pressure*, 9 L. & SOC'Y REV. 515 (discussing the correlation between caseloads and plea bargaining). Even the Supreme Court finally acknowledged, in 2012, that plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system." Missouri v. Frye, 566 U.S. 134, 144 (2012).

14. *See* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 866 (2000).

15. *See id.* at 1043.

16. *See* CHARLES MERZ, THE DRY DECADE 332–33 (1931).

indictment.[17] And, in *Kercheval v. United States*,[18] the Court rejected a prosecutor's attempt to use a previously withdrawn guilty plea as trial evidence, weighing in emphatically on the conclusive and final nature of guilty pleas.[19]

Counterintuitively, at least from a twenty-first century political perspective, the Taft Court was less reflexively pro-law enforcement in the few criminal procedure matters it had involving race. In *Moore v. Dempsey,*[20] the Court reversed the capital murder convictions of five black men from Arkansas on charges arising out of a "race riot" precipitated by a violent white mob.[21] The trial of the nine defendants had taken only forty-five minutes, the verdict had been returned in five minutes, and an angry and armed mob had hovered outside the courthouse during the proceedings.[22] Although the facts of this "judicial lynching" were appalling, prior to *Moore*, the Supreme Court had reversed state court criminal convictions in just a handful of cases, all in which states had willfully and blatantly refused to empanel black jurors.[23] And *Moore* effectively overruled a 1915 precedent in which the Court had upheld a conviction of a white defendant under similar circumstances, where the defendants were also tried in a setting denominated by a bloodthirsty mob fueled not by racism but by antisemitism.[24]

Moreover, in *Aldridge v. United States*,[25] the Court reversed a federal conviction of a black defendant alleged to have killed a white police officer.[26] The Court found that the trial judge abused his discretion in refusing to permit voir dire of potential jurors for racial bias.[27] In doing so, the Court flatly rejected the government's argument that such questioning would be unseemly:

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17. *See* Brede v. Powers, 263 U.S. 4, 10, 13 (1923).

18. 274 U.S. 220 (1927).

19. *Id.* at 223 ("A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence.").

20. 261 U.S. 86 (1923).

21. *See id.* at 92.

22. *Id.* at 89–90.

23. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 118 (2004).

24. *Compare Moore*, 261 U.S. at 93 (McReynolds, J., dissenting) ("I can not agree now to put [*Frank v. Mangrum*] aside and substitute the views expressed by the minority of the court in that case."), *with* Frank v. Mangum, 237 U.S. 309, 344–45 (1915) (upholding the conviction despite the allegations of "hostile public sentiment and disorder in and about the court room" that "improperly influenc[ed] the trial court and the jury").

25. 283 U.S. 308 (1931).

26. *Id.* at 315; *id.* (McReynolds, J., dissenting).

27. *See id.* at 314–15 (majority opinion).

> The argument is advanced on behalf of the government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.[28]

The government's point rejected by the Court in *Aldridge,* that asking voir dire questions about racial bias is indecorous,[29] may seem frivolous today but probably was not by 1931 standards. Indeed, the same point was actually expressed by the Supreme Court itself in 1976—forty-five years later—where the Court refused to reverse a conviction by a trial judge who failed to voir dire jurors for racial prejudice in a case where a black defendant was convicted of killing a white security guard.[30]

It is tempting to analogize Prohibition to the so-called War on Drugs, a more recent metaphorical war declared in the 1970s or 1980s, depending on how you want to define it. Both wars were fought against an enemy that did not claim victims who would complain to the police.[31] Both wars had popular support, particularly in their beginnings.[32] Both wars, in some respects, targeted unpopular minority groups.[33] And, as I do here with respect to Prohibition, academics have argued that the War on Drugs skewed the preexisting criminal procedure landscape.[34] For example, in *Drug Exceptionalism*, Professor Erik Luna argued that "the Constitution seems to bend when the criminal procedure rights of drug offenders are at stake."[35] The

28. *Id*.

29. *See id.* at 316 (McReynolds, J., dissenting).

30. *See* Ristaino v. Ross, 424 U.S. 589, 596 n.8, 598 (1976) ("In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption as a Per se rule that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion.").

31. *See* LISA MCGIRR, THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE 48 (2016).

32. *Id.*

33. *Id*.

34. *See, e.g.*, Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1399 (1993); David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 245 (1994); Steven Wisotsky, *Crackdown: The Emerging 'Drug Exception' to the Bill of Rights*, 38 HASTINGS L. J. 889, 889 (1987); Thomas Regnier*, The "Loyal Foot Soldier": Can the Fourth Amendment Survive the Supreme Court's War on Drugs?*, 72 UMKC L. REV. 631, 645 (2004).

35. Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 757 (2002). Other commentators have made the same or similar points. *See, e.g.*, Finkelman, *supra* note 34, at 1399; Rudovsky, *supra* note 34; Wisotsky, *supra* note 34; Regnier, *supra* note 34.

same point was even made by a sitting Supreme Court Justice; in a 1991 dissent, Justice Stevens lamented that the Court had become but a "loyal foot soldier in the Executive's fight against crime."[36]

However, the analogy between Prohibition and the War on Drugs is inapt for two main reasons. First, the modern Court's hard drift to the right was well under way before the heyday of the War on Drugs, responding to rising crime rates generally and also to President Nixon's fulfilled campaign promises to appoint so-called "strict constructionists" to the Supreme Court.[37] For example, the foundational precedent in what later became the police's ability to leverage routine traffic stops into the drug interdiction weapons was the 1973 decision in *Schneckcloth v. Bustamonte,*[38] a garden-variety stolen checks case. The weakening of *Miranda* had also begun by the early 1970s,[39] and the legitimizing of stop-and-frisk policing after *Terry v. Ohio*,[40] was actually a product of the 1960s Warren Court. In short, the anti-defendant trajectory of the Court was readily apparent well before the War on Drugs was declared. On the other hand, during Prohibition, the Taft Court operated against a criminal procedure backdrop that was modest in volume but in substance had demonstrated a robust commitment to the Fourth and Fifth Amendments and the values underlying them. The Taft Court pivoted sharply and abruptly away from that backdrop—suddenly, not gradually—and, in a short period of time, decided a raft of criminal procedure cases favoring the government.

Second, as a matter of social control, Prohibition was both more and less extreme than the War on Drugs. Prohibition was more extreme in that it almost overnight attempted to regulate by criminalization an activity engaged in by the majority of adult Americans.[41] Illegal drug use was never as widespread as alcohol consumption.[42] On the other hand, Prohibition was less extreme than the War on Drugs in that the Volstead Act, unlike later federal drug

36. California v. Acevedo, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting).

37. *See Nixon and the Supreme Court*, RICHARD NIXON PRESIDENTIAL LIBR. & MUSEUM (Sep. 22, 2021), https://www.nixonlibrary.gov/news/nixon-and-supreme-court [https://perma.cc/NW7C-5SKD] (stating, in a rough draft of a campaign speech, that Supreme Court vacancies would be filled by strict constitutionalists).

38. 412 U.S. 218 (1973) (upholding vehicle searches based on consent even where the driver had not knowingly waived his Fourth Amendment rights).

39. *See, e.g.,* Harris v. New York, 401 U.S. 222, 226 (1971) (holding that an un-Mirandized statement can be used for impeachment).

40. 392 U.S. 1, 30 (1968).

41. *See* National Prohibition Act, ch. 85, tit. II, § 3, 41 Stat. 305 (1919) (repealed 1935).

42. *Compare A Social History of America's Most Popular Drugs*, PBS: FRONTLINE, https://www.pbs.org/wgbh/pages/frontline/shows/drugs/buyers/socialhistory.html [https://perma.cc/5P4M-XFU9] (discussing the prevalence of illegal drug use), *with* STEVE OLSON & DEAN GERSTEIN, ALCOHOL IN AMERICA: TAKING ACTION TO PREVENT ABUSE 1 (1985) (discussing the prevalence of alcohol consumption).

legislation, did not criminalize mere possession or use of alcohol.[43] And, whereas the War on Drugs was fueled by draconian prison sentences and mass incarceration, Prohibition's criminal penalties were mild.[44] Most Volstead Act violations were misdemeanors,[45] although many crimes regarded as serious today were also misdemeanors then.[46] But the penalties, a better indicator of harshness, were light.[47] The defendants in *Carroll v. United States*,[48] who, for example, aggressively challenged their indictment by pretrial motions before being ultimately convicted at trial, were sentenced only to the statutory maximum penalty of a $500 fine (about $9,000 today).[49]

In short, Prohibition's crusade against alcohol was not perfectly analogous to the sort of "total war" as the War on Drugs. But the Taft Court enabled law enforcement as if it were. In doing so, the Court served as more than the mere "foot soldier" of executive enforcement policy identified by Justice Stevens.[50] In many respects, the Court led the charge.

The self-appointed leader of this charge was Chief Justice William Howard Taft, who wrote the leading criminal procedure opinions of the Prohibition period.[51] Ironically, Taft had been vocally and staunchly opposed to Prohibition—both during and after his presidency—before the adoption of the Eighteenth Amendment in 1919 and his appointment to the Court in 1920.[52] Indeed, in 1913, as President, he had vetoed the Webb-Kenyon Act, a precursor to national prohibition, which criminalized the transportation of liquor from a wet state to a dry one.[53] Taft's opposition to Prohibition was largely the product of his devotion to federalism and his cynical view of legislation.[54] Prohibition, Taft contended, "was a direct blow at local self-government and at the integrity of our Federal system, which depended on

43. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 180 (2011).

44. *See id.* at 181.

45. *See, e.g.*, National Prohibition Act, ch. 85, tit. II, §§ 21, 29, 41 Stat. 305 (1919) (repealed 1935).

46. *See National Affairs: Refinements*, TIME (June 9, 1930), https://time.com/archive/6745006/national-affairs-refinements [https://perma.cc/3NTN-3DNL] (stating that the Jones Act, passed in 1929, upgraded violations of the Volstead Act from misdemeanors to felonies).

47. *See* National Prohibition Act, §§ 21, 29.

48. 267 U.S. 132 (1925).

49. *See id.* at 162; SARAH A. SEO, POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM 114 (2019).

50. *See* California v. Acevedo, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting).

51. *See, e.g.*, *Carroll,* 267 U.S. at 132; Olmstead v. United States, 277 U.S. 438, 438 (1928).

52. *See* Post, *supra* note 12, at 87–88 & nn.305–14.

53. *See* DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION 58 (2009). Taft's veto was overridden by Congress. *Id*.

54. *See* Post, *supra* note 12, at 26 n.309.

preserving the control by the States of parochial and local matters."[55] Further, he rejected the proposition that "any reform could be accomplished merely by legislation," believing that federal statutes less reflected national sentiment than legislators' views on what "would profit them politically."[56]

In 1918, Taft predicted that Prohibition would be "an irretrievable national blunder" that would doom federal law "to contempt and ridicule" and "hang a permanent millstone around our necks."[57] This was a self-fulfilling prophecy. Once the Eighteenth Amendment was effective and Taft was on the Court, he righteously repressed his anti-prohibition views and, it would seem, overcompensated for his previous impulses by favoring the interests of Prohibition's enforcers at every turn.[58] As a leading biographer of Taft would later put it, "[i]t sometimes seemed as though there were no lengths to which [Taft] would not go, and along which he would not attempt to lead the court, in his determination to uphold prohibition enforcement."[59] Any accounting of the "permanent millstones" that Prohibition hung around the nation's neck has to include the Taft Court's Prohibition Era judicial decisions that fundamentally altered the course of federal criminal procedure and remain entrenched today. Three of those millstones are the focus of this Article.

Part II below describes the existing state of criminal procedure law prior to Prohibition. During this period, both the Fourth and Fifth Amendments were well on their way to becoming robust sources of protection for the rights of criminal defendants. The subsequent three parts of the article discuss different aspects of the Prohibition era's criminal procedure legacy.

A highlight of the pre-Prohibition period was *Boyd v. United States*,[60] where the Court upheld both Fourth and Fifth Amendment challenges to a trial subpoena for the defendants' business records in a civil forfeiture action.[61] Extolling the values protected by the Bill of Rights, the Court rejected the government's claim that the subpoena was a necessary tool of law enforcement.[62] In *Weeks v. United States*,[63] relying on *Boyd*, the Court adopted the exclusionary rule for criminal cases in federal court, reversing a conviction where the government's evidence at trial was obtained in a warrantless search of the defendant's home.[64] And, on the very cusp of

55. *Id*.; *For Local Option Mr. Taft Explains: Ex-President Amplifies Recent Address in Which He Opposed National Prohibition*, N.Y. TIMES, Jan. 24, 1915, at 10.

56. *See* Post, *supra* note 12, at 86.

57. *See* Letter from William Howard Taft to Allen B. Lincoln (Sep. 2, 1918) (on file with Libr. of Cong., William Howard Taft Papers, *microformed* on Reel 197).

58. *See, e.g.*, *infra* Section III.A.

59. HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 989 (1939).

60. 116 U.S. 616 (1886).

61. *See id.* at 634–35.

62. *See id.* at 629.

63. 232 U.S. 383 (1914).

64. *Id*. at 393–94.

Prohibition, in 1920, the Court in *Silverthorne Lumber Co. v. United States*[65] rejected the government's effort to obtain a subpoena from a defendant for use at trial using documents it had originally obtained in an illegal search but had been ordered to return.[66] The Court described the government's two-step as an "outrage" and held that the tainted materials could not be used at all.[67]

As for the Fifth Amendment in other contexts, the pre-Prohibition Court was also solicitous of constitutional rights. In *Counselman v. Hitchcock*,[68] the Court invalidated a federal immunity statute that "[did] not supply a complete protection from all the perils against which the [Fifth Amendment's] constitutional prohibition was designed to guard[] and [was] not a full substitute for that prohibition."[69] The Court relied on *Boyd* and the values it embraced, and was unmoved by the government's argument that its ruling "would nullify most investigations instituted under legislative authority."[70] And, in *Bram v. United States*,[71] the Court reversed a conviction because the defendant's confession was the result of an interrogation tainted "either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted."[72] Channeling the spirit of *Boyd*, the Court held that the Fifth Amendment rights at issue "had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change."[73]

Part III focuses on the long-term Fourth Amendment influence of *Carroll v. United States*, a case that is taught in criminal procedure courses as standing solely for the so-called "automobile exception" to the Fourth Amendment's warrant requirement.[74] I will attempt to show that *Carroll*'s legacy runs much more deeply and more perniciously than this. In doing so, I aim to expand on arguments recently made by Professors Sarah Seo and Tracey Maclin.[75]

Carroll is the godfather of the wide latitude that the Supreme Court has conferred on police in the last century.[76] In permitting a police officer's

65. 251 U.S. 385 (1920).
66. *See id*. at 391.
67. *See id.* at 391–92.
68. 142 U.S. 547 (1892).
69. *Id.* at 585–86.
70. *See id.* at 564–65.
71. 168 U.S. 532 (1897).
72. *Id.* at 547, 565.
73. *Id.* at 544.
74. *See* Tracey Maclin, *Cops and Cars: How the Automobile Drove Fourth Amendment Law*, 99 B.U. L. REV. 2317, 2337 (2019).
75. *See* SEO, *supra* note 49, at 114–16.
76. *See* Maclin, *supra* note 74, at 2339 ("*Carroll*'s willingness to find probable cause on these facts "'signaled that courts could and would defer to officers' claimed need for an investigatory search rather than perform a vigorous, independent review.'" (quoting SEO, *supra* note 49)).

assessment of probable cause to justify the stop and search of an automobile, *Carroll* elevated the authority of police officers to the same status as the "neutral and detached" magistrates contemplated under the Fourth Amendment.[77] Three specific manifestations of this latitude all descend directly from *Carroll*: a tolerance of racial profiling, the weakening of the probable cause standard, and an overly deferential attitude toward the testimony of police officers.

Part IV looks at *Olmstead v. United States*,[78] perhaps the most infamous decision of the Prohibition era. In *Olmstead,* the Court upheld a Volstead Act conviction of Roy Olmstead, a bootlegger in Washington state, even though virtually all the evidence developed by the federal agents was the result of the illegal wiretapping of the telephone lines used by Olmstead's business.[79] *Olmstea*d is best known in constitutional circles for Justice Brandeis's dissenting opinion espousing the virtues of privacy,[80] which were famously relied on by the Supreme Court decades later in finding a "right to privacy" in cases such as *Griswold v. Connecticut*[81] and *Roe v. Wade*.[82] In a less famous part of the *Olmstead* dissent, Justice Brandeis condemned the Court's indifference to the illegal conduct (wiretapping in violation of state law) of the federal agents who investigated Olmstead:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[83]

The Court's indifference to the police misconduct that led to the prosecution and conviction of Roy Olmstead persists to this day. That aspect of *Olmstead*'s legacy has proven far more durable in the long run, as it has turned out, than Justice Brandeis's paean to privacy.

Just as *Carroll* is the godfather of police discretion, *Olmstead* is the godfather of the Court's tolerance for police misconduct. Of course, the Court

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77. *See* Johnson v. United States, 333 U.S. 10, 14 (1948) (holding that entry into a home or private place requires a search warrant by a neutral and detached magistrate).

78. 277 U.S. 438 (1928).

79. *See id.* at 456–57, 468.

80. *See id.* at 478 (Brandeis, J., dissenting).

81. 381 U.S. 479, 494 (1965) (Goldberg, J., concurring) (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)).

82. 410 U.S. 113, 152 (1973) (citing *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)), *overruled by*, Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

83. *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

has not routinely cited *Olmstead* over the years as standing for such a proposition. *Olmstead's* legacy, rather, is captured in the frequent invocation of Justice Brandeis's dissent by dissenters in decisions overlooking or excusing police misconduct. Consistent with *Olmstead*'s influence, the Court has overlooked a wide array of crimes committed by police in enforcing the law, including fraud, trespass, theft, and false imprisonment.[84]

Part V considers the legacy of the principal Fifth Amendment decision by the Taft Court, *United States v. Lanza*,[85] where the Supreme Court, for the first time in a case of successive prosecution, applied a "dual sovereignty" exception to the Fifth Amendment's Double Jeopardy Clause. *Lanza* approved a subsequent federal prosecution of a(nother) Washington state bootlegger who had already been prosecuted by the state for the same conduct in violation of Washington's prohibition law.[86] This anachronistic doctrine has been consistently reaffirmed by the Supreme Court, including as recently as 2019 in *Gamble v. United States*.[87]

Lanza was not preordained. It did not have to come out the way it did in 1922, and it is easy to imagine it being distinguished or overruled by later Courts as a relic attributable to the excesses of Prohibition. This is essentially what happened when the Court considered a question on the other side of the same coin as *Lanza*: whether the Fifth Amendment required an immunity statute to confer immunity against both federal and state prosecution. It does, said the Court, in its 1964 decision in *Murphy v. Waterfront Commission of New York Harbor,*[88] where the Court noted the modern realities of "cooperative federalism" and the pure fiction of hermetically sealed sovereigns.[89]

Lanza, by contrast, was followed slavishly in 1959 in two companion cases: *Abbate v. United States*[90] and *Bartkus v. Illinois*,[91] the former in an opinion written by Justice Brennan. *Bartkus* was the first time that the Dual Sovereignty doctrine had been applied to the successive prosecution was of a defendant who had been found not guilty in the first trial.[92] As explained below, the results in *Abbate* and *Bartkus* may be attributable to bad timing. But no mitigating factors explain the Court's 2019 decision in *Gamble*, in which the Court dutifully followed the precedent of *Lanza, Abbate, and Bartkus*, even though the obvious purpose of the successive federal

84. *See, e.g.*, cases cited *infra* notes 540–49 and accompanying text.
85. 260 U.S. 377 (1922).
86. *Id.* at 382.
87. *See* 587 U.S. 678, 687 (2019).
88. 378 U.S. 52 (1964).
89. *See id.* at 56, 77–78.
90. 359 U.S. 187 (1959).
91. 359 U.S. 121 (1959).
92. *See id.* at 150 (Black, J., dissenting).

prosecution was simply to obtain a more severe sentence than had been imposed in state court.[93]

II. CRIMINAL PROCEDURE BEFORE PROHIBITION: OFF TO A GOOD START

Before the twentieth century, there wasn't much federal criminal procedure law—or federal criminal law, for that matter.[94] The Constitution's Bill of Rights did not apply to the states.[95] Most federal criminal statutes focused narrowly on specific federal interests, such as immigration, customs, smuggling, taxation, and admiralty.[96] Criminal appeals were not routinely available until 1889.[97] Nor was there a strong federal enforcement apparatus.[98] The few federal agencies with any enforcement capacity were either unfunded or underfunded.[99] There was a United States Attorney General and regional United States Attorneys, called District Attorneys, but each of these roles functioned much differently than they do today.[100]

The post of Attorney General was created by the Judiciary Act of 1789, but the responsibilities of that job were modest (advising the President on legal issues and representing the United States in the Supreme Court), part-time (most Attorney Generals also had private law practices), and narrow (the Attorney General had no supervisory responsibility over the regional District Attorneys).[101] At times, some authority was exercised over the regional District Attorneys by the Treasury Department, but for the most part, the District Attorneys had discretion to bring or not bring prosecutions under the very few existing federal criminal statutes.[102]

The Department of Justice was created in 1870.[103] For a short period of time during Reconstruction, under the leadership of President Grant, the Department nobly attempted to criminally enforce the newly enacted civil rights legislation—the Civil Rights Act of 1866, the Enforcement Act of 1870, and the Ku Klux Klan Act of 1871—in the South, where white vigilante groups were waging a reign of terror on newly freed black Americans and

93. *See Gamble,* 587 U.S. at 691.

94. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 261 (1993).

95. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833).

96. FRIEDMAN, *supra* note 94, at 262.

97. *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

98. FRIEDMAN, *supra* note 94, at 270.

99. *See* Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 126–27 (2014) (detailing the early years of DOJ's role in the U.S. government).

100. *See id.* at 128–32.

101. *See id.* at 130–32.

102. *See id.*

103. *Id.* at 122.

white Unionists.[104] The effort succeeded for a time but subsided as the political will and focus of the Grant Administration declined.[105]

The Bureau of Investigation, the predecessor to the FBI, was not created until 1908.[106] As of 1925, there were only three federal prisons.[107] Total annual federal criminal prosecutions on a nationwide basis peaked at around 15,000 shortly before Prohibition.[108] In 1932, by contrast, there were 90,000 federal criminal prosecutions, including 65,000 under the Volstead Act and its successors.[109] Prior to Prohibition, in short, criminal law enforcement was largely the province of the states.[110]

A. The Fourth Amendment Before Prohibition

In 1925, in confronting the dilemma presented in *Carroll*, the Court was able to summarize the entire "subject of search and seizure" by reviewing the holdings of just five cases, none of which—as they were described by the Court—were controlling:[111] *Boyd v. United States, Weeks v. United States*, *Silverthorne Lumber Co. v. United States, Gouled v. United States*,[112] and *Amos v. United States*.[113] In fact, this nascent body of Fourth Amendment law reflected a commitment to constitutional values that would be rejected by the Taft Court.

Boyd, the Supreme Court's first important Fourth Amendment decision, was also its first important Fifth Amendment decision.[114] The occasion was a somewhat unlikely one inasmuch as *Boyd* was not a criminal prosecution but a civil forfeiture action, although the customs statute authorizing the government's suit also provided for criminal penalties.[115] The United States alleged that defendant E.A. Boyd & Sons had violated federal customs laws by importing thirty-five cases of plate glass without paying the required duties; the government sought forfeiture of the glass.[116] The trial court, at the

104. *Id.* at 168.

105. RON CHERNOW, GRANT 817–18 (2017).

106. FRIEDMAN, *supra* note 94, at 270.

107. *Id.* at 269.

108. Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 910–11 (2000).

109. *See id.* at 911.

110. FRIEDMAN, *supra* note 94, at 262.

111. *See* Carroll v. United States, 267 U.S. 132, 147–49 (1925).

112. 255 U.S. 298 (1921).

113. 255 U.S. 313 (1921).

114. *See generally* Sophia Z. Lee, *The Reconciliation Roots of Fourth Amendment Privacy*, 91 U. CHI. L. REV. 2139 (2024) (discussing Boyd's role as a catalyst for the Court's recognition of "the privacies of life" (quoting Boyd v. United States, 116 U.S. 616, 630 (1886))).

115. *See Boyd*, 116 U.S. at 617–18.

116. *Id*.

government's request and pursuant to the statute authorizing the forfeiture action, issued a subpoena requiring the Boyds to produce an invoice for an earlier shipment of imported glass.[117] The Boyds complied with the subpoena—failure to do so would have meant, under the statute, that the government's allegations were proven—but they objected to the compelled production of the invoice on both Fourth and Fifth Amendment grounds.[118]

The Supreme Court upheld both of the Boyds' objections, basing its decision on a view of individual liberty that was consciously more expansive than the language of both amendments.[119] After all, as for the language of the Fourth Amendment, there had been no search and no seizure in *Boyd*.[120] And as for the language of the Fifth Amendment, the action against the Boyds was not a criminal prosecution nor had the Boyds been compelled to testify.[121] The Court could easily have found both amendments inapplicable but instead found that the statute authorizing the subpoena violated both of them.[122]

The Court's opinion construed the Fifth Amendment liberally, taking an expansive view of the command that no person "shall be compelled in any criminal case to be a witness against himself."[123] The Court found that the statute authorizing the subpoena violated the Fifth Amendment by forcing the Boyds to provide evidence that would support the government's efforts to obtain forfeiture of their property.[124] In a similarly generous vein, the majority concluded that the Fourth Amendment applied because the purpose (discovering evidence of wrongdoing) and effect (using that evidence against a wrongdoer) of the disputed subpoena were equivalent to those of a literal search and seizure.[125] Accordingly, the Court concluded that a subpoena and a physical search differed only in degree, not in kind, and that the Fourth Amendment prohibited all government intrusions into "the sanctity of a man's home and the privacies of life."[126] Purpose, rather than language, was controlling.

In adopting an expansive, structural view of the Fourth and Fifth Amendments and the values they embraced, the Court harkened back to the despised British writs of assistance that inspired the amendments, with police action similarly aimed at enforcing customs laws.[127] It stated:

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117. *Id.* at 618.
118. *See id.* at 618, 631.
119. *See id.* at 630–32.
120. *Id.* at 640 (Miller, J., concurring).
121. *See id.* at 637 (majority opinion).
122. *See id.* at 638.
123. *See id.* at 621–22.
124. *Id.* at 634–35.
125. *Id.* at 635.
126. *See id.* at 630, 635.
127. *See id.* at 630.

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers . . . to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard, the fourth and fifth amendments run almost into each other.[128]

In exalting the triumvirate of constitutional values—security, liberty, and property—the Court flatly rejected what it called the argument of "utility"—that is, that the government action must be permitted, as it is an important "means of detecting offenders by discovering evidence."[129]

Weeks, decided in 1914, is best known as the case that adopted the exclusionary rule for federal cases.[130] The defendant, Fremont Weeks, was arrested at his place of employment at Union Station in Kansas City, Missouri.[131] While under arrest, local police officers searched his home without a warrant and turned over the materials they found to a United States Marshal.[132] Later, the marshal returned to the home (still without a warrant) and seized papers that included Weeks's correspondence.[133] Weeks was indicted under a federal statute that criminalized the use of the mail to transport lottery tickets.[134]

Prior to trial, Weeks filed a motion for the return of his property and to prevent its evidentiary use at trial, what we would today call a motion to suppress.[135] The trial court ordered the return of the items it found were irrelevant to the criminal charges but denied the motion as to the other

128. *Id*.
129. *See id.* at 629.
130. *See* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1893, 1922–23 (2014).
131. Weeks v. United States, 232 U.S. 383, 386 (1914).
132. *Id*.
133. *Id*.
134. *Id*.
135. *Id.* at 387–88.

materials, which it ultimately admitted at trial, including the correspondence seized by the marshal.[136] Weeks was convicted.[137]

A unanimous Supreme Court held that the denial of Weeks's motions and the use of his personal correspondence as evidence at trial violated the Fourth Amendment.[138] The Court embraced *Boyd*'s emphasis upon the history of the Amendment and the values it embodied and confirmed that the Fourth Amendment's "protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws."[139] The Court stated further that the rule of exclusion was essential, not ancillary, to the Fourth Amendment: "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense," the Fourth Amendment's protections are "of no value," and "might as well be stricken from the Constitution."[140]

The Court made two other notable observations. First, as in *Boyd*, it rejected the "utility" argument, stating that the courts' efforts to "bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[141] Second, the Court noted that federal courts, in particular, should serve as beacons of integrity and should not condone or sanctify lawless police action:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.[142]

The third case mentioned in *Carroll* was the 1920 decision in *Silverthorne Lumber*.[143] Frederick Silverthorne and his son, principals of the Silverthorne

136. *Id.* at 388–89.
137. *Id.* at 386.
138. *Id.* at 393.
139. *See id.* at 389–92.
140. *See id.* at 393.
141. *Id*.
142. *See id.* at 392.
143. Carroll v. United States, 267 U.S. 132, 178 (1925) (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)).

Lumber Company, were indicted, arrested, and held in custody.[144] While the defendants were thus indisposed, federal agents "without a shadow of authority" went to the company's place of business where they "made a clean sweep" of its business records and effectively arrested all of the employees on the premises, transporting them or directing them to the office of the District Attorney, along with the seized records.[145]

The defendants promptly filed a motion for the return of their illegally seized property.[146] Over the District Attorney's opposition, the district court ordered a return of the original seized documents but impounded the photographs and copies that the government had made in the meantime, notwithstanding the acknowledged constitutional violations.[147] The government then served trial subpoenas on the defendants and the company to produce the originals, and when they refused, the district court held them in contempt.[148]

Justice Holmes's terse opinion for the Court focused almost entirely on the government's illegal methods.[149] He rejected the argument that a subpoena could be based upon illegally obtained evidence, because that would permit the government to achieve a result in two steps that it could not lawfully obtain in one.[150] He described the government's conduct as an "outrage" and stated that allowing warrantless searches and seizures to serve as the basis for a subpoena would reduce "the Fourth Amendment to a form of words."[151] As to whether the government could use the tainted materials in some limited capacity, Justice Holmes was adamant: the government could derive no "advantages" from its illegal conduct, as the protection afforded by the Fourth Amendment requires that wrongfully obtained evidence "shall be used at all."[152]

Gouled was similarly enthusiastic about Fourth and Fifth Amendment rights.[153] Gouled was convicted for conspiracy to defraud the United States arising out of contracts to sell clothing and equipment to the Army during World War One.[154] At issue were three searches of the defendant's offices—one conducted without a warrant and two authorized by a warrant.[155] The Court enthusiastically embraced the rulings in *Boyd, Weeks*, and *Silverthorne*:

144. *Silverthorne Lumber*, 251 U.S. at 390.
145. *Id*.
146. *Id.* at 390–91.
147. *Id.* at 391.
148. *Id*.
149. *See id.* at 391–92.
150. *Id*.
151. *See id*.
152. *See id*.
153. *See* Gouled v. United States, 255 U.S. 298, 303–04 (1921).
154. *See id.* at 302–04.
155. *See id.* at 303.

> It would not be possible to add to the emphasis with which the framers of our Constitution and this court [in those three cases] have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these [the Fourth and Fifth] amendments. . . . [S]uch rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers.[156]

The Court noted that it is "[i]n the spirit of these decisions [that] we must deal with the questions before us."[157]

B. The Fifth Amendment Before Prohibition

Following the lead of *Boyd*, two other important Fifth Amendment cases from the 1890s, endorsed similarly expansive views of the Fifth Amendment. First, *Counselman v. Hitchcock*[158] involved a grand jury investigation into railroad rates being conducted by the Interstate Commerce Commission, a federal agency created by the 1887 Interstate Commerce Act.[159] Counselman, a Chicago grain dealer, repeatedly invoked his Fifth Amendment privilege against self-incrimination in response to questions asked by the grand jury about the rates that railroads had charged him.[160] He was ultimately found in contempt of the grand jury proceeding, and he brought his case to the Supreme

156. *Id.* at 303–04.

157. *Id.* As to the "questions before it," the Court in *Gouled* endorsed an odd relic of Fourth Amendment law from that era, holding that papers having only "evidential value"—as opposed to papers as to which the Government or complainant had a superior interest—could not be seized even with a valid warrant. *See id.* at 304–06, 309. This doctrine eventually grew to be ignored until it was overruled by *Warden v. Hayden. See* Warden v. Hayden, 387 U.S. 294, 304 (1967). *Amos*, a companion case to *Gouled*, held that even contraband goods that had more than just "evidential value" could not be seized from a home without a warrant. *See* Amos v. United States, 255 U.S. 313 (1921).

158. 142 U.S. 547 (1892).

159. *See id.* at 548.

160. *See id.* at 548-49.

Court on a petition for habeas corpus.[161] The Court rejected the government's argument that the Fifth Amendment did not apply in grand jury proceedings, holding it applicable in "any proceeding."[162] And it found that the "immunity" provision of the statute authorizing the investigation was constitutionally inadequate:

> We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the constitution of the United States. [The immunity statute under consideration] does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.[163]

The Court relied on *Boyd* and the values *Boyd* embraced.[164] The Court condemned "extorting the party's oath, . . . to convict him of crime . . . [as] is contrary to the principles of a free government."[165] The Court further stated, "[i]t is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."[166] As in *Boyd* and *Weeks*, the Court in *Counselman* rejected the government's "utility" argument and was unmoved by the complaint that immunity commensurate with the Fifth Amendment "would nullify most investigations instituted under legislative authority."[167]

Shortly after the decision in *Counselman*, Congress accepted the Court's invitation and enacted a revised immunity statute based on the reference to "absolute immunity" in *Counselman*, broadly precluding prosecution on the subject of any immunized testimony.[168] That statute was found to pass constitutional muster four years later in *Brown v. Walker*.[169] Of particular relevance to the "dual sovereignty" issue discussed here, the Court in *Brown* rejected the defendant's argument that the statute was constitutionally

161. *Id.* at 552.
162. *See id.* at 563.
163. *See id.* at 585–86.
164. *See id.* at 586.
165. *Id.* at 581.
166. *Id.*
167. *Id.* at 585; *see supra* notes 129–142 and accompanying text.
168. *See* Compulsory Testimony Act of 1893, ch. 83, § 27 Stat. 443–44 (1983).
169. 161 U.S. 591, 593–94, 610 (1896).

defective in that it did not provide for immunity from state prosecution.[170] The Court dismissed the "bare possibility" of duplicative prosecution as "not a real and probable danger," when considering "the ordinary operations of the law in the ordinary courts," but instead, merely "a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct."[171]

In a different Fifth Amendment context, the Court displayed a sensitivity to the coercive power of the state in extracting confessions from defendants. *Bram v. United States* involved a homicide on a ship on the "high seas" sailing from Boston to South America.[172] The captain of the ship and his wife, Charles and Laura Nash, and another seaman were allegedly axe-murdered in their sleep by the first mate, Bram.[173] After the murders, the ship, now under the Bram's control, sailed to Halifax, Nova Scotia, where local authorities conducted an investigation, including an interrogation of Bram.[174] During that interrogation Bram made incriminating statements, which were used against him at his ensuing trial in Boston, in which he was convicted of murder.[175] The Supreme Court reversed his conviction, finding that his Fifth Amendment rights had been violated.[176] As in *Counselman*, the Court noted that *Boyd* established that both the Fourth and Fifth Amendments "perpetuat[e]" constitutional guarantees of the very "principles of humanity and civil liberty" which those in England had struggled to achieve.[177] In doing so, these amendments "implant [those principles] in [American] institutions in the fullness of their integrity, free from the possibilities of future legislative change."[178] The Court also relied on English precedent that held the following:

> The human mind, under the pressure of calamity, is easily seduced, and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant,

170. *See id.* at 594.
171. *Id.* at 608.
172. 168 U.S. 532, 534 (1897).
173. *See id.* at 536.
174. *See id.* at 536–37.
175. *Id.* at 540.
176. *See id.* at 565.
177. *Id.* at 544 (citing Boyd v. United States, 116 U.S. 616, 633 (1886)); *see supra* notes 164–71 and accompanying text.
178. *Counselman*, 142 U.S. at 544 (citing Boyd v. United States, 116 U.S. 616, 633 (1886)).

> either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted . . . is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.[179]

Of less direct doctrinal import, but nonetheless illuminating of the values the Court found embodied in the Fifth Amendment, is *Wilson v. United States*.[180] In *Wilson*, the defendant was convicted by a jury on obscenity charges for allegedly directing a mailing to another person, advising him as to sources of obscene materials.[181] In his closing argument, the prosecutor commented dramatically on the defendant's failure to testify: "if I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand, and hold up my hand before high heaven, and testify to my innocence of the crime."[182]

The prosecutorial comment was a blatant violation of an 1878 federal statute.[183] The statute provided that a defendant "shall, at his own request, but not otherwise, be a competent witness; and his failure to make such request shall not create any presumption against him."[184] The conviction was reversed under the authority of that statute, not the Fifth Amendment.[185] But, in passing, the Court made the following thoughtful observations about the purpose of Congress's statute and its underlying Fifth Amendment values:

> [T]he act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be witnesses, particularly when they may have been in some degree compromised by their association with others, declares that the failure of a defendant in a criminal action to

179. *See id.* at 548 (citation omitted).
180. 149 U.S. 60 (1893).
181. *Id.* at 60.
182. *Id*.
183. *See id*.
184. *Id*.
185. *See id.* at 70.

> request to be a witness shall not create any presumption against him.[186]

To be clear, Fifth Amendment law prior to Prohibition was not uniformly hospitable to defendants. The Fifth Amendment claims of corporations and their representatives fared poorly. *Hale v. Henkel*,[187] the third important "white collar crime" Fifth Amendment case of the Court in the period before Prohibition, involved a grand jury investigation into potential monopolistic activities of tobacco companies, conduct that had recently been criminalized by the 1890 Sherman Antitrust Act.[188] Edward Hale, a corporate officer of one such company, was subpoenaed to testify before a federal grand jury, and to produce corporate records, including contracts and correspondence from his employer.[189] In the grand jury, Hale received "transactional" immunity under a 1903 federal statute that had cured the deficiency of the statute at issue in *Counselman*.[190] He nonetheless refused to testify and refused to produce the subpoenaed documents on Fifth Amendment grounds.[191]

The Supreme Court correctly rejected Hale's personal Fifth Amendment claim because he did, in fact, have immunity under a constitutional immunity statute.[192] Further, it correctly rejected his attempt—in withholding the subpoenaed corporate records—to assert a Fifth Amendment claim on behalf of a third party, his employer.[193] That should have been the end of the matter. But, in dicta, the Court proceeded to declare that a corporation, which it characterized as an "object" of government regulation and the beneficiary of "special privileges and franchises," had no Fifth Amendment privilege.[194] In doing so, the Court explicitly embraced the sort of "utility" argument it had been unmoved by in *Boyd*, *Weeks*, and *Counselman*, noting that a Fifth Amendment privilege for corporations "would result in the failure of a large

186. *Id.* at 66. Today, 132 years after *Wilson*, its judge-made successor, *Griffin v. California*, 380 U.S. 609 (1965) (precluding comment on a defendant's failure to testify pursuant to the Fourteenth Amendment), is under siege and at least one current member of the current Supreme Court has called for overruling it, *see* Tracey Maclin, *Is Silence Golden?*, 65 ARIZ. L. REV. 43, 44 (2023).

187. 201 U.S. 43 (1906).

188. *See id.* at 44–46.

189. *See id.* at 44–45.

190. *See id.* at 46.

191. *See id*.

192. *See id.* at 73.

193. *See id.* at 69–70.

194. *See id.* at 74–75.

number of [antitrust] cases where the illegal combination was determinable only upon the examination of such papers."[195]

In sum, prior to Prohibition, the Court largely took an expansive view of the liberties guaranteed by the Fourth and Fifth Amendments, at least to individuals, and consistently sang the praises of the values underlying them. In doing so, the Court consistently rejected the kind of "utility" arguments that were offered by the government to justify less generous interpretations of those Amendments. The Court also spoke firmly about the government's use of illegally tainted evidence—it cannot be used—and expressed skepticism about police motivations, warning of the "stealthy encroachment [upon Fourth Amendment rights] . . . by well-intentioned, but mistakenly overzealous, executive officers."[196]

III. *UNITED STATES V. CARROLL* AND THE ENABLEMENT OF POLICE DISCRETION

> "The evils that will flow from this decision will be as mountains compared to molehills when contrasted with those that now exist. I therefore refuse to assent to the decision pronounced."[197]

Professor Sarah Seo recently wrote about the significance of the seminal Prohibition era case of *Carroll v. United States*, traditionally known to law students as the source of the so-called "automobile exception" to the Fourth Amendment's warrant requirement.[198] In *Policing the Open Road: How Cars Transformed American Freedom*, Professor Seo examined the broader influence of *Carroll*, and its enablement and empowerment of the notion of police discretion,[199] including how *Carroll* provided a playbook for the Warren Court's 1968 development of the "reasonable suspicion" standard in *Terry v. Ohio*.[200] Professor Tracey Maclin, in reviewing Professor Seo's book, expands on her argument, showing how *Carroll* was wrongly decided in

195. *See id.* at 74. For a critique of *Hale* and other cases regarding the Fifth Amendment rights of corporations and their representatives, see Tracey Maclin, *Long Overdue: Fifth Amendment Protection for Corporate Officers*, 101 B.U. L. REV. 1523, 1526–55 (2021).

196. *See* Gouled v. United States, 255 U.S. 298, 304 (1921).

197 Moore v. State, 103 So. 483, 499 (1925) (Ethridge, J., dissenting) (warning of the fallout from the majority's interpretation of the Mississippi Constitution as consistent with the United States Supreme Court's decision in *Carroll*).

198. *See* SEO, *supra* note 49, at 133–55.

199. *See id.* at 138.

200. *See id.* at 151–52 (discussing *Carroll*, *Terry*, and the development of the "automobile exception").

multiple respects yet nonetheless affords a broader measure of protection of motorists' rights than exists under current Supreme Court doctrine.[201]

Professors Seo and Maclin properly assess *Carroll* as a case whose significance exceeds its adoption of the automobile exception, but they still underrate its generative force. As the next section will demonstrate, *Carroll* has directly contributed to three other important aspects of contemporary criminal procedure doctrine: (1) a tolerance of racial profiling, (2) a dilution of the probable cause standard, and (3) an overly deferential attitude toward the testimony of police officers.

A. United States v. Carroll *and its Direct Descendant* Brinegar v. United States

1. United States v. Carroll

George Carroll and John Kiro were convicted of transporting intoxicating liquor in violation of the Volstead Act, a misdemeanor, and fined $500.[202] In one sense, the operative facts of *Carroll* are undisputed. The charges arose out of a December 1921 automobile stop on a highway near Grand Rapids, Michigan, by a combined force of federal and state police: three federal prohibition agents and one Michigan police officer, a not unusual instance of federal-state law enforcement cooperation during Prohibition.[203] An ensuing search of the car—including destruction of the car's back seat—uncovered dozens of bottles of liquor stashed away within the seat cushions.[204] Carroll and Kiro had been stopped because one of the prohibition agents purportedly recognized their car and its occupants as the car zoomed by them going in the opposite direction on the Michigan highway.[205] Several months earlier, that officer had dealt with Carroll in an unsuccessful undercover sting operation, in which he had tried to induce Carroll into buying him whiskey.[206]

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201. *See* Maclin, *supra* note 74, at 2360. Two other academics have noted *Carroll*'s role in shaping original understandings of the Fourth Amendment. *See* Thomas Y. Davies, *The Fictional Character of Law–and–Order Originalism: A Case Study of the Distortions and Evasions of Framing–Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 256–58 (2002); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1762–70 (2000).

202. *See* SEO, *supra* note 49, at 114–16.

203. *See* Carroll v. United States, 267 U.S. 132, 132, 171–73 (1925). The concerted action of federal and state police seen here, and the question of the correlative responsibilities of federal and state government for enforcing Prohibition, is recurring theme during the Prohibition Era. *See infra* Part V.

204. *See Carroll,* 267 U.S. at 132.

205. *See id.* at 171–72.

206. *See id*.

The defendants appealed their conviction to the Supreme Court, arguing that the officers' actions violated the Fourth Amendment.[207] The Supreme Court famously affirmed, finding that the search and seizure were legal, despite the absence of a warrant, because the officers had "reasonable or probable cause" for believing that the automobile they stopped and seized had "contraband liquor therein which [was] being illegally transported."[208] Thus the so-called "automobile exception" to the Fourth Amendment was born.[209] Explaining the result, the Court acknowledged its Fourth Amendment precedent noted above inasmuch as it mentioned the names of the cases, but those cases' appeals to the values underlying the Fourth and Fifth Amendments were nowhere to be seen or heard in *Carroll.*[210] Just four years earlier, in *Gouled*, the Court had noted with respect to those precedents (*Boyd, Weeks* and *Silverthorne*), that it is "[i]n the spirit of these decisions [that] we must deal with the questions before us."[211] Not a whiff of that "spirit" was present in *Carroll*.[212] As Justice Etheridge observed in his dissent in *Moore v. State*,[213] "[*Carroll*] speaks a different philosophy" than *Boyd*, *Weeks*, *Gouled*, and *Silverthorne* because those cases "speak the voice of Liberty and Democracy. They accord to the citizen his full constitutional liberties and rights. [*Carroll*] . . . bespeaks the supremacy of the government."[214]

In his review of Professor Seo's book, Professor Tracey Maclin explains how *Carroll*, in announcing a new legal standard for automobile searches, "altered constitutional law principles in at least three ways."[215] First, whereas under the common law warrantless arrests for misdemeanors were only permitted if officers personally witnessed a criminal occurrence, *Carroll* permitted a car and its occupants to be seized based on mere suspicion of criminality.[216] Second, *Carroll* permitted the search of the seized vehicle without a warrant even though an automobile is inarguably an "effect" within the Fourth Amendment's "persons, houses, papers, and effects" litany, an issue Taft does not consider.[217] And third, *Carroll* relaxed the standard for

207. *See id.* at 132.
208. *See id.* at 155–56.
209. *See id.* at 156.
210. *See id.* at 147–49.
211. Gouled v. United States, 255 U.S. 298, 303–04 (1921).
212. *Compare id.* at 302 (following the "spirit" of precedent regarding the Fourth and Fifth Amendments), *with Carroll*, 267 U.S. at 149 (departing from Fourth and Fifth Amendment precedent).
213. 103 So. 483 (1925) (Etheridge, J., dissenting).
214. *Id.* at 497.
215. Maclin, *supra* note 74.
216. *See id.* at 2336–37.
217. *See id.*

such law enforcement action—the mens rea of the police, if you will—from knowledge to belief.[218]

There is a fourth potentially transformative thing about *Carroll*, although it is not in the "altering a constitutional principle" category. It is the Court's application of the legal standard it announced. The Court found probable cause or reasonable belief for the agents' seizure based on the following facts: the defendants' car was coming from the general direction of Detroit, which (per only the Court's judicial declaration) had a reputation as a source of "spirituous liquors"; that the officers recognized defendants' car and its occupants as it whizzed by them outside of Grand Rapids; and that the defendants, some months earlier, had agreed to deliver liquor to one of the federal agents but failed to do so.[219] In short, the officers' belief was based on a questionable exercise of judicial notice, an implausible observation, and a stale encounter. Based on this meager fare, the Court stated that "the officers when they saw the defendants believed that they were carrying liquor we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so."[220] Even assuming the truth of the posited facts, the Court's finding is a wild leap. Indeed the Court's conclusion on this issue provoked a bitter dissent from the notoriously anti-defendant Justice McReynolds (to be fair, he had a long list of hatreds), who fumed: "Has it come about that merely because a man once agreed to deliver whiskey, but did not, he may be arrested whenever thereafter he ventures to drive an automobile on the road to Detroit!"[221]

The Court's probable cause conclusion has had long-term constitutional significance. But there's more. The Court failed to acknowledge or address the record evidence that one of the federal prohibition agents had testified that the officers "had no reason to believe that the [defendants] were transporting liquor before they searched the Roadster."[222] No cause to believe, probable, slight, or otherwise. It is in this sense that *Carroll's* facts are—remarkably—disputed: the Court and the agents disagree on what the agents actually believed.[223] As will be discussed below, this aspect of *Carroll* also has long-term significance.

As for the immediate legacy of *Carroll*, Professor Seo persuasively argues that *Carroll* "constitutionally legitimized police discretion" and, even more consequentially, "delegated the judicial inquiry of probable cause, at

218. *Id.* at 2337.

219. *See* Carroll v. United States, 267 U.S. 132, 160–61 (1925).

220. *Id.* at 160.

221. *Id.* at 174 (McReynolds, J., dissenting).

222. *See* Brief of Plaintiffs in Error on Reargument at 2, Carroll v. United States, 267 U.S. 132 (1925) (No. 15).

223. *See Carroll*, 267 U.S. at 160–61.

least in the first instance, to the police."[224] That is consequential indeed. Sound institutional reasons explain why the constitutional order presumptively and historically conferred the responsibility for the probable cause inquiry on neutral judges or magistrates, and not police. These reasons were clearly expressed by Justice Jackson, twenty-three years after *Carroll*, in *Johnson v. United States*:[225]

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[226]

Carroll's probable cause analysis and conclusion implies that the discretionary judgments with which the Court empowers the police will not be closely scrutinized. As one astute contemporaneous critic of *Carroll* quipped, police officers' interpretations of situations they encounter as they roam the highways in search of probable cause will be subject to "judicial charity."[227] The officers in *Carroll* were surely themselves the beneficiaries of such judicial charity. That spirit of deference proved to be infectious, and not just in car cases.[228]

2. Carroll *and New Technology*

Carroll, in short, is about much more than the automobile exception. But *Carroll* is also very much a case about cars. The automobile—as a form of new technology—is at the heart of *Carroll*. The role the automobile plays in *Carroll*, however, is different than in most of the Court's Fourth Amendment cases implicating "new technology."[229] In most of those cases, the technology warrants special Fourth Amendment attention because it has become

224. SEO, *supra* note 49, at 139.

225. 333 U.S. 10 (1948).

226. *Id.* at 13–14.

227. *See* SEO, *supra* note 49, at 140.

228. *See, e.g.*, Steele v. United States, 267 U.S. 498, 504–05 (1925) (citing *Carroll*, 267 U.S. 132) (deferring to investigator Isidor "Izzy" Einstein's conclusion during execution of search warrant that certain unlabeled boxes were crates of whisky because Einstein was "a man of experience in such prosecutions and in such seizures"); Dumbra v. United States, 268 U.S. 435, 441 (1925) (crediting search warrant affiant's probable clause conclusion because to do otherwise would assume "a singular lack of practical experience on the part of the officer").

229. *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 827–31 (2004).

weaponized by law enforcement[230] or because it has become so widespread in public life that it challenges existing actual expectations of privacy.[231] In *Carroll*, on the other hand, the automobile was viewed by the Court as itself an agent of criminality, as technology that was enabling the bad guys.[232] And the Court, especially Chief Justice Taft, hated that. In correspondence with his brother Horace, the Chief Justice called the automobile "the greatest instrument for promoting immunity of crimes and violence that I know of in the history of civilization," and ultimately "rejoiced" that his views were to carry the day in *Carroll* and that "this instrument of evil the automobile" will be neutralized.[233]

Taft's views on this subject, not expressed as explicitly in *Carroll*, reflect precisely the type of "utility" argument denounced by the Supreme Court in *Boyd, Silverthorne*, *Gouled*, and *Counselman*.[234] The utilitarian result reached in *Carroll* certainly was appreciated in law enforcement quarters. Mabel Walker Willebrandt, the Department of Justice's zealous Assistant Attorney General in charge of Prohibition enforcement, described *Carroll* as "a bulwark of strength in dealing with rum runners along the border."[235]

Chief Justice Taft went public with his autophobia shortly after *Carroll*, perhaps because with *Carroll* already on the books, he was confident that he had slain the beast.[236] In *Brooks v. United States*,[237] when upholding a Dyer Act conviction, the Chief Justice wrote from the heart: "It is known of all men that the radical change in transportation of persons and goods effected by the introduction of the automobile, the speed with which it moves, and the ease with which evil-minded persons can avoid capture have greatly encouraged and increased crimes."[238] In vilifying the automobile, not to mention the twentieth-century wheels of commerce, Chief Justice Taft never seemed to appreciate that the police also have cars, and they can use them to chase, follow, and surveil criminal suspects. Or that cars, in combination with the

230. *E.g.*, United States v. Jones, 565 U.S. 400, 404–05 (2012) (GPS device); Kyllo v. United States, 533 U.S. 27, 27 (2001) (thermal imaging device).

231. *E.g.*, Carpenter v. United States, 585 U.S. 296, 297–98 (cell phone).

232. *See* Carroll v. United States, 267 U.S. 132, 147–153 (1925).

233. *See* Post, *supra* note 12, at 123 n.406, 125 n.408. Professor Seo explains how technology might be the explanation for Justice Brandeis's otherwise curious vote for the government in *Carroll*, inasmuch as he was famously technophobic, never owned or learned how to drive a car, and was thus unlikely to view this new contraption as a legitimate source of privacy interests. *See* SEO, *supra* note 49, at 131–32.

234. *See* Boyd v. United States, 116 U.S. 616, 629–30 (1886); Gouled v. United States, 255 U.S. 298, 312–13 (1921); Counselman v. Hitchcock, 142 U.S. 547, 580–82 (1892); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 390–92 (1920).

235. MABEL WALKER WILLEBRANDT, THE INSIDE OF PROHIBITION 240 (1929).

236. *See* Brooks v. United States, 267 U.S. 432, 438–39 (1925).

237. 267 U.S. 432 (1925).

238. *Id.* at 438.

telephone, make it possible for police officers to obtain search warrants from remote locations, including warrants for cars. Justice Etheridge of the Mississippi Supreme Court saw the good guy-bad guy balance of power in the 1920s as more of a toss-up:

> The automobile and other rapid moving vehicles do not change the status at all. At the time the original Constitutions were adopted, it was much more difficult to make arrests, searches, and seizures, and procure proper warrants than it is now. A person who violated the law in that day could mount a horse and escape the officers by getting beyond the county lines. The outlaw and the officer were on equal terms so far as speed was concerned, and so are they now. Now in this day and time of swift movement, officers can use the same rapid moving vehicle that the lawbreaker can. He can go further; he can continue the pursuit from one county to another until he overtakes the outlaw.[239]

It would only be three years before the Court would revisit the issue of new technology in a Fourth Amendment context, although this time the technology—wiretapping—was being used to the government's advantage.[240]

3. United States v. Brinegar

Was *Carroll* fated to be a constitutional relic, the 1925 product of the Court's misguided but understandable tolerance for law enforcement overreach during the challenging times of Prohibition? The Court did not revisit *Carroll* until the late 1940s.[241] By then, Prohibition had reached its ignominious end in the early 1930s, with the formal repeal of the Eighteenth Amendment in 1933.[242] Legendary bootlegger Roy Olmstead had been pardoned by President Roosevelt in 1935.[243] Cars and automobile travel were far more prevalent in American culture by the late 1940s.[244] The Great Depression, the New Deal, and World War Two had all begun and ended since

239. Moore v. State, 103 So. 483, 497–98 (Miss. 1925).

240. *See* Olmstead v. United States, 277 U.S. 438, 466 (1928).

241. *See* Brinegar v. United States, 338 U.S. 160, 164 (1949).

242. *See* SEO, *supra* note 49, at 142.

243. RICHARD F. HAMM, *OLMSTEAD V. UNITED STATES*: THE CONSTITUTIONAL CHALLENGES OF PROHIBITION ENFORCEMENT 11 (Fed. Jud. Ctr. ed., 2010).

244. *See* Cameron Elliot Gordon, *Putting the Car Before the Horse: The Diffusion of the Automobile and the Rise of Technocratic Primacy*, 4 HISTORIES 487, 496–97 (2024).

Carroll.[245] If ever intervening developments might have justified overruling a precedent, as the Court had done several times in the previous decade,[246] this was the time. In fact, overruling precedent was in the air: the "New Deal" Court had overruled thirty Supreme Court precedents between 1937 and 1944—two-thirds as many as the Court had overruled in its previous history.[247] But despite all this, *Carroll* would survive. In 1949, the Court, albeit by a 6-3 vote, gave *Carroll* a resounding endorsement, all in the name of stare decisis.[248]

The case was *Brinegar v. United States*.[249] Virgil Brinegar, a farmer in Northeastern Oklahoma, was convicted of the unpermitted "importing" of liquor into dry Oklahoma from wet Missouri in violation of the Liquor Enforcement Act of 1936, a federal statute that criminalized such conduct.[250] Brinegar had been stopped near the Missouri-Oklahoma state line by officers in the Alcohol Tax Unit, part of the Treasury Department, who purportedly recognized Brinegar and his car—an unremarkable Ford coupe—as they hung out by the side of the highway.[251] They chased Brinegar at "top speed" before overtaking him, then activated their siren and ran him off the road, proceeding to seize twelve cases of liquor as a consequence of the stop.[252] There is no suggestion the officer's vehicle was marked in any way.[253] The officers would later testify—at Brinegar's unsuccessful motion to suppress hearing—of Brinegar's "reputation" for illegally transporting liquor and that Brinegar's car, as it sped by them and they began chasing it, appeared "heavily loaded" and "weighted down with something."[254] The district court denied Brinegar's motion, and the court of appeals affirmed.[255]

As in *Carroll* itself, the outcome of *Brinegar* was not a foregone conclusion, and not just because of the recent spate of Supreme Court decisions that overturned precedents. The Court had just a year earlier

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245. *See* Elliot West, *The Great Depression, the New Deal, and World War II in the American West*¸ GILDER LEHRMAN INST. OF AM. HIST, https://www.gilderlehrman.org/history-resources/essays/great-depression-new-deal-and-world-war-ii-american-west [https://perma.cc/GGT9-PX84].

246. *See* David Schultz*, The Supreme Court has Overturned Precedent Dozens of Times in the Past 60 Years – History Thursday*, OHIO CAP. J. (Sep. 30 2021, 12:20 ET), https://ohiocapitaljournal.com/2021/09/30/the-supreme-court-has-overturned-precedent-dozens-of-times-in-the-past-60-years/ [https://perma.cc/6GCC-7UVS].

247. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000) 485–86. The Warren Court overruled thirty-three decisions from 1963 to 1969. *Id.* at 486.

248. *See* Brinegar v. United States, 338 U.S. 160, 177–78 (1949).

249. 338 U.S. 160 (1949).

250. *Id.* at 161–62.

251. *See id.* at 162.

252. *Id.* at 163.

253. *See id.* at 162–63.

254. *Id.* at 163, 186.

255. *See id.* at 163–64.

declined to extend *Carroll* to a situation where a federal statute did not purport to permit a warrantless search of a car,[256] part of the reasoning in *Carroll*. Further, there was much behind-the-scenes discussion among the justices about how the *Brinegar* case should be decided and who would write the opinion.[257] Ultimately, the Court affirmed Brinegar's conviction, finding that *Carroll* was "indistinguishable from this one on the material facts, and [if] that decision [was] to continue in force" the conviction must have been affirmed.[258] The Court reached this conclusion even as it candidly acknowledged an arguable lack of probable cause in both *Brinegar* and *Carroll*: "The troublesome line posed by the facts in the *Carroll* case and this case is one between mere suspicion and probable cause."[259] The Court even implied that the assessment of probable cause by the officers might have been incorrect:

> These long-prevailing standards [of probable cause] seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.[260]

The Court was able reach its conclusion that sustained the validity of *Carroll* only by diluting the substance of the probable cause standard and by doubling down on the deference owed to the police. As the Court summed it up, "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[261] But by using the plural form of the word "probability," the Court strongly suggested that multiple measures of probability—and not just "more probable than not"—can suffice to show probable cause.[262] This inference is bolstered by the Court's reference to the facts of *Carroll* and *Brinegar* as being situated on the line "between

256. *See* United States v. Di Re, 332 U.S. 581, 585–87 (1948).
257. *See* SEO, *supra* note 49, at 164–65.
258. *Brinegar*, 338 U.S. at 171.
259. *See id.* at 176.
260. *Id*.
261. *Id.* at 175.
262. *See id.* at 175–76.

reasonable suspicion and probable cause."[263] And by disparaging "legal technicians," can the Court mean anything other than that judges (what other technicians could this mean?)should be hesitant to second guess the conclusions of the "reasonable and prudent men" who wear police uniforms? At bottom, the Court concludes, the determination of probable cause turns on the police officer's "act of judgment."[264]

Brinegar was the direct result of *Carroll*. The *Brinegar* majority thought Carroll must "continue in force."[265] Without that perceived need, it is unlikely Brinegar's conviction would have been affirmed. Justice Jackson's dissent, joined by Justices Murphy and Frankfurter, is one for the ages. He insisted that the Fourth Amendment's guarantees must be seen from the perspective of "Everyman," and not retrospectively where a defendant has already been found in possession of contraband.[266] In doing so, he characterized the Fourth Amendment's exclusionary power as a "a means of extending protection against the central government's agencies," requiring that "a search against Brinegar's car must be regarded as a search of the car of Everyman."[267]

Justice Jackson also warned, with the credibility of a former prosecutor, against giving too much discretion to police officers, who will "push to the limit" any authority they have, and that any such authority "may be exercised by the most unfit and ruthless officers as well as by the fit and responsible."[268] As for *Carroll*, Justice Jackson noted that the case "already has been too much taken by enforcement officers as blanket authority to stop and search cars on suspicion."[269] The blank check the Court wrote to the police in *Carroll* was not going to be withdrawn anytime soon. Indeed, *Brinegar* would come to serve as a useful precedential proxy for *Carroll* in subsequent Supreme Court decisions.

B. Direct Effects of Carroll

1. Racial Profiling

The connection between discretionary policing and discriminatory policing may not have been obvious in 1925, but from a more modern perspective there has been no doubt about the matter for some time.[270] The

263. *See id.* at 177.
264. *See id.* at 176.
265. *Id.* at 171.
266. *Id.* at 181 (Jackson, J., dissenting).
267. *Id*.
268. *Id.* at 182.
269. *Id.* at 183.
270. STUNTZ, *supra* note 43, at 5 ("Discretionary justice too often means discriminatory justice.").

Supreme Court's constitutional tolerance of racial profiling—the apotheosis of discriminatory policing—was established by two immigration cases decided in consecutive years in the 1970s: *United States v. Brignoni-Ponce*,[271] and *United States v. Martinez-Fuerte*.[272] The road to those two decisions was paved by *Carroll*, and the decisions in both cases explicitly relied on *Carroll*, albeit in different ways.[273]

The first of these cases, *Brignoni-Ponce*, involved a vehicle stop by Border Patrol agents on "roving patrol" early in the morning—it was still dark—sixty-five miles from the Mexican border near San Clemente, California.[274] According to the Government, a stop by agents on a "roving patrol" was a brief (usually less than a minute) and limited intrusion (no search of the vehicle or occupants), in which the occupants only have to answer a question or two and sometimes produce documentation showing a right to be in the United States.[275] On this occasion, the agents stopped a vehicle and interrogated its three occupants, learning that the two passengers were in the country illegally.[276] The agents arrested all three people, and the driver, Felix Humberto Brignoni-Ponce, was ultimately charged with transporting illegal immigrants in violation of the Immigration and Nationality Act.[277]

The Border Patrol agents would later testify that the only reason they stopped the vehicle was because the occupants appeared to be of Mexican descent.[278] Regardless, Brignoni-Ponce's motion to suppress was denied.[279] The Ninth Circuit reversed, however, holding that the requisite "founded suspicion" for a roving patrol stop under the Court's previous decision, in *Almeida-Sanchez v. United States,*[280] could not, as it had been here, be based on the "appearance of Mexican descent" alone.[281] The Supreme Court granted certiorari on the question of whether ethnicity alone can justify such a vehicle stop.[282]

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271. 422 U.S. 873 (1975).

272. 428 U.S. 543 (1976); *see* Bernard Harcourt, United States v. Brignoni-Ponce *and* United States v. Martinez-Fuerte*: The Road to Racial Profiling*, in CRIMINAL PROCEDURE STORIES 323–24, 337–40 (Carol Steiker ed. 2006); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1043–44 (2010).

273. *See Martinez-Fuerte*, 428 U.S. at 557–58, 560–61; *Brignoni-Ponce*, 422 U.S. at 884–85.

274. *Brignoni-Ponce*, 422 U.S. at 874–76.

275. *Id.* at 879–80.

276. *Id.* at 875.

277. *See id*.

278. *Id*.

279. *Id*.

280. 413 U.S. 266 (1973).

281. United States v. Brignoni-Ponce, 499 F.2d 1109, 1112 (9th Cir. 1974).

282. *Brignoni-Ponce*, 422 U.S. at 876.

The Court rejected the government's argument that the strong public interest in combatting illegal immigration warranted the authorization of such "roving patrol" stops without *any* amount of suspicion.[283] And the Court ultimately held that an appearance of Mexican descent alone could not justify a vehicle stop.[284] But along the way to these two conclusions, the Court did a very curious thing, for which it found comfort in *Carroll*.[285]

In order to prevent the government's loss in *Brignoni-Ponce* from hampering the work of the Border Patrol, the Court gratuitously provided a tutorial on how easily the agents could come up with enough suspicion to justify a stop.[286] The Court explained that "[a]ny number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area."[287] And the Court then proceeded to tick off a litany of general and specific factors that could inform agents' reasonable suspicion analysis while not running afoul of constitutional guarantees.[288] The Court even channeled *Brinegar*, albeit without citation, identifying as one factor that "the vehicle may appear to be 'heavily loaded.'"[289] As the only Supreme Court precedent for this practical primer on the breadth of police discretion, the Court enlisted *Carroll*, specifically citing the case's conclusion endorsing the factual basis for probable cause.[290] And the punch line in this litany of factors was the "appearance of Mexican descent," as the Court accepted the government's argument that "trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut."[291]

In the second of the two cases, *United States v. Martinez-Fuerte*, the Court expanded on the reach of *Brignoni-Ponce*. The police action at issue

283. *See id.* at 878–86.

284. *Id.* at 886–87.

285. *Id.* at 885.

286. *See id.* at 884–85.

287. *Id.* at 884.

288. *Id.* at 884-885 (noting factors such as "the characteristics of the area in which they encounter a vehicle"; including its "proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic [in the area]"; "information about recent illegal border crossings in the area"; "the driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion"; "[a]spects of the vehicle itself may justify suspicion," such as "certain station wagons, with large compartments for fold-down seats or spare tires" that are "frequently used for transporting concealed aliens," or vehicles that "may appear to be heavily loaded," "may have an extraordinary number of passengers.").

289. *Id.* at 885; *see supra* Section III.A.3.

290. *See Brignoni-Ponce*, 422 U.S. at 885 (citing *Carroll*, 267 U.S. at 159–61) (describing factors such as "the characteristics of the area in which they encounter a vehicle"; [i]ts proximity to the border"; "the usual patterns of traffic on the particular road"; and "previous experience with alien traffic").

291. *Id*.

there was not "roving patrol" stops but rather fixed immigration highway checkpoints, where agents would visually screen northbound traffic and select some vehicles for further investigation at a secondary inspection site, where the vehicles would be stopped and their occupants would be questioned about their citizenship and immigration status.[292] The Court held that unlike the "roving patrol" stops at issue in *Brignoni-Ponce*, checkpoint screening required no level of suspicion inasmuch as the intrusion was "minimal,"[293] and that the suspicion-less stops were permissible even if vehicles' selection process was based primarily or even entirely on an appearance of Mexican ancestry.[294] The Court cited *Carroll* twice, once as support for the minimal nature of the intrusion,[295] and once as support for the proposition that the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion."[296]

The combination of *Brignoni-Ponce* and *Martinez-Fuerte* obviously were important markers in Fourth Amendment case law. But their impact on policing in the real world, especially *Brignoni-Ponce's* laundry list of suspicion factors, may have been even more significant. The two cases effectively blessed and even encouraged racial profiling in both immigration and drug cases.[297] In border cases, courts seized on *Brignoni-Ponce's* embrace of police discretion and itemization of factors, and to this day use *Brignoni-Ponce* as a suspicion template.[298] A typical summary of the factors that are considered under this template includes the following: (1) the characteristics of the area in which the vehicle is encountered; (2) the arresting agent's previous experience with criminal activity; (3) the area's proximity to the border; (4) the usual traffic patterns on the road; (5) information about recent illegal trafficking in aliens or narcotics in the area; (6) the appearance of the vehicle; (7) the driver's behavior; and, (8) the passengers' number, appearance and behavior.[299] Multiple circuits even refer to this template as "the *Brignoni-Ponce* factors," as if they were referring to the historical facts of an actual case, and not merely the Supreme Court's gratuitous tutorial on discretion in the case bearing that name.[300]

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292. *Id.* at 546.

293. *See id.* at 563–64.

294. *Id.* at 563.

295. *See id.* at 557–58 (citing *Carroll*, 267 U.S. at 154).

296. *Id.* at 560–61 (citing *Carroll*, 267 U.S. at 154).

297. Harcourt, *supra* note 272.

298. *See* Johnson, *supra* note 272, at 1029.

299. *E.g.*, United States v. Hernandez, 477 F.3d 210, 213 (5th Cir. 2007).

300. *See, e.g.*, United States v. Cheromiah, 455 F.3d 1216, 1221 (10th Cir. 2006); United States v. Quintana-Garcia, 343 F.3d 1266, 1271 (10th Cir. 2003); United States v. Garza, 727 F.3d 436, 440 (5th Cir. 2013).

Meanwhile, and of broader significance, *Brignoni-Ponce and Martinez-Fuerte* also gave a jump start to the Drug Enforcement Administration's (DEA) development of a "drug courier profile."[301] The DEA had been developing its profile since the early 1970s, and had implemented it on an experimental basis at the Detroit airport in 1974.[302] The program was implemented on a nationwide basis after *Brignoni-Ponce* and *Martinez-Fuerte* were decided, and from 1976 through 1986 there were more than 140 reported court decisions involving stops of passengers at airports based on the drug courier profile.[303] The drug courier profile was not as cut-and-dried as "the *Brignoni-Ponce* factors," as different factors might apply at different airports.[304] In *United States v. Mendenhall*,[305] for example, the suspect was stopped based on the following profile attributes:

> (1) the respondent was arriving on a flight from Los Angeles, a city believed by the agents to be the place of origin for much of the heroin brought to Detroit; (2) the respondent was the last person to leave the plane, "appeared to be very nervous," and "completely scanned the whole area where [the agents] were standing"; (3) after leaving the plane the respondent proceeded past the baggage area without claiming any luggage; and (4) the respondent changed airlines for her flight out of Detroit.[306]

DEA agents rarely acknowledged that race or ethnicity was part of their profile.[307] And for obvious reasons, the DEA has never publicized or published a definitive drug courier profile.[308] Nor is there necessarily a single profile,[309] as much as DEA agents may like to dress up what are sometimes little more than hunches in the clothing of "agencywide expertise."

The usefulness to law enforcement of both the *Brignoni-Ponce* factors and the drug courier profile was in how they leveraged the police discretion enabled originally by *Carroll* into tools whereby no actual level of suspicion was necessary. Due to the open-ended breadth of the *Brignoni-Ponce* factors

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301. *See* Harcourt, *supra* note 272.

302. *Id.* at 324.

303. *Id.* at 337.

304. *Id*.

305. 446 U.S. 544 (1980).

306. *Id.* at 547 n.1.

307. *See* Sheri Lyn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 234 (1983) ("Courts were initially reluctant even to acknowledge [the racial] aspect of the profile, but they have now approved it.").

308. *Id.*

309. *Id.* at 233–36, 233 n.128. *Compare* Florida v. Royer, 460 U.S. 491, 493 n.2 (1983) (describing the DEA's drug courier profile to include six relevant facts), *with Mendenhall*, 446 U.S. at 547 n.1 (describing the DEA's drug courier profile to include four relevant facts).

(e.g., "the appearance of the vehicle" and "the driver's behavior") and the secrecy of the drug courier profile, the permissible bases for police intrusions metastasized to absurd levels.[310] One Fifth Circuit judge, lamenting a "border exception" to the Fourth Amendment, observed that courts accept as justifiable suspicion in border searches "virtually everything and anything":

> The vehicle was suspiciously dirty and muddy, or the vehicle was suspiciously squeaky-clean; the driver was suspiciously dirty, shabbily dressed and unkept, or the driver was too clean; the vehicle was suspiciously traveling fast, or was traveling suspiciously slow (or even was traveling suspiciously at precisely the legal speed limit); the [old car, new car, big car, station wagon, camper, oilfield service truck, SUV, van] is the kind of vehicle typically used for smuggling aliens or drugs; the driver would not make eye contact with the agent, or the driver made eye contact too readily; the driver appeared nervous (or the driver even appeared too cool, calm, and collected); the time of day [early morning, mid-morning, late afternoon, early evening, late evening, middle of the night] is when "they" tend to smuggle contraband or aliens; the vehicle was riding suspiciously low (overloaded), or suspiciously high (equipped with heavy duty shocks and springs); the passengers were slumped suspiciously in their seats, presumably to avoid detection, or the passengers were sitting suspiciously ramrod-erect; the vehicle suspiciously slowed when being overtaken by the patrol car traveling at a high rate of speed with its high-beam lights on, or the vehicle suspiciously maintained its same speed and direction despite being overtaken by a patrol car traveling at a high speed with its high-beam lights on; and on and on ad nauseam.[311]

The course of the drug courier profile is similar. Professor David Cole has catalogued over 50 factors that DEA agents have offered in Court as contributing to the basis for reasonable suspicion, including many—like those on Judge Wiener's list —that are mutually exclusive.[312] Similar observations

310. *Cf.* United States v. Zapata-Ibarra, 223 F.3d 281, 282–83 (5th Cir. 2000) (Wiener, J., dissenting) ("It is we, not law enforcement, who have constructed the straw man of articulatable facts and we who then accept as justifiable suspicion virtually anything and everything thus articulated.").

311. *Id.* (citations to sixteen cases identifying these factors omitted).

312. *See* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 48–49 (The New Press 1999) (highlighting mutually exclusive factors such as "arrived late at night," "arrived early in the morning," and "arrived in the afternoon").

were made in a dissenting opinion by Judge Pratt in *United States v. Hooper*:[313]

> To justify their seizure of Hooper's bag the agents testified he had come from a "source city" and fit the DEA's "drug courier profile." Yet the government conceded at oral argument that a "source city" for drug traffic was virtually any city with a major airport, a concession that was met with deserved laughter in the courtroom. The "drug courier profile" is similarly laughable, because it is so fluid that it can be used to justify designating anyone a potential drug courier if the DEA agents so choose. "The [DEA] has not committed the profile to writing" and "the combination of factors looked for varies among agents." Moreover, a canvass of numerous cases reveals the drug courier profile's "chameleon-like way of adapting to any particular set of observations:"
>
> Arrived late at night[,]
>
> Arrived early in the morning[,]
>
> One of first to deplane[,]
>
> One of last to deplane[,]
>
> Deplaned in the middle[,]
>
> Used a one-way ticket[,]
>
> Used a round-trip ticket[,]
>
> Carried brand-new luggage[,]
>
> Carried a small gym bag[,]
>
> Travelled alone[,]
>
> Travelled with a companion[,]
>
> Acted too nervous[,]
>
> Acted too calm[,]
>
> Wore expensive clothing and gold jewelry[,]
>
> Dressed in black corduroys, white pullover shirt, loafers without socks[,]
>
> Dressed in dark slacks, work shirt, and hat[,]

313. 935 F.2d 484, 499 (2d Cir. 1991) (Pratt, J., dissenting).

> Dressed in brown leather aviator jacket, gold chain, hair down to shoulders[,]
>
> Dressed in loose-fitting sweatshirt and denim jacket[,]
>
> Walked rapidly through airport[, or]
>
> Walked aimlessly through airport . . . .[314]

In sum, when the Court in *Brignoni-Ponce* and *Martinez-Fuerte* needed to find precedential support for the breadth and malleability of reasonable suspicion as a matter of fact, and for the breadth and malleability of the Fourth Amendment as a matter of law, they were able to find it in *Carroll*. And once the genie of reasonable suspicion by way of laundry lists of factors was out of the bottle it was not going back in. In this manner, *Carroll* became responsible for the Supreme Court's acceptance of racial profiling.[315]

2. Brinegar*: The Triumph of Deference and the Dilution of Probable Cause*

Brinegar lay essentially dormant for over three decades but it, too, was to have a powerful impact on current criminal procedure doctrine. *Brinegar* awoke with a vengeance in 1983. In *Illinois v. Gates*,[316] the Court enlisted *Brinegar* as the principal legal support for overruling two precedents and adopting a new probable cause standard for the use of informant tips in search warrants.[317] The Court overruled the pre-existing *Aguilar-Spinelli* test, and replaced it with the more forgiving "totality of the circumstances test."[318] The issue that had led to the *Aguilar-Spinelli* doctrine was the difficulty faced by magistrates in evaluating probable cause when the information supplied by a

314. *Id.* at 499–500 (citations to thirty-four cases omitted).

315. As this article is being finalized, the racial profiling issues in *Brignoni-Ponce* and *Martinez-Fuerte* are front and center in the Supreme Court's shadow docket. In *Noem v. Vazquez*, 222 L.Ed.2d 1213 (2025) (mem.), the Court without explanation granted a stay of an order by the United States District Court for the Central District of California that temporarily enjoined immigration enforcement raids by federal agents in the Los Angeles area. *Id.* at 1. The district court found that the agents' reliance on four factors to justify the stops (1) appearance of ethnicity, (2) speaking Spanish or accented English, (3) the suspect's location (e.g., car wash or bus stop), and (4) apparent job – failed the Fourth Amendment's "reasonable suspicion" requirement. *Id.* at 11 (Sotomayor, J., dissenting). Justice Sotomayor observed that in *Brignoni-Ponce*, which involved searches at or near the actual U.S.-Mexico border, the Court rejected the "appearance of Mexican ancestry" as a sufficient basis for a stop. That basis for reasonable suspicion, like the bases relied on in *Vazquez*, run afoul of the Fourth Amendment because they "describe a very large category of presumably innocent people." *Id.* at 19.

316. 462 U.S. 213 (1983).

317. *Id.* at 231–46.

318. *Id.* at 230–38.

police officer in an affidavit supporting a search warrant application was based on an informant's tip.[319] Prior to *Gates*, in order to preserve the magistrate's independent function, and not simply serve as a rubber stamp for the police, the affidavit was required to inform the magistrate of the underlying circumstances which led the officer to conclude that the informant was credible and the information the officer supplied had been obtained in a reliable way.[320] Accordingly, under the two-prong *Aguilar-Spinelli* test, a determination of probable cause had required that the "informant's affidavit reveal the 'basis of knowledge' and provide sufficient facts to establish the credibility of the report" measured by veracity and reliability.[321]

In *Gates,* the Court explained that the "totality of the circumstances" test it was adopting "is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip."[322] And as precedential support for that "prior treatment of probable cause," it turned to *Brinegar*, and only to *Brinegar*:

> Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a "practical, nontechnical conception." "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[323]

The Court did not directly acknowledge the Court's frank admission in *Brinegar* that the facts of *Brinegar* and *Carroll* being situated "between mere suspicion and probable cause."[324] But the Court muddied the difference between the two legal standards, finding secondary support for its "practical, nontechnical conception" of probable cause in two cases decided under the "reasonable suspicion" standard of *Terry v. Ohio*.[325]

The Court fully embraced *Brinegar's* avowed antipathy to "legal technicians."[326] It characterized the two prongs of *Aguilar-Spinelli* as if they

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319. *See generally* Aguilar v. Texas, 378 U.S. 108 (1964) (establishing the two-pronged test requiring magistrate judges to evaluate both the credibility of the informant and the basis of their knowledge to determine probable cause); Spinelli v. United States, 393 U.S. 410 (1969) (refining that same test).

320. *See Gates*, 462 U.S. at 278–79.

321. *Id.* at 230–31.

322. *Id.*

323. *Id.* at 231 (alteration in original) (citations omitted) (quoting Brinegar v. United States, 338 U.S. 160 (1949)).

324. *Brinegar*, 338 U.S. at 176.

325. *See Gates*, 462 U.S. at 230–33 (citing United States v. Cortez, 449 U.S. 411 (1981) and Adams v. Williams, 407 U.S. 143 (1972)).

326. *See id.* at 241.

were arcane doctrines of Talmudic scholarship, referring to them as "rigid legal rules" that required an "excessively technical dissection" of informants' tips.[327] The Court declared that "probable cause is a fluid concept," and "not readily, or even usefully, reduced to a neat set of legal rules."[328] Thus, *Brinegar* made the probable cause standard for search warrants more "fluid," just as *Carroll* had made the reasonable suspicion standard for border stops more "fluid." And as Judge Pratt observed in *Hooper*, fluidity is a one-way street under the Fourth Amendment; the drug courier profile was "so fluid that it can be used to justify designating anyone a potential drug courier if the DEA agents so choose."[329]

Brinegar's enduring influence was not confined to the *Gates* scenario of search warrants based on anonymous tips. In the same spirit as *Gates,* the Court also leaned on *Brinegar* in *Ornelas v. United States,*[330] in which it aimed to protect police officers' discretionary findings of cause or suspicion from meddlesome federal district judges.[331] *Ornelas* was an appeal from a drug conviction where a search of the defendants' car found two kilograms of cocaine hidden behind a door panel.[332] In establishing a de novo standard of review for federal appellate courts assessing district court determinations of reasonable suspicion and probable cause, the Court referenced Brinegar eight times in its four-page analysis. [333] It noted *Brinegar*'s contribution to the "commonsense, nontechnical" formulations of the probable cause standard of *Gates* and again emphasized that both probable cause and reasonable suspicion are "fluid concepts."[334] The Court even noted, as an exception to its snowflake theory of reasonable suspicion and probable cause showings (no two cases are alike), "that the circumstances in *Brinegar* . . . and *Carroll* . . . were so alike that [the Court] concluded that reversing the Court of Appeals'

327. *See id.* at 232–34.

328. *Id.* at 232. *Gates* was widely criticized at the time, although some of that criticism was muted because of the unrealized concern that *Gates* was also expected to be the occasion for the announcement of the Court's adoption of a good faith exception to the exclusionary rule, an issue on which the Court had requested supplemental briefing after oral argument. *See, e.g.*, Yale Kamisar, Gates*, 'Probable Cause,' Good Faith,' and Beyond*, 69 IOWA L. REV. 551 (1984). The Court, in *United States v. Leon,* would actually adopt the awaited good faith exception to the exclusionary rule the following year. 468 U.S. 897, 922–24 (1984). As of 2023, *Gates* was among one of the most departed-from Supreme Court criminal procedure rulings, with ten states not following its holding. Christopher R. Green et al., *State-Court Departures from the Supreme Court: A Comprehensive Survey*, 92 MISS. L.J. 329, 347 (2023).

329. United States v. Hooper, 935 F.2d 484, 499 (2d Cir. 1991) (Pratt, J., dissenting).

330. 517 U.S. 690 (1996).

331. *See id.* at 691, 695.

332. *Id.* at 691.

333. *Id.* at 695–99.

334. *Id.* at 695–96 (citing Illinois v. Gates, 462 U.S. 213, 231, 232 (1983)).

decision in *Brinegar* was necessary to be faithful to *Carroll*."[335] For good measure, the Court ended its analysis with a one-way exception to the de novo standard where the police officer was performing the sort of "act of judgment" like the officers in *Brinegar*: "An appeals court should give due weight to a trial court's finding that the officer was credible and the inference [he drew] was reasonable." [336]

Ornelas offers multiple paeans to police officer experience and the deference that police factual conclusions must therefore be accorded, as they were in *Brinegar*.[337] The Court notes that one of the officers involved in the apprehension of the defendants was "a 20–year veteran of the Milwaukee County Sheriff's Department with 2 years specializing in drug enforcement"; that his partner was "a detective with approximately 25 years of law enforcement experience, assigned for the past 6 years to the drug enforcement unit"; and that the detective who actually performed the search—tearing up the interior of the car, as the officers had also done in *Carroll*—over the past nine years had searched approximately 2,000 cars for narcotics.[338] Accordingly, in adopting a de novo review standard for appellate courts, the Court "hasten[ed] to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.[339] The Court emphasized that "a police officer views the facts through the lens of his police experience and expertise." [340] The Court extolled this superpower even further:

> To a layman the sort of loose panel below the back seat armrest in the automobile involved in this case may suggest only wear and tear, but to Officer Luedke, who had searched roughly 2,000 cars for narcotics, it suggested that drugs may be secreted inside the panel. An appeals court should give due weight to a trial court's finding that the officer was credible and the inference was reasonable.[341]

There was no skepticism of the officer's ability to identify a "loose panel," and no discussion of Officer Luedke's success rate in his 2,000

335. *See id.* at 698. But, the Court's point is erroneous, as the Tenth Circuit affirmed the conviction in *Brinegar*. Brinegar v. United States, 338 U.S. 160, 160 (1949).

336. *Ornelas,* 517 U.S. at 700.

337. *See id.* at 699.

338. *Id.* at 691–93.

339. *Id.* at 699.

340. *Id*.

341. *Id.* at 700.

automobile searches.[342] As in *Carroll* and *Brinegar*, the officers' acute powers of observation and of expertise forged by experience were simply assumed.[343]

Yet, *Brinegar* has also been deployed by the Court to salvage police officers' conclusions that are indisputably erroneous. Despite their superpowers, police officers are also human beings whose mistakes must be tolerated. The Court has relied, as recently as 2014, on *Brinegar*'s reference to the "fair leeway" that must be afforded police officers in probable cause determinations, and its acknowledgement that reasonableness requires room to make "some mistakes on the part of government officials."[344] The Court has invoked *Brinegar's* "leeway" to uphold a warrantless search of a home based on the consent of a resident, even where the consent was given by someone who was not, but merely appeared to be, a resident.[345] Similarly, where officers with probable cause to arrest a suspect mistakenly arrested an individual matching the suspect's description, neither the seizure nor an accompanying search of the arrestee are unlawful.[346]

Most recently, the Court extended "*Brinegar* leeway" to mistakes of law.[347] In *Heien v. North Carolina*,[348] police officers stopped a motorist under the pretext of a faulty brake light.[349] In an ensuing consent search of the vehicle, the officers discovered cocaine.[350] Defendant Nicholas Heien moved to suppress the evidence seized from the car on Fourth Amendment grounds but the trial court denied the motion, concluding that the faulty brake light had given the officer reasonable suspicion to initiate the stop, and that Heien's subsequent consent to the search was valid.[351] On appeal, the North Carolina Court of Appeals reversed, finding the initial stop invalid because driving with only one working brake light was not a violation of North Carolina law and the officer's purported justification for the stop was therefore "objectively unreasonable."[352] On review, however, the Supreme Court disagreed.[353] Invoking *Brinegar*, the Court held that the officer's "mistake of law" was objectively reasonable inasmuch as the North Carolina statute at issue could plausibly be read to prohibit a faulty brake light.[354]

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342. *See id*.
343. *See id.* at 699.
344. *E.g.*, Heien v. North Carolina, 574 U.S. 54, 60–61 (2014) (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).
345. *See* Illinois v. Rodriguez, 497 U.S. 177, 183–86 (1990).
346. *See* Hill v. California, 401 U.S. 797, 802–05 (1971).
347. *Heien*, 574 U.S. at 61.
348. 574 U.S. 54 (2014).
349. *See id.* at 61.
350. *Id.* at 58.
351. *Id*.
352. *Id.* at 58–59.
353. *Id.* at 59.
354. *Id.* at 61, 68.

IV. *CARROLL, BRINEGAR* AND THE FORMS OF SUPREME COURT DEFERENCE TO POLICE TESTIMONY

Recall that in *Carroll,* the Court found that the officers had probable cause for the traffic stop not based on the police officers' actual testimony—the officers said they "had no reason to believe" alcohol was in the car at the time of the stop—but on the Court's own assessment of the circumstances.[355] In this way, the Court in *Carroll* not only empowered the police to act based on their exercise of discretion, but also empowered the judiciary, or at least the Supreme Court, to make a finding of probable clause even when the police have not done so.[356] This variety of "deference," if it may be called that, is at one extreme of the different kinds of deference the Court extends to the police.[357] But all of the various ways in which the Court finds its way to accepting the litigation positions of the police have roots in *Carroll*, *Brinegar*, and their progeny.

Deference Based on Actual Expertise. First, police testimony will be credited where the police actually have—or are presumed to have—relevant experience or expertise supporting their conclusions.[358] An example of this aspect of deference would be in *Ornelas*, where the officer who searched the defendants' car testified that he had searched approximately 2,000 cars for narcotics in the last nine years and that his suspicion that drugs might be packed away in the car door had been aroused by a loose door panel.[359] This sort of deference was also seen in the 1920s progeny of *Carroll* itself, such as *Steele* and *Dumbra*, where the Court deferred to the actual or presumed expertise of prohibition agents.[360]

Deference Based on Farfetched Expertise. Second, police testimony will be credited where the police exercise discretion and purport to have relevant experience or expertise, even where that experience is thin,

355. *See* Carroll v. United States, 267 U.S. 132, 162 (1925).

356. *See id.* at 160–61.

357. *See* discussion *infra* Part IV (describing forms of deference the Court shows to police).

358. *See* Ornelas v. United States, 517 U.S. 690, 700 (1996).

359. *Id.* at 693.

360. *See, e.g.*, Steele v. United States, 267 U.S. 498, 504 (1925) (citing *Carroll* and deferring to investigator Isidor "Izzy" Einstein's conclusion during execution of search warrant that certain unlabelled boxes were crates of whisky because Einstein was "a man of experience in such prosecutions and in such seizures"); Dumbra v. United States, 268 U.S. 435, 439, 441 (1925) (citing *Carroll* and crediting the search warrant affiant's probable cause conclusion because to do otherwise would assume "a singular lack of practical experience on the part of the officer").

unpersuasive or even far-fetched.[361] An example of this would be *Brignoni-Ponce*, where the Court noted, in endorsing an appearance of Mexican ancestry as a permissible factor (among many, many others) that border agents can rely on, that "trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut."[362] Another example of this dynamic was present in *Minnesota v. Dickerson*,[363] where the Court recognized a "plain-feel" exception to the normal permissible scope of a *Terry* search.[364] In doing so, the Court—although it found the exception inapplicable on these facts—credited the veteran police officer's testimony that "as I pat-searched the front of his body, I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane."[365] The Minnesota Supreme Court had called the officer's testimony "fiction."[366] Of course, a police officer's testimony can also be credited where based merely on common sense.[367] In *Kansas v. Glover*,[368] for example, the inference drawn by a police officer that the driver of a car whose owner had a suspended license are one and the same person was a matter of "common sense," even though unfounded in training or experience.[369]

Deference Based on Misleading Testimony with or Without Expertise. A third variant, closely related to the second, is that police testimony will be credited, with or without any profession of expertise, even where it is misleading, disingenuous, or even potentially perjurious.[370] Indeed a contemporary journalist criticized *Carroll* for making this possible, posing the question, "What would prevent an unscrupulous and lawless agent from manufacturing 'reasonable and probable cause'?"[371] A singularly egregious contemporary example of this phenomenon is *Florida v. Riley*.[372] In *Riley*, police officers were unable to get a view from the street of a greenhouse

361. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 875–85 (1975); Minnesota v. Dickerson, 508 U.S. 366, 375-76 (1993); Kansas v. Glover, 589 U.S. 376, 385 (2020) (crediting officers' experience and training in assessing reasonable suspicion based on observed facts and contextual judgment).

362. *Brignoni-Ponce*, 422 U.S. at 885.

363. 508 U.S. 366 (1993).

364. *Id.* at 375–76.

365. *Id*. at 369, 379.

366. State v. Dickerson, 481 N.W.2d 840, 844 (Minn. 1992), *aff'd*, 508 U.S. 366 (1993).

367. *E.g.*, Kansas v. Glover, 589 U.S. 376, 385 (2020).

368. 589 U.S. 376 (2020).

369. *Id.* at 385.

370. *See, e.g.*, Florida v. Riley, 488 U.S. 445, 450-51 (1989); United States v. Brignoni-Ponce, 422 U.S. 873, 885-86 (1975); Brinegar v. United States, 338 U.S. 160, 170 (1949).

371. *Has the Rest of the Constitution Been Repealed by the Eighteenth Amendment?*, BALT. SUN, Mar. 4, 1925, at 10.

372. 488 U.S. 445 (1989).

located behind the house of a suspected marijuana dealer, in part because the interior of the greenhouse was shielded from view by roofing panels covering ninety percent of the structure.[373] So, naturally, the police decided to take a look from a helicopter, hovering at an altitude of four hundred feet above the suspicious property.[374] The officers claimed, and the Court found unremarkable, that by using only the naked eye they could distinguish the presence of marijuana plants among other nearby flora in the greenhouse.[375] There is no standard of review imaginable where such testimony should be credited.[376]

Two other examples of this deference variant appear in the *Carroll* caselaw tree. In *Brignoni-Ponce*, the officers based their decision to stop Brignoni-Ponce's vehicle because the occupants appeared to be of Mexican ancestry, a conclusion the officers reached based on a fleeting glimpse of the car, illuminated only by the headlights of their police cruiser, as the car passed by them on a dark night.[377] The Supreme Court itself seemed skeptical of this conclusion although the officers' testimony was credited by both the district court and the Ninth Circuit panel.[378]

And for the last example of this third variant, we have *Brinegar*. The articulated reasons for the stop of Brinegar's car were a previous arrest on a similar charge, even though no charges appear to have been brought against him; Brinegar's "reputation" for illegal liquor dealing; and the officer's perception that Brinegar's car, as it sped by them on the highway, was "heavily loaded" and "weighted down with something."[379] It is hard to resist the conclusion that the officers were lying. The observation about Brinegar's car is simply implausible. And to the extent Brinegar's alleged "reputation" was based on his previous arrest on a similar but unprosecuted charge by one of the officers, it only sows doubt, revealing a stereotypical motive for a police vendetta. Even the *Brinegar* majority opinion seems uncomfortable with the officers' testimony, as it gratuitously introduces into its analysis of a police officer's probable cause determination the notions of "leeway" and "room for mistakes."[380]

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373. *See id*. at 448.

374. *Id*.

375. *See id*.

376. *See generally* Adam M. Gershowitz & Caroline E. Lewis, *Laundering Police Lies*, 2023 WIS. L. REV. 1187, 1221–39 (2023) (noting that *Terry*, *Whren*, *Innis*, *Murray*, and *Ornelas* (the rusty screw) are other examples of the Supreme Court tolerating obvious police lies).

377. United States v. Brignoni-Ponce, 422 U.S. 873, 874–75 (1975).

378. *Id.* at 886 ("Even if they saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country." (emphasis added)); United States v. Brignoni-Ponce, 499 F.2d 1109, 1110 (9th Cir. 1974).

379. Brinegar v. United States, 338 U.S. 160, 162–63 (1949).

380. *Id.* at 176.

From his dissenting opinion, it is also hard to resist the conclusion that Justice Jackson believed the police officers were lying. Perhaps a sense of decorum stopped him from saying as much. In a way, he did not need to, as his dissent otherwise served as a public clarion call about the risks of police authority. As noted above, Justice Jackson warned that police officers will "push to the limit" any authority they have, that any authority given "may be exercised by the most unfit and ruthless officers as well as by the fit and responsible," and that *Carroll* "already has been too much taken by enforcement officers as blanket authority to stop and search cars on suspicion."[381] He also observed that Fourth Amendment rights are so difficult to protect because the "officers are themselves the chief invaders."[382] While he did not specifically take issue with the officers' observation that Brinegar's car was "weighted down," he was highly skeptical of the testimony regarding Brinegar's prior arrest, and its unexplained nature, noting "there had been no conviction and it does not appear whether the circumstances of the former arrest indicated any strong probability of it."[383]

Deference to Insufficient Police Testimony By the Substitution of Judicial Factfinding. *Carroll* is the classic example of this variety of "deference," as noted at the beginning of this section. In these situations, the Court will be free to draw its own conclusions regardless of the police testimony.[384] As the Court is fond of saying when employing this paradigm, "Fourth Amendment reasonableness is 'predominantly an objective inquiry.'"[385]

Interestingly, *Terry v. Ohio*, used the same playbook.[386] Here is how the Court in *Terry* articulated its holding:

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381. *Id.* at 182–83 (Jackson, J., dissenting).

382. *Id.* at 181.

383. *Id.* at 186. Justice Jackson even went out of his way to criticize the circumstances of the stop itself, describing the officers' pursuit "at speeds dangerous to those who participated, and to other lawful wayfarers" as either "taking the initial steps in arrest, search and seizure, or . . . a completely lawless and unjustifiable act." *Id*. at 187–88. He also speculated whether a vehicle stop, or at least this particular vehicle stop, might even require a search warrant. *See id*. ("But when a car is forced off the road, summoned to stop by a siren, and brought to a halt under such circumstances as are here disclosed, we think the officers are then in the position of one who has entered a home . . . ." (citing Johnson v. United States, 333 U.S. 10, 17 (1948); McDonald v. United States, 335 U.S. 451, 456 (1948))).

384. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 162 (1925) (holding that courts may independently assess the objective reasonableness of a search).

385. Ashcroft v. al-Kidd, 563 U.S. 731, 736 (2011) (quoting Indianapolis v. Edmond, 531 U.S. 32, 47 (2000)).

386. *See* 392 U.S. 1, 21–22 (1968); SEO, *supra* note 49, at 148 (noting *Carroll*'s connection to and influence on *Terry*, including its use by the drafters of the 1942 Uniform Arrest Act).

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[387]

There at least three factual predicates contained within that sentence: the officer has experience that is relevant to his conclusions; the officer concludes from observed conduct that "criminal activity may be afoot"; and the officer concludes that the person or persons he is dealing with "may be armed and dangerous."

Not a single one of these predicates was established by the testimony of Detective Martin McFadden, the arresting officer, at the suppression hearing in *Terry*. First, as to his experience relevant to his conclusion that the suspects he observed in front of the department store were "casing the place," McFadden acknowledged that in his entire career he had never observed anybody casing a place.[388] Second, McFadden was also unable to articulate any reasons for his suspicion, as the following exchange demonstrates:

> Q. What caused you specifically to be attracted to those two individuals at the location that you have mentioned, or let me put it to you this way:
>
> Supposing those two defendants here that are now in court were standing across the street from here, and doing the same activities that you observed them on Huron and Euclid, would you have had any cause for suspicion?
>
> A. I really don't know.[389]

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387. *Terry*, 392 U.S. at 30.

388. Transcript of Suppression Hearing, *reprinted in* State of Ohio v. Richard D. Chilton *and* State of Ohio v. John W. Terry*: The Suppression Hearing and Trial Transcripts*, 72 ST. JOHN'S L. REV. 1387, App. B at 1420 [hereinafter Suppression Hearing Transcript].

389. *See id.* at 1421.

Third, McFadden also did not believe that the individuals he was dealing with were "armed and dangerous"; when asked if he knew the men had guns, he replied "[a]bsolutely not."[390]

This varying deference was most famously put to work in *Whren v. United States*,[391] in which the Court held that when police officers have an objectively reasonable basis for a traffic stop, their "subjective intent" in making the stop is immaterial.[392] In *Whren*, as elsewhere, the Court expressed this principle as if it were almost a specie of reverse *mens rea*: "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional," and "[s]ubjective intentions play no role in ordinary, probable cause Fourth Amendment analysis."[393]

But the principle is much broader than its expression in *Whren.* The Court has also employed it outside the probable cause context, in analyzing whether the conditions of an exception to the warrant requirement exist. For example, in *Brigham City v. Stuart*,[394] the Court found the "emergency assistance" specie of the exigent circumstances exception applicable where the police entered a home without a warrant to quell a "melee" at a house party.[395] The Court found it immaterial whether the officers entered the home for the subjective purpose of making arrests and gathering evidence or of assisting the injured and preventing further violence so long as there was an objective basis to enter on the latter grounds.[396] And in *Warden v. Hayden*,[397] the Court found that exigent circumstances justified a warrantless search for weapons in a home even though officer testified that he was searching for "the man or the money."[398]

Moreover, the Court has applied the principle outside the Fourth Amendment. For example, in *New York v. Quarles*,[399] the Court recognized a public safety exception to *Miranda v. Arizona*,[400] where a police officer apprehended a suspect in a store and asked him the location of his discarded gun without giving him *Miranda* warnings.[401] The Court recognized a public safety exception even though the officer had testified to opposite effect at the

390. *Id.* at 1419.
391. 517 U.S. 806 (1996).
392. *See id.* at 813.
393. *Id*.
394. 547 U.S. 398 (2006).
395. *See id.* at 400–01, 403–04, 406.
396. *Id.* at 405–06.
397. 387 U.S. 294 (1967).
398. *See id.* at 299–300.
399. 467 U.S. 649 (1984).
400. 384 U.S. 436 (1966) (establishing the requirement for warnings before custodial interrogation).
401. *Quarles,* 467 U.S. at 655–56.

suppression hearing, describing the situation as "under control."[402] The Court has even hinted that an objective standard might be applicable to a discriminatory prosecution claim under the Equal Protection Clause.[403] In *United States v. Armstrong*,[404] the Court "reserve[d] the question whether a defendant must satisfy the similarly situated requirement in a case involving direct admissions by [prosecutors] of discriminatory purpose."[405]

In sum, *Carroll* has a rich legacy. Although the proposition that the case formerly known as the "automobile exception" has swallowed the Fourth Amendment is likely an exaggeration, the footprints of *Carroll* and its direct descendants are still visible in multiple aspects of contemporary criminal procedure.

V. *OLMSTEAD V. UNITED STATES* AND GOVERNMENT MISCONDUCT

In *Olmstead v. United States*, the Supreme Court retreated from the position it had taken in *Weeks* and *Silverthorne* that the government could not derive prosecutorial advantage from its unlawful behavior.[406] In affirming the conviction of Roy Olmstead, despite the conviction being based entirely on federal investigative agents' wholesale violation of Washington state's criminal prohibition of wiretapping,[407] *Olmstead* enshrined the Court's high tolerance for police misconduct that exits to this day. *Olmstead,* as explained below, was the apotheosis of a trend in Prohibition era cases to excuse police lawlessness for the sake of a perceived "greater good," precisely the sort of utility- based reasoning the Court had rejected in the era preceding Prohibition.

It is perhaps not surprising that *Olmstead* is not regularly cited for this ignoble proposition. But the decision receives backhanded recognition of a sort in the many dissent citations over the decades to Justice Brandeis's dissent in *Olmstead*, in which he warned that "[i]f the government becomes a lawbreaker, it breeds contempt for law."[408] With the exception of a brief period during the early days of the Warren Court, Brandeis's *Olmstead* dissent has seen action only in other dissenting opinions. Most recently, it was

402. *Id.* at 675 (Marshall, J., dissenting).

403. *See* United States v. Armstrong, 517 U.S. 456, 469 n.3 (1996).

404. 517 U.S. 456 (1996).

405. *Id.* at 469 n.3.

406. *See* 277 U.S. 438, 468 (1928). *But see* Weeks v. United States, 232 U.S. 383, 392 (1914) (holding that unlawfully seized documents could not be used by the government as incriminating evidence); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (holding that evidence obtained in an illegal search is inadmissible).

407. *Olmstead*, 277 U.S. at 456–57, 468–69.

408. *Id*. at 486 (Brandeis, J., dissenting).

invoked by Justice Ginsburg in her dissent in *Herring v. United States*,[409] where the Court held that only "culpable" police misconduct requires the exclusion of improperly obtained evidence.[410] Dissenting, Justice Ginsburg called for a more "majestic" conception for the Fourth Amendment, for which she invoked Justice Brandeis's eighty-one-year-old dissent in *Olmstead*.[411]

A. Olmstead Backdrop

Recall that part of the rationale for requiring the exclusion from evidence of the papers seized in a warrantless search of Fremont *Weeks*'s home was the integrity of the judicial process.[412] The Court observed that the police "tendency . . . to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."[413] The same sentiment was reflected in *Silverthorne*.[414] This commitment to judicial integrity, however, began to ebb upon the advent of Prohibition.

Burdeau v. McDowell[415] was not a liquor case, but it came to the Court shortly after the effective dates of both the Eighteenth Amendment and the Volstead Act. The Court held that neither the Fourth nor Fifth Amendments precluded the government from bringing a mail fraud prosecution based on papers allegedly stolen from the defendant by a private party acting without government knowledge or involvement.[416] Moreover, the Court reasoned that the amendments only proscribed "the activities of sovereign authority" and were not "intended to be a limitation upon other than governmental agencies."[417] Justice Brandeis, joined by Justice Holmes, in a harbinger of things to come, dissented:

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409. 555 U.S. 135, 152–53 (2009) (Ginsburg, J., dissenting).

410. *Id*. at 144.

411. *Id.* at 151–52 (Ginsburg, J., dissenting) (agreeing with the Court's description of the exclusionary rule as a "majestic conception" of the Fourth Amendment in *Arizona v. Evans*, 514 U.S. 1, 18 (1995), and invoking Justice Brandeis's dissent in *Herring* to explain the purpose of the rule).

412. *See* Weeks v. United States, 232 U.S. 383, 393 (1914).

413. *Id*. at 392.

414. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

415. 256 U.S. 465 (1921).

416. *See id*. at 476. The majority and dissent both assumed the papers were "stolen." *Id*. at 470; *id*. at 476 (Brandeis, J., dissenting). However, a more accurate and benign interpretation is that corporate officials discovered that their officer employee, McDowell, had been committing fraud in connection with the company's business and had therefore fired him and turned over documents in his company office to the DOJ.

417. *Id.* at 475 (majority opinion).

> At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play.[418]

Three years later, in *Hester v. United States*,[419] federal revenue agents acting on a tip ("[i]n consequence of information") approached Charlie Hester's residence, concealing themselves fifty to one hundred yards from the house.[420] From that vantage point, they observed what appeared to be a hand-to-hand liquor transaction between Hester and a visitor, and then charged in to apprehend the suspects.[421] The Court assumed the agents had been trespassing when the agents observed the illicit transaction but held that their observation, despite the vantage point, was not a search and thus did not require a warrant: "the defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle."[422] The Court also held that the "open fields" location of the agents' surveillance was not among the "persons, houses, papers, and effects" listed in the Fourth Amendment.[423]

Three years after that, just one year before *Olmstead*, the Court in *Byars v. United States*,[424] recognized the continued vitality of what would later become known as the "silver platter doctrine." Under this doctrine, it was permissible for "the federal government to avail itself of evidence improperly seized by state officials operating entirely on their own account," that is, without official participation by federal agents.[425] The Court actually reversed the conviction in *Byars*, but only because of the extent of the federal agent's participation in the search.[426] That involvement, in the agent's "official capacity," included taking possession of illegally seized (beyond the scope of the warrant) counterfeit stamps for liquor bottles, which had no value for any state prosecution.[427]

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418. *Id.* at 477 (Brandeis, J., dissenting).

419. 265 U.S. 57 (1924).

420. *Id.* at 57.

421. *See id.* at 58.

422. *See id.*

423. *Id.* at 59. *Hester*'s open fields doctrine would be relied on by the Court sixty years later in *Oliver v. United States*, Oliver v. United States, 466 U.S. 170, 173 (1984), with the dissenters invoking Brandeis's *Olmstead* dissent, *id.* at 197 (citing Oliver, 466 U.S. at 478 (Brandeis, J., dissenting)).

424. 273 U.S. 28 (1927).

425. *Id.* at 33.

426. *Id.* at 33–34.

427. *See id.* at 30–32.

Another important part of the backdrop to *Olmstead* was the state of wiretapping law in 1928.[428] Wiretapping, the covert use of a device to monitor electric or electronic communications sent over a wire, came into use in the last quarter of the nineteenth century after the 1876 invention of the telephone.[429] Principal early uses were for what could be described as "corporate espionage," including surveillance by business organizations of their competitors and labor unions.[430] State legislatures responded to this trend, and by 1928, when *Olmstead* was decided, over half of the states had imposed criminal bans on wiretapping.[431] No federal case mentioned wiretapping prior to *Olmstead*, which was probably a function of the overall dearth of Fourth Amendment case law prior to Prohibition, as explained above.[432]

The federal government had not been entirely silent on the subject of wiretapping prior to *Olmstead*, however. For example, during Prohibition, federal law enforcement executives forbade wiretapping's use by government agents.[433] Under the leadership of Attorney General (later Justice) Harlan Fiske Stone, who would be a dissenter in *Olmstead*, the Justice Department prohibited the use of the practice, as did the Treasury Department, which oversaw the Bureau of Prohibition and its investigative agents.[434] In short, the federal agents who tapped Roy Olmstead's phones had gone rogue, defying federal law enforcement policies.[435] The Solicitor General frankly acknowledged the illegality of the agents' actions in its brief to the Court.[436] Even zealous Assistant Attorney General Willebrandt refused to appear in the Supreme Court on behalf of the United States in *Olmstead*.[437] Willebrandt, who was not squeamish about the excesses of federal agents (she had represented the government before the Court in *Hester*) explained her position in the "whispering wires" case as follows:

> I certainly approved of apprehending Olmstead—he was head of a ring of liquor runners from Canada—but I did not approve of the way the prohibition agents obtained their evidence. Practically all their

428. *See* Kerr, *supra* note 229, at 839–45.

429. *See id.* at 840–41.

430. *See id.* at 841; April White, *A Brief History of Surveillance in America*, SMITHSONIAN MAG., Apr. 2018, https://www.smithsonianmag.com/history/brief-history-surveillance-america-180968399/ [https://perma.cc/YPS8-4ZJ5].

431. Kerr, *supra* note 229, at 841.

432. *See id.* at 816, 843.

433. *Id.* at 843.

434. *See id.* at 817 n.84, 843.

435. *Id.* at 843.

436. *See id.* at 844.

437. WILLEBRANDT, *supra* note 235, at 232.

> testimony was based on information they obtained by "tapping" telephone wires.
>
> Now, I thoroughly disapprove of the practise of tapping telephone wires. Irrespective of its legality, I believe it a dangerous and unwarranted practise to follow in enforcing law. Many of the states have laws against such interception of communications. . . .
>
> . . . I indicated to the Solicitor General my unwillingness to argue the case in an attempt to justify the prohibition agents' wire-tapping tactics of which I thoroughly disapproved.[438]

B. Olmstead v. United States

1. Factual Background

Roy Olmstead was a legend. He had been a rising star in the Seattle Police Department when, in 1920, he was caught by federal agents from the Treasury Department's Prohibition Bureau smuggling liquor from Canada in violation of the Volstead Act, which had gone into effect on the first of that year.[439] He was fined the statutory maximum for a first offense of $500 and fired from the Police Department.[440] Unencumbered by his former day job, Olmstead rededicated himself to his liquor business and quickly became the most successful and powerful bootlegger in the Pacific Northwest.[441] His organization, which eventually numbered fifty employees, imported liquor in ocean freighters from England to Vancouver, British Columbia, from where it was distributed by speedboats and then trucks throughout the Seattle area to individual and business clients.[442]

In his majority opinion for the Court, Chief Justice Taft acknowledged the breadth of *Olmstead*'s empire, and marvels that an illicit operation could be so well-organized.[443] He also seems obsessed with the operation's telephones, which he no doubt viewed—just like he did automobiles—as

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438. *Id.* at 231–32.

439. *See* DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION 284–85 (2010); Richard F. Hamm, Olmstead v. United States*: The Constitutional Challenges of Prohibition Enforcement*, *in* FEDERAL TRIALS AND GREAT DEBATES IN UNITED STATES HISTORY 1, 2–3 (2010).

440. *See* Hamm, *supra* note 439, at 3.

441. *See id*.

442. WALTER F. MURPHY, WIRETAPPING ON TRIAL 16–17 (1965); OKRENT, *supra* note 439.

443. *See* Olmstead v. United States, 277 U.S. 438, 455–56 (1928).

unadulterated instruments of criminality.[444] Taft described Olmstead's business as "a conspiracy of amazing magnitude," with all the conventional trappings of a commercial enterprise, including dozens of employees and a network telephones.[445] The operation featured

> [A] central office manned with operators, and the employment of executives, salesmen, deliverymen dispatchers, scouts, bookkeepers, collectors, and an attorney. In a bad month sales amounted to $176,000; the aggregate for a year must have exceeded $2,000,000.
>
> Olmstead was the leading conspirator and the general manager of the business. He made a contribution of $10,000 to the capital; 11 others contributed $1,000 each. The profits were divided, one-half to Olmstead and the remainder to the other 11. Of the several offices in Seattle, the chief one was in a large office building. In this there were three telephones on three different lines. There were telephones in an office of the manager in his own home, at the homes of his associates, and at other places in the city. Communication was had frequently with Vancouver, British Columbia. . . . One of the chief men was always on duty at the main office to receive orders by the telephones and to direct their filling by a corps of men stationed in another room-the 'bull pen.' The call numbers of the telephones were given to those known to be likely customers. At times the sales amounted to 200 cases of liquor per day.[446]

Almost all of the above information about Olmstead's business, and all of the evidence obtained by prosecutors, was learned by wiretapping those very phones that Taft mentions.[447] Federal prohibition agents spent almost five months covertly intercepting telephone communications between members of the enterprise, between enterprise members and customers, and even between Olmstead and Seattle police officers, discussing the arrests and release of conspirators and payments to the officers.[448]

The agents generated 775 pages of typewritten notes on the intercepted conversations,[449] and used the wiretap evidence to generate search warrants that led to the seizure of further evidence of Olmstead's enterprise.[450] In January 1925, federal prosecutors used the wiretap evidence and its fruits in

444. *See id.* at 456–57.
445. *See id*.
446. *Id*.
447. *See id.* at 456.
448. *See id.* at 471 (Brandeis, J., dissenting).
449. *Id.* at 471.
450. *See* MURPHY, *supra* note 442, at 18–19.

the grand jury to secure indictments of more than ninety people on Volstead Act conspiracy charges.[451] In the ensuing trial of Olmstead and forty-six co-defendants, the wiretap evidence was the centerpiece of the government's case, along with the testimony of several insider cooperating witnesses for whom the government had dropped charges in exchange for their testimony.[452] Olmstead was convicted along with nineteen others and sentenced to four years in prison and an $8,000 fine.[453]

2. The Majority Opinion

Olmstead's conviction was affirmed by the Ninth Circuit and the Supreme Court granted review solely on the question of "whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wiretapping, amounted to a violation of the Fourth and Fifth Amendments."[454] Chief Justice Taft wrote for a 5-4 majority of the Court, rejecting constitutional arguments under both amendments, and also rejecting the argument that the evidence should be otherwise excluded.[455] Justices Brandeis, Holmes, Butler, and Stone all wrote dissenting opinions on slightly different grounds.[456]

As he had done in *Carroll*, Chief Justice Taft briefly reviewed the Court's principal Fourth and Fifth Amendment precedents.[457] He summarily dismissed the Fifth Amendment argument inasmuch as there was "no evidence of compulsion to induce the defendants to talk" over what Taft pointedly described as "their many telephones," as if there was an assumption of risk element to a Fifth Amendment challenge.[458] As to the Fourth Amendment, Taft noted that the Court's applicable precedents—*Weeks, Silverthorne, Amos,* and *Gouled*—all involved an "actual entrance into the private quarters of defendant and the taking away of something tangible."[459] By contrast, he went on, here "[t]here was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants."[460] There was

451. *See id.* at 18–22.
452. Hamm, *supra* note 439, at 6.
453. *Id.* at 7.
454. *Olmstead*, 277 U.S. at 455.
455. *See id.* at 438–69.
456. *See id.* at 471–88.
457. *Id.* at 458–64; Carroll v. United States, 267 U.S. 132, 147–53 (1925).
458. *See Olmstead*, 277 U.S. at 462.
459. *Id.* at 463–64.
460. *Id*.

little acknowledgment by Taft of the new and controversial technology which made this sort of "hearing" possible.[461]

Taft also distinguished another precedent,[462] *Ex parte Jackson*,[463] in which the Court had held that the government could not open a sealed letter in the United States Mail without a warrant.[464] In doing so, Taft was confronted with the "effect" question that he had ignored in *Carroll*, that is, whether a private conversation was among the "persons, houses, papers, and effects" singled out in the taxonomy of the Fourth Amendment.[465] Taft concluded it was not: whereas a sealed letter was both a "paper" and an "effect," and thus "plainly within the words of the amendment," a private conversation did not fall within any of the Fourth Amendment's categories.[466] As for the precedential value of *Hester*, Taft pointed out that "[w]hile there was a trespass, there was no search of person, house, papers, or effects."[467] At bottom, while Taft paid lip service to the expansive spirit of *Boyd* and *Gouled*, to the effect that the Fourth Amendment should "be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty," he concluded that such an approach "cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight."[468]

Having dealt with the substantive Fourth Amendment question, Taft turned to the dissenters' points, some of which, in his view, strayed beyond the lone question upon which certiorari had been granted.[469] Taft's huffiness in this regard anticipates the substance of his response to the dissenters: that violation and remedy are two sides of the same Fourth Amendment coin.[470] In response to the argument that the government's wiretapping was unethical as well as criminal under Washington state law, Taft enlisted a supposedly

461. *Id.* at 464.

462. *See Olmstead*, 277 U.S. at 486 & n.22 ("The court, adhering to and reiterating the principles laid down and applied in prior decisions construing the search and seizure clause, in substance adopts the contention of the government." (citations omitted)).

463. 96 U.S. 727 (1877).

464. *Id.* at 733.

465. *See Olmstead*, 277 U.S. at 463–64; Maclin, *supra* note 74, at 2336–37.

466. *Olmstead*, 277 U.S. at 464.

467. *Id.* at 465 (citing United States v. Lee, 274 U.S. 559 (1927); Eversole v. State, 106 Tex. Cr. R. 567, 294 S.W. 210 (Tex. 1927)).

468. *Id.*

469. *Id.* at 466 ("But some of our number, departing from that [certiorari] order, have concluded that there is merit in the twofold objection, overruled in both courts below, that evidence obtained through intercepting of telephone messages by a [*sic*] government agents was inadmissible, because the mode of obtaining it was unethical and a misdemeanor under the law of Washington.").

470. *See id.* at 466–69.

longstanding common-law rule that "admissibility of evidence is not affected by the illegality of the means by which it was obtained."[471] As for the dissenters' argument that the exclusionary rule of *Weeks* was controlling, Taft dismissed *Weeks* as an "exception" to the common law rule.[472] An exclusionary rule based on unethical conduct would also be bad public policy, according to Taft, and he gave as an illustrative example the government's necessary use of undercover informants.[473] In any event, wrote Taft, if wiretapping were to be banned federally, or if the fruits of wiretapping were to be inadmissible in federal courts, it was up to Congress, not the Supreme Court, to say so.[474]

Mabel Willebrandt was not the only member of the interested public who disapproved of the *Olmstead* prosecution.[475] The press vilified the decision. One journalist slammed *Olmstead* as "the Dred Scott decision of prohibition."[476] *Barron's Weekly* asserted that Olmstead was proof that Prohibition could be forced upon a resistant nation only by such "dirty business" of wiretapping.[477] In a similar vein, an editorial in *Nation* saw the decision as evidence that Prohibition's biggest burden "is the shocking lawlessness that has been employed to enforce it."[478] Even the virulently dry Anti-Saloon League, whose lobbying efforts had secured Prohibition, was nervous about *Olmstead*.[479] It feared that Prohibition would become disreputable if the public perceives that "universal snooping" is being used in enforcing the Eighteenth Amendment.[480]

3. The Dissenting Opinions

The majority opinion drew four separate dissents.[481] Justice Butler found that wiretapping violated at least the Fourth Amendment.[482] He implied both a privacy and property rationale to this conclusion, observing that wiretapping

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471. *Id.* at 467.

472. *Id.* Nothing in *Weeks* suggests the rule it introduced was an exception. *See generally* Weeks v. United States 232 U.S. 383 (1914) (distinguishing precedent without articulating an exception).

473. *Olmstead*, 277 U.S. at 468.

474. *Id.* at 465–66, 468.

475. *See* Post, *supra* note 12, at 170–71 nn.563–67.

476. *A New Dred Scott Decision*, OUTLOOK, June 20, 1928, at 293.

477. Post, *supra* note 12, at 171 (citing *With the Editor: Judge-Made Law*, BARRON'S WEEKLY, June 11, 1928, at 11).

478. *Id.* (citing *Editorial*, 126 NATION 679, 679 (1928)).

479. *See Dr. Nicholson Backs Dry Wire-Tapping*, N.Y. TIMES, June 24, 1928.

480. *Id.*

481. Olmstead v. United States, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting); *id.* at 471 (Brandeis, J., dissenting); *id.* at 485 (Burton, J., dissenting); *id.* at 488 (Stone, J., dissenting).

482. *Id.* at 488 (Butler, J., dissenting).

intrudes on telephone users' "contemplat[ion of] the private use of the [telephone] facilities" and also interferes with users' "exclusive use" of the wire while they are speaking.[483] Citing *Boyd,* he noted that his conclusion "is in harmony with the rule of liberal construction that always has been applied to provisions of the Constitution safeguarding personal rights."[484] He also rebuked Taft's technophobic antipathy towards the Olmstead empire's "many phones": "Telephones are used generally for transmission of messages concerning official, social, business and personal affairs including communications that are private and privileged -- those between physician and patient, lawyer and client, parent and child, husband and wife." [485]

Justice Holmes, for his part, was not "prepared" to find a Fourth Amendment violation but did note that he "fully agree[s] that courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them."[486] He agreed with Justice Brandeis, however, that "apart from the Constitution the government ought not to use evidence obtained and only obtainable by a criminal act."[487]As for the "common law rule" relied on by the majority that evidence is admissible irrespective of its origin, Holmes appealed to precedent: "that somewhat rudimentary mode of disposing of the question has been overthrown by *Weeks* and the cases that have followed it."[488]

Justice's Brandeis dissenting opinion has been widely admired. Some dissents are famous for their foresight, staking out a position that eventually becomes, or contributes to, controlling law, such as Justice Harlan's plea in *Plessy v. Ferguson*, that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens."[489] Or a dissent can become famous is for its eloquence in a losing cause, taking a stand that never gains popular traction but has a "rage, rage, against the dying of the light" passion.[490] Consider Justice Douglas's warning in dissent in *Terry v. Ohio* that "[t]o give the police greater power than a magistrate is to take a long step down the totalitarian path," the quixotic expression of a noble sentiment.[491]

Justice Brandeis's *Olmstead* dissent has both of these qualities: his famous paean to privacy eventually became an accepted part of constitutional

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483. *See id.* at 487.

484. *Id.* (citing Byars v. United States, 273 U.S. 28, 32 (1927)).

485. *See id.*

486. *Id.* at 469 (Holmes, J., dissenting) (citing Gooch v. Oregon Short Line R.R. Co., 258 U.S. 22, 24 (1922)).

487. *Id.*

488. *See id.* at 470

489. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Obviously, the legacy of the "color blind" constitution observation, though powerful, is complicated.

490. Dylan Thomas, *Do Not Go Gentle into That Good Night*, ACAD. OF AM. POETS, https://poets.org/poem/do-not-go-gentle-good-night, [https://perma.cc/66T3-T3MR].

491. 392 U.S. 1, 38 (1968) (Douglas, J., dissenting).

law in *Griswold v. Connecticut*, *Roe v. Wade*, and beyond, while his equally powerful appeal to governmental integrity lies in the ash heap of legal history.[492] In advocating for a constitution that has a "capacity of adaptation to a changing world," Brandeis enlisted the language and spirit not only of the pre-Prohibition Fourth Amendment stalwarts (*Boyd, Silverthorne, Gouled*) but also *McCulloch v. Maryland*.[493] In *Boyd*, "a case that will be remembered as long as civil liberty lives in the United States," he found an expression of that capacity, of a recognition that while the written law flows "from an experience of evils" its words are not "necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes."[494]

For Brandeis, "the evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails," the evil at issue in *Jackson*, or even in the original evils sought to be proscribed by the Fourth Amendment.[495] "As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping."[496] Preventing such "invasions" of privacy was the entire purpose of the Fourth Amendment:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[497]

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492. *See* 381 U.S. 479, 494 (1965) (Goldberg, J., concurring) (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)); 410 U.S. 113, 152 (1973) (citing *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting), *overruled by*, Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

493. *Olmstead*, 277 U.S. at 455–56 ("[W]e must never forget that it is a constitution we are expounding." (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819))).

494. *Id.* at 472–74 (Brandeis, J., dissenting) (citation omitted) (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).

495. *Id.* at 475.

496. *Id.* at 476.

497. *Id.* at 478.

The vindication of this part of Justice Brandeis's *Olmstead* dissent would come thirty-nine years later, in *Katz v. United States*,[498] where the Court moved away from *Olmstead*'s property-centric focus and recognized that "the Fourth Amendment protects people, not places."[499]

But Justice Brandeis has also earned acknowledgement, if only in academic commentary[500] and dissenting opinions, for the "rage against the dying of the light" aspect of his *Olmstead* dissent.[501] He found, as did Justice Holmes, an "independent" ground for reversal of Olmstead's conviction in the criminality of the Prohibition agents' wiretapping.[502] Distinguishing *Burdeau*—here, in *Olmstead*, it was the investigating officers themselves who committed the crime—Brandeis invoked the equitable spirit of "unclean hands" as a principled basis for reversal, and warned of the perils of an overly utilitarian approach to law enforcement:[503]

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-to declare that the government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.[504]

With *Olmstead*, the Supreme Court's Prohibition era abandonment of the governmental integrity rationale expressed in *Boyd*, *Weeks,* and *Silverthorne* was complete. But, as explained above, *Olmstead* had not come out of the blue. Since the very beginning of Prohibition, the Court had been enabling law enforcement in new ways. In 1921, *Budreau* had permitted a prosecution

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498. 389 U.S. 347 (1967).

499. *Id.* at 351; *see id.* at 361 (Harlan, J., concurring) (explaining that the Fourth Amendment requires an inquiry into whether a person had an "expectation of privacy" and that such expectation is one that "society is prepared to recognize as reasonable").

500. *See* Carol S. Steiker, *Brandeis in Olmstead: "Our Government Is the Potent, the Omnipresent Teacher,"* 79 MISS. L. J. 149, 149–50 (2009).

501. *See Olmstead*, 277 U.S. at 484–85 (Brandeis, J., dissenting).

502. *Id.* at 478–80; *see id.* at 469–70 (Holmes, J., dissenting).

503. *See id.* at 483–85 (Brandeis, J., dissenting).

504. *Id.* at 485.

based on the evidentiary use of the fruits of a private theft; in 1924, *Hester* had sanctioned a prosecution made possible only by the trespass by federal agents on to private property; and in 1927, *Byars* condoned federal prosecutors' use in a federal prosecution of evidence obtained by state officials in a manner that was illegal under federal law.[505] *Olmstead,* although an extreme example, was hardly an outlier in the Court's blessing of police misconduct for the sake of Prohibition.

4. Legacy: High Tolerance for Misconduct

The "pernicious doctrine" decried by Brandeis—that police lawbreaking in the enforcement of the law can be ignored—is the long-term victor in *Olmstead*.[506] But the ember of the *Olmstead* dissents flickered briefly in the early days of the Warren Court, as the Court increasingly expanded the Fourteenth Amendment's due process guarantees against the states. In *Elkins v. United States,*[507] the Court overturned what had become known as the "silver platter doctrine" associated with the Prohibition era case *Byars*, namely, that evidence obtained by state actors in violation of the Fourth Amendment could nonetheless be used in a federal prosecution.[508] Quoting from both the Holmes and Brandeis dissents, as well as Jackson's dissent in *Brinegar*, the Court held that the "imperative of judicial integrity" precluded the use of such evidence in federal court.[509] And the following year, in *Mapp v. Ohio*,[510] the Court relied on *Elkins'*s "imperative of judicial integrity" and Brandeis's *Olmstead* dissent in holding that the Fourth Amendment's exclusionary rule applied to the states.[511] *Mapp* was one of the last times the *Olmstead* dissents would be cited in a majority opinion of the Court.[512]

The beginning of the end for the imperative of judicial integrity came thirteen years after *Mapp*, with the Court's membership substantially repopulated by President Richard Nixon, who had campaigned in both the 1968 and 1972 presidential elections on a law-and-order platform and a

505. Burdeau v. McDowell, 256 U.S. 465, 476 (1921); Hester v. United States, 265 U.S. 57, 58–59 (1924); Byars v. United States, 273 U.S. 28, 33–34 (1927).

506. *See Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

507. 364 U.S. 206 (1960).

508. *See id.* at 208, 215–18.

509. *Id.* at 222.

510. 367 U.S. 643 (1961).

511. *See id.* at 659.

512. 367 U.S. 643, 659 (1961) (citing Justice Brandeis's dissent in *Olmstead*). *But see, e.g.*, *Carpenter v. United States*, 585 U.S. 269, 320 (2018) (quoting Justice Brandeis's dissent in *Olmstead* where Justice Brandeis explained that the Court is obligated to ensure that the "progress of science" does not erode Fourth Amendment protections." (quoting *Omstead*, 277 U.S. at 473–74 (Brandeis, J., dissenting))).

promise to appoint "strict constructionists" to the Court.[513] In *United States v. Calandra*,[514] federal agents for several hours ransacked a two-story office building housing John Calandra's metalworking business in connection with a gambling investigation.[515] When the agents subsequently sought to immunize Calandra and compel him to testify in the grand jury, Calandra moved to preclude any questioning based on the results of the search, which he contended had been illegal.[516] The federal district court granted his motion, finding that the warrant was not supported by probable cause, was insufficiently particular, and that the search exceeded the warrant's authorized scope.[517] In short, the warrant and the search were illegal in every way possible. The Sixth Circuit affirmed.[518]

The Supreme Court reversed.[519] It held that the exclusionary rule did not apply because Calandra's argument was made in the context of a grand jury proceeding, as opposed to a motion to suppress prior to trial.[520] The Court noted the lower evidentiary standard that governed the grand jury indictment (probable cause) and that an aggrieved defendant would still be able to challenge the admission of any illegally obtained evidence at a trial on the merits.[521] Trivializing any "integrity" concerns, the Court focused almost exclusively on the deterrent rationale of the exclusionary rule, reasoning that agents would have little motivation to behave illegally solely to obtain evidence to use in the grand jury.[522]

Even putting aside the myopic focus on deterrence, the majority opinion in *Calandra* reflects a remarkably naïve view of how law enforcement works in the real world.[523] The Court wholly ignores the potential instrumental use of illegally obtained evidence, that is, as a means to a secondary law enforcement end.[524] For example, whatever was seen or taken in the search of John Calandra's office could be used as a lead to other evidence against him

513. *See* Keith E. Whittington, *Commentary: Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 504–06 (2001).

514. 414 U.S. 338 (1974).

515. *Id.* at 340.

516. *Id.* at 341.

517. *Id.* at 341–42.

518. *Id.* at 342.

519. *Id*.

520. *See id.* at 354–55.

521. *See id.* at 349–51.

522. *See id.* at 351–52. The court distinguished *Calandra* from *Silverthorne Lumber Co. v. United States*, because in *Silverthorne,* the defendants were already indicted, had standing to invoke the exclusionary rule, the grand jury did not need the documents for its investigation, and a prior court had already deemed the seizure unlawful. *See id.* at 352 n.8.

523. *See* Brett Raffish, *Making the Fourth Amendment "Real" in Grand Jury Proceedings*, 19 GEO. J.L. & PUB. POL'Y 529, 546–47 (2021).

524. *See* Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 300–01 (1998).

that can be acquired legally, or to develop a case against third-parties, as seems to have been the case here, given the prosecutor's offer of immunity to Calandra.[525] Indeed the combination of the immunity offer to Calandra and the blatant illegality of the search suggests the police had no intention to use the fruits of their search directly against Calandra.[526] The Court's view also ignores the reality that a grand jury indictment is usually the endgame of the criminal process.[527] As the Court knew full well in 1974, over 90% of cases never go to trial but are resolved by a guilty plea.[528]

In his dissent, Justice Brennan, joined by Justices Douglas and Marshall, protested the majority's single-minded focus on deterrence, which he described as "a startling misconception, unless it is a purposeful rejection, of the historical objective and purpose of the exclusionary rule.[529] He emphasized the principles established by such precedents as *Elkins* and *Mapp*, and even *Weeks* and *Silverthorne*, and quoted from both the Holmes and Brandeis dissents in *Olmstead*:

> The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.[530]

Justice Brennan went so far as to express concern about the future of the exclusionary rule, which had been applicable in federal court for sixty years at the time:

> I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search-and-seizure cases; for surely they cannot believe that application of the exclusionary rule at trial furthers the goal of

525. *See id*.

526. *See Calandra,* 414 U.S. at 341–42.

527. *Compare* Brady v. United States, 397 U.S. 742, 752 n.10 (1970) (where the Court would not deign to formally recognize the finality of grand jury indictment), *with* Missouri v. Frye, 566 U.S. 134, 143 (2012) (formally recognizing that grand jury indictment usually ends the criminal process, forty years after *Brady*).

528. *See Brady*, 397 U.S. at 752 n.10; Heumann, *supra* note 13, at 516 n.1.

529. *See Calandra*, 414 U.S. at 356 (Brennan, J., dissenting).

530. *See id.* at 357–61.

> deterrence, but that its application in grand jury proceedings will not 'significantly' do so.[531]

Justice Brennan's 1974 fears were prescient. The erosion of the exclusionary rule took place in due course, gradually, then suddenly, as has been well-documented elsewhere.[532] A prominent, comparatively recent milestone in that process was *Herring v. United States*,[533] where the Court found the exclusionary rule inapplicable where local police officers in Alabama arrested Bennie Dean Herring based on a warrant that turned out to have been erroneously posted in a police database.[534] The Court upheld his conviction on federal drug and gun charges, the evidence for which was exclusively the product of a search incident to Herring's illegal arrest.[535] The Court emphasized the exclusionary rule's deterrent rationale, citing *Calandra*, and reimagined the exclusionary rule as being focused solely on the "culpability" of the police conduct because, as the Court claimed, only culpable misconduct is capable of being deterred.[536] In dissent, Justice Ginsburg, joined by Justices Stevens, Breyer, and Souter, noted that the notion that only culpable conduct can be deterred ignores "the foundational premise of tort law," routinely taught to and readily absorbed by first-year law students, "that liability for negligence, i.e., lack of due care, creates an incentive to act with greater care."[537] She also called for "a more majestic conception" of the Fourth Amendment, and cited both the Holmes and Brandeis *Olmstead* dissents.[538]

But it is the tradition of *Olmstead* itself, and not its dissents, that runs through the last century of the Court's criminal procedure decisions. And it is in the spirit of *Olmstead*, which overlooked illegal wiretapping by rogue federal agents, that the Supreme Court has long found ways to overlook all manner of police misconduct, notwithstanding the sentiment expressed by the dissent in *Herring*.[539] In that spirit, the Court has overlooked multiple varieties of criminal and tortious conduct committed by or implicating law enforcement, including the following representative categorical examples.

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531. *See id.* at 365.

532. *See, e.g.*, Matthew Allan Josephson, *To Exclude or Not to Exclude: The Future of the Exclusionary Rule After* Herring v. United States, 43 CREIGHTON L. REV. 175, 179–81 (2009).

533. 555 U.S. 135 (2009).

534. *Id.* at 147–48.

535. *See id*.

536. *See id.* at 139–40, 144.

537. *See id.* at 153 (Ginsburg, J., dissenting).

538. *Id.* at 151–52.

539. *Id.* at 139–40 (majority opinion); *see* Olmstead *v.* United States*,* 277 U.S. 438, 484–85 (1928); *Herring*, 555 U.S. at 148–57 (Ginsburg, J., dissenting).

Fraud/Misrepresentation. *See, e.g.*, *Frazier v. Cupp* (deliberate deception by police—here, falsely telling a suspect in custody that his companion at the crime scene had confessed to the murder—was not grounds for excluding a subsequent confession);[540] *United States v. Washington* (warnings given to a grand jury witness who was subsequently indicted were adequate, and his testimony need not be excluded, even though the witness was told by law enforcement that he was only "needed as a witness in prosecuting [two other people]").[541]

Trespass. *See Oliver v. United States* (relying on *Hester*, and holding evidence need not be excluded even where probable cause to arrest defendant was obtained only by trespassing far down a private road on defendant's property);[542] *Murray v. United States* (where agents broke into a warehouse without a warrant, the "independent source doctrine" permits use of evidence initially discovered in connection with the unlawful search, but later obtained independently from lawful activities untainted by the initial illegal search);[543] *Segura v. United States* (where police officers illegally entered an apartment awaiting a search warrant, the suppression of evidence was not required where a warrant was obtained on the basis of information unconnected with the initial unlawful entry).[544]

Theft. *California v. Greenwood* (validating a warrantless search and seizure of opaque garbage bags left curbside for trash pickup as reasonable, despite ordinances prohibiting anyone except authorized trash removal personnel from interfering with trash left for collection);[545] *Payner v. United States* (exclusion of a loan guarantee document was not required where government agents had broken into a hotel room and stolen a briefcase containing the document because the defendant was not the person whose hotel room was broken into).[546]

False Imprisonment. *See Virginia v. Moore* (suppression of cocaine found during a search incident to the arrest of defendant was not required, even though the arrest was illegal under a Virginia law mandating issuance of a summons for misdemeanor of driving without a license);[547] *Heien v. North Carolina* (suppression of cocaine found during search incident to arrest of

540. 394 U.S. 731, 737 (1969).
541. 431 U.S. 181, 192–93 (1977).
542. 466 U.S. 170, 180 (1984) (citing Hester v. United States 265 U.S. 57, 59 (1924)).
543. 487 U.S. 533, 541–42 (1988).
544. 468 U.S. 796, 813–15 (1984).
545. 486 U.S. 35, 37–39, 44–45 (1988).
546. 447 U.S. 727, 735 (1980).
547. 553 U.S. 164, 180 (2008).

defendant was not required, even though the arrest for driving with one faulty brake light was illegal under North Carolina law).[548]

The *Olmstead* spirit can also be seen in the Court's high tolerance of, if not willful blindness towards, deliberate and strategic police violations of constitutional protections that do not fall neatly into the categories of crimes or torts. A classic example of this sort of misconduct is the successive interrogation technique, whereby police will interrogate a suspect without giving *Miranda* warnings and then, after extracting incriminating admissions and declaring a contrived break—for lunch, for example, or to bring in a stenographer—the interrogating officer will give *Miranda* warnings and ask the witness "to clarify" or "repeat for the record" the earlier statements.[549] The technique is based on the assumption that, once "the cat is out of the bag" as a consequence of the unwarned interrogation, the subsequent *Miranda* warnings will be ineffective and the suspect will repeat the earlier admissions.[550] The Court refused to suppress admissions obtained pursuant to this technique in *Oregon v. Elstad*[551] even though the dissent made clear that this mode of interrogation was being used on a nationwide basis.[552] Although the Court in *Missouri v. Seibert*[553] held that admissions obtained by a deliberate and obvious use of the successive interrogation technique should have been excluded, there were four dissenters, and the plurality opinion held that the admissibility of such admissions should be governed by a multifactor test.[554]

VI. *UNITED STATES V. LANZA*: THE MYSTIC CHORDS OF DUAL SOVEREIGNTY

A. Introduction

The correlative responsibilities of the federal and state governments for the enforcement of federal Prohibition had been an elephant in the room from Prohibition's outset. No previous federal criminal statute had so directly encroached on state regulatory domain. Over half of the states prior to 1920 had their own prohibition laws, some decades old, although many had exceptions for activities such as the consumption of beer and wine and

548. 574 U.S. 54, 58–59, 68 (2014).
549. *See* Oregon v. Elstad, 470 U.S. 298, 300–05 (1985).
550. *See id*.
551. *Id.* at 318.
552. *See id.* at 329–32 (Brennan, J., dissenting).
553. 542 U.S. 600 (2004).
554. *See id.* 611–12, 617; *id.* at 622–23 (O'Connor, J., dissenting); *see also* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 110, 132–139 (1998) (collecting California training materials encouraging questioning "outside Miranda").

obtaining alcohol by mail.[555] These prohibitions were enforced by the states with varying degrees of vigilance.[556] Yet there was certainly abundant evidence of state-level enthusiasm for national prohibition: forty-four of the then forty-eight state legislatures ratified the Eighteenth Amendment within thirteen months of the proposed amendment, and the states' representatives in Congress overrode President Wilson's veto of the Volstead Act by votes of 176-5 in the House and 65-20 in the Senate.[557] In its final form, the Eighteenth Amendment was cryptic on enforcement responsibility. Section 2 provided that "Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."[558]

The Volstead Act provided that prohibition was to be enforced federally by the Treasury Department, even though both the Secretary of the Treasury and the Commissioner of the Bureau of Internal Revenue both opposed to undertaking this responsibility.[559] But despite that allocation of power, Congress never funded federal prohibition enforcement at levels that were anywhere near adequate to ensure significant enforcement efforts.[560] And the states, even bone dry states, displayed little appetite to assist the federal efforts, notwithstanding their ballot-box support for the Volstead Act and the Amendment itself, as well as their "concurrent power" of enforcement under the latter.[561] President Coolidge himself convened a conference of state Governors in 1923 for the explicit purpose of addressing "co-operation between the State and Federal Governments in the enforcement of the Eighteenth Amendment," and argued at that conference that the "concurrent power" language of the Amendment imposed on states "a joint responsibility to enact and execute enforcement laws."[562] The President's appeal fell on deaf ears. New York even repealed its own prohibition statute, the Mullan-Gage law, that same year.[563]

The issue of the states' obligations, if any, under the Eighteenth Amendment was potentially at issue in a case that reached the Supreme Court

555. Post, *supra* note 12, at 5 n.6.

556. DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 7 (2D. ED. 2000).

557. *Id.* at 12–13.

558. U.S. CONST. amend XVIII.

559. *See* Post, *supra* note 12, at 24–26.

560. *Id.* at 27–28.

561. *See id.* at 30–33.

562. *Governors Accept Coolidge Program to Back Up Dry Law*, N.Y. TIMES, Oct. 21, 1923. Neither President Coolidge nor Congress ever made any effort to affirmatively require states to prosecute Volstead Act violators. *See* Post, *supra* note 12, at 30–31, 55–56. Any such effort would have raised serious constitutional issues. *See* Printz v. United States, 521 U.S. 898, 939 (1997) (upholding challenge to the requirement in federal gun control legislation, the Brady Act, that hundreds of local and state law enforcement officers perform background checks on firearms purchasers).

563. *See* Gambino v. United States, 275 U.S. 310, 314 (1927).

in 1927, four years after the New York legislature had repealed New York's prohibition statute.[564] In *Gambino v. United States*,[565] the automobile occupied by Gambino and a co-defendant was stopped by New York state troopers near the Canadian border in upstate New York.[566] A warrantless search of the car found liquor, and the defendants were arrested and the liquor seized and turned over to federal authorities for prosecution under the Volstead Act.[567] Defendants filed a motion to suppress under the authority of the federal Fourth Amendment, arguing that given New York's repeal of prohibition the troopers could only have been acting lawfully pursuant to their obligations under the Eighteenth Amendment, thus federal law applied and suppression was required.[568] The government argued that probable cause existed under *Carroll* and that the Fourth Amendment did not apply to state police action.[569] The suppression motion was denied and defendants were convicted at trial, the only evidence of guilt being the evidence seized by the state troopers.[570]

On appeal, the Court rejected the government's probable cause argument and therefore had to address the source of the troopers' authority.[571] Unlike in *Byars*, discussed above, there was no hint of any federal direction or involvement in the troopers' actions such that the troopers could be considered agents of federal law enforcement.[572] The Court was able to sidestep the issue of the obligatory nature of the Eighteenth Amendment, however. It held that since New York Governor Al Smith had ordered New York police officers to fully cooperate with federal prohibition efforts, the troopers' actions were in furtherance of federal enforcement as a matter of state policy.[573] As the Court saw it,

> The wrongful arrest, search, and seizure were made solely on behalf of the United States. The evidence so secured was the foundation for the prosecution and supplied the only evidence of guilt. It is true that the troopers were not shown to have acted under the directions of the federal officials in making the arrest and seizure. But the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such co-operation as by the state officers acting under

564. *See id.* at 314–16.
565. 275 U.S. 310 (1927).
566. *Id.* at 312.
567. *Id.* at 312–13.
568. *See id.* at 313–15.
569. *See id.* at 313.
570. *See id.* at 313, 316.
571. *See id.* at 313–14.
572. *See id.* at 316.
573. *See id.* at 316–17.

> direction of the federal officials. . . . The prosecution thereupon instituted by the federal authorities was, as conducted, in effect a ratification of the arrest, search, and seizure made by the troopers on behalf of the United States. Whether the laws of the state actually imposed upon the troopers the duty of aiding the federal officials in the enforcement of the National Prohibition Act we have no occasion to inquire.[574]

Accordingly, the evidence should have been suppressed as the fruit of a state-mandated policy to assist federal enforcement efforts and not the result of the command of the Eighteenth Amendment.

In short, while some notion of what we might today call "cooperative federalism" may have been a gleam in President Coolidge's eye during Prohibition, nothing like it had been formalized or institutionalized.[575] It was in this context that the issue of dual sovereignty in the context of successive prosecutions would first reach the Supreme Court.

B. United States v. Lanza

1. The Court's Decision

It did not take long for the issue of successive prosecutions to come to the fore during Prohibition. In *United States v. Peterson*,[576] a federal district judge in the Western District of Washington considered federal Volstead Act charges against Vito Lanza.[577] Lanza and several other defendants, just ten days prior to the commencement of the federal charges, had been convicted of prohibition violations under Washington law.[578] The federal charges were filed on April 28, 1920, three months after the Volstead Act became effective, and were based on the very same acts that had been the basis of the defendants'

574. *Id.*

575. *See* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55–56 (1964); Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 117 (2015) (noting examples of "cooperative federalism" in modern legislation including the Clean Water Act, the Clean Air Act, and the Patient Protection and Affordable Care Act of 2010).

576. 268 F. 864 (W.D. Wash. 1920), *rev'd sub nom.*, United States v. Lanza, 260 U.S. 377 (1922).

577. Referring to a criminal defendant's first name, as Chief Justice Taft does in *Lanza*, was uncommon for the Court in general and Taft in particular during this period. This may have been the only time that Taft did so. Anti-immigrant nativism was a powerful force in the 1920s, and the Immigration Act of 1924, Pub. L., 68–139, 43 Stat. 152, set quotas on the number of immigrants from Eastern and Southern Europe, including Italy.

578. *See Peterson*, 268 F. at 864. Note that the State of Washington had enacted a prohibition statute in 1915, years before the Volstead Act. 1915 Wash. Sess. Laws 2.

state convictions.[579] Given the timing, it seems obvious that no independent federal investigation had lead federal agents to these particular defendants. Possibly, the federal agents had been involved in some sort of joint investigation with their state counterparts, similar to the paradigm in *Carroll*. Or perhaps the federal agents were simply piggybacking off the work of those counterparts.

The *Lanza* defendants entered special "pleas in bar" in the trial court, arguing that their previous state convictions barred federal prosecution based on the same conduct.[580] The issue was understood as a matter of common sense; neither the defendants nor the trial court seemed to have considered the issue in terms of the Fifth Amendment's Double Jeopardy Clause.[581] The district court did find, however, that successive prosecutions could not have been intended by either the Eighteenth Amendment or the Volstead Act:

> Neither article 18 nor the Congress sought to destroy any existing remedies by a state to curb the drink evil, and where existing remedies are provided by a state, available for the enforcement of [the Eighteenth Amendment], and in harmony with the Prohibition Act . . . the power of the state, through its courts, may be invoked, and a conviction in a state court for conduct which is in violation of the Prohibition . . . is a bar to a prosecution in the federal courts. It seems manifest that it was not the intent that a person should be punished by the state and federal law for the same offense.[582]

In short, notwithstanding the Volstead's Act incursion into the state's regulatory domain, Congress could not have intended that successive state and federal punishments for the same conduct. The district court dismissed the indictments, and the government appealed.[583]

In *Lanza*, Chief Justice Taft began by rejecting defendants' argument that the Eighteenth Amendment itself prohibited their federal re-prosecution, inasmuch as it conferred "concurrent power" upon Congress and the states to enforce its substance.[584] The Court stated that the language simply acknowledged that both federal and state governments have the power to

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579. *See Peterson*, 268 F. at 864.

580. *See Lanza,* 260 U.S. at 379.

581. *See id.*

582. *Peterson,* 268 F. at 865–66.

583. *See id.* at 866. *Peterson* was an outlier. Five other federal district courts had permitted successive federal prosecutions on similar facts. *See* United States v. McCann, 281 F. 880 (D. Conn. 1922); United States v. Ratagczak, 275 F. 558, 558–61 (N.D. Ohio 1921); United States v. Regan, 273 F. 727, 727–29 (D.N.H. 1921); United States v. Bostow, 273 F. 535, 535–38 (S.D. Ala. 1921); United States v. Holt, 270 F. 639–42 (D.N.D. 1921).

584. *Lanza,* 260 U.S. at 380.

enforce Prohibition.[585] That point rebuffed, the Court went right into a disquisition on the abstraction of "sovereignty":

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government . . . and the double jeopardy therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority. Here the same act was an offense against the state of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy.[586]

As legal support for its sovereignty views, the Court cherrypicked from available dicta in a body of cases that supported both sides of the issue.[587] The Court said nothing about the nature or weight of the comparative state and federal interests in the two prosecutions at issue, or if the "peace and dignity" both sovereigns sought to protect was identical in each case.[588] The Court said nothing about the fact that the two sovereigns in the case at issue appear to have acted not separately but as one in bringing their separate charges, inasmuch as the federal and state prosecutions here were surely the products of a single investigation, whether done jointly or solely by state authorities. The Court said nothing about congressional intent to permit successive prosecutions, the basis for the trial court's decision.

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585. *Id.* at 381.
586. *Id.* at 382.
587. *See infra* Section VI.B.2.
588. *See Lanza,* 260 U.S. at 382.

The Court concluded its opinion by acknowledging that Congress, if it wanted, could by legislation bar successive prosecutions where it saw fit, but "it has not done so," and "it is not for us to discuss the wisdom of legislation."[589] The Court immediately abandoned its vow of silence, and proceeded to "discuss the wisdom" of any such legislation Congress might propose.[590] Taft's observations reflect, shall we say, an idiosyncratic conception of both criminality and what might be called the Rule of Law:

> If a state were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that state to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect.[591]

The Court was surely aware that Vito Lanza and the other defendants faced a maximum penalty of $500 for each Volstead Act violation, hardly a far cry from the $250 they had been fined for each violation of the Washington statute.[592] And the Court, or at least Chief Justice Taft, seems willfully oblivious to the possibility that Rule of Law concerns here might cut in the opposite direction, that it was the potential for successive prosecutions that might sow disrespect for law.

In sum, the Court gave birth to the Dual Sovereignty doctrine in the successive prosecution context in the most extreme form imaginable. First, the two prosecutions were based on exactly the same facts.[593] Indeed the two sets of charges were commenced within days of each other.[594] Second, the federal and state interests in their respective prosecutions were identical, the consequence of Prohibition's encroachment on the criminal law domain previously occupied exclusively, or almost exclusively, by the states.[595] Even the punishments were virtually identical.[596] And third, perhaps most significantly, the two prosecutions were the result of a single investigation, the results of which were the basis for both prosecutions.[597] The Court could easily have written an opinion recognizing the doctrine of dual sovereignty as a matter of abstract principle, but rejecting its application on these extreme

589. *Id.* at 385.
590. *Id*.
591. *Id.*
592. *See id.* at 379.
593. *See id.* at 379–80.
594. *See id.*
595. *See id.* at 382.
596. *See id.* at 379–80.
597. *See id.* at 378–79.

facts. Such an opinion would have left plenty of room for the doctrine to operate in future cases.

2. Lanza*'s Dubious Legal Basis*

To some extent, the Court in *Lanza* was in unchartered waters. No Double Jeopardy precedent was on point, most likely due to the relative paucity of federal criminal law as a general matter.[598] Almost all of the Court's prior Double Jeopardy decisions dealt with whether a federal prosecution was barred by a judgment in a previous federal case.[599] Accordingly, the Court necessarily relied on dicta in a handful of old cases suggesting, at most, that successive federal-state prosecutions did not offend Double Jeopardy principles.[600]

Two are representative. In *Fox v. Ohio*,[601] the Court had held that a state retained authority to criminalize and punish the offense of circulating (uttering) counterfeit coins despite the Constitution's affirmative grant to Congress of the powers to coin money and to provide for the punishment of counterfeiting the coin of the United States.[602] The Court noted that the federal and state interests at issue were not entirely congruent, inasmuch as the federal government had an interest in protecting the integrity of its money whereas the state had an interesting in protecting its citizens from being defrauded.[603] But any legal protection a putative defendant might have in facing such a double whammy where these interests overlapped would be primarily a matter of prosecutorial discretion, that is, "the benignant spirit in which the institutions both of the state and federal systems are administered."[604] That spirit, the Court observed in *Fox*, should counsel restraint except "in instances of peculiar enormity, or where the public safety demanded extraordinary rigor."[605] A few years later, in *United States v. Marigold*,[606] the Court had affirmed a federal conviction for uttering counterfeit currency despite the defendant's claim that Congress did not have the power to punish the crime of uttering.[607] This was so because such a criminal act would "as to its character

598. *See id.* at 385.

599. *E.g.*, Keerl v. Montana, 213 U.S. 135, 137–38 (1909) (holding that a retrial after the dismissal of a deadlocked jury in a federal case does not constitute double jeopardy). *See generally* Alexander L. Chen, Note, *Sovereign Interests and Double Jeopardy*, 110 VA. L. REV. 1955 (2024) (collecting cases).

600. *See Lanza*, 260 U.S. at 382–84.

601. 46 U.S. (5 How.) 410 (1847).

602. *Id.* at 410–40.

603. *See id.* at 433.

604. *See id.* at 435.

605. *Id.*

606. 50 U.S. (1 How.) 560 (1850).

607. *Id.* at 560–70.

and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each."[608]

Plenty of dicta counseled in favor of a different result, had the Court been at all inclined in that direction.[609] *United States v. Furlong*,[610] for example, involved federal prosecutions for robbery and murder on the high seas. The Court analyzed the scope of federal power to prosecute such extraterritorial crimes in terms of the defendant's protection, under international law principles, against successive prosecution by another nation (sovereign).[611] Because a robbery at sea was within the criminal jurisdiction of all nations, such a crime was within Congress' legislative jurisdiction even when the robbery was committed by a foreigner on a foreign victim in a foreign ship.[612] But an incident of this "universal jurisdiction" was the preclusion of a successive prosecution by another nation (sovereign).[613] Under this conceptual framework, Vito Lanza's crime was within the "universal jurisdiction" of both the federal government and the states, and the consequence of that fact would be the preclusion of a successive prosecution.[614]

Language in *Nielsen v. Oregon*,[615] years later, is to similar effect. In *Nielsen*, the Court construed the federal statute that established the Columbia River as the boundary between Washington and Oregon and gave both states "concurrent jurisdiction" on the Columbia's waters.[616] The consequence of such "concurrent jurisdiction," the Court held, was that both states could not prosecute crimes occurring on the Columbia's waters; rather the first state acquiring jurisdiction over the person could prosecute and its judgment would be final as to both sovereigns.[617] Two cases also made clear that Double Jeopardy's sister clause in the Fifth Amendment did not embrace the mystique of dual sovereignty. In both *Ballmann v. Fagin*[618] and *United States v. Saline Bank,*[619] the Court held that the Self-Incrimination Clause precluded federal immunity and compulsion statutes that could permit the potentially

608. *Id.* at 569.

609. *See* Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U REV. L. & SOC. CHANGE 383, 384–87 (1986); MURCHISON, *supra* note 9, at 104–06.

610. 18 U.S. (5 Wheat.) 184 (1820).

611. *See id.* at 194–97.

612. *Id*.

613. *See id.* at 196–98.

614. *See* United States v. Lanza, 260 U.S. 377, 385 (1922).

615. 212 U.S. 315 (1909).

616. *Id.* at 319.

617. *Id.* at 320.

618. 200 U.S. 186 (1906).

619. 26 U.S. (1 Pet.) 100 (1828).

incrimination of a defendant under a state law. None of these four cases was mentioned in *Lanza*.

The Court also failed to acknowledge other dicta in the caselaw similar to the expression in *Fox v. Ohio* that successive prosecution should be an extraordinary thing, reserved for "instances of peculiar enormity, or where the public safety demanded extraordinary rigor."[620] In *Jack v. Kansas*,[621] for example, the Court considered whether the Due Process Clause was violated where a state antitrust immunity statute did not confer protection against a federal antitrust prosecution.[622] The Court was incredulous at the prospect of such a successive federal prosecution—"if it could be imagined that such prosecution would be instituted under such circumstances"—and found that such a remote possibility did not render the Kansas law unconstitutional.[623] To similar effect was an observation in the Court's earlier decision in *Brown v. Walker,*[624] in which the Court upheld the constitutionality of the federal immunity statute enacted in order to cure the unconstitutionality of the statute the Court had struck down in *Counselman.*[625]As to the objection that the new statute did not explicitly provide immunity from state prosecution, the court described that "bare possibility" as "not a real and probable danger, with reference to the ordinary operations of the law in the ordinary courts, but 'a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct."[626] In short, the Supreme Court viewed the potential for successive federal and state prosecutions as unworthy of serious attention.[627]

Professors Murchison and Grant have also noted that the result in *Lanza* was inconsistent with the legislative history of the Eighteenth Amendment, another subject ignored by the Court.[628] The Senate Judiciary Committee had fussed over what, if anything, the Eighteenth Amendment should say about state power to enforce state prohibition laws, ultimately saying nothing on the subject in the final resolution it sent to the House.[629] The House Judiciary Committee added to the resolution's enforcement provision the language included in the final amendment, which granted Congress and the states

620. 46 U.S. (5 How.) 435, 435 (1847).
621. 199 U.S. 372 (1905).
622. *Id.* at 380.
623. *See id.*
624. 161 U.S. 591 (1896).
625. *See id.* at 610.
626. *Brown*, 161 U.S. at 608.
627. *See id.* at 609–10.
628. Murchison, *supra* note 609, at 398; MURCHISON, *supra* note 9, at 120; J.A.C. Grant, *The "*Lanza*" Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1311 (1932).
629. *See* Murchison, *supra* note 609, at 388–89.

"concurrent power" to enforce prohibition laws.[630] In the substantial and sometimes confusing floor debate that ensued over the "concurrent power" language, the chairman of the House Judiciary Committee was clear about one thing: the term was not intended to permit both federal and state governments to prosecute offenders for a single act.[631] When specifically asked whether the "concurrent power" language would permit successive prosecutions by state and federal authorities for the same act, the chairman replied in the negative.[632] He also noted that while an earlier proposal would have allowed successive federal and state prosecutions, the "concurrent power" language was intended to mean that the Federal Government cannot do it if the State government does it, and vice versa."[633]

3. Lanza*'s Reception*

The decision in *Lanza* was publicly vilified.[634] The day after the decision was issued, the Chicago Daily Tribune called it "a sweeping victory" for "dry enforcement,"[635] and the *New York Times* observed that *Lanza* meant "that prisoners charged with breaking the dry laws may be severely penalized by more than one tribunal."[636] A few months later, the *New York Times* condemned the decision as "repulsive to believers in justice."[637] The *Chicago Daily Tribune* lambasted *Lanza* as nullifying "a fundamental American principle . . . in order to impose a measure of discipline on the American people."[638] The legal academy concurred with these assessments. A commentator in the *Cornell Law Quarterly* described successive prosecutions for the identical act as "manifestly unjust."[639] In the *Columbia Law Review*, J.A.C. Grant asked rhetorically, "Shall we fritter away our liberties upon a metaphysical subtlety, two sovereignties?"[640]

Lanza even took on a specific political resonance in the New York popular and legislative debate over whether New York's state prohibition law

630. *Id*.
631. *See id.* at 389–90.
632. *Id.* at 390.
633. *Id.*
634. *See* Post, *supra* note 12, at 38–39.
635. Grafton Wilcox, *2 Prison Terms for One Drink Upheld by U.S.: Supreme Court Decision Big Victory for Drys*, CHI. DAILY TRIB., Dec. 12, 1922, at 2.
636. *Double Penalties in Dry Law Cases: Supreme Court Holds the Same Offense Punishable by State and Nation*, N.Y. TIMES, Dec. 12, 1922.
637. *Double Dry Enforcement*, N.Y. TIMES, Mar. 13, 1923.
638. *Double Jeopardy*, CHI. DAILY TRIB., Apr. 15, 1923, at 8.
639. Post, *supra* note 12, at 38 n.127 (citing Anthony A. Goerner, Note, *Constitutional Law: Double Jeopardy: Double Liability*, 12 CORNELL L.Q. 212, 213 (1927)).
640. Grant, *supra* note 628, at 1331.

should be repealed.[641] In a statement Governor Al Smith issued in connection with signing the statute repealing the New York law on June 1, 1923,[642] he stated that repeal would

> [D]o away entirely with the possibility of double jeopardy for violation of the laws enforcing the Eighteenth Amendment . . . Under the United States Supreme Court decision in the Lanza case, a citizen is today subjected to double trial and even to double punishment for a single offense . . . This is an unwarranted and indefensible exception to the fundamental constitutional guarantee contained in both the Federal and State Constitutions that no person shall be twice tried or punished for the same offense.[643]

If anything, public reaction was even more virulent after the Supreme Court reaffirmed *Lanza* four years later in *Hebert v. Louisiana*,[644] holding that a pending Volstead Act indictment did not preclude a state prohibition prosecution based on the same conduct.[645] The *Baltimore Sun* opined:

> It is inconceivable that a Supreme Court . . . should have made such a decision only a few years back. But since Volsteadism became the law of the land many things have changed . . . . [I]t is not surprising that legal doctrines which have no place in justice or in common sense should be enunciated and supported.[646]

C. Lanza*'s Legacy*

1. Dual Sovereignty and the Scope of Immunity Statutes

The first mischief wrought by *Lanza* was not in the successive prosecution context. Rather, the notion of dual sovereignty arose in a closely related Fifth Amendment context, discussed above: the scope of the immunity that must be granted by the government in order to compel a witness's

641. *See id.* at 1310 ("The most startling immediate result of [*Lanza*] was the repeal of the New York state prohibition act. Time will doubtless reveal that this was one of the least significant aspects of the problem.").

642. *See* Gambino v. United States, 275 U.S. 310, 314–15 (1927) (noting that the Mullan-Gage Law, the state prohibition act, was repealed on June 1, 1923, and that the Governor filed a memorandum approving the repeal).

643. Alfred E. Smith, *The Governor's Statement*, N.Y. TIMES, June 2, 1923, at 1 (reprinting of Governor Smith's signing statement for the bill repealing the state prohibition act).

644. 272 U.S. 312 (1926).

645. *Id.* at 314–16.

646. Post, *supra* note 12, at 38 n.126 (citing *Bad News for Bootleggers*, LITERARY DIG., Nov. 20, 1926, at 18 (quoting the Baltimore Sun)).

testimony.[647] In other words, must a state or federal immunity statute also afford immunity to prosecution by the other sovereign? In 1931, shortly after Chief Justice Taft retired, the Court decided *United States v. Murdock*.[648] In *Murdock*, a federal taxpayer was summoned to appear before the IRS and explain the bases for $12,000 in deductions on his 1927 and 1928 tax returns.[649] He refused to testify on Fifth Amendment grounds and was indicted under a federal statute that criminalized a willful failure to supply information to the IRS.[650] The trial court dismissed the indictment.[651] The Supreme Court reversed, finding that the defendant's fears of incrimination were based entirely on potential state criminal law exposure, and were therefore not the concern of the Fifth Amendment.[652] The Court did not cite *Lanza*, nor do the words "sovereign" or "sovereignty" appear in the opinion. The Court instead relied on *Brown v. Walker* and *Jack v. Kansas*, as well as English precedent that the rule against compulsory self-incrimination "does not protect witnesses against disclosing offenses in violation of the laws of another country."[653] The Court also ignored *Ballmann v. Fagin,*[654] which had reached a different conclusion on the same issue twenty-five years earlier, and which post-dated *Brown v. Walker* and *Jack v. Kansas*.[655]

A more heartfelt rendition of the mystic chords of dual sovereignty was delivered by Justice Frankfurter thirteen years later in his plurality opinion in *Feldman v. United States*.[656] In *Feldman*, the defendant, a judgment debtor, was compelled by New York law to testify in a civil "supplementary proceeding" aimed at discovering his assets.[657] The New York statute that conferred immunity on Feldman related to his testimony in a supplementary proceeding only protected him against New York prosecutions.[658] Feldman was subsequently prosecuted federally for mail fraud, and the government introduced Feldman's testimony from the New York proceeding into evidence in the federal mail fraud trial.[659] Relying on the dual sovereignty doctrine—this time citing *Lanza* as well as *Murdock, Brown*, and *Jack* (but not *Ballmann*

647. *See supra* Section VI.B.2.
648. 284 U.S. 141 (1931).
649. *Id.* at 146.
650. *Id.* at 146–48 (citing 26 U.S.C. § 1265).
651. *Id.* at 147.
652. *Id.* at 148–50.
653. *Id.* at 149 (citing Counselman v. Hitchcock, 142 U.S. 547 (1892); Brown v. Walker, 161 U.S. 591, 606 (1896); Jack v. Kansas, 199 U.S. 372, 381 (1905); Hale v. Henkel, 201 U.S. 43, 68 (1906)).
654. 200 U.S. 186, 195–96 (1906).
655. *See id.*
656. 322 U.S. 487 (1944).
657. *Id.* at 488.
658. *See id.*
659. *Id.* at 487–88.

v. Fagin)—the Court affirmed the conviction.[660] The Court analogized the situation in *Feldman* to the Court's Fourth Amendment precedent, pointing to *Byars v. United States*,[661] and the "silver platter doctrine," under which it was permissible for "the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account."[662] The Court noted "the separateness in the operation of state and federal criminal laws,"[663] and that the federal government and the states are "separate and distinct sovereigns, acting separately and independently of each other."[664]

This emphasis on "separateness" wholly ignores the facts of *Lanza* and the joint investigation enforcement paradigm of the Prohibition era, which was evident in Supreme Court precedent.[665] It even ignores the facts of *Byars*, the case to which the Court analogizes.[666] In *Byars*, while the Court upheld the vitality of the "silver platter doctrine" in the abstract, the Court held it inapplicable there due to the federal agents' significant involvement in the illegal investigative activities by state officials.[667] The Court in *Feldman*, by contrast, expressed no curiosity as to how the federal prosecutor in *Feldman* learned about Feldman's state testimony, although the Court did state "[t]here is no suggestion of complicity between Feldman's creditors and federal law-enforcing officers."[668]

Justice Black dissented in *Feldman*, joined by Justices Douglas and Rutledge.[669] Relying on *Boyd*, he denounced the majority for upholding a conviction based on forced self-incriminatory testimony:

> In Boyd v. United States, this Court said that 'any compulsory discovery by extorting the party's oath . . . is contrary to the principles of a free government. It is abhorrent . . . to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.' Unless the Court now is disavowing this belief, the use of testimony obtained by compulsory discovery to convict an accused must be considered 'shocking to the universal sense of justice' and 'offensive to the common and fundamental ideas of fairness and right', and

660. *See id.* at 490–94.
661. *Id.* at 492 (citing Byars v. United States, 273 U.S. 28 (1927)).
662. *Byars*, 273 U.S. at 33.
663. *Feldman*, 322 U.S. at 493–94.
664. *Id.* at 491.
665. *Id.* at 503 (Black, J., dissenting).
666. *See id*.
667. *See Byars*, 273 U.S. at 32–34.
668. *Feldman*, 322 U.S. at 492.
669. *Id.* at 494. Justices Murphy and Jackson took no part in the decision in *Feldman*, which might have made a difference in the result.

> therefore, under past decisions of the Court, incompatible with Constitutional due process of law.[670]

As for the plurality's invocations of dual sovereignty, Justice Black stated that "[c]onstitutional interpretation should involve more than dialectics."[671]

Twenty years after *Feldman,* the Court was emphatically the "Warren Court," and the incorporation of the Bill of Rights' protections into the Fourteenth Amendment was heavy in the air.[672] In 1961, the Supreme Court held, in *Mapp v. Ohio*, that the Fourth Amendment's exclusionary rule was incorporated into the Due Process Clause of the Fourteenth Amendment, and thereby applicable to the states.[673] Three years after that, the Court in *Malloy v. Hogan*[674] held that the Fifth Amendment privilege against self-incrimination is likewise applicable to the States through its incorporation into the Fourteenth Amendment.[675]

In a case decided the same day as *Malloy v. Hogan* and *Murphy v. Waterfront Comm'n of N.Y. Harbor*, the Court revisited the conception of dual sovereignty from *Murdock* and *Feldman*.[676] *Murphy* was factually analogous to *Jack v. Kansas*: a state immunity statute provided no protection against incrimination under federal law.[677] The Waterfront Commission, established in 1953 to investigate labor racketeering in the Port of New York Harbor, was only empowered to confer immunity under New Jersey and New York state law.[678] William Murphy and John Moody, union officials in the International Longshoremen's Association, were subpoenaed to testify before the Commission in an investigation of a work stoppage at the Hoboken piers.[679] They invoked their Fifth Amendment rights, refusing to answer certain questions on the ground that their testimony might incriminate them as a matter of federal law.[680] The two witnesses were held in civil and criminal contempt for their recalcitrance.[681]

The Court began its analysis by famously identifying the national values reflected in Fifth Amendment:

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670. *Id.* at 494–95 (Black, J., dissenting) (citations omitted).
671. *Id.* at 499.
672. *See, e.g.*, Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253, 253 (1982).
673. *Id.* at 655.
674. 378 U.S. 1 (1964).
675. *Id.* at 6.
676. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 53–54 (1964).
677. *See id*.
678. *See id.* at 53.
679. *Id.*
680. *See id.* at 53–54.
681. *Id.* at 54.

> [O]ur unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load.'[682]

Tellingly, the Court noted that the need for a broad scope for the Fifth Amendment "has become especially true in our age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity."[683]

In overruling *Murdock* and *Feldman*, the Court discussed the entire body of both American and English precedent on the issue.[684] Interestingly, in view of the Taft Court's extraction of the dual sovereignty doctrine in *Lanza* out of Supreme Court dicta, the *Murphy* Court concluded that the "correct" view of the Fifth Amendment was the view expressed in *Saline Bank* and *Ballman v. Fagin*, and not the view maintained in *Jack v. Kansas*, *Murdock*, and *Feldman*.[685] In particular, the Court noted that the English precedent relied on in *Murdock*, *King of the Two Sicilies*, had been overruled in 1867.[686] In reaching this conclusion, the Court did not rely on the newly incorporated Fifth Amendment as much as it did on a de novo review of existing precedent, although doubtless *Malloy* emboldened the Court in conducting that review.[687] And while the Court does not directly address the subject of "dual sovereignty" in the abstract, the Court's reasoning—including its reference to "cooperative federalism"—certainly created tension with the general theory expressed in *Lanza* and the 1959 companion cases *Abbate-Bartkus*, discussed below.[688] Indeed, one of the concurring opinions accuses the Court of "asserting that the 'separate sovereignty' theory of self-incrimination should be discarded."[689]

Oddly, *Murphy* appears to have had no effect whatever on the dual sovereignty doctrine in the successive prosecution context. No one asked the

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682. *Id.* at 55.

683. *Id.* at 55–56. The Court did not acknowledge the Prohibition era's state-federal prosecutorial cooperation.

684. *See id.* at 58–78.

685. *Id.* at 77.

686. *Id.* at 61.

687. *See id.* at 57.

688. *See id.* at 56.

689. *Id.* at 89 (Harlan, J., concurring).

Court to reconsider the permissibility of successive prosecutions in light of *Murphy* until the defendant in *Gamble* did so in 2019.[690] This may be a matter of timing. The Warren Court had taken a conservative turn by the end of the 1960s, as evident in cases like 1968's *Terry v. Ohio*.[691] And by 1977, the next time the Court considered the successive prosecution issue after *Murphy*, President Nixon had successfully remade the Court to suit his "law and order" tastes.[692] Further, the Department of Justice in the late 1950s adopted an internal policy, discussed below, which appeared to ameliorate successive prosecutions' public relations problems.[693]

2. The 1959 Rebirth of Dual Sovereignty

In the successive prosecution context, *Lanza* and the dual sovereignty doctrine had little impact between the Prohibition era and the late 1950s, apart from in the immunity context discussed above. In 2019, the Court in *Gamble*— looking backwards in its justification of the precedential weight of *Lanza*—suggests otherwise, describing the period after *Lanza* as one where "we applied our precedent without qualm or quibble."[694] This breezy observation is misleading. *Gamble* cites four cases decided between Prohibition and 1959, and although each of those cases contained citations to *Lanza*, it is an exaggeration to say that the Court was "applying" its successive prosecution precedent in any of those cases.[695]

690. *See* Gamble v. United States, 587 U.S. 678, 681–82 (2019).

691. *See* 392 U.S. 1, 30–31 (1968) (holding that a policeman's "stop and frisk" procedure was reasonable under Fourth Amendment grounds).

692. *See* Richard Nixon, Remarks on the Mutual Broadcasting System: "Order and Justice Under Law" (Sep. 29, 1968), https://www.presidency.ucsb.edu/documents/remarks-the-mutual-broadcasting-system-order-and-justice-under-law [https://perma.cc/RR4T-VE7Z] (on file with author).

693. *See generally* Gamble v. United States, 587 U.S. 678 (2019) (referencing four cases that were decided between Prohibition and 1959).

694. *See id.* at 688 (2019).

695. In *Westfall v. United States*, 274 U.S. 256 (1927), the Court upheld the conviction of a defendant for two related federal banking crimes, one of which covered state banks that had joined the Federal Reserve System. *Id.* at 259. Purely as an aside, the Court cited *Lanza* for the proposition that the two offenses could have both been prosecuted even if one had been a state crime. *Id.* at 258. In the second case chronologically, *Puerto Rico v. Shell Co. (P. R.), Ltd.*, 302 U.S. 253 (1937), the Court found that the territory of Puerto Rico does not have sovereignty separate from the federal government, and therefore successive prosecutions by Puerto Rico courts and federal courts are not permitted. *Id.* at 264. In the third case, *Jerome v. United States*, 318 U.S. 101 (1943), the Court made an offhand reference to *Lanza* in interpreting a provision in the Bank Robbery Act. *Id.* at 105. And in *Screws v. United States*, 325 U.S. 91 (1945), the prosecution of an infamous Georgia sheriff for the murder of a black detainee in violation of the predecessor of 18 U.S.C. § 242, criminalizing civil rights violations, the Court in a footnote observed that due to *Lanza*, Georgia was free to prosecute Sheriff Screws for assault or murder

The successive prosecution version of the dual sovereignty doctrine was applied with a vengeance, however, in a pair of 1959 companion cases, *Abbate v. United States*, and *Bartkus v. Illinois*. "Qualms and quibbles" abounded.

Abbate was a successive federal prosecution of a union official and others for conspiring to blow up telephone company facilities in Mississippi in connection with a strike.[696] Two of the co-conspirators, Abbate and Falcone, got cold feet and informed the telephone company and the Chicago police of the plot; a third conspirator stayed the course, traveling to Mississippi to carry out the job.[697] Abbate and Falcone pleaded guilty to an Illinois charge of conspiracy to destroy property and were sentenced to three months' imprisonment.[698] The result hardly seems unjust, given their confession and thwarting of the plan, an arguable example of the rarity of a successful withdrawal from a conspiracy.[699] Notwithstanding their cooperation and state court guilty plea, Abbate and Falcone were subsequently charged federally, along with their confederates, of a conspiracy to destroy property owned and controlled by the United States, the jurisdictional hook being certain federally owned communications circuitry within the telephone company facilities they had plotted to destroy.[700] They were convicted of the federal charges, and their convictions were affirmed by the Fifth Circuit.[701] The Supreme Court granted certiorari limited to consideration of the claim that the federal prosecutions, based on the same acts as were the prior state convictions, placed petitioners twice in jeopardy contrary to the Fifth Amendment.[702]

The Court explicitly declined to overrule *Lanza*, emphasizing the claims of precedent.[703] "We do not write on a clean slate in deciding this question," its analysis began.[704] The Court marched uncritically through the same nineteenth-century precedent the Taft Court had relied on in *Lanza*, quoted liberally from *Lanza* itself, and also noted that *Lanza* "ha[d] been accepted

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under Georgia law irrespective of the federal civil rights prosecution. *Id.* at 166 n.10. The problem in *Screws*, of course, was the opposite of the typical successive prosecution paradigm: the state of Georgia had refused to take any action against Screws. *See id.* at 93.

696. *Abbate*, 359 U.S. at 187–88.

697. *See id.* at 188.

698. *See id*.

699. *See generally* Carrie Casey & Lisa Marino, *Federal Criminal Conspiracy*, 40 AM. CRIM. L. REV. 577, 596 n.96 (2003) (explaining the difficulties arising from allocation of the burden to the defendant to affirmatively prove he has withdrawn from the conspiracy); *see also* 20 AM. JUR. TRIALS 351 *Handling the Defense in a Conspiracy Prosecution* § 59 (1973) ("Unfortunately, the defense of withdrawal must frequently be proved by the testimony of the defendant only, since it is rare that any of the coconspirators will offer testimony in his behalf.").

700. *See Abbate*, 359 U.S. at 188–89.

701. *See id.* at 189.

702. *See* Abbate v. United States, 355 U.S. 902 (1957).

703. *Abbate*, 359 U.S. at 194–96.

704. *Id.* at 190.

without question" since it was decided, exaggerating the significance of *Lanza* in the very same cases discussed above, just as the Court would do sixty years later in *Gamble*.[705] More troubling, the Court offered a more rational variation of the concern Chief Justice Taft had expressed in *Lanza* about punishment disparities for similar crimes causing criminals to storm the courthouse in order to plead guilty to the crime with the lower sentence.[706] The Court specifically noted the three months' imprisonment sentence given to Abbate and Falcone on the Illinois charge, pointing out that the federal charges could result in a sentence of up to five years given that the defendants' conduct "impinge[d] more seriously on a federal interest than on a state interest."[707] The Court observed:

> [T]he efficiency of federal law enforcement must suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions. Needless to say, it would be highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses.[708]

These last two observations are hard to swallow. The "federal interest" in the successive prosecution in *Abbate* was wholly contrived, surely the product of a scorched-earth search by DOJ for a federal nexus in some statute that might produce a longer sentence than the three months state sentence it viewed as a sweetheart deal. And the observation about "impracticality," even if not obsolete even in 1959, has certainly been overtaken by the realities of twenty-first century law enforcement. The Court's apparent acceptance of federal dissatisfaction with a sentence perceived as too lenient is ironic given that the Court has essentially abdicated any Eighth Amendment role reviewing state sentences that are challenged as too harsh.[709]

Even more difficult to swallow is the result in *Bartkus*, *Abbate's* companion case.[710] Alfonse Bartkus was prosecuted for bank robbery in federal court in Chicago and found not guilty by a jury.[711] He was subsequently prosecuted and convicted of robbery on the same facts in Illinois state court and sentenced to life imprisonment.[712] The state court prosecution was a shameless second bite of the apple. As conceded in the majority opinion,

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705. *See id.* at 190–94.

706. *See* United States v. Lanza, 260 U.S. 377, 385 (1922).

707. *Abbate*, 359 U.S. at 195 (1959).

708. *Id*.

709. *See generally* Harmelin v. Michigan, 501 U.S. 957, 964–65 (1991) (stating that the Eighth Amendment contains no proportionality guarantee as to state sentences).

710. Barktus v. Illinois, 359 U.S. 121 (1959).

711. *Id.* at 121–22.

712. *Id.* at 122.

the disappointed FBI case agent in the federal case turned over his entire file to the state prosecutors, including evidence he developed subsequent to the federal acquittal.[713] If, as seems plausible, the prosecutor used grand jury subpoenas in developing this post-trial evidence it would have amounted to abuse of the federal grand jury, which can only be used for the purpose of returning a federal indictment.[714] Further, the federal sentencing of Bartkus's accomplices, who testified in both trials, was delayed until after the state trial, presumably in order to prevent the disclosure to the defense of exculpatory information.[715] The Court's attitude towards these facts is blasé, at best. It sugarcoats this tag-teaming as "federal officials act[ing] in cooperation with state authorities, as is the conventional practice between the two sets of prosecutors throughout the country."[716] The Court concludes this paragraph by noting that the state was not "merely a tool of the federal authorities," and the state prosecution was not "a sham and a cover for a federal prosecution."[717] Aside from those concerns, the remainder of the opinion was essentially a longer, windier version of *Abbate*.

Justice Black dissented bitterly in both *Abbate* and *Bartkus*, joined by Chief Justice Warren and Justice Douglas, pounding most of the same points he had made in his *Feldman* dissent.[718] In *Bartkus,* he also noted the historical and "universal abhorrence of . . . double prosecutions,"[719] as well as the mystical quality of the dual sovereignty rationale: "Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp."[720] As to the international law analogy, and the fact that

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713. *See id*.

714. *See generally In re* Ellsberg, 446 F.2d 954 (1971) ("To look upon an indictment as 'evidence of an event' when the event is the indictment itself is beyond our lexicon.").

715. *See Barktus*, 359 U.S. at 122–23. At this point, *Giglio* and *Brady* had not yet been decided.

716. *Id.* at 123.

717. *Id.* at 123–24; This throwaway line in the majority opinion has led to speculation about a theoretical "*Bartkus* exception" to the dual sovereignty doctrine where a subsequent prosecution is just a tool for an initial unsuccessful prosecution. *See* United States v. All Assets of G.P.S. Auto. Corp., 66 F.3d 483, 494–96 (2d. Cir. 1995). Like the Loch Ness Monster, there have been rumors of a *Bartkus* exception though no one has ever seen one.

718. *Compare* Abbate v. United States, 359 U.S. 187, 201–04 (1959) (Black, J., dissenting) ("[T]he Bill of Rights' safeguard against double jeopardy was intended to [prevent] against federal courts trying or punishing a man a second time after acquittal or conviction in any court."), *and Bartkus*, 359 U.S. at 150–64 (Black, J., dissenting) ("[A] federal trial following either state acquittal or conviction is barred by the Double Jeopardy Clause of the Fifth Amendment."), *with* Feldman v. United States, 322 U.S. 487, 494–503 (1944) (Black, J., dissenting) ("It is impossible . . . to reconcile today's restrictive interpretation of the prohibition against compelled self-incrimination with . . . the basic safeguards of liberty specifically enumerated in the Bill of Rights.").

719. *Bartkus*, 359 U.S. at 155 (Black, J., dissenting).

720. *Id*.

nations normally respect the judgments of other nations due to comity, he quoted an 1816 case from the Supreme Court of South Carolina: "If this prevails among nations who are strangers to each other, (it could) fail to (prevail) with us who are so intimately bound by political ties?"[721]

Curiously, Justice Brennan, who wrote the majority opinion in *Abbate*, dissented in *Bartkus*.[722] While he had accepted the *Abbate* result as required by *Lanza*, he thought the extent of federal participation in the state re-trial required reversal on Fifth Amendment grounds.[723] He pointed out several aspects of the federal-state "cooperation" that the majority glossed over.[724] First, the Assistant United States Attorney and the FBI case agent helped arrange for the accomplice-cooperators to testify in the state trial, surely promising them additional leniency, not only by deferring their sentencing but causing them to be released on bail between the two trials.[725] Second, the FBI agent managed to procure out of thin air a sketchy jailhouse informant, Grant Pursel, who testified that Bartkus had confessed to him while in jail before trial.[726] Third, Pursel's sentencing for his Mann Act conviction was also postponed.[727] Fourth, Pursel only dealt with the FBI prior to trial and had no contact with any state attorney or police officer until the morning of his testimony.[728] And finally, the state attorney successfully moved to allow the FBI agent to remain in the courtroom during the entire trial, in contradiction to standard practice and the sequestration of all other trial witnesses.[729]

By no means did Justice Brennan condemn "cooperative federalism" as a general matter. Rather he praised its "normal and healthy" operation where "state and federal officers cooperat[e] to apprehend lawbreakers and present the strongest case against them at a single trial, be it state or federal."[730] And he was careful not to cast aspersions on the State of Illinois's role: "The conviction [should be] set aside not because of any infirmities resulting from fault of the State but because it is the product of unconstitutional federal action."[731]

Abbate and *Bartkus* have several interesting postscripts, two of which are addressed in the next section. A third one didn't arise until 1995, when Judge Guido Calabresi of the Second Circuit, in a concurring opinion, called for a

721. *Id.* at 156–57 (quoting State v. Antonio, 7 S.C.L. (1 Tread.) 776, 781 (1816)).
722. *See id.* at 164–70 (Brennan, J., dissenting).
723. *See id*. at 169–70.
724. *See id*.
725. *Id.* at 166.
726. *Id.* at 167.
727. *Id.* at 166.
728. *Id.* at 167.
729. *See id.* at 166–67.
730. *Id.* at 168–69. This is the first use of the term "cooperative federalism" in a Supreme Court opinion.
731. *Id.* at 168.

reconsideration of the "fiction" that is the dual sovereignty doctrine.[732] He noted the controversy surrounding the doctrine from its inception, but his principal objections were that the doctrine has wholly failed to account for either the expanded scope of federal criminal law or the "unparalleled levels" of federal-state cooperation in modern law enforcement.[733] But the most interesting aspect of his opinion was his speculation that the results in *Abbate* and *Bartkus* might have been attributable to the prevailing political winds in the late 1950s, just as the doctrine's original conception in *Lanza* was the product of Prohibition era zeal.[734] He notes that just a few months before deciding *Abbate* and *Bartkus*, the Court decided *Cooper v. Aaron*,[735] where in an opinion issued over the names of each of its nine members, the Court found it necessary to re-assert its supremacy as the final arbiter of the federal constitution, thwarting the defiance of the Arkansas Governor and legislature over the desegregation of the Little Rock schools.[736] Judge Calabresi suggests that the need for another reminder of the primacy of federal interests might have played a role in the double jeopardy decisions, and might explain why both *Abbate* and *Bartkus* cited *Screws v. United States* as precedent, even though the case's connection to the dual sovereignty doctrine was tenuous.[737] Judge Calabresi's speculation cannot be dismissed as idle, as he had served as a law clerk to Justice Black during the 1958–59 term in which *Cooper*, *Abbate,* and *Bartkus* were all decided.[738]

In any event, it seems likely that the survival of the dual sovereignty doctrine was a matter of timing. As noted above, the rationale for the doctrine is inconsistent with the Court's 1964 decision in *Murphy v. Waterfront Commission of New York Harbor*.[739] If the doctrine had been up for reconsideration in the early to mid 1960s, instead of when the Court might reasonably have feared for its authority, the doctrine likely would not have survived.

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732. United States v. All Assets of G.P.S. Auto. Corp., 66 F.3d 483, 499 (2d. Cir. 1995).

733. *See id.* at 498–99.

734. *See id.* at 497–99.

735. 358 U.S. 1 (1958).

736. *See id*. at 4.

737. *See G.P.S. Auto. Corp.*, 66 F.3d at 497 n.15.

738. Professor George Thomas has also speculated about the effect of *Cooper v. Aaron* on *Abbate* and *Bartkus. See* George C. Thomas III, *Islands in the Stream of History: An Institutional Archeology of Dual Sovereignty*, 1 OHIO ST. J. CRIM. L. 345, 355 (2003). His view is that in the national political climate of 1958 and 1959, when *Brown v. Board of Education* may have been hanging by a thread: "[The] Court was frying bigger fish than double jeopardy . . . [and] had no stomach to restrict state sovereignty in the criminal area. Let Illinois try Alfonse Bartkus after the federal authorities failed to convict him. As long as the Court could continue its heroic, but lonely, quest for racial equality in the United States, the Alfonse Bartkuses of the world counted for little." *Id.*

739. *See supra* notes 676–690 and accompanying text.

3. Dual Sovereignty, the Department of Justice, and Civil Rights

The decisions in *Abbate* and *Bartkus* were widely condemned by the legal academy,[740] and even by the public. As one contemporary commentator put it, "even the man in the street knows what 'double jeopardy' means."[741] No recent precedent compelled the result—*Lanza*, after all, was a World War, a Great Depression, and a New Deal ago—and the intuitive sense of injustice was palpable.[742] Indeed, Congress introduced a bill after the decisions were issued that barred most federal prosecutions where a state had previously prosecuted a defendant for the same conduct.[743]

Attorney General William Rogers also tried to seize control of the public relations narrative of the decisions. Approximately a week after the decisions in *Abbate* and *Bartkus*, he issued a press release—an unusual means of communicating DOJ policy—directing all United States attorneys to "continue" to "sparingly" use the federal power to successively prosecute defendants for the same conduct already prosecuted by the state.[744] Attorney General Rogers urged cooperation between federal and state prosecutors, and imposed a requirement that all successive prosecutions be approved by Main Justice and brought to his personal attention.[745] This policy soon became known as the "Petite Policy," owing to its invocation in *Petite v. United States*,[746] where the DOJ asked the Supreme Court to dismiss a case DOJ had brought on the grounds that the prosecution's continuation "inadvertently" violated DOJ policy on successive prosecutions.[747] The Petite Policy, which still exists today in the DOJ's Justice Manual, has evolved over time.[748] It has

740. *See generally* Walter T. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591, 591–92 (1961) (discussing that double jeopardy has more serious implications for the legal order than has commonly been appreciated and that its common law roots should be examined); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecutions: A Suggested Solution*, 34 S. CAL. L. REV. 252 (1961) (detailing the problems created by *Abbate* and *Bartkus* and proposing solutions that would resolve claims by the competing interests implicated in issues of double jeopardy); George C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of* Bartkus v. Illinois *and* Abbate v. United States, 14 CASE W. RES. L. REV. 700 (1963) (criticizing the theoretical underpinnings and practical consequences of *Abbate* and *Bartkus*).

741. Fisher, *supra* note 740, at 592.

742. *See generally* Adam Harris Kurland, *The Enduring Virtues of Deferential Federalism: The Federal Government's Proper Role in Prosecuting Law Enforcement Officers for Civil Rights Offenses*, 70 HASTINGS L.J. 771, 774–75 (2019) (tracing the history of federal prosecutorial deference to state authorities and its status in the present day).

743. *Id.* at 797 & n.129.

744. *See id.* at 797–98.

745. *See id*.

746. 361 U.S. 529 (1960).

747. *See id.* at 530.

748. *See* Kurland, *supra* note 742, at 798–807.

generally encouraged cooperation with state and local authorities, and generally permitted subsequent federal prosecution only where necessary to vindicate a specific federal interest.[749] In each incarnation, as with all DOJ policies, it has never been binding on the DOJ.[750] Nor did that lack of enforceability really matter, as the policy was always articulated with sufficient qualifications and vagueness that it could not be a true source of accountability.[751]

The Supreme Court's next successive prosecution case after *Abbate* and *Bartkus, Rinaldi v. United States,*[752] involved a defendant's attempt to assert rights under the Petite Policy.[753] Peter Rinaldi was prosecuted, almost simultaneously, by both the state of Florida and the federal government, based on his alleged involvement in the robbery of safety-deposit boxes at the Doral Beach Hotel in Miami.[754] Florida charged him with robbery and other state crimes in February 1973; a federal grand jury indicted him in March of that same year for conspiracy to affect interstate commerce by robbery in violation of the Hobbs Act, 18 U.S.C. § 1951.[755] In May, Rinaldi was convicted of the state charges and sentenced to six years' imprisonment.[756] A subsequent federal trial ended in a mistrial.[757] When asked by the federal judge about the need for a re-trial in view of the state convictions, the prosecutor confessed to a novel version of cooperative federalism: he responded that he was under orders from DOJ to pursue the federal prosecution because the state convictions were vulnerable on appeal.[758] In short, the federal prosecution was a placeholder, an ancillary insurance policy on the success of the state case.[759] In the ensuing federal re-trial, Rinaldi was convicted and sentenced to twelve years' imprisonment, to be served concurrently with the state sentence.[760]

Rinaldi appealed, arguing that his prosecution had violated the Petite Policy.[761] While disputing that the policy gave any rights to defendants, the government sought a remand so that it could voluntarily dismiss the indictment under Rule 48(a) of the Federal Rules of Criminal Procedure.[762] On remand the district court denied the government's motion based on the

749. *See id.* at 797–98.
750. *See id.* at 817.
751. *See id*.
752. 434 U.S. 22 (1977).
753. *See id.* at 24–25.
754. *See id.* at 23.
755. *Id*.
756. *Id*.
757. *Id.* at 23–24.
758. *Id.* at 24.
759. *See id*.
760. *Id*.
761. *See id*.
762. *See id.* at 24–25.

government's bad faith in maintaining the prosecution, and the Fifth Circuit.[763] The Supreme Court reversed, noting the Petite Policy's origin as a reaction to *Abbate* and *Bartkus*[764] "protect[s] the individual from any unfairness associated with needless multiple prosecutions."[765] The Court did not acknowledge that in this very case the defendant had been subjected to "multiple prosecutions" and that federal and state prosecutors tag-teamed him until they were sure they had at least one conviction that would stick.[766]

At times, the DOJ has called out civil rights enforcement as a federal interest deserving of special weight under the Petite Policy.[767] Yet throughout its various incarnations, and its sporadic recognition of a specific federal interest in civil rights prosecutions, the Petite Policy has never taken the position that the federal government should be the primary means of civil rights enforcement.[768] Rather, the federal role the policy has consistently envisioned is as a "backstop," waiting in the wings in the event that state prosecution efforts are inadequate.[769]

The Petite Policy, the dual sovereignty doctrine, and public perceptions of Double Jeopardy all came to a head in the early 1990s. In March 1991, the vicious beating of black motorist Rodney King by white Los Angeles Police Department officers was captured on videotape by a British bystander with an early version of a camcorder.[770] Within two weeks of the beating, on March 14, 1991, a Los Angeles County grand jury returned an indictment charging the officers with state crimes focused on, inter alia, excessive use of force.[771] The defendants succeeded in getting the trial venue moved from Los Angeles County to a state court in Simi Valley in Ventura County, a suburban bedroom community popular with retired LAPD officers, where trial was held before a predominantly white jury[772] with no African-American jurors. The state prosecution was uninspired. Prosecutors relied almost exclusively on the

763. *Id.* at 25.

764. *See id.* at 34.

765. *See id.* In the decade after *Rinaldi*, the Court decided two cases implicating the meaning of "sovereign" under the dual sovereignty doctrine. *See* Heath v. Alabama, 474 U.S. 82, 83, 92–94 (1985) (recognizing that two states are separate sovereigns and successive prosecution by a second state not barred by the Double jeopardy clause); United States v. Wheeler, 435 U.S. 313, 319–23 (1978) (recognizing that the Navajo tribe is a sovereign such that a successive federal prosecution after a tribal prosecution is not barred by the Double jeopardy clause).

766. *See* Kurland, *supra* note 742, at 800–08.

767. *See id.* at 808–09.

768. *See id.* at 775–76.

769. Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 516 (1994).

770. *Id.* at 525.

771. *Id.* at 525, 572 & n.363.

772. *Id.* at 525–26.

videotape: they presented no expert use-of-force testimony in their case-in-chief; presented no testimony from civilian witnesses to the beating;[773] did not call Rodney King himself as a witness; and presented no evidence about the cause of King's injuries (fifteen facial fractures).[774] The defense, by contrast, presented two LAPD use-of-force experts who reviewed the videotape and explained to the jury, frame by frame, why King's behavior justified the officers' actions and[775] those actions were consistent with LAPD policy.[776] Two of the officers testified, consistently with the use-of-force experts, that they believed King was a threat to them and that their use of force was necessary.[777]

The jury acquitted all defendants except one, and Los Angeles erupted in several days of looting and violence.[778] During the riots, which like the beating videotape itself were televised around the world, President George H. W. Bush announced on television that he was "stunned" by the verdict and did not see how it "could possibly square with the video."[779] He committed to a federal review of the matter.[780] Attorney General William Barr—in his first stint at the job—stated publicly that "[i]t's important for people to remember . . . that the verdicts . . . on state charges are not the end of the process" and that the standard whether to bring a second federal prosecution is "whether or not we believe the federal interest has been vindicated by the state proceeding."[781] Although, this was plainly a reference to the Petite Policy, at least in substance, the DOJ never made public any Petite Policy analysis that it may have conducted.[782] In any event, on August 4, 1992, three months after the state court acquittals, a federal grand jury for the Central District of California returned an indictment charging all four officers with federal civil rights violations.[783] Each defendant was charged with a single count of violating Rodney King's civil rights in violation of 18 U.S.C. § 242, which criminalizes the "deprivation" of federal rights "under color of law."[784]

The precise "cooperative federalism" paradigm at issue— a successive federal prosecution *after a state court acquittal*—was novel. Thus, prior to

773. *Id.* at 526–27.
774. *Id*.
775. *Id*.
776. *Id.* at 527.
777. *Id.* at 528 & n.101.
778**.** *Id.* at 528.
779. Kurland, *supra* note 742, at 818.
780. *Id.* at 818–19.
781. *Id.* at 818.
782. *See id.* at 554–55; Tennessee v. Garner, 471 U.S. 1, 1 (1985) (holding that the use of deadly force against an unarmed suspect constitutes an unreasonable seizure under the Fourth Amendment and can give rise to a civil rights violation).
783. Levenson, *supra* note 769, at 528 & n.107.
784. *See id.* at 530.

trial, defendants sought unsuccessfully to dismiss the case both on Double Jeopardy grounds and for violations of the Petite Policy.[785] Equally novel was the nature of the federal-state interaction in the two cases. The state prosecution had been closely followed by DOJ, in real time, and federal prosecutors absorbed the lessons of the state prosecution's failure.[786] Accordingly, their strategy for the federal re-trial took full advantage of their second bite at the apple. Naturally, they still focused on the videotape, but the federal prosecutors also presented the following evidence: (1) civilian witnesses to the beating, who testified to hearing King's screams and the officers' talking and laughing; (2) an LAPD use-of-force expert, who testified that the blows administered during the first thirty-two seconds of the videotape were necessary to subdue King, but that each of the dozens of blows in the forty-nine seconds thereafter were excessive and violated LAPD policy; (3) a medical expert who testified that the fractures to King's head and face from the blows left those bones "reduced to a very fine powder, like sand"; and (4) a biomechanic expert, who testified that King's head and facial injuries were consistent with being beaten by a police baton, and inconsistent with a fall to the road (the defendants' theory) as there was no evidence of abrasions that a fall on asphalt would have caused.[787] The prosecutors also called King as a witness, a decision that critically attached a human face to the grainy footage in the videotape.[788]

Federal prosecutors did not profit simply from a second look at the evidence choices made by their state counterparts. They also were well-equipped to impeach potential defense witnesses, who they had been able to identify from the first trial and other sources.[789] The federal prosecutors subpoenaed those potential defense witnesses to the grand jury after the first trial as a defensive maneuver—to get a preview of, and to potentially neutralize and lock in, any testimony the witnesses might be called on to give that was helpful to defendants.[790]

Following a week of deliberations and in the midst of a city-wide tactical alert, the jury returned two guilty verdicts and two acquittals.[791] The jury

785. *See id.* at 530–31 & nn.119–20.

786. *See id.* at 531 & n.121.

787. *Id.* at 531–32.

788. *See id.* at 547–59.

789. *Id.* at 532.

790. *See id.* at 532. *See generally* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 18–19 & n.1 (1995) (noting that Section 242 was the key criminal statue at issue in the federal trial of the Los Angeles officers in United States v. Koon, 833 F. Supp. 769, 774 (C.D. Cal. 1993)).

791. *See* Amar & Marcus, *supra* note 790, at 2.

found two of the defendants guilty of violating Section 242 and acquitted the other two.[792]

4. United States v. Gamble: *The Latest Word on Dual Sovereignty*

For the two decades following the Rodney King trials, the Supreme Court did not address the dual sovereignty doctrine in any context whatsoever.[793] The Court next considered the issue in 2016 in *Puerto Rico v. Sanchez Valle*,[794] where it found that Puerto Rico's commonwealth status derived its authority from the federal government (as had its prior status as a territory), and thus Puerto Rico was not a separate sovereign for Double Jeopardy purposes.[795] However, Justice Thomas joined a concurrence by Justice Ginsburg, arguing that the dual sovereignty doctrine warranted reconsideration.[796] Two years later, the Court granted certiorari in *Gamble v. United States* to determine whether to overturn the dual sovereignty doctrine.[797]

Terance Gamble had been pulled over by local police in Mobile, Alabama, allegedly because of a damaged headlight.[798] A search of his car ensued and a handgun was found.[799] Inasmuch as Gamble had a previous felony conviction, he was prosecuted under Alabama's felon-in-possession law, pleaded guilty, and sentenced to ten years' imprisonment, all but one year of that sentence suspended.[800] Apparently unhappy with that result, state prosecutors prevailed upon their federal counterparts to prosecute him under the federal felon-in-possession statute, which they did, and Gamble, again pleading guilty but preserving his appellate rights, received an additional three years' imprisonment.[801] In *Gamble*, as in *Lanza* and *Bartkus*, no credible argument could be made that the state and federal governments had different

792. *See generally* Amar & Marcus, *supra* note 790, at 11–18 (discussing the peculiar persistence of the doctrine and calling for a civil rights exception to the doctrine rooted in the Fourteenth Amendment).

793. *See id.* at 1 n.1.

794. 579 U.S. 59 (2016).

795. *See id.* at 59, 72.

796. *See id.* at 79 (Ginsburg, J., concurring).

797. 587 U.S. 678, 681 (2019).

798. *Id.* at 682.

799. *Id*.

800. *See id.* at 726 (Ginsburg, J., dissenting).

801. *Id*.

"interests" in their respective prosecutions.[802] The legislatively-perceived evils of alcohol, bank robbery, and guns know no sovereigns.[803]

Gamble is largely a recitation of the *Lanza* and *Bartkus* playbook. The Court discusses the same nineteenth-century precedent as the Court did in those two cases, and then, just as those two cases did, describes the result in *Lanza* as if a foregone conclusion, the inevitable result of the clearcut claims of precedent.[804] With *Lanza* thus entrenched, *Gamble,* like *Bartkus*, also develops an air of inevitability, absent any appetite for considering the increases in the federalization of criminal law and the role of "cooperative federalism" in criminal prosecution. As in *Bartkus*, the Court exaggerates the effect of *Lanza* in the ensuing decades—applied "without qualm or quibble"—and ticks off the same list of supposed "applications" of *Lanza* as did the court in *Bartkus*.[805]

The Court also rejects a more novel "originalist" argument made by the dissenters: that the dual sovereignty doctrine is at odds with the original understanding that sovereignty derives from "the people," and is thus unitary and not "dual."[806] Going nuclear, the Court refers to precedent holding that in adopting the constitution, the people "split the atom of sovereignty," conferring some aspects of sovereignty on the federal government while retaining others for the states.[807] As to the arguments by Gamble and the dissenters that the proliferation of federal criminal law and the prevalence of tag-team prosecutions necessitated a reconsideration of dual sovereignty, a trend the Court had acknowledged and been concerned about over fifty years earlier in *Murphy*, the Court dodged the argument by answering a different question: it noted that even if the dual sovereignty doctrine was eliminated, the broad reach of federal criminal law would remain.[808] And the Court could not resist adding, utterly gratuitously, that even without the dual sovereignty doctrine, defendants would still have difficulty succeeding on Double

802. *See id.* at 743 (Gorsuch, J., dissenting).

803. The majority's lack of interest in the underlying facts of *Gamble* is shocking, if not surprising, never mind that the traffic stop was likely pretextual. The Court does not even mention the obvious sentencing motivation behind the successive federal prosecution, which only the dissent raises. Moreover, it is likely that the two prosecutions derived from "Operation Triggerlock," a joint state-federal effort aimed at the coordination of state and federal firearms prosecutions. *See generally* David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011, 1011–12 (2020) (explaining how federal prosecutors use felon-in-possession prosecutions to target what used to be considered local crimes).

804. *See Gamble,* 587 U.S. at 678–79.

805. *See id.* at 688.

806. *See id*.

807. *Id.* at 688–89 (quoting Alden v. Maine, 527 U.S. 706, 751 (1999)).

808. *See id.* at 709–10.

Jeopardy challenges due to other doctrinal barriers the Court has maintained.[809]

Gamble is a particularly coldblooded opinion. As noted above, the Court fails to consider or even express the slightest bit of curiosity about the background of and relationship between the two prosecutions, including the obvious sentencing motivation that only the dissenters note.[810] In *Bartkus*, by contrast, the majority opinion at least acknowledged the federal participation in the successive state prosecution (although it remained for the dissent to fully explain the federal role).[811] *Gamble* also says nothing about the profound lack of any difference in the state and federal interests sought to be vindicated in the two cases.[812] In *Abbate,* by contrast, the Court at least articulated a plausible, albeit ultimately unpersuasive, independent federal interest in a second prosecution.[813] The Court does not deign to acknowledge the perspective of a successively prosecuted defendant, who of course is utterly indifferent to the identity of the sovereign that is trying to imprison him. *Gamble* does not acknowledge the public controversy that surrounded the dual sovereignty doctrine's original conception in *Lanza*, where it was criticized both academically and in the press, or in the doctrine's rebirth in *Abbate-Bartkus*, where the decisions sent both Congress and the Department of Justice off in a mad scramble to ameliorate the doctrine's manifest unfairness.[814] Nor does the Court acknowledge the arguable special role played by successive federal prosecutions in civil rights cases in the twenty years immediately preceding *Gamble*, including in the Rodney King prosecutions.

In some of these respects, *Gamble* is the spitting image of *Lanza* itself, despite the ninety-seven years between them. *Lanza*, similarly, found it unremarkable that the federal and state prosecutions were entirely a tag-team attack. *Lanza,* similarly, found it unnecessary to consider the correlative state and federal interests at issue, even though precedent had thought it the decent thing to do. *Lanza*, similarly, thought it unremarkable that the successive prosecution was driven by nothing more than federal law enforcement's desire for a more severe punishment than the state imposed.

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809. *See id.* at 710; Amar & Marcus, *supra* note 790, at 2; Blockburger v. United States, 284 U.S. 299, 304 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

810. *See Gamble*, 587 U.S. at 739 (Gorsuch, J., dissenting).

811. *See* Bartkus v. Illinois, 359 U.S. 121, 165–66 (1959) (Brennan, J., dissenting).

812. *See Gamble*, 587 U.S. at 686–88.

813. *See* Abbate v. United States, 359 U.S. 187, 196–97 (1959).

814. *Cf. Gamble*, 587 U.S. at 687–88 (refusing to acknowledge the public controversy surrounding the dual sovereignty doctrine and instead of clarifying or overturning the doctrine, upholding the doctrine as sound law).

VII. CONCLUSION

It is hardly surprising that the repeal of Prohibition in 1933 did not result in any material undoing of the criminal procedure edifice created by the Taft Court.[815] That is not how constitutional law works. As explained above, *Carroll* was explicitly reaffirmed in 1949 by *Brinegar,* and the direct effects of *Carroll* and *Brinegar* are very much present today. *Olmstead*'s toleration of police misconduct found firm footing in Nixon's reconstituted Court in the 1970s, and that same view is driving the current Court's retreat from the exclusionary rule. *Lanza* was reborn in *Abbate-Bartkus* in 1959, and it was uncritically and unapologetically ratified by the Supreme Court just six years ago.[816] Those three Taft Court cases have served as "millstones around our necks" indeed.

It is tempting to find something honorable in Taft's slavish devotion to the effective enforcement criminal prohibitions he personally opposed. This is how judges should conduct themselves, though it is doubtful they always do. But this would be true only if Taft, during Prohibition, had been making a good-faith effort to apply existing precedent, or at least to nudge the law at its margins to accord with changing times. That was not the case.

There is no doubt Taft was well aware that in his efforts to enable maximum Prohibition enforcement he was altering existing criminal procedure law. For example, in attempting to secure a majority for his opinion in *Carroll*, Taft conceded in a letter to his son in December 1924 that the case

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815. There was arguably a mild softening around the edges of criminal procedure in the early 1930s—after Taft resigned in 1930 and as Prohibition tottered and then fell—but these developments were modest and without staying power. For example, after expanding the scope of the search incident to arrest doctrine during the heyday of Prohibition, the Court trimmed the doctrine's scope in two cases in the early 1930s. *See* Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); United States v. Lefkowitz, 285 U.S. 452, 465–67 (1932). The doctrine fluctuated in scope for decades thereafter, but when the Court finally expanded the scope into its current form in *United States v. Robinson,* authorizing an unlimited search of the person of any arrestee regardless of the suspected offense, the Court relied on one of the earlier, expansive Prohibition era cases, *Agnello v. United States*. *See* United States v. Robinson, 414 U.S. 218, 225, 235 (1973) (citing Agnello v. United States, 269 U.S. 20, 30 (1925)). At the end of 1932, with Roosevelt on his way to the White House as the president-elect and ending prohibition a plank in the Democrat Party platform, *see* DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION, 157–59 (1979), the Court finally considered the entrapment doctrine. *See* Sorrells v. United States, 287 U.S. 435, 452 (1932). On the extreme facts of *Sorrells v. United States*, to induce a sale of liquor the agent had to make multiple requests and manipulate Sorrells based on their common military experience—the Court recognized the entrapment defense, which has consistently been confined ever since to egregious situations analogous to those in *Sorrells* itself. *See id.* at 439–41, 443.

816 *See Gamble*, 587 U.S. at 678–79.

would establish a "new principle."[817] In a letter to Justice DeVanter the very next day, Taft acknowledged that in an effort get Justice Butler's vote, his opinion would "try to steer away from the suggestion that we are introducing any new law and new principle of constitutional construction, but are only adapting old principles and applying them to new conditions created by the change in the National policy which the 18th Amendment represents."[818] Similarly, it was hardly an exercise in good faith for Taft in *Olmstead* to dismiss *Weeks'*s exclusionary rule as "an exception," or in *Lanza* to ignore the Eighteenth Amendment's legislative history or the nineteenth century precedent decrying successive prosecutions as unthinkable.[819]

In fairness, we know that Taft personally despised the lawlessness that national Prohibition engendered, even in its most benign form as the "light-hearted contempt with which the Eighteenth Amendment" was regarded by millions of citizens who were otherwise law abiding.[820] Prior to the passage of the Eighteenth Amendment, Taft had been concerned that Prohibition would be disregarded and disrespected "by a lot of foreigners of the lower classes who would violate it if they could."[821] But after he joined the Court, and Prohibition was on the books, he was especially critical of the hypocrisy of the well-off—his people—who were quick to condemn, say, the lawlessness of extreme labor union activity, yet displayed an analogous "spirit of lawlessness" towards Prohibition.[822] Taft found the lawlessness of the "intelligent and well-to-do" even "more alarming" than the lawlessness of the working classes because the former "should know that demoralization is the necessary consequence of the attitude which they are now taking in the patronizing of bootlegging and in their general contemptuous attitude toward the law."[823] For Taft, it seemed as if public attitudes towards Prohibition

817. *See* Letter from William Howard Taft to Charles P. Taft, 2nd (Dec. 22, 1924) (on file with the Libr. of Cong., William Howard Taft Papers, microformed on Reel 270).

818. Letter from William Howard Taft to Willis Van Devanter (Dec. 23, 1924) (on file with the Libr. of Cong., William Howard Taft Papers, microformed on Reel 270).

819. *See* Olmstead v. United States, 277 U.S. 438, 467 (1928); United States v. Lanza, 260 U.S. 377, 380–82 (1922) (determining that the second section of the Eighteenth Amendment "does not enable Congress or the several states to defeat or to thwart the prohibition, but only to enforce it by appropriate means").

820. Fabian Franklin, *What's Wrong with the Eighteenth Amendment?*, 109 ANNALS AM. ACAD. POL. & SOC. SCI. 48, 50 (1923); *see also* Letter from William Howard Taft to James R. Sheffield (July 8, 1923) (on file with the Libr. of Cong., William Howard Taft Papers, microformed on Reel 255) (opining that the people "insist upon violating the law because they don't like it" and that such behavior leads to "a demoralization of all law" of which Taft disagrees).

821. *See* Letter from William Howard Taft to James R. Sheffield, *supra* note 820.

822. *See id*.

823. Letter from William Howard Taft to Francis Peabody (July 12, 1923) (on file with the Libr. of Cong., William Howard Taft Papers, microformed on Reel 255).

threatened not just the prohibition law's enforcement but "the rule of law itself."[824]

Yet Taft's view of the rule of law was shortsighted. Equally a part of "the law" that Prohibition entailed was the fact Congress had cast such a wide net that inevitably only a small fraction of violators would be prosecuted; that Congress failed to adequately fund its enforcement, shrinking even that small fraction; that Congress provided only modest penalties for Volstead Act violations; and that Prohibition was sufficiently unpopular that juries in Volstead Act prosecutions often exercised their nullification prerogative.[825] Furthermore, the law that was Prohibition, and its enforcement, were part of a larger constitutional system. That system reflected judgments about individual rights that were as much part of the rule of law as the Volstead Act's prohibitions. Justice Jackson spoke to this concept in *United States v. Di Re*:[826]

> We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand.[827]

The maximum enforcement of Prohibition that Taft seemed bent on enabling, in short, is a distortion of the rule of law, in the context of Prohibition or any other context. Unlike the Pokémon game franchise, where players are told "You Gotta Catch 'Em All," *not* catching them all is a primary feature of the rule of law, not a bug. This reality is at the very essence of prosecutorial discretion. As stated by then-Attorney General Robert Jackson, the prosecutor must choose his targets honestly and wisely because the

824. Post, *supra* note 12, at 95–96.

825. *See* Justin Murray, *Prosecutorial Reform and the Myth of Individualized Enforcement*, 102 WASH. UNIV. L. REV. 1435, 1438 (2024); Amdt21.S1.2.2 Problems with the Eighteenth Amendment and Prohibition, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt21-S1-2-2/ALDE_00013855/ (on file with the South Carolina Law Review); Sean P. Cecil, *The History and Use of Jury Nullification*, SPC: BLOG (Dec. 9, 2014), https://www.cecil.law/the-history-and-use-of-jury-nullification# (on file with the South Carolina Law Review).

826. 332 U.S. 581 (1948).

827. *Id.* at 595.

potential pool of targets is so vast.[828] Eleven years later, in his capacity as Justice Jackson, he expressed a narrower version of this same spirit in a different context, observing in ruling on a motion to reduce excessive bail:

> Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice. We know that Congress anticipated that bail would enable some escapes, because it provided a procedure for dealing with them.[829]

And in an equally narrow context, Judge Learned Hand defended jury nullification on a similar theory, as it reflected a happy degree of "slack" in the enforcement of the law:

> The institution of trial by jury- especially in criminal cases- has its hold upon public for chiefly for two reasons. The individual can forfeit his liberty- to say nothing of his life- only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions.[830]

Admire Taft for his ability to put aside his personal misgivings about Prohibition, if you will, but not for his fealty to the rule of law.

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828. *See* Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18, 18 (1940) (address at the Conference of United States Attorneys, Washington, D.C., Apr. 1, 1940).

829. Stack v. Boyle, 342 U.S. 1, 8 (1951) (citing FED. R. CRIM. P. 46 (f)).

830. United States *ex rel.* McCann v. Adams, 126 F.2d 774, 775–76 (2d Cir. 1942).