

Towards a history of deviance: policing drunkenness in mid-nineteenth-century New South Wales

On the 22 December 1849, *Bell's Life in Sydney*, reported on the arrest of Amelia Beard for the crime of public drunkenness. Described as a “young lady ... known to the police as a keen shaver,” Constable Halliday, initially “found it necessary to remonstrate with her on the impropriety of her conduct,” but when she responded with “a volley of abusive language against him, accompanied with a pantomimic exhibition of talons and legs, which left most remarkable notice of her visitations upon his person,” she was promptly arrested and charged with “with being excessively drunk and disorderly in one of the main streets of the metropolis.”¹ Beard’s arrest for drunkenness was one of thousands made by the New South Wales police that year and she herself was arrested close to a hundred times during her life for minor offences including drunkenness, vagrancy, obscene language, minor assault, receiving stolen goods, robbery, damaging property, and prostitution.² But understanding this incident – or the offence of drunkenness in general – as simply a crime fails to do it justice. This kind of policing was merely the formal expression of a much broader contest over public order in which the offence of drunkenness had a symbolic role. As I argue, we can use the concept of deviance to help understand Beard’s arrest and read the policing of drunkenness as a crucial form of modern urban social control.

This chapter uses the history of a particularly common but often neglected crime – public drunkenness – in a specific jurisdiction and period – mid-nineteenth century New South Wales, c. 1840-1860 – to argue for the critical importance of the concept of deviance to the emerging field of historical criminology. Throughout this period public drunkenness was the most common cause of arrest in New South Wales but notwithstanding its prevalence, only a tiny fraction of those who became publicly drunk were ever arrested, and for most of them their punishment was a small fine. At the same time, drunkenness was an intensely politicised social problem, opposed by a popular global temperance movement, and roundly and repeatedly condemned from the pulpit and by the press. Thus the formal criminality of drunkenness cannot be understood without considering the many informal ways in which it was also judged and controlled.

Linking Beard and Halliday’s story to this broader history, I propose that historical criminology in general and the history of drunkenness in particular is best framed as a study of deviance. By focussing on the micro-history of a specific moment of deviance – both deviant action and labelling reaction – in its historical context, we can theorize from the past rather than apply theory to it. Unpacking Beard’s drunkenness and Halliday’s arrest as a historical episode of deviance, I argue that drunkenness was symbolically central to the

¹ “Police Office Sketches,” *Bell's Life in Sydney and Sporting Reviewer* (Sydney: George Ferrers Pickering and Charles Hamilton Nichols, 1845-1860): 22 December 1849, 3. The arresting officer is only referred to as “P.O. 37” but is then named in the succeeding report in which “another disorderly John Cochrane was also charged by Constable Halliday.”

² For arrests for drunkenness see the data in: Matthew Allen, “The Temperance Shift : Drunkenness, Responsibility and the Regulation of Alcohol in NSW, 1788-1856” (Ph. D., University of Sydney, 2013), Appendix 4. Unfortunately there are no surviving colony-wide records for 1849 but in 1848 there were over 7000 arrests for drunkenness in NSW (46% of all recorded arrests). For Beard, see the tagged list of newspaper reports of her arrest in Trove: <http://trove.nla.gov.au/result?!-usertag=Amelia%20Beard>. This is certainly only a sample of her full criminal record, which does not survive.

social controls which helped establish the Victorian city. Reading the history of crime in terms of the much broader processes by which societies form and enforce social judgements helps us to understand crime critically, as a constructed social and historical phenomenon and not simply a problem to be solved.

In this chapter I will first try to situate the emerging study of historical criminology in relation to the discipline of history and the interdisciplinary field of criminology. I argue that what distinguishes historical criminology from histories of crime and criminal justice is precisely its explicit connection to the theoretical grounding of criminology and specifically the tradition of critical criminology which developed from the 1970s in parallel with social historians' growing interest in the history of crime. I then briefly outline the concept of deviance as it has developed within sociology and criminology and show that it remains relevant and useful to understanding crime. In particular, deviance is a necessary frame for the practice of historical criminology since the historical evidence so clearly demonstrates that crime is not a social fact but a creative and political process of rule-breaking and labelling. Finally, I illustrate this argument in relation to the crime of drunkenness in colonial New South Wales, c. 1840-1860. Using the example of Amelia Beard, I analyse her arrest as an episode of deviance and labelling that reveals the symbolic importance of drunkenness for modern social control.

History, Historical Criminology and the Concept of Deviance

The notion of a distinct sub-field of historical criminology is a relatively new one, but there is a much longer tradition of more or less closely connected work by both criminologists interested in the past and historians interested in crime. Paul Lawrence identifies four distinct approaches to the historical study of crime in the twentieth century which "developed broadly consecutively:" an early period of positivism, increasingly challenged by more theorised and critical work which contributed to the interest of social and subsequently cultural historians.³ This chronology broadly parallels Barry Godfrey's account of the evolving methodologies of crime historians: "[c]ounting (statistics), reading (discourse analysis), looking (visual sociology), typing (digital resources), and linking (micro-histories and biographical research)."⁴ But while crime history has flourished since the 1970s, Lawrence observes that crime historians "usually stop short of making any explicit intervention in contemporary debates" about crime, reflecting broader trends within the discipline of history.⁵

These approaches and methodologies were largely driven by historians, and have only occasionally and belatedly affected the practice of criminology which, in direct contrast, has tended to be resolutely focussed on the present with only sporadic interest in the past. In the post-war era, whiggish accounts of criminal justice history predominated among criminologists, typically based on broadly normative readings of official records, and this work was seen as establishing the foundations of contemporary criminology as a positivist social science.⁶ From the 1960s the practice of criminology was increasingly institutionalised and, as Lawrence describes, there was a "perceptible turn towards an empiricism focused on the immediate

³ Paul Lawrence, "The Historiography of Crime and Criminal Justice," in *The Oxford Handbook of the History of Crime and Criminal Justice*, ed. Paul Knepper and Anja Johansen (Oxford: Oxford University Press, 2016): 17-37, 18.

⁴ Barry Godfrey, "The Crime Historian's *Modi Operandi*," in *The Oxford Handbook of the History of Crime and Criminal Justice*, ed. Paul Knepper and Anja Johansen (Oxford ; New York: OUP USA, 2016): 39-56, 52.

⁵ Paul Lawrence, "History, Criminology and the 'Use' of the Past," *Theoretical Criminology* 16, no. 3 (2012): 313-328, 314.

⁶ The most famous example is: Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*, 5 vols. (London: Stevens & Sons, 1948-1986).

demands of the present.”⁷ Reacting against this growing disciplinary orthodoxy, the new critical criminology of the 1970s drew attention to the “absence of any historical dimension in contemporary work,” arguing that this contributed to the normative assumptions of the establishment.⁸ At the same time, and closely connected to this critique, a series of theoretically-driven historical studies of criminal justice systems in the modern period were published by scholars outside of the history discipline.⁹ This diverse body of work, shared a critical perspective on crime as a form of power relation and a sociological focus on modernity as a distinct era, and has significantly shaped subsequent criminology. While this work inspired “a loosely defined sub-discipline,” until recently its main impact on criminology was to bolster the critique of positivist establishment criminology and its failure to account for historical changes in crime rates.¹⁰ It is only in the past decade that consistent calls for criminology to historicise and for a coherent field of historical criminology have developed.¹¹

However, such recent assertions of historical criminology invoke distinct and sometimes competing visions of the field, perhaps especially in terms of its relation to contemporary criminological problems. Lawrence draws attention to the contrasting orientations of historians concerned with the past, and criminologists, with the present, and calls for greater collaboration towards present-focussed histories which could contribute to “the co-production of a revitalized public criminology.”¹² But in contrast, Sverre Flaatten and Per Jørgen Ystehede call for a broader field of research incorporating “all historical studies relevant to topics and discussions in the field of criminology, criminal law, the criminal sciences and the criminal justice system.”¹³ Such an approach has the considerable merit of inclusivity but would also involve claiming all history of crime as part of the field of criminology, even when it was conceived in an entirely different disciplinary context.

David Churchill suggests a more coherent broad approach by defining historical criminology as “the work of criminology done in an historical mode.”¹⁴ He rejects as “partisan” efforts to define the field by its

⁷ Lawrence, “History, Criminology,” 318.

⁸ Ian Taylor, Paul Walton, and Jock Young, “Advances Towards a Critical Criminology,” *Theory and Society* 1, no. 4 (1974): 441–76, 462.

⁹ Most obviously, Foucault: Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (London: Allen Lane, 1977). But also published, republished, translated or increasingly influential from this period were: Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (Columbia University Press, 1939); David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little, Brown, 1971); Norbert Elias, *The Civilizing Process*, trans. Edmund Jephcott, 2 vols. (Oxford: Blackwell, 1978); Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850* (London: Pantheon Books, 1978); Dario Melossi and Massimo Pavarini, *The Prison and the Factory: Origins of the Penitentiary System*, trans. Glynis Cousin (London: Macmillan, 1981).

¹⁰ Sverre Flaatten and Per Jørgen Ystehede, “What’s Past Is Prologue,” *European Journal of Criminology* 11, no. 2 (2014): 135–141, 138. On the historical critique see: Jock Young, “Introduction to 40th Anniversary Edition,” in *The New Criminology for a Social Theory of Deviance*, by Ian R. Taylor, Paul Walton, and Jock Young, 40th Anniversary Edition. (Oxfordshire, England ; New York: Routledge, 2013): xi-li, esp. xli-xliv.

¹¹ See for example: Nicole Rafter, “Silence and Memory in Criminology—The American Society of Criminology 2009 Sutherland Address,” *Criminology* 48, no. 2 (2010): 339–355.

¹² Lawrence, “History, Criminology,” 324. He shapes this around recent debates over the need for a more explicitly public criminology. See: Ian Loader and Richard Sparks, *Public Criminology?*, (London; New York: Routledge, 2011).

¹³ Flaaten and Ystehede, “Past is Prologue,” 136.

¹⁴ David Churchill, “Towards Historical Criminology,” *Crime, Histoire & Sociétés / Crime, History & Societies*, vol. 21, no. 2 (2017): 379–86, 380. Original italics removed.

methodology and argues instead for a criminology concerned with “[h]istorical time[:] ... the time of events and processes ... of tenses ... an embodied time.”¹⁵ Specifically, he argues that criminologists should embrace historians’ critique of the concept of modernity – as whiggish and imperialist – and acknowledge that time is plural and layered.¹⁶ I fully endorse this suggestion and its implicit critique of “most historical works in criminology [which] gain traction from their orientation to the present – from their use of historical enquiry to speak to contemporary concerns.”¹⁷

In a closely-related argument, Paul Knepper and Sandra Scicluna, suggest that historical criminology needs to balance historians’ concern with primary-source evidence, against criminologists’ interest in theory.¹⁸ Their argument seeks to “join a conversation” begun by John Braithwaite in his critique of David Garland and the genealogical approach to the history of punishment.¹⁹ In the *Culture of Control* (2001) Garland contrasted his “analytical rather than archival” method with that of historians, and explicitly aligned himself with Foucault and the ‘history of the present.’²⁰ As Braithwaite argues, the “Foucauldian tradition of a ‘history of the present’” is “an inferior method to history of the past” precisely because it is driven by present concerns.²¹ It pre-determines the outcome of the historical process by ignoring branches of the genealogy that do not lead to the present, consequently misunderstanding both “imperial present” and “colonial pasts.”²² I would add that history of the present is necessarily and fundamentally teleological: it “[identifies] the essential qualities of something in the light of what are assumed to be its outcomes.”²³ To adapt Braithwaite’s useful metaphor, by starting from the leaves of present phenomena and searching downward for their roots, we end up with a tree with only one branch.²⁴

Braithwaite made this criticism in relation to his call for a broader history of regulation in contrast to a narrower history of punishment.²⁵ His point is that focussing the history of punishment exclusively on prisons

¹⁵ David Churchill, “What Is Historical Criminology? Some Methodological Implications of Doing Historical Criminology,” *British Society of Criminology Newsletter*, no. 82 (2018): 8-11, 9. Compare Mary Bosworth, who argues that historical methods would enrich criminology by drawing attention to “problems of interpretation, evidence and emotion:” “The Past as a Foreign Country? Some Methodological Implications of Doing Historical Criminology,” *British Journal of Criminology* 41, no. 3 (2001): 431–442, 432.

¹⁶ Churchill, “Towards Historical Criminology,” 384-5.

¹⁷ Churchill, “Towards Historical Criminology,” 380.

¹⁸ Paul Knepper and Sandra Scicluna, “Historical Criminology and the Imprisonment of Women in 19th-Century Malta,” *Theoretical Criminology* 14, no. 4 (November 1, 2010): 407–24, 419.

¹⁹ Knepper & Scicluna, “Historical Criminology,” 408.

²⁰ David Garland, *Culture of Control: Crime and Social Order in Contemporary Society* (Chicago, Ill.: University of Chicago Press, 2002), 2.

²¹ John Braithwaite, “What’s Wrong with the Sociology of Punishment?,” *Theoretical Criminology* 7, no. 1 (2003): 5–28, 6.

²² Braithwaite, “What’s Wrong”, 6-9. Braithwaite’s point about the significance of neglected “colonial pasts” is particularly significant for the history of policing in NSW which may not have been driven by metropolitan reforms. On this point, see also: Knepper and Scicluna, “Historical Criminology,” 409.

²³ J. C. D. Clark, *English Society, 1660-1832: Religion, Ideology, and Politics during the Ancien Regime*, 2nd ed. (New York: Cambridge University Press, 2000), 1. Clark identifies three common errors of projecting the present into the past: anachronism, prolepsis and teleology.

²⁴ Garland is well aware of this critique of genealogy, seeing its’ deliberate efforts to problematize the present as a strength, not a weakness. See: David Garland, “What Is a ‘History of the Present’? On Foucault’s Genealogies and Their Critical Preconditions,” *Punishment & Society* 16, no. 4 (2014): 365–384.

²⁵ Braithwaite. “What’s Wrong”, 23-4; John Braithwaite, “The New Regulatory State and the Transformation of Criminology,” *British Journal of Criminology* 40, no. 2 (2000): 222–238.

ignores the breadth of regulatory sanctions imposed in non-criminal contexts. In this chapter I wish to make an analogous point about historical criminology and deviance. In order to avoid artificially narrowing the field to the history of present criminal problems we need to focus on specific historical episodes of deviance and labelling and analyse them in their historical context before drawing broader theoretical conclusions.

To appreciate why historical criminology should conceive of itself as the history of deviance it is worth briefly summarising the concept and its development. The study of deviance originated in the late nineteenth-century sociology of Emile Durkheim as a positivist and normative project that sought to explain why people break rules, but by the mid-twentieth century the concept was evolving.²⁶ One significant branch of this new sociology of deviance involved a more critical understanding of deviant subcultures, based on Robert Merton's strain theory: the idea that deviance is a rational response to the anomie produced by modern life.²⁷ Subcultural theorists were often symbolic interactionists, sought to understand deviance from the deviant's perspective rather than the perspective of authority, and engaged in ethnographic research to understand the meaning of deviant acts for deviant actors.²⁸ This shift in perspective was closely connected to a shift in focus, from explaining deviance to explaining "how judgments of deviance come about."²⁹ From the 1960s sociologists of deviance increasingly rejected positivism in favour of social constructionism, influenced in particular by Howard Becker's innovative suggestion that "deviant behaviour is behaviour that people so label" and his argument that the act of labelling helps to create deviance.³⁰ This approach inspired a wave of theoretical work focussed on the construction of deviance and social problems which drew attention to the situational and subjective nature of social judgements and social controls, and especially the ways that official judgements and controls reflect power.³¹

However, since the 1990s deviance has declined as a concept within the discipline of sociology with critics arguing that it "poses awkward definitional problems that have never been successfully resolved."³² At the

²⁶ Erich Goode, "The Sociology of Deviance," in *The Handbook of Deviance*, ed. Erich Goode (Online: Wiley, 2015), 1–29; Colin Sumner, "The Social Nature of Crime and Deviance," in *Blackwell Companion to Criminology*, ed. Colin Sumner, (Chichester: Wiley, 2008), 3–31; Emile Durkheim, *The Rules of Sociological Method*, 8th ed. (Chicago, Ill: University of Chicago Press, 1938 [1897]). Durkheim and his contemporaries did not use the term deviance, generally referring to social pathologies or social problems, reflecting their normative assumptions.

²⁷ Jock Young, "Introduction to 40th Anniversary Edition," in *The New Criminology for a Social Theory of Deviance*, by Ian R. Taylor, Paul Walton, and Jock Young, 40th Anniversary Edition (Oxfordshire, England ; New York: Routledge, 2013), xi–li; Robert K. Merton, "Social Structure and Anomie," *American Sociological Review* 3, no. 5 (1938): 672–682.

²⁸ Jeff Ferrell, "Cultural Criminology," *Annual Review of Sociology*, 1999, 395; Jeff Ferrell, "Cultural Criminology and the Politics of Meaning," *Critical Criminology* 21, no. 3 (2013): 257–271.

²⁹ Goode, "Sociology of Deviance."

³⁰ Howard S. Becker, *Outsiders; Studies in the Sociology of Deviance* (New York: The Free Press, 1963), 8-9.

³¹ From a profusion of literature some key works are: Kai T. Erikson, "Notes on the Sociology of Deviance," *Social Problems* 9, no. 4 (1962): 307–14; David Matza, *Becoming Deviant* (Englewood Cliffs: Prentice Hall, 1969); Stanley Cohen, *Visions of Social Control: Crime, Punishment and Classification* (Cambridge: Polity Press, 1985); Malcolm Spector and John Kitsuse, *Constructing Social Problems* (Transaction Publishers, 1987).

³² Joel Best, "Whatever Happened to Social Pathology? Conceptual Fashions and the Sociology of Deviance," *Sociological Spectrum* 26, no. 6 (December 1, 2006): 533–46, 537. For defences of the concept see: Erich Goode, "Is the Sociology of Deviance Still Relevant?," *The American Sociologist* 35, no. 4 (2004): 46–57; Patricia A. Adler and Peter Adler, "The Deviance Society," *Deviant Behavior* 27, no. 2 (March 1, 2006): 129–48. This intra-disciplinary debate is largely irrelevant to my argument since it turns on a rejection of what Best calls "categorical conveniences" – like deviance – because their very breadth means that they do not "[allow] us to devise broader, more powerful theories" (541-2). I accept that it is probably impossible to theorise powerfully and in general

same time (and not coincidentally) deviance has become central to the flourishing field of critical criminology. As Jock Young has argued, critical criminology emerged from the synthesis of subcultural and labelling theory to develop a “fully social theory of deviance” that placed deviant acts in their social and historical context and did so “symmetrically; that is for both actor and reactor.”³³ By rejecting normative and positivist assumptions critical criminology uses deviance as a means to draw attention to the vast breadth of judgements about right and wrong which can be – but more often are not – formally labelled as crimes. By focussing on the symbiotic relationship between deviant action and labelling reaction it draws attention to each process as creative and political, and facilitates a clearer understanding of the power dynamics at stake in them. Thus deviance is a fundamental and necessary concept for criminology; and, I argue, should be central to historical criminology as well.

By understanding historical criminology as the study of deviance, we orient the field around two critical concerns: explaining the historical processes by which some forms of deviance are criminalised, and understanding why people deviate and label within specific historical contexts. Such a project is historicising rather than genealogical. It offers a broad conceptual framework within which historical criminology can interpret the past but it insists on the discipline of evidence, echoing Knepper and Scicluna’s argument that “pursuing historical evidence leads to better theorizing.”³⁴ As Young argues for critical criminology, historical criminology must be at once nomothetic and ideographic.³⁵ It should seek to identify general features of the history of criminal justice and to fully historicise them in specific examples. By focussing on episodes of deviance and labelling, historical criminology can identify such general features and develop theory that is fully engaged with its historical context.

Policing Drunkenness in New South Wales, c.1840-60

Beard’s arrest, considered in the context of the history of the crime of drunkenness in mid-nineteenth-century New South Wales helps illustrate this approach to historical criminology. Public drunkenness was first criminalised in English law in the seventeenth century, decriminalised in New South Wales in the late 1970s, and for much of the nineteenth and twentieth-centuries it was the most common cause of arrest, broadly echoing a pattern found throughout the British world. One interpretation of this fact, prominent throughout our period, suggested that rates of arrest reflected the colony’s persistent problem with alcohol. Discussing social conditions in the early months of the 1854 gold rush, the *Illustrated Sydney News* described the paradox of “a nation increasing in every element of national prosperity, while in virtue and in morals it is deteriorating,” citing as the chief cause the “unprecedented opportunities which have been afforded for [drunkenness].”³⁶ Similarly, the Chief Superintendent of Police for Sydney, John McLerie, told the 1854 Select Committee on Intemperance that drinking habits had “changed very much for the worse over the last two

about everything which is ever labelled as deviant. But I argue that deviance is a valuable concept for historical criminologists precisely as a categorical convenience, one which facilitates historical and cross-cultural comparison of rule-breaking and control.

³³ Jock Young, *The Criminological Imagination* (Cambridge: Polity, 2010), 212-3. Significantly, Young explicitly connects this tradition of critical criminology with the new social history (211).

³⁴ Knepper & Scicluna, “Historical Criminology,” 419.

³⁵ Young, “Introduction to 40th.”

³⁶ “Vice in Sydney,” *Illustrated Sydney News* (Sydney: Walter George Mason, 1853-1872), 29th October 1853, 1-2. For another attempt to connect increased drunkenness with gold see: “The Social Condition of NSW,” *Bell’s Life*, 2nd September 1854, 2.

years” based on “the evidence ... in the increased number of drunkards brought ... [to the] Police Office.”³⁷ However, this naïve view of arrests for drunkenness – that they reflect the control of a real social problem and that the rate of arrest is an index of rates of intoxication – cannot survive a critical engagement with the historical construction of drunkenness as deviance.

There was a long tradition of problematizing drunkenness in England in which religious and moral objections to sin, allied with elite and official fears about declining public order. Drunkenness was first formally criminalised in the early seventeenth century, during a period of puritan moral reform, with public drunkards made subject to arrest and punished with a fine of five shillings or six hours in the stocks.³⁸ Reflecting these two controlling impulses the act complained that drunkenness was “the roote and foundation of many other ... Synnes... to the great dishonour of God and of our Nacion ... the disabling of dyvers Workmen and the genrall ympovrishing of many good Subjects.”³⁹ The Act and subsequent law reinforced an existing distinction between public and private behaviour as Sir William Blackstone made clear in the 1760s, arguing that only public drunkenness was a crime because “its evil example makes it liable to temporal censure.”⁴⁰ This distinction was significant because in practice it made drunkenness a crime of the poor: the social elite drank privately and their drunkenness was “beyond the reach” of the law.⁴¹ Since only public drunkenness was a crime, the offence was never merely about intoxication.

Just as importantly the policing of drunkenness depended on enforcement. Early modern English policing was largely amateur or incentivised by rewards, which meant that police were both reluctant and often incapable of arresting public drunkards. It was only with the new police of the nineteenth-century that anything approaching systematic law enforcement became possible and the process of police reform was accompanied by a dramatic increase in arrests.⁴² As I have shown, in New South Wales drunkenness became the leading cause of arrest in the 1820s and 1830s as policing was professionalised and from 1860, when annual data is consistently available, it was typically the cause of more than forty percent of all arrests, more

³⁷ NSW Legislative Council, “Progress Report from the Select Committee on Intemperance ...,” *Votes and Proceedings of the Legislative Council of New South Wales* (Sydney: Government Printer, 1832-1855), 1854, vol. 2, 517-641, 555. For more on this inquiry and the moral panic that inspired it see: A. W. Martin, “Drink and Deviance in Sydney: Investigating Intemperance 1854-5,” *Historical Studies* 17, no. 68 (1977): 342–60.

³⁸ Drunkenness Act, 4 Jac. I, c. 5 (1606). Note that drunkenness was a crime under Church law before this date but was rarely dealt with. For more on the origins of criminalization see: James Nicholls, *Politics of Alcohol: A History of the Drink Question in England* (Manchester: Manchester University Press, 2009), 13-18; Joan R. Kent, “Attitudes of Members of the House of Commons to the Regulation of ‘Personal Conduct’ in Late Elizabethan and Early Stuart England,” *Bulletin of the Institute of Historical Research* 46 (1973): 41–71. For a longer version of my argument here see: Matthew Allen, “Policing a Free Society: Drunkenness and Liberty in Colonial New South Wales,” *History Australia* 12, no. 2 (2015): 143–64, 146-150.

³⁹ Drunkenness Act (1606).

⁴⁰ William Blackstone, *Commentaries on the Laws of England. In Four Books*, 4th ed., 4 vols. (Dublin: J. Exshaw et al, 1771), vol. 4, 41-2.

⁴¹ *Ibid.*

⁴² For the history of early modern policing, and police reform in England see for example: J. M. Beattie, *The First English Detectives: The Bow Street Runners and the Policing of London, 1750-1840* (Oxford: Oxford University Press, 2012); Clive Emsley, *The English Police: A Political and Social History*, 2nd ed. (London: Longman, 1996); Elaine A. Reynolds, *Before the Bobbies: The Night Watch and Police Reform in Metropolitan London, 1720-1830* (Houndmills, Basingstoke: Macmillan, 1998).

than twenty arrests per thousand population, and more than ten arrests per police officer.⁴³ However, there is rarely any meaningful relationship between these arrest rates and alcohol consumption.⁴⁴ Rather, as many historians and criminologists have argued, such data, at best, can inform us about levels and priorities of policing.⁴⁵ In this light, it is clear that criminal drunkenness is best understood as conduct labelled as such by the state, and that in general this requires a modern system of preventative police surveillance, and an efficient and committed judiciary.

But even under modern policing, these arrest rates do not reflect the systematic prosecution of public drunkenness, let alone a measure of actual rates of intoxication. In fact, the crime of drunkenness should be understood as a process of labelling on at least three levels: ambiguous definition (what constitutes a criminal level of drunkenness?), discretionary arrest (how consistently do the police arrest criminal drunkards?) and inconsistent punishment (what happens to drunkards who are arrested?).

Since its first delineation, drunkenness has always been an ambiguous and subjective offence. Responding to the law of 1606, the legal commentator Michael Dalton defined drunkenness by reference to the Bible:

Now for to know a drunken man the better, the Scripture describeth them to stagger, and reele too and fro – *Job 12.25 Esay 24.20*. And so where the same legges which carry a man into the house, cannot bring him out againe, it is a sufficient signe of drunkennesse."⁴⁶

By the era of professional policing there was slightly more clarity with nineteenth-century magistrates' guides specifying that conviction could occur "on view, confession, or the oath of one witness."⁴⁷ At the 1854 Intemperance Committee, the long-serving Chief Justice of the New South Wales Supreme Court (and prominent temperance campaigner), Sir Alfred Stephen, dismissed any difficulty in defining drunkenness, describing it as "the negation of sobriety; or simply this, that every man not sober is necessarily drunk."⁴⁸ But

⁴³ Allen, "Policing a Free Society," 150-155. These rates were meaningfully higher than England, but drunkenness was also the leading cause of arrest there. This pattern also holds for the US: Eric H. Monkkonen, "A Disorderly People? Urban Order in the Nineteenth and Twentieth Centuries," *The Journal of American History* 68, no. 3 (December 1981): 539-559.

⁴⁴ The data on alcohol consumption in the nineteenth-century has its own problems: we can only measure available alcohol, only then when it was officially recorded (customs-paying imports or excise-paying domestic production), and have no means of knowing how consistent rates of consumption were across the population as a whole. But even ignoring these problems there is no consistent meaningful relationship between available alcohol and arrest rates for drunkenness in nineteenth-century NSW. See: Allen, "Temperance Shift," Appendix 1 and 4; A. E. Dingle, "'The Truly Magnificent Thirst': An Historical Survey of Australian Drinking Habits," *Historical Studies* 19, no. 75 (October 1, 1980): 227-49; N. G. Butlin, "'Yo Ho Ho and How Many Bottles of Rum?'" *Australian Economic History Review* 23 (1983): 1-27.

⁴⁵ Eric Monkkonen, "Systematic Criminal Justice History: Some Suggestions," *Journal of Interdisciplinary History* 9, no. 3 (1979): 451; John Walliss, "Lies, Damned Lies and Statistics? Nineteenth Century Crime Statistics for England and Wales as a Historical Source," *History Compass* 10, no. 8 (August 2012): 574-83; John I. Kitsuse and Aaron V. Cicourel, "A Note on the Uses of Official Statistics," *Social Problems* 11, no. 2 (1963): 131-39.

⁴⁶ Michael Dalton, *The Countrey Justice ...*, 5th ed., (London: 1635), 27. Note that earlier editions did not contain this specific delineation of drunkenness suggesting that magistrates developed a working definition after having to put the 1606 Act into practice. When the 1606 Act was made permanent it specified that the testimony of a single witness would be sufficient evidence: Drunkenness Act, 21 Jac. I c. 7 (1624).

⁴⁷ Edwin C. Suttor, *Plunkett's Australian Magistrate...*, 2nd ed. (Sydney: W.A. Coleman, 1847). The original edition of 1835 did not deal with drunkenness except to note that it was a basis for arrest in Sydney, and a misdemeanour for convicts: John H. Plunkett, *The Australian Magistrate ...* (Sydney: Anne Howe, 1835), 260, 276-7.

⁴⁸ "Select Committee on Intemperance," 601.

this only serves to highlight the subjective judgement involved, and perhaps Stephen's lack of experience with the effects of alcohol.

Behaviour under the influence of alcohol is not merely or even primarily shaped by its intoxicating effects. What scholars refer to as "drunken comportment" – how people behave when intoxicated – is socially constructed and culturally and situationally specific.⁴⁹ Beard's drunken comportment was doubtless shaped by the sub-cultures in which she learned to drink and given that she was transported aged 17 for stealing after a series of other arrests, it is likely that this took place in the streets and pubs of her home town of Bath in the 1830s.⁵⁰ By 1849 she had been free for four years but during that period she was arrested at least three times for public drunkenness, once for criminal damage and was the victim of a brutal assault by her partner, John Osborne.⁵¹ We would need to know a great deal more about the drinking cultures of Bath and Sydney, and about Beard's personal circumstances at the time of her arrest to draw firm conclusions about the way that she drank. But even provisionally, it seems very likely that Beard's conduct reflected a popular street culture in which men and women drank together in public and which was increasingly the subject of respectable and official concern; and that the traumatic circumstances of her life also influenced her behaviour. Beard's act of deviance must be understood on its own terms.

Moreover, the process by which it was labelled a crime is also shaped by both general and specific historical context. As Arlie Loughnan has shown, the nineteenth-century saw the formation of new kinds of expert and lay knowledge of the intoxicating effects of alcohol which had a profound influence on the law around intoxication; and I might add on the policing of drunkenness.⁵² In relation to the crime of drunkenness a similar kind of lay or common knowledge underlies Stephens' ambiguous standard which was probably representative of legal officials more broadly. Constables were required and empowered to judge whether an individual was drunk or sober and in the case of a repeat offender like Beard, "known to the police as a keen shaver," it is not hard to imagine that the police prejudged the offence. In all likelihood the police regularly saw Beard on the street in various degrees of intoxication and arrested her when they found her

⁴⁹ Craig MacAndrew and Robert B. Edgerton, *Drunken Comportment: A Social Explanation* (Clinton Corners, N.Y: Eliot Werner Publications, 1969); Joseph Gusfield, *Contested Meanings: The Construction of Alcohol Problems* (Madison Wisconsin: Univ. of Wisconsin Press, 1996); Robin Room, "Intoxication and Bad Behaviour: Understanding Cultural Differences in the Link," *Social Science and Medicine* 53 (2001): 189–98. For histories of intoxication see: Phil Withington, "Introduction: Cultures of Intoxication," *Past & Present* 222, no. 9 (2014): 9–33; Stuart Walton, *Out of It: A Cultural History of Intoxication* (London : Penguin, 2002).

⁵⁰ *Bath Chronicle* (Bath: R. Cutwell, 1770-1925) 22 October 1835, 3; 4 August 1836, 2; 20 April 1837, 3; 13 July 1837, 3; 2 November 1837, 3.

⁵¹ Beard, Amelia, Certificate of Freedom, 4 October 1845, NSW State Records, 4/4401; *Sydney Morning Herald* (Sydney: Charles Kemp & John Fairfax, 1842-) 11 October 1845, 2; 26 January 1846, 2; 1 July 1847, 3; 7 March 1848, 3; *Australian* (Sydney: George Williams, 1824-1848) 17 December 1846, 3.

⁵² Arlie Loughnan, "The Expertise of Non-Experts: Knowledges of Intoxication in Criminal Law," in *Intoxication and Society: Problematic Pleasures of Drugs and Alcohol*, ed. J. Herring et al., (Basingstoke: Palgrave, 2013), 52–68. For related arguments about knowledge of alcohol and the law see: Martin J. Wiener, *Reconstructing the Criminal: Culture, Law, and Policy in England, 1830-1914* (Cambridge University Press, 1994), ch. 7; Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton, NJ: Princeton University Press, 2003), ch. 7.

troublesome, regardless of how drunk she was. Indeed, there were regular complaints throughout the nineteenth-century of wrongful and unfair arrest by citizens who claimed they were sober.⁵³

Subjective definition overlaps here with discretionary arrest. Such discretion was (and is) implicit in the policing of public order and was exercised in what was seen as the public interest.⁵⁴ Reporting on the practices of the police under his command in 1844, the then Superintendent, W. A. Miles claimed that “I do not allow the police to interfere ruthlessly with drunken men for the sake of the fines; if they are unable to take care of themselves, or if they are a nuisance to the public the police interfere.”⁵⁵ Similarly, his successor, John McLerie, reported that under his command men were not arrested provided they could “walk home quietly.”⁵⁶ This approach allowed the police to control public behaviour through the exercise of discretion. Those deemed respectable and polite were warned or even ignored while those deemed unruly or otherwise deviant were removed from the streets. Indeed, given the ambiguity of the offence, and the role of the police as the definitive witness, public deviants could be arrested regardless of whether they were drunk. In an illustrative case in 1848, Solomon Waters was arrested by the Sydney police as a convict out past the curfew. At the Police Office he proved that he was a free man but was subsequently charged with drunkenness and only released after he paid a fine. In a letter to the paper, his employer, James Robinson, complained that the charges were false, and “made with a view of extorting the fine from him,” defending him as “a sober, industrious, and particularly steady man.”⁵⁷

Discretion of this sort will necessarily reflect the prejudices of the arresting officer and society more broadly, and in nineteenth-century New South Wales this was most clearly reflected in the treatment of gentlemen. For example, in 1847 two clerks from the Commissariat Department were arrested for drunkenness but released without charge “in consideration of their having been in the lock-up for a few hours.”⁵⁸ The arresting officer testified that he found them drunk in town at two in the morning, knocking on doors, and “kicking up a row” and that when he repeatedly requested them to return home “they refused doing so, saying they were ‘gentlemen.’”⁵⁹ Indeed he only arrested them after they broke a window, an offence with which they were never charged though Beard was on several occasions.⁶⁰

This episode not only illustrates discretionary arrest but also inconsistent punishment. Under the various Police Acts, constables were permitted to release offenders charged with misdemeanours on bail “with or without sureties.”⁶¹ By the early 1840s the practice was applied systematically to drunkenness such that anyone who could afford to pay the maximum fine as a bond was released as soon as they were deemed

⁵³ Michael Sturma, “Police and Drunkards in Sydney, 1841-1851,” *Australian Journal of Politics & History* 27, no. 1 (1981): 48–56; Allen, “Temperance Shift,” 206-216. These complaints peaked in the 1830s and 1840s when police were incentivised to arrest drunkards because they were granted a proportion of the fine.

⁵⁴ For a summary of the issue of discretion in contemporary public order policing see: David E. Thatcher, “Order Maintenance Policing,” in *The Oxford Handbook of Police and Policing*, ed. Michael D. Reisig and Robert J. Kane (Oxford University Press, 2014): 122-147.

⁵⁵ Evidence of W.A. Miles in: NSW Legislative Council, ‘Report of the Select Committee on the Insecurity of Life and Property’, *VPLC*, 1844, pp369-448, 380.

⁵⁶ ‘Committee on Intemperance,’ 537-9.

⁵⁷ ‘Police Abuses’, *Bell’s Life*, 8th Apr. 1848, 3.

⁵⁸ ‘A Couple of Swells’, *Australasian Chronicle* (Sydney: Andrew Bent, 1839-1848), 7th Feb. 1846, 2.

⁵⁹ *Ibid.*

⁶⁰ *Herald*, 1 July 1847, 3; *Empire* (Sydney: 1850-1875), 13 April 1852, 2.

⁶¹ Sydney Police Act, 4 Gul. IV, no. 7 (1833). This provision was extended to other towns in 1838.

sober. Such bonds were forfeited if the offender failed to appear in court and the wealthy took advantage of this to avoid the shame of a public trial.⁶² More importantly, they avoided any prospect of the kind of public humiliation experienced by Amelia Beard when her story was made the subject of ribald humour. While this kind of extended treatment was unusual and a distinctive feature of *Bells' Life* the press more broadly adopted the practice of reporting on the so-called "drunkards' list", and *Bell's* was not alone in naming and shaming offenders.⁶³

Tellingly, women seem to have received especially severe sentences and to be overrepresented among those "habitual drunkards" who were repeatedly arrested and named in the press, despite the fact that they were almost certainly a small fraction of offenders.⁶⁴ In 1854, a detailed accounting of those committed to Darlinghurst gaol for drunkenness – a sentence reserved for offenders who failed to pay their fine – showed that only ten percent of men but over a quarter of women were gaoled three times or more over a six month period.⁶⁵ This suggests that a substantial proportion, if not the majority of female arrests, were members of a relatively small deviant subculture of women whose life on the streets brought them into frequent contact with the police. Reports of the Police Courts show repeated reference to "incorrigible" women sentenced for drunkenness, idleness, disorder and prostitution and often given more severe sentences as a result of their repeated arrest as Beard's record clearly illustrates.⁶⁶ Equally, it reflects a longstanding obsession with female immorality as a threat to the future of the colony.⁶⁷

The press report of Beard's arrest gives some evidence of such a double standard. The next item in the 'Police Sketch,' reported that John Cochrane, "another disorderly," was charged with having assaulted Constable Halliday in the execution of his duty. Halliday was called to the Hand and Heart in Redfern by Mrs Swain, the wife of the licensee, to deal with Cochrane who had tried to get a drink without paying for it. An altercation ensued and Cochrane attended the bench with his shirt "saturated with blood" from a wound inflicted by Halliday with a handcuff. Rather than charging Cochrane, the magistrates held that since the matter was "a simple debt" it should never have come before the bench and released him accordingly.⁶⁸ Yet it is hard to believe that Cochrane was more sober or more orderly than Beard.

⁶² "Committee on Intemperance," 557; "Editorial," *Teetotaller and General Newspaper* (Sydney: 1842-1843), 29 March 1843, 1; Michael Sturma, *Vice in a Vicious Society: Crime and Convicts in Mid-Nineteenth Century New South Wales* (St Lucia, Qld.: University of Queensland Press, 1983), 157.

⁶³ For more on *Bell's Life* and its 'humorous' reporting see: Brian Taylor, "Englishes in Sydney Around 1850," *Australian Journal of Linguistics* 23, no. 2 (October 1, 2003): 161–83; Charles Adam Corby, *Sydney Revels (the Eighteen-Fifties) of Bacchus, Cupid and Momus...*, ed. Cyril Pearl (Sydney: Ure Smith, 1970).

⁶⁴ Unfortunately there are no Colony wide statistics for arrests distinguished by sex until the 1860s but for the last four decades of the century, on average, less than one fifth of all arrests for drunkenness were women. See: NSW Legislative Assembly, *Statistical Register of NSW*, (Sydney: Government Publisher, 1858-1900).

⁶⁵ "Select Committee on Intemperance," 608. There were 691 men and 370 women sentenced to Darlinghurst for drunkenness in that period but the bulk of repeat offenders were female.

⁶⁶ For more evidence of this gendered pattern see: "Intemperance Committee," 538, 556.

⁶⁷ Paula Jane Byrne, *Criminal Law and Colonial Subject: New South Wales, 1810-1830* (Cambridge University Press, 2003), 106-126; Joy Damousi, *Depraved and Disorderly: Female Convicts, Sexuality and Gender in Colonial Australia* (Cambridge ; Melbourne: Cambridge University Press, 1997); Kristy Reid, *Gender, Crime and Empire: Convicts, Settlers and the State in Early Colonial Australia* (Manchester University Press, 2007).

⁶⁸ "Police Office Sketches," *Bell's Life*, 22 Dec. 1849, 3.

Deviance, Labelling and Historical Criminology

Considered in this historical context and through the conceptual frame of deviance, even the brief report we have of Beard's arrest can provide theoretical insights. We will never know exactly what happened between Beard and Halliday in December 1849, and the specific reasons for her act of deviance and his act of labelling can only be presumed. What we can see more clearly is the way that her conduct was constructed as deviant. Arrest, fine and public humiliation of those labelled as drunkards was a performative assertion of a particular kind of respectable public order and a key tool of modern urban policing.⁶⁹ The prevalence of such arrests strongly suggests that they were crucial, both instrumentally and symbolically, as a form of social control in mid-nineteenth-century Sydney. More generally, unpacking Beard's story demonstrates the value of deviance as a concept for historical criminology. Focus on a specific episode of deviance and labelling in its full historical context, grounds our theories in the past and allows us to generalise without projecting from the present. The concept of deviance is essential to the project of historical criminology.

⁶⁹ For more on respectability in NSW politics see: Michael Roe, *Quest for Authority in Eastern Australia, 1835-1851* (Parkville, Vic. : Melbourne University Press, 1965); Martin, "Drink and Deviance".