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The Regulation of Alcohol in the U.S., 1750-1860

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Abstract: Scholars have been skeptical about the capacity of law to shape what police do, but that skepticism results from a myopic view of the relationship between legal systems and policing practices. This paper develops a more holistic view of that relationship by exploring the legal standards, social understandings, and policing practices that played a role in the regulation of alcohol and drunkenness from roughly 1750 to 1860 in the United States. From the late colonial period through the 1830s, alcohol regulation did not aim to reduce drinking but to prevent public disorder -- a task that was well-suited to the character of the early American legal system. From the 1830s through 1860, however, the temperance movement successfully pressed legislators to enact more explicitly moralistic liquor laws, demanding that police ferret out private alcohol sales rather than merely regulating their impact on public order. That new mandate quickly unraveled, for it proved incompatible with a wide range of legal restraints, including traditional protections against searches of private homes, skepticism about the testimony by criminal accomplices, and liability rules related to official enforcement actions. No single restriction on policing tactics undermined antebellum prohibition, but the basic orientation of criminal procedure and the social understandings and practices through which it operated informed a wide range of specific restrictions on morals policing that collectively made prohibition unworkable. To understand that story, we need to take a broader view of the relationship between law and policing than most policing research has taken.

Keywords: alcohol, police, law, history

Contemporary drug policing aims to uncover secret wrongdoing. Drug teams cultivate informants to identify people engaged in secret drug-selling (Skolnick 1966: 125), detectives surveil private spaces to ferret out clandestine drug activity (Wistotsky 1987; Finkelman 1993; Rudovsky 1994; Duke and Gross 2014: ch. 7), and patrol officers mine their authority to detain and question drivers in search of hidden drug stashes (Epp, Haider-Markel, and Maynard-Moody 2014; Skogan 2018; Friedman 2017). These practices have given rise to many of the central controversies in contemporary policing.

The 18th and 19th century precursors to contemporary drug policing took a different form because they embodied a different legal philosophy. In his classic account of modern drug policing, Jerome Skolnick concluded that the aggressive tactics used by today's narcotics officers are intimately intertwined with the moralistic character of American drug laws (Skolnick 1965: 205): Because drug laws aim to control practices that do not directly affect (and may not even be visible to) other people, the police must conduct intrusive surveillance on their own initiative to enforce it (Skolnick 1966: 210; cf. Moore 1983, Packer 1968, Åkerström 1991). Skolnick relied on H.L.A. Hart's classic account of legal moralism, which (among other things) aimed to clarify the meaning of legal moralism and disentangle it from its alternatives (Hart 1963: 25-48). Hart observed that Roman law "distinguished the province of the Censor, concerned with morals, from that of the Aedile, concerned with public decency", and he lamented that "in modern times perhaps insufficient attention has been given to this distinction" (1963: 44; cf. Feinberg 1985; Wolfendon 1957). If contemporary vice policing illustrates the practical embodiment of legal moralism, American vice policing before the 20th century illustrates the practical embodiment of Aedile.

This paper will reconstruct that model by focusing on the law and practice of the police role regulating alcohol and drunkenness from the middle of the 18th century through the onset of the Civil War. That story is best understood by breaking it into two phases. During the first phase, from the late Colonial era through the 1830s, alcohol regulation mainly encompassed the tavern licensing system and the public drunkenness laws. Constables, sheriffs, watchmen and other early law enforcement officials played both direct and indirect roles in regulating alcohol during this period. They played a direct role by arresting those who became so intoxicated in public places that they disrupted public order. They played an indirect role by helping to ensure that tavern owners followed the rules laid down in their annual operating licenses, while tavern owners themselves regulated drinking more directly by managing their customers in accordance with those rules. Neither their direct nor indirect roles in alcohol regulation required law enforcement officials to look beneath the surface of public life. Police did not generally seek to regulate the private use (or even, in many places, sales) of alcohol but to regulate the time, place, and manner of alcohol consumption and commerce.

Beginning in Massachusetts in the 1830s, the temperance movement pressed many counties and states to take a more aggressive approach to alcohol regulation (Tyrrell 1979; Hampel 1982; Blocker 1989; Compton 2014). Officials began to create "dry" counties by denying all applications for liquor licenses, and eventually most Northern state legislatures banned the sale of alcohol for nonmedical and nonindustrial purposes. In this second phase of alcohol policing, the substantive law embodied a more aggressively moralistic mandate than it had in the past, but enforcement quickly ran into intractable obstacles (Tyrrell 1979: 293 ff.). Prohibition required a new kind of policing that came into conflict with several basic procedural commitments of early American law enforcement, including those embedded in the law of

evidence, in traditional standards of police liability, and in social and legal norms about the role of informants. This second phase of the story reveals the features of early American criminal justice that limited its capacity for true morals policing.

This history provides a cautionary tale about the limits of policing, and about the role of law in shaping those limits. The first phase of alcohol regulation was guided by a circumscribed goal and a restricted strategy for achieving it that were adapted to the limited authority and capacity of peace officers at the time. During the second phase of alcohol regulation, by contrast, temperance reformers tried to force police to accomplish a more ambitious goal without much regard for their capacity to achieve it, and although reformers attempted to revise their enforcement strategy when early efforts proved unworkable, they never successfully adapted it to the legal, social, and institutional constraints on 19th century criminal justice. Historical literature about 19th century prohibition has recognized that enforcement challenges played a central role in its collapse (e.g. Blocker 1988; Tyrrell 1979). In this paper I will interpret those challenges in terms of the legal framework of 19th century criminal justice and the social understandings and practices through which legal regulation operated. Prohibition enforcement failed not just because so many police, big-city mayors, and ethnic voting blocks were unsympathetic to the temperance movement's goals, nor because of the small numbers, poor morale, and corruption of the era's urban police forces (Tyrrell 1979: ch. 11). The collapse of mid-19th century prohibition was not just a story about politics and organization but a story about law.

It has been easy to miss how extensively law constrains policing because we conceive of that relationship myopically, assuming that law shapes police work mainly by issuing discrete commands that restrict permissible investigative tactics. Doctrinal scholarship has focused narrowly on specific 4th and 5th Amendment rules about the permissible surveillance and

investigative methods, ignoring other bodies of law that can and should shape policing (Harmon 2012; Stuntz 1995); empirical research has focused on the impact of discrete legal rules taken one-by-one in isolation, ignoring the potential for complex packages of interconnected rules to shape police work more holistically (e.g. Nardulli 1983; Gould and Mastrofski 2004; Skogan 2018); and both bodies of work treat law as a self-contained abstraction, neglecting the social understandings and practices through which it operates, and which thereby shape the meaning, reach, and malleability of legal principles (Ewick and Silbey 1998). A broader historical view makes it possible to recover a different and more complex story about the relationship between law and policing than contemporary doctrinal and empirical work has produced. Long-run historical inquiry that attends not just to the law itself but also to the social relations and practices through which it operates reveals how whole systems of legal principles and the social understandings that mediate them set the context for policing practice, even when the discrete legal commands that come and go over shorter periods of time have little impact in isolation.

The story of 19th century prohibition illustrates these dynamics clearly. When temperance activists encountered social and legal obstacles to the enforcement of the new prohibition laws, they successfully evaded many of them one by one, finding substitute forms of authority when an initial strategy faltered and tweaking criminal procedure doctrine to clear the way for new tactics. In the end, however, the cumulative resistance that this diverse range of social and legal obstacles created was substantial. What was most important was their coherence: When prohibitionists tried to overcome the challenges that their original enforcement tactics had encountered by adopting new tactics, they often found themselves blocked in the new domain as well by different constraints that were animated by the same basic commitments. The law and social practice of criminal procedure was not a disconnected jumble of miscellaneous

constraints; its specific elements were expressions of an overall vision of the roles that private complainants and public officials should play in early American criminal justice. That broader understanding informed a network of legal restraints that made it difficult to evade discrete restrictions on intrusive police surveillance, and it informed the social understandings of the judges, witnesses, and others who enacted the law and participated in attempts to change it. This coherence among a variety of legal practices and social understandings helped make the system durable (cf. Ewick and Silbey 1998: 49-50).

More than four decades ago, Donald Black criticized empirical research that evaluates the relationship between legal practices and broad legal ideals that cannot easily be operationalized, using Skolnick's work on modern narcotics enforcement to illustrate his concerns. Instead, Black insisted, researchers should focus their attention more narrowly on the impact of precisely defined legal rules (Black 1973: 1087-90). Research about the relationship between law and policing increasingly consists of precisely the kind of discrete impact studies that Black called for. The price of that approach has been to miss the complex and integrated way in which whole systems of legal practices and social understandings shape and constrain the mandate that the police pursue. The changes and continuities in alcohol regulation during the first century of American history illustrate that relationship vividly.

I will develop this more holistic perspective on the relationship between law and policing by summarizing the two phases of antebellum alcohol policing discussed above. In reconstructing the common law model of alcohol policing that prevailed through the 1830s, I emphasize how the law's substantive goals, rules of criminal procedure, and social expectations about the appropriate behavior of key actors reinforced one another to create a stable strategy of alcohol policing. In chronicling the experiment with mid-19th century prohibition, I emphasize

how the substantive goals and the discrete criminal procedure reforms that temperance activists tried to introduce came into conflict with other elements of antebellum criminal procedure, as well as the social understandings that animated and enacted it. Finally, in the conclusion, I step back from the specific elements of 19th century law that shaped alcohol policing to interpret them as expressions of a more general social vision about the proper organization of criminal justice.

Regulating Alcohol, 1750-1850

Late 18th and 19th century law primarily criminalized the public manifestation of vice rather than vice itself—streetwalking and disorderly brothels rather than prostitution (Hill 1993), flagrant obscenity rather than the private possession and perusal of obscene materials (Dennis 2009), and public drunkenness and disorderly taverns rather than alcohol consumption in general. As Mayor Josiah Quincy put it during one brief effort to crack down on vice in Boston's notorious West End in 1823: "If in great cities the existence of vice is inevitable, . . . its course should be in secret, like other filth, in drains, and in darkness; not obtrusive, not powerful, not prowling publicly in the streets for the innocent and unwary" (Quincy 1852: 380).

Alcohol regulation clearly illustrated this philosophy. Early American alcohol laws regulated the time, place, and manner of alcohol consumption, leaving private use (and even some sales) largely outside the scope of governmental concern. The main goal was not to reduce drinking but to prevent public disorder—disruptive behavior on public streets and within public taverns, particularly when it affected neighboring residents, businesses, and church services.[1] This limited mandate was well-suited to the limited capacity and legal authority of early American policing, as the laws regarding drunkenness and alcohol sales illustrate.

[1] Enslaved people, Indians, and a few other marginalized groups were notable exceptions, for their general lack of legal rights extended to this area as well.

Public Drunkenness

In *Commentaries on the Laws of England*, Blackstone used the crime of drunkenness to illustrate the limits of legal authority over individual behavior:

> Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. . . Public sobriety is a relative duty [i.e., a duty we owe to other members of society in virtue of our relationship with them], and therefore enjoined by our laws; private sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction (Blackstone 1765: 122).

The early American legal system endorsed Blackstone's view (*e.g.* Tucker 1836: 2, 34). Private drunkenness was not a crime under the common law (Bishop 1865: 274; *State v. Waller* 7 N.C. 299), and even public drunkenness might not be illegal unless it significantly disrupted public order. As the temperance movement gained steam in the 1840s, the North Carolina supreme court overturned William Deberry's conviction for drunkenness because he had only been "slightly intoxicated", and although he had sworn and yelled "in a vulgar manner" at the crowd assembled near the courthouse, witnesses testified that no one had been seriously bothered by his antics. The court opined:

> It is only when the act or acts done by a person. . . operate to the annoyance, detriment or disturbance of the public at large, that the offender becomes amenable to the public by way of indictment at common law. . . . There are many immoral acts and vicious conduct of persons, which bring down the indignation of every virtuous man, in regard to which the legislature have not thought society would be much aided by having the delinquents indicted; they are left to the correction of the religious and moral influence of society itself (*State v. Deberry*, 27 N.C. 371, 1845).

When courts did announce a more expansive standard, legislatures often overruled them by decriminalizing single acts of drunkenness (e.g. Bishop 1868: 173; Lane 1967: 113).

Some state legislatures eventually passed drunkenness statutes that seemed to encompass merely private drunkenness. In 1858, a Massachusetts man was arrested for being drunk in another man's room in the tenement where both of them lived, and although his attorney insisted that getting drunk in a private room was not a crime, the Supreme Judicial Court interpreted the

state's 1835 drunkenness statute as applicable to private as well as public intoxication (*Commonwealth v. Miller*, 8 Gray 484, 1858). Nevertheless, that application was novel enough to reach the highest court in the Commonwealth, and it remained an outlier in antebellum America. Even in aggressively prohibitionist states, drunkenness laws regulated private drunkenness lightly or not at all. According to Maine's influential 1851 law, all intoxication on "the streets or highways" was against the law, but a person who was "intoxicated in his own house, or in any other building or place" could only be charged if he became "quarrelsome, or in any way disturb[ed] the public peace" (Clubb 1856: 341).

Criminal procedure reinforced these substantive principles. Early American peace officers had very limited authority under the common law to make any misdemeanor arrest without a warrant unless the offense caused an ongoing breach of the peace in a public place (Davies 2002: 319-45; Lane 1967: 36), so private drunkenness would not justify a warrantless arrest even in jurisdictions where it was against the law. As late as 1863, a Massachusetts court threw out Cornelius O'Connor's conviction for possessing a dangerous weapon during an arrest for drunkenness, concluding that the arrest itself was unjustified: "The crime of drunkenness," the court insisted, "is a purely statute offence, and no authority exists to arrest a person who may be guilty of it, without a warrant" unless the violator "is intoxicated in a public place" (*Commonwealth v. O'Connor* 89 Mass. 583, 1863). In this way, the law of arrest reinforced the system's reluctance to intervene against private vice.

Public drunkenness, by contrast, was one of the small number of specifically enumerated exceptions to the standards that restricted warrantless arrests (Davies 2002: 348). In many jurisdictions, it quickly became the single most common form of legal authority invoked by the early American police. Even before the establishment of full-time salaried police forces,

constables and watchmen were expected to arrest people found drunk in public, particularly during the night (Davies 1999: 622; Smith 1961: 131-2; Krout 1925: 27-8). By 1824 in Boston, the city's small constabulary made over 300 drunkenness arrests, accounting for one-eighth of the total number of arrests in the city (Ferdinand 1980: 193); a few years later in Philadelphia, the small force of watchmen and day police regularly made a dozen or more arrests for public drunkenness in a single day (Steinberg 2014: 121, 279).

After the arrival of full-time salaried police forces, drunkenness arrests became even more common (e.g. Steinberg 2014: 29-30, 177, 226; Ferdinand 1992: 43 ff.; Schneider 1982: 106). By design, these new forces were less beholden to private complaints and more able and willing to seek out wrongdoing on their own initiative, so they were better suited to the enforcement of public order laws like drunkenness that lacked identifiable victims (Thacher 2014; Lane 1968: 160). By the civil war, public drunkenness was often the single largest arrest category for America's largest police forces (Monkkonen 1981).

Despite the fairly large volume of arrests for drunkenness in the early 19th century and the overwhelming volume by the 1860s, officers rarely invoked the full scope of their arrest authority. Police mainly arrested public inebriates when they had become completely incapacitated or they substantially disrupted public order. In 1830s New York, officers escorted drunks home rather than arresting them unless they were disorderly (Miller 1977: 69), and even at the height of the temperance movement two decades later, when the law ostensibly required police to arrest everyone found intoxicated in a public place, one Captain testified that officers would avoid arrests unless there was "a violation of public decency, as for instance a man staggering up against parties" (Miller 1977: 72). Police officers in Boston and Hartford recalled that they only made arrests for drunkenness during this era when it was "particularly necessary"

(for example, because an intoxicated person was acting violently) (Massachusetts General Court 1867: 243; Clubb 1856: 117), while the Mayor of Portland, Maine recalled that until the 1850s the practice was "to commit no intoxicated persons who were quiet and able to get home" (Clubb 1856: 171). A Philadelphia manual from the 1860s explicitly instructed officers to "arrest any person they may find intoxicated, under such circumstances as amount to a violation of public decency" but added that if the person "is quiet and not disorderly, and his place of residence is known or made known to the officer, he shall permit such person to quietly pass to his place of residence, and if necessary must accompany and assist such person to his residence" (§ 29-30). In these ways, the social understandings that guided the exercise of police discretion reinforced the law's formal emphasis on public order.

The Licensing System

Like the system for policing drunkenness, the early American liquor licensing system also aimed to promote public order rather than regulate private drinking. By the 18th century, liquor licensing was mostly a local affair run by local courts and sometimes city officials, so its provisions varied from place to place (Krout 1925: 8), but the most significant rules were consistent throughout the country. With a few exceptions that I will return to, only licensed taverns could sell alcohol, and sellers had to abide by several common restrictions: They could not sell to habitual drunkards, enslaved people, and Indians; they could not allow patrons to drink excessively or for long periods of time; they had to ensure that on-site entertainment was discreet (gambling and "unseemly noise" were typically prohibited); and they had to close at appointed times (typically before 9PM and during church services) (e.g. Krout 1925: 13 ff.; Lender and Martin 1987: 17; Sabin 1982). Licenses were granted for a particular location and could not be transferred (e.g. NJ Laws 1800: 136), and officials could deny licenses if they felt

the neighborhood was already overrun or the neighbors objected (Lender and Martin 1987: 43; Salinger 2004: 205). These rules mainly aimed to ensure that drinking in public places remained orderly and relatively discreet (Krout 1925: 21).

Early licensing officials did sometimes try to limit the overall number of taverns in a community (e.g. Salinger 157 ff; Paterson 1800: 236-7). Sometimes those efforts may have aimed not just to maintain order but also to reduce the overall level of drinking. Eventually this strategy evolved into the "high license" and "no license" approaches to prohibition in the 1830s and 1840s that I will discuss below. During the first several decades after the American revolution, however, the legal system discouraged the use of licensing to reduce the level of alcohol consumption. In many states those who applied for licenses had something like a right to have their request granted as long as they could demonstrate that they were of good moral character and that their proposed location was suitable for a tavern (Nelson 1975: 50). In early 19th century Massachusetts, for example, the first temperance societies began to petition the courts to reduce the number of licenses granted on the grounds that these taverns were "nurseries of vice and debauchery" and that "the expenses for the support of the poor…[were] rapidly increasing. . . owning in a great measure to the undue use of ardent spirits," but according to William Nelson "the courts were impervious to such petitions" until the 1830s (1975: 130). In many jurisdictions, licensing officials never turned down an applicant on the grounds that there were too many taverns in the area (*e.g.,* Yoder 1979). Even when they did deny licenses for that reason, their main goal may have had more to do with public order than temperance: As licenses proliferated, taverns under competitive pressure might be tempted to sell to drunks, offer immoral attractions, and violate other public order rules (Rorabaugh 1981).

An exception to the licensing system is revealing. In many jurisdictions, anyone could sell alcohol for consumption off the premises: Many state laws explicitly authorized carryout sales without a license, and even when they were illegal the law was rarely enforced (e.g. *Statutes at Large of South Carolina* 1838: 576; Paterson 1800: 235 ff.; Thompson 1998: 36, 26). English custom had long treated these sales as an offshoot of production, which was unregulated, and colonial law often explicitly allowed it (Pearson and Hendricks 1967: 26; Salinger 155). The regulations that did exist did not necessarily aim to promote temperance. In 1822, Virginia legislators concluded that the unregulated status of sales for off-premises consumption had become a loophole: Thirsty customers increasingly bought alcohol from merchants and drank it on site illegally, establishing a *de facto* tavern (and often a disorderly one) where only carryout sales were supposedly allowed. Some merchants simply could not be trusted with carryout sales, so they, too, needed to be screened and licensed—though the standards could be laxer since they played a less demanding role (Pearson and Hendricks 1967: 26-7). These jurisdictions created a new regulatory category of licenses, but the goal was to preserve the arrangement of drinking practices the law had always aimed to police. Applicants who were denied tavern licenses or had their licenses revoked were often granted licenses for carryout sales instead (e.g. Salinger 2004: 176). In all cases, the law aimed to control the quasi-public behavior of people who drank in common spaces, leaving drinking at home essentially unregulated.

Licensing Enforcement

Enforcement of the licensing rules was a shared responsibility between legal officials and tavern owners themselves. In effect, the licensing scheme deputized tavern owners as agents of law enforcement, requiring them to ensure that their patrons and staff maintained a discreet and orderly environment. Police and other legal officials sometimes helped directly with that task by

patrolling taverns and responding to complaints about rule violations, but their most important role lay in the more indirect task of ensuring that tavern owners dutifully played the order maintenance role the law assigned to them.

In part, they pursued that goal by selecting tavern owners who seemed to accept the views about tavern decorum that the law required. Many of the licensing rules cut against the tavern owners' economic interests, requiring them to turn away willing customers and suppress some of their revelry (Thompson 1998: 36). Not everyone could be trusted to play that role effectively, so applicants usually had to prove that they were "sober" and of "good moral character" (Gentleman of the Bar 1819: 246; Thompson 1998: 25; Salinger 2004: 152; Coleman 1935). Class, gender, and ethnic prejudice apparently shaped those judgments (Salinger 2004: 159 ff.; Wagner 2008: 22; Rorabaugh 1981: 28), and unfamiliar residents might find their applications summarily rejected if officials felt they could not evaluate their character (Nelson 1975: 52). Licensing officials also invited neighbors and respected members of the community to testify about the suitability of new applicants (e.g. Thompson 1998: 37 ff.; Salinger 2004:169 ff). Licenses typically came up for renewal every year, so tavern keepers who failed to abide by the terms of their license risked losing it (Thompson 1998: 46 ff.; Lender and Martin 1987: 72). They might also forfeit the bond they posted to receive their license, and tavern owners could be held liable for the misbehavior of their patrons (Sabin 1982). These devices ensured that when owners informally maintained order in their taverns, they did so in the shadow of legally established expectations.

Courts and other licensing authorities sometimes evaluated tavern owners with little help from constables, sheriffs, or other early police officials. In preparation for their annual review of tavern licenses, officials might hear complaints directly from community members (e.g. Salinger

2004: 176), and community members could lodge complaints against tavern owners in court at other times as well.[2] Grand juries or ad hoc committees appointed by the licensing authority sometimes conducted investigations to determine whether licensed taverns seemed to be following the rules (e.g. Coleman 1935: 56 ff.; Salinger 2004: 201; Thompson 1998: 48). Justices of the Peace, magistrates, and other court officials sometimes patrolled and investigated taverns themselves (Salinger 2004: 155).

In most places, however, police officials played a significant role in decisions to issue or renew licenses, engaging in a longstanding example of what would later come to be called "Third Party Policing" (Mazerolle and Ransley 2006). Under many licensing laws, peace officers could summon a tavern owner before the licensing authorities if they believed that he was violating the rules, and his license could be revoked at that time (e.g. *The Public Statute Laws of the State of Connecticut* 1839: 593). Peace officers also had the opportunity—or even the duty—to bring their concerns to licensing officials during annual license reviews. In New York City, the Board of Excise Commissioners was responsible for issuing and renewing licenses, and to evaluate each application it relied on police to assess the applicant's character (Richardson 1970: 181); other jurisdictions assigned police a similar role (Krout 1925: 9, 22). Licensing officials revoked or failed to renew licenses relatively often when presented with evidence that a tavern was not following the rules (Thompson 1998: 37; Krout 1925: 11). Once again, these enforcement practices did not maintain public order directly but rather provided mechanisms by which police and other legal actors could influence the sense of responsibility that tavern owners brought to their jobs.

[2] The law sometimes entitled community informers to a share of the offender's fine, though such incentives were not universal, and some jurisdictions positively discouraged informing by making an informer liable for court costs when a defendant was acquitted. See, e.g., *The Statutes at Large of South Carolina* (1838), 576; *The Statute Laws of the State of Tennessee of a Public and General Nature*, Volume 1 (1831), p. 236; Flaherty (1971: 147).

Peace officers were also expected to play a more direct role enforcing license provisions. Early Anglo-American law enforcement was primarily reactive, consumed with the ministerial work of serving court process, but a variety of laws and municipal policies explicitly announced the duty of constables, sheriffs, watchmen, and marshals to enforce licensing rules and patrol taverns.[3] While it is hard to determine how seriously the early police took that duty, the law did take concrete steps to facilitate it. In 18th century Charleston, the wives of constables and watchmen could not operate a tavern because their husbands would be too conflicted to enforce the law against them and their customers (Salinger 2004: 173), and laws in several states specified that sheriffs and their deputies could not run taverns (e.g. Salinger 2004: 160; Paterson 1800: 237). Decades later, big city police forces often stipulated that officers must "have no interest in any 'tavern, inn, coffee house, or dram shop'" (Wagner 2008: 9). Rules like these illustrate the attention that law gave to the social dimensions of enforcement, and they suggest that the stated duty to enforce licensing provisions was not entirely empty.

Police officials carried out that duty in several ways. In part, they made themselves available to respond to community complaints about disorderly taverns. The technology for summoning police to the scene of a disturbance was limited, but tavern owners and community members often did find ways to get the attention of peace officers when they needed them to restore order to an unruly gathering (e.g. Sprogle 1880/2007: 51; Thompson 1998: 44). Licensing rules sometimes required tavern owners to summon the constable to remove people who became drunk (Sabin 1982: 14), and they could avoid punishment for illegal gatherings if they could

[3] See e.g. *The Public Statute Laws of the State of Connecticut* (1808), p. 642, 646; *The Statutes at Large of South Carolina* (1838), 162; *The Statute Laws of the State of Tennessee of a Public and General Nature*, Volume 1 (1831), p. 238**;** *Philadelphia Police Manual* (1855: §89); Costello (1884: 62); Davies (1999: 621-2).

demonstrate that they had alerted the authorities.[4] In the District of Columbia during the 1830s, an officer testified that in the larger licensed houses, "when a drunken man comes in, the practice is to send for a gentleman constable, and have him turned out" (*U.S.* v. *Bede* 24 F. Cas. 1063).

Police officials also patrolled taverns on their own initiative to search for rule violations. From colonial times through the late 19th century, the licensing framework envisioned drinking places that were always open to inspection by enforcement officials (e.g. Thompson 1998: 21; *Commonwealth v. Ducey,* 126 Mass. 269, 1879). Taverns were typically required to post a sign identifying their business, and constables, sheriffs, and police officers had the authority to enter to ensure that order was being kept and the licensing rules were being followed. Periodically public officials ordered peace officers to monitor local trouble spots (*e.g.* Costello 1884: 51; Dykstra 1983: 123 ff.). A few police leaders proactively embarked on vigorous campaigns to enforce licensing rules, sometimes at the behest of political leaders (e.g. Sprogle 1880/2007: 104) and sometimes against their will (e.g. Rousey 1997: 69). Others worried about the temptations to corruption and dereliction of duty that awaited their officers inside taverns, and by the middle of the 19th century many police forces discouraged officers from entering taverns except to respond to an emergency or complaint (e.g., Alfers 1976: 16; Costello 1891: 44).

The licensing rules were criminal laws that carried fines and jail terms, and when police discovered violations they had the authority to initiate prosecution; tavern owners could also be charged with keeping a disorderly house if their patrons became so "noisy and riotous" that their behavior tended to "disturb the neighborhood generally" (*State v. Buckley* 5 Del. 508, 1854; cf. *State v. Mulliken* 8 Blackf. 560, 1846; *State v. Thornton* 44 N.C. 252, 1853; Salinger 2004: 149). A fair number of proprietors and patrons were prosecuted for breaking the rules against gambling

[4] E.g. *The Public Statute Laws of Connecticut* (1808), p. 641; *The Statute Laws of the State of Tennessee of a Public and General Nature*, Volume 1 **(**1831**),** p. 237.

and prostitution in their taverns, but in most jurisdictions it appears that violations of the other tavern rules rarely landed anyone in court (Salinger 2004: 128). Law enforcement officers took action most readily against violations of the licensing rules that were connected to other, more serious forms of lawbreaking, such as fencing stolen goods (Salinger 2004: 127, 147; Spindel and Thomas 1983: 231). Some early police forces maintained lists of disreputable taverns that harbored criminals, gamblers, and prostitutes, and they encouraged officers to keep a close eye on them (Schneider 1982: 100 ff.). For less serious infractions, however, the third-party policing tools of license revocation and nonrenewal were more important mechanisms of enforcement than arrest and prosecution.

Policing Unlicensed Taverns

The habitual drunkards, enslaved people, Indians, and others who had been banned from licensed taverns had to find secluded haunts where they could drink, and many of the would-be tavern owners who could not get licenses were happy to oblige. Some proprietors simply did not want to pay the licensing fee and bond to operate legally, and they did not intend to run their tavern according to the rules. In this way the rules fueled the unlicensed tippling-house industry.

The basic challenge of policing unlicensed sellers was their secrecy. Licensees had to agree to become quasi-public spaces that police and court officials could enter freely to verify their compliance with the licensing rules. By contrast, unlicensed taverns had never agreed to such inspection, and as a matter of law a suspected tavern seemed to be no different from any other private home or business.[5] Enforcement officials had limited authority to enter such private spaces in search of wrongdoing without a search warrant, and warrants were issued for very

[5] Roger Lane suggests that through the first third of the 19th century, "it had seemed reasonable that since licensed places had always been open to inspection, that illegal ones should be at least equally liable" (1967: 105-6). He does not explain the basis on which he makes this claim about what "seemed reasonable", and the claim seems inconsistent with the general common law aversion to warrantless searches.

limited purposes (principally for stolen goods) (Davies 1999: 1999: 645-6). Only if a constable could hear or see a fight inside the private structure did he have the authority to forcibly enter the premises without a warrant (Chitty 1819: 45; Davies 1999: 646). If he did so without justification he could be found guilty of trespass and sued for damages (Davies 1999: 652); more important, in a world where few people were likely to resort to lawsuits, the occupant could forcibly resist the intrusion without being guilty of assault (cf. Lane 1967: 36; Davies 1999: 638-9; Chitty 1819: 42). On the other hand, a *de facto* tavern probably did not lock its doors, and enforcement officials may have felt empowered to enter as if they were would-be customers.

Despite these inherent difficulties, law enforcement officials were expected to keep an eye out for unlicensed taverns and take action against them (e.g. Caruthers and Nicholson 1836: 509; Pearson and Hendricks 1967: 29). They had a natural ally for that work in official license-holders, who viewed the tippling houses as unfair competition. Individual tavern owners sometimes filed complaints against individual tippling houses that seemed to be siphoning off customers, and the court might order the town constable or county sheriff to arrest the proprietor or summon him to court (Thompson 1998: 31). Licensed tavern-owners sometimes banded together to lobby local officials for more systematic action against their disreputable competitors (Thompson 1998: 49). Annoyed neighbors and other community members might also bring illegal sales to the attention of law enforcement, particularly when an illegal tippling house became a neighborhood nuisance. Such places could be indicted not only for violating the license laws but as disorderly houses (e.g. *Commonwealth v. Stewart* 1 Serg. & Rawle 342, 1815; *U.S.* v. *Bede* 24 F. Cas. 1063, 1837; *State v. Patterson* 29 N.C. 70, 1846; *Henry & McGurk v. Commonwealth* 48 Ky. 361, 1849; *State v. Bertheol* 6 Blackf. 474; 1843). In some jurisdictions, disorderly house prosecutions required evidence not only that the proprietor sold liquor illegally

but that the enterprise regularly disturbed the peace and quiet of the surrounding neighborhood (e.g. *Dunnaway v. the State*, 17 Tenn. 350, 1836). That definition of "disorderly house" simplified the task of enforcement, since taverns that met it were likely to generate neighborhood complaints that could set the legal process in motion. In all of these ways, prevailing social practices and understandings helped to make the ban on unlicensed taverns workable, given the nature of the licensing criteria.

By contrast, proactive enforcement of the licensing laws against illegal tippling-houses was apparently limited to nonexistent. The spotty historiographical literature occasionally reports examples of constables, police, sheriffs, and watchmen proactively making arrests for selling alcohol without a license or drinking in an unlicensed tippling house (e.g. Salinger 2004: 147), but it is hard to tell how often this happened (cf. the contrasting estimates of Thompson 1998: 48 and Krout 1925: 18). In 1841, the Philadelphia courts pressured local constables to seek out and report unlicensed taverns, and after a long period of stonewalling and evasion, the judges threatened the constables with prosecution for neglecting their duty. The constables finally returned enough information for the grand jury to indict several dozen tippling houses, but this surge of prosecution was short-lived (Steinberg 2014: 131-3). The scarcity of similar episodes in the historical literature suggests that they probably did not occur very often; attempting to force police to crack down on secretive scofflaws seemed to be a hopeless undertaking. Even after the rise of full-time salaried police forces made proactive efforts to detect unlicensed sales more feasible, police apparently made few arrests. During its first 5 years of existence, the New York City Police Department made fewer than 8 arrests a year for selling liquor without a license (the

total annual number of arrests in the city was around 30,000) (Costello 1884: 116). The formal duty to police unlicensed taverns did not seem to translate into much enforcement activity.[6]

Recognizing how difficult it was to police unlicensed taverns, local governments did their best to accommodate a robust but orderly industry of legal taverns. In 18th century Boston, the city's extraordinarily strict licensing rules meant that activity that most Bostonians viewed as perfectly reasonable was technically illegal, so city residents refused to report illegality and judges and juries often treated it leniently when they did; as illegal taverns thrived, city officials eventually relented and relaxed licensing requirements. In 18th century Philadelphia, by contrast, city officials deliberately adopted less severe rules in order to "keep taverns within the official system so they could be monitored more formally" (Thompson 1998: 34). Such cities mitigated the difficult task of policing unlicensed taverns by creating a regulatory system that the prevailing system of law enforcement and the social attitudes of those who participated in it could feasibly administer.

The goals of the licensing system in early America were well-suited to the character of 18th and early 19th century law enforcement. Law enforcement officials could not effectively ferret out secretive wrongdoing, and they had little authority or incentive to prosecute violations of the law. By granting and withholding licenses themselves, however, they could effectively prevent the worst forms of public disorder. They had to exercise that authority with restraint, lest they fuel an unmanageably large industry of unlicensed taverns that they could not feasibly police: They could not expand the meaning of "public disorder" too broadly without undermining their own capacity to maintain it. In practice, they apparently did that by focusing their attention on rowdy taverns that disturbed the neighborhood and those that became

[6] As in the case of licensed taverns, law enforcement officials seemed to pay more attention to unlicensed liquor when they were also involved in more serious forms of illegality (Salinger 2004: 147; Lender and Martin 1987: 12).

intertwined with more serious forms of crime. They certainly could not pursue the purely moralistic agenda that temperance activists increasingly wanted them to pursue.

Towards Prohibition, 1830-1860

In the middle third of the 19th century this approach to alcohol regulation began to break down, as many state and local governments embraced outright prohibition. This experiment quickly unraveled, however, and the unraveling makes visible many of the formal and informal features of the American legal system that held the common law model of alcohol regulation in place. Those features made it difficult to police private wrongdoing, including traditional protections against searches of private homes, skepticism about the testimony by criminal accomplices, liability rules related to official enforcement actions, and standards of evidence for proof of a crime. Changing the liquor laws alone was not enough, for police and the courts lacked the capacity and authority to enforce laws that criminalized private vice. To some degree, temperance reformers recognized that need, and they tried to reform elements of criminal procedure to make prohibition effective. Those efforts ultimately failed, however, because many different strands of criminal procedure and social expectations about policing reinforced one another; efforts to reform individual strands in isolation proved futile. That story illustrates the holistic character of legal control over policing practice.

Towards Prohibition

The early-19th century temperance movement arose out of widespread alarm about extraordinary rates of alcohol consumption (Rorabaugh 1981: 89-90) and a revival of religious moralism that made the licensing system seem like "official complicity in sin" (Compton 2014: 71). Until that time, almost everyone had accepted the premises of the licensing framework—that government's main responsibility was to maintain public order rather than control private

drinking habits. By the 1820s, however, even solitary bouts of drinking at home activated public concern (Rorabaugh 1981: 169). At first, temperance reformers eschewed government regulation in favor of persuasion, but they soon demanded prohibition (Blocker 1988, Tyrrell 1979).

Several Massachusetts counties led the way in the 1830s, first by establishing exorbitant licensing fees and restricting the number of licenses, and later by refusing to grant any licenses at all (Hampel 1982: 55-62). Other states eventually followed suit by empowering counties to use the traditional licensing regime to try to reduce or eliminate drinking rather than just regulate its public character (Krout 1925: 275). In 1838 the Massachusetts legislature passed the first state-level ban on alcohol sales, prohibiting all sales of less than 15 gallons of distilled spirits (Hampel 1982: 57, 80 ff.). Several more states soon passed similar laws (Krout 1925: 273-4).

These early prohibition efforts proved controversial, and enforcement concerns figured prominently in the controversy. The year after Massachusetts adopted statewide prohibition, Harrison Gray Otis delivered a "memorial" to the legislature calling for the law's repeal, signed by nearly 5,000 Boston residents. His first objection focused on the intrusive enforcement tactics the law would require—"following the article when sold to the home and the closet of the citizen who buys, and instituting a new system of espionage upon his domestic acts" (Mass. General Court 1839). It was significant that it was Otis who raised this concern. In the years leading up to the American Revolution, his uncle, James Otis, Jr., had become the face of American resistance to the British writs of assistance, which granted broad authority to customs officers to search colonists' homes for smuggled goods. As much as anything else, the writs of assistance came to symbolize the tyranny of British rule, and their memory inspired the fourth amendment's protections against unreasonable searches and seizures (Cuddihy 2009: chs. 17, 20). Decades later, James Otis's nephew raised similar objections to Massachusetts's prohibition law, invoking

a foundational article of American ideology to resist this attempted reform. The legislature repealed the law the following year (Hempel 1982: 88). Concerns about aggressive searches also figured prominently in prohibition debates in other states (e.g. Clubb 1856: 112).

Although these objections were powerful, they rarely undermined prohibition laws single-handedly. Prohibition gained steam over the course of the 1840s, and over the course of that decade prohibitionists gained more insight into the nature and scope of the challenges that enforcement posed. Massachusetts's experience had already demonstrated that many sellers would ignore the law once public officials stopped issuing licenses, and that it would be difficult to enforce the law against them—both because it was difficult to detect and prove violations and because many jurors, magistrates, and other public officials refused to apply a law they believed to be unjust. Whatever their own views about prohibition, most sheriffs and town constables took no action to enforce it, so it fell to members of temperance organizations to initiate and gather evidence for the overwhelming majority of the cases against illegal liquor dealers in the 1830s. As they did so, they quickly found themselves vilified, assaulted, and sued for malicious prosecution. "I had no idea of the trouble and bother I was making for myself when I took hold of this temperance business", one complained (Hampel 1982: 88). Physical retaliation against complainants had been almost unknown during the earlier era of liquor law enforcement, but under prohibition it became more common. Cases proved hard to win, and reformers lamented the high rate of failed prosecutions (Hampel 1982: 89, 148-51).

Neal Dow, who eventually drafted Maine's pioneering prohibition law in 1851, ran headlong into these obstacles in the 1840s as he became a leader of temperance activism in his own state. Largely due to his advocacy and leadership, the city of Portland voted in 1842 to stop issuing licenses, but grog shops refused to close, and it proved almost impossible to gather the

evidence needed to convict them of violating the law (Krout 1925: 287). When the state legislature passed its first prohibition law in 1846, the lack of commitment to enforcement among sheriffs and constables and the difficulty of proving cases in the courts meant that illegal liquor sales continued almost unabated (Krout 1925: 291-2; Clubb 1856: 19-21).

After nearly a decade of frustrations like these, Dow successfully pressed the Maine legislature to pass a new prohibition law that heavily emphasized enforcement (Krout 1925: 159). The new law, enacted in 1851, banned the manufacture and sale of alcohol for nonmedical and nonindustrial uses, and it expanded the authority of sympathetic private citizens to initiate prosecutions and enlist law enforcement officials to gather evidence. The law also provided a financial incentive for law enforcement officers and private citizens to pursue liquor law violations, protected them from lawsuits brought by the owners, and lowered the legal barriers to forfeiture and conviction (Krout 1925: 293-4). The Maine law became the model for prohibition throughout the country over the next several years, and by the middle of the 1850s over half the country's population lived in jurisdictions that had banned alcohol sales.[7]

It was important that mid-19th century laws were *sales* bans: They explicitly allowed the personal consumption of alcohol and manufacture for personal use; only possession with intent to sell was against the law (e.g. Clubb 1856: 406). Liquor became a public concern only when someone tried to sell it to others within the state: It was not illegal to keep it for personal use, and local officials had no authority to prohibit sales outside the jurisdiction.[8] These distinctions

[7] Prohibition laws were enacted in almost all of the northern states but none of the southern states, though the South did tighten restrictions on alcohol sales (Tyrrell 1982; Pearson and Hendricks 1967: 130). That pattern may reflect a general aversion to morals legislation in a region where extralegal forms of social control remained important (Hindus 1980: ch. 2).

[8] The focus on sales reflected the 19th century understanding that market exchange was subject to government regulation in a way that private behavior and consumption were not. As Christopher Tiedeman put it later in the century: "Vice as vice can never be the subject of criminal law, yet a trade which has for its object or necessary consequence the provision of means for the gratification of a vice may be prohibited" (1886: 302).

raised recurrent challenges for enforcement. The mere possession of liquor did not necessarily violate the law, and those who initiated or carried out enforcement activity might mistakenly seize alcohol kept for legal purposes or arrest owners who had committed no crime.

Three Fearless Temperance Men and a Good Constable

On paper, the state prohibition laws of the 1850s charged sheriffs, constables, city marshals, and other police officials with a duty to enforce the law proactively (e.g. Clubb 1856: 317, 326, 362, 384, 395). Maine's law insisted that any public official who became aware of illegal liquor sales had a duty to file a complaint with the local court, which in turn should issue a warrant ordering the sheriff or constable to search the place (Clubb 1856: 339); the law also tried to encourage enforcement by granting officers all fines from successful prosecutions (Krout 1925: 295) and by fining those who neglected their enforcement duties (Clubb 1856: 344). In practice, however, these provisions were apparently ineffective, as temperance activists throughout the country complained that officials failed to enforce the new laws (Clubb 1856: 153, 211, 219, 224, 233-4, 265-6; Costello 1891: 57). The scope of the task was potentially overwhelming for the modest police forces of the time, and few city governments were willing to finance the expanded forces that would be necessary (e.g. Dannenbaum 1984: 94). When police did conduct stings and make arrests, they attracted ridicule, lawsuits, and violence (Krout 1925: 269; Richardson 1970: 110, 1971: 92, 183; Schneider 1982: 22-3; Volk 2014: 172-3). Police were, as always, willing to take action against liquor law violators who also broke other laws, but they rarely sought out illegal liquor sales for their own sake (e.g. Schneider 1982: 51).

The most important enforcement mechanism in the Maine laws did not involve the duties they imposed on the police but the legal authority they granted to private citizens. Neal Dow's famous claim that effective prohibition only took "three temperance men who are not afraid, one

good justice of the peace, and one good constable" (Clubb 1856: 155) was in fact just a summary of the legal framework he had pioneered. In the most common version of the law, when any three legal voters in a town notified a magistrate under oath that they believed that liquor was being kept illegally for sale, the magistrate had a duty to issue a search warrant for the place they identified, to be served by a constable, sheriff, or other appropriate law enforcement officer.

These provisions invested private complainants with broad authority to order the legal system to investigate their suspicions. In Maine and several other states, the complainants had to state "that they have reason to believe, and do believe" that liquor was being kept for sale illegally, but they did not have to state the reasons for their belief, and the magistrate did not need to evaluate whether their suspicions were justified (Clubb 1856: 325, 335, 407). Other states imposed more restrictive standards: In Michigan, complainants had to "state the facts and circumstances fully, upon which such belief is founded, that the magistrate may the better judge the existence of probable cause", and Connecticut instructed magistrates to issue warrants only when they could "find probable cause for said complaint" (Clubb 1856: 370, 303). Every state imposed additional restrictions on residential searches. Indiana barred searches of private homes entirely unless the owner had already been convicted of violating the liquor law, while Connecticut imposed stricter evidentiary standards for house searches (Clubb 1856: 303). Nevertheless, in all states private citizens could effectively order local officials to investigate suspected violations of the liquor laws—sometimes only if they could convince a court that they had probable cause for their suspicions, but sometimes even on their bare assertion.

Across the country, interested community members took advantage of this authority. Even if constables and sheriffs did not want to seek out illegal liquor sales proactively, temperance advocates effectively had the power to order them to take action against the specific

targets they had nominated. From Grand Rapids, Michigan, to Portland, Maine, local temperance societies mined this authority extensively, establishing organized vigilance committees like the multistate Carson League and Temperance Watchmen that systematically sought out liquor law violations and asked the court to issue a search warrant ordering a peace officer to investigate (Tap 1993: 34; Krout 1925: 268; Tyrrell 1979: 293-7; Clubb 1856: 255 and *passim*).

The same hostility that temperance vigilantes had faced in Massachusetts during the 1830s greeted this new generation of private complainants as well. Temperance activists were pelted with rotten eggs, knocked unconscious, and otherwise harassed (Tyrell 1979: 294-5; Clubb 1856: 236, 245), and some faced suits for malicious prosecution (e.g. *Taylor v. Godfrey* 36 Me. 523, 1853; *Page et. al.* v. *Cushing et. al* 38 Me. 523, 1854). This abuse did not necessarily deter them—Dow had warned that they had to be "fearless", after all—but it vividly expressed the widespread view that there was something illegitimate about a system that put so much power in the hands of staunch prohibitionists. As Ian Tyrrell put it: "Law did not seem to be an impartial authority administered in the interests of the whole community; rather it tended to become a plaything of the most extreme prohibitionists," and thereby provoked a degree of resistance that "would not be made to regular law enforcement authorities" (1979: 294). Temperance activists could sometimes alter specific legal provisions, but when they actually invoked the new provisions they ran afoul of social expectations that constrained legal practice.

Complaints about the scope of the authority that temperance activists had been granted were also pressed vigorously in the courts. The legal process for initiating a search under the Maine laws departed substantially from prevailing legal practices, and the mid-19th century legal system ultimately rejected its most important provisions. The most important legal judgment came in 1854, when the Massachusetts Supreme Judicial court concluded that the broad search

warrants authorized by the state's new prohibition law and the evidentiary standards that could justify search and seizure of alcohol violated the state constitution. A search could be authorized and property could be forfeited based entirely on three people's stated belief that the law was being violated, and the owner had no opportunity to confront his accusers. Warrants issued under the law did not carefully specify the objects to be seized (for example, by failing to distinguish liquor held for export or personal consumption from that held for sale within the state). Although the court recognized the legislature's authority to prohibit alcohol sales, it insisted that enforcement provisions had to comply with these strict procedural constraints, and it therefore invalidated the enforcement sections of Massachusetts's law (*Fisher v McGirr* 67 Mass. at 36-8).

The legal uncertainty surrounding these new forms of authority exposed the complainants and peace officers who invoked them to legal peril. Through much of the 19th century, anyone who swore out the complaint that justified a search warrant was liable to a lawsuit for trespass if the search came up empty, and the officer who served an unjustified search warrant could also be sued for damages (Davies 1999: 652-4). In fact, peace officers who executed search warrants for liquor in Maine law states repeatedly faced such lawsuits, and courts repeatedly ordered them to pay damages (e.g. *McGlinchy v. Barrows*.; 41 Me. 74, 1855). Complainants who initiated charges against a purported liquor law violator might also be subject to suit for malicious prosecution. Anglo-American law made such suits difficult to win or even bring to court (Hay 1989), but a few defendants in aggressive liquor law prosecutions did turn the tables on their accusers (e.g. *Taylor v. Godfrey et. al.* 36 Me. 525, 1853).

Temperance reformers in many states tried to protect complainants and peace officers from these legal risks by pressing for new laws that would ban all lawsuits regarding alcohol, but courts uniformly rejected those provisions. Maine's Supreme Court struck down the provision of

Dow's own law that barred legal actions regarding seized alcohol. Although the state argued that seizures of alcohol did not have to satisfy traditional due process standards because alcohol was no longer legal property, the court rejected that argument. Some liquor remained legally held (such as alcohol intended for export or medicinal uses), and legislation could not remove the protections the state constitution provided to its owners (*Preston v. Drew* 33 Me. 338, 1852). Two years later, the Massachusetts Supreme Judicial Court neutralized a similar provision in that state's prohibition law when it allowed a plaintiff to sue the constable who wrongfully seized his legally held liquor (*Fisher v McGirr* 67 Mass. 47). The following year, the legislature experimented with a different form of indemnification by promising to reimburse peace officers for any damage judgments entered against them (Clubb 1856: 365), but that approach proved expensive and was quickly repealed (Mass. General Court 1857: 350).

In short, the "three good temperance men" strategy tried to bring police into the private realm by giving private citizens the authority to send them there, but it was hard to put that authority on strong foundations. The strategy attempted to pursue the goals of legal moralism using the tools provided by the existing model of criminal procedure, in which private actors rather than proactive public officials generally set the criminal process in motion. That model, however, brought with it a range of safeguards that had been designed with a particular kind of complainant in mind—namely, crime victims with personal knowledge of a specific offense. The temperance activists who initiated liquor law complaints usually had less direct and more uncertain evidence of lawbreaking, so the enforcement activity they initiated was legally risky. Cases went forward—liquor was seized and scofflaws were fined or even jailed—but the process used to reach these conclusions was fraught with legal and social peril for those who mobilized it. Despite the creativity and tenacity that temperance activists applied to legal reform, the legal

and social supports behind the limited mandate of 19th century alcohol policing proved too deeply and broadly rooted to overcome in this manner.

Drunks as Informers

A different strategy left the police themselves in the public realm, but it turned the public inebriates they continually arrested on the streets and sidewalks into informants. During the early experiments with prohibition in the 1830s and 1840s, judges and prosecutors in many states offered lenient treatment to public inebriates who were willing to tell the court who had sold to them (e.g. Tap 1993: 41; Clubb 1856: 137; Hampel 1982: 149), and several versions of the Maine law included provisions that formalized this practice. Vermont was the pioneer: Under its 1853 law, sheriffs and other officers had a duty to bring anyone arrested for public drunkenness to the local jail until he sobered up. A justice of the peace would then ask him to disclose who had sold liquor to him, and if he refused he could be detained in jail indefinitely (Clubb 1856: 410). Two years later, Massachusetts temperance advocates—stung by the recent setbacks from *Fisher*—argued that their state should adopt a similar provision, and the legislature obliged the next year (Clubb 1856: 244, 358). Several other states pursued the same strategy during the 1850s (Clubb 1856: 307, 316, 327, 342, 384). By this route the legal system could detect secret wrongdoing even if the police still focused on violations that were visible in public.

To capitalize on these new provisions, many jurisdictions stepped up enforcement of the public drunkenness laws. As described above, in practice police had traditionally made arrests for drunkenness only when an intoxicated person became disruptive, violent, or incapacitated. Temperance-minded local governments in the 1850s encouraged police to use their authority more aggressively. Describing his experience in Portland, Neal Dow explained: “The practice formerly was to commit no intoxicated persons who were quiet and able to get home. At present

the orders to the police and watch are to arrest all persons found in the streets and all other public places, either by night or by day, who exhibit unmistakable signs of intoxication" (Clubb 1856: 172). A Hartford, Connecticut police officer similarly observes that "it was only when a drunken man was making some assault that he was taken up formerly," implying that he was more zealous after the state's new prohibition law took effect in 1854 (Clubb 1856: 117). Police in these cities may have stepped up their enforcement of the drunkenness laws simply because of the growing intolerance for alcohol consumption, but they may have also hoped to use drunkenness arrests to build cases against liquor sellers (Clubb 1856: 307-8, 342).

This strategy proved legally and socially controversial, though it survived legal challenges that sought to strike the laws down outright. In Vermont itself, a state Supreme Court judge acknowledged that the pressure placed on public inebriates was widely viewed as "anomalous" and that it "exposes [the law] to so much criticism", but he did not believe it violated the constitution. The police clearly had the authority to arrest anyone who was disturbing the public peace, and once the arrestee sobered up he could be detained as a material witness to the seller's crime—not unlike a witness compelled to testify before a grand jury (*in re Powers*, 25 Vt. 269-70). To be sure, the defendant in an intoxication case could not be compelled to disclose who had sold her liquor, for that disclosure would violate her right against self-incrimination (*in re Emma Pierce*, 46 Vt. 374). But Vermont's disclosure did not subject the arrested drunk to prosecution for buying liquor; the original arrest was ostensibly for order maintenance, and the continued detention was as a witness rather than a defendant. As long as the drinker's testimony could not be used to prosecute *him*, the courts could legitimately compel it (e.g. *Commonwealth v. Willard* 39 Mass. 476, 1839; *Commonwealth v. Whitcombe* 78 Mass. 126, 1858). The sellers convicted on such testimony fared no better. After a Rutland man named

James Brislin was arrested for public intoxication in the summer of 1854, he told the court that he had gotten drunk on gin sold to him by one James Conlin. The justice issued a warrant for Conlin's arrest and ultimately convicted him on the basis of Brislin's testimony. Conlin appealed, but the Vermont Supreme Court concluded that the due process guarantee in the state constitution simply did not apply to "offences so utterly insignificant" as the liquor law. It would "paralyze" the system to subject such cases to "the cumbrous detail and heavy machinery" of a more formal criminal proceeding (*Vermont v Conlin* 27 Vt. 318; cf. *in re Dougherty* 27 Vt 325).

Although these provisions usually survived direct constitutional attacks, the strategy that relied on them proved unsuccessful, for it ran up against longstanding suspicions about the credibility of informers and the legal safeguards they had inspired. Like the temperance activists who provided testimony voluntarily, drunks who did so under duress were sometimes vilified, threatened, or physically abused. Some became the targets of new criminal complaints of their own, and judges and juries often seemed skeptical of their testimony (Hampel 1982: 88-90, 149). Those risks made it unattractive to testify against sellers even in a state like Massachusetts, which offered to dismiss drunkenness charges entirely in exchange for testimony. According to one 19th century Boston Police officer who had observed innumerable hearings in the police court, very few people arrested for drunkenness were willing to disclose who had sold them liquor (Savage 1873: 249-53). Another Boston officer reported that only two of the thousands of people he had asked to disclose who had sold them alcohol was willing to do so, and many were "outraged" by the question (Mass. General Court 1867: 215). Men facing drunkenness charges in Michigan also refused to disclose who had sold to them despite promises of lenient treatment (Tap 1993: 41).

In the rare cases when public inebriates did disclose who had sold to them, defense attorneys for the sellers argued that this testimony could not justify a conviction on its own: If a crime had been committed, the drinker was an accomplice to it, and accomplice testimony had limited legal value. The law of evidence on this point was not entirely clear at the time. Through the early 19thth century, it had been common for courts to insist that conviction should not be based on the uncorroborated testimony of an accomplice—some states passed legislation that barred such convictions outright—and there was considerable wariness about the testimony of informers who provided evidence in exchange for leniency (e.g *U.S. v. Troax* 28 F. Cas. 216, 1843; *State v. Clemens*, 38 Iowa 257, 1874). As late as 1866, Joel Bishop's influential criminal procedure treatise insisted that although there was no definite legal rule against it, "under most circumstances it would be manifestly unsafe for the jury to convict the prisoner on the sole testimony of an accomplice, unsupported by other evidence," and judges "usually deem it incumbent on themselves to caution the jury of the danger of finding a verdict on such testimony" (Bishop 1866: 363; cf. Dearsley 1854: 34-5). In the end, Bishop did not believe that liquor consumers met the technical definition of "accomplices" to the illegal sale, but he agreed that caution in believing their testimony was appropriate and that judges ought to instruct the jury to treat it skeptically (1866: 682). Since there has been no systematic study of liquor law prosecutions during this era, it is unclear exactly how often liquor law defendants invoked this argument, nor how often those cases ended in acquittal. Still, the fact that Bishop's widely used treatise addressed the question at all suggests that this defense was not unusual, and a close review of liquor law enforcement in Massachusetts observed that grocers accused of violating the liquor laws frequently argued that jurors should not trust the "common drunkard" who had testified against them (Hampel 1982: 88).

Although the law of criminal procedure did not forbid this novel approach to prohibition enforcement outright, prevailing understandings about the role of the informant discouraged it. Social pressure on the inebriates themselves discouraged them from testifying, and courtroom practice seemed to place any testimony they did give under a cloud of suspicion. Once again, discrete legal changes were ineffectual on their own because the law they targeted was only one part of a coherent network of laws and social understandings that advanced similar ends.

Conclusion

The early American approach to vice policing was very different from the approach that prevails today, for it restricted legal attention to public order rather than private wrongdoing—to the province of the Aedile, as Hart understood it, rather than the Censor. That approach took its purest form from the late colonial era through the first third of the 19th century. In that early era, peace officers played a major role regulating drunkenness, but their mandate only extended to highly visible public intoxication that significantly disrupted public order; they also helped administer the liquor licensing system, but that system directed their attention to the way public taverns were managed rather than private consumption or carryout sales. This legal mandate was well adapted to the prevailing apparatus of law enforcement and the social practices through which it operated, which had limited ability to monitor behavior in private places.

Those limits became vividly apparent during the mid-19th century experiment with alcohol prohibition. By the 1850s—and in some places earlier—prohibitionists struggled to find a workable strategy to enforce more comprehensive bans alcohol sales. That project did not fall victim to any single, decisive blow, but in most states it collapsed by the end of the 1850s under the cumulative weight of many different obstacles to morals enforcement, as attempts to evade or work around one obstacle encountered new resistance from others. Once they discovered that

peace officers were insufficiently motivated and authorized to surveil the private sphere, prohibitionists authorized private temperance activists to initiate criminal proceedings even when they had not been injured directly. Once they learned that those cases exposed the activists themselves and the constables who served process for them to legal peril, they tried to indemnify them in various ways. Once they discovered that civil liability doctrine rejected indemnification, they changed course entirely, trying to enlist public inebriates as unwilling complainants against illegal liquor dealers. Soon they found that legal actors and the inebriates themselves resisted that tack too. The cumulative resistance that this diverse range of legal obstacles exerted was substantial. The rules and norms that governed criminal procedure were not a disconnected jumble of miscellaneous constraints. They were mutually reinforcing expressions of a coherent vision of the scope and limits of official power.

To understand both the unraveling of mid-19th century prohibition and the relative stability of the approach to alcohol policing that preceded it more deeply, it is useful to consider that vision from a broad perspective. From the colonial era through the mid-19th century, crime victims were the motive force driving Anglo-American criminal justice practice. With a few important exceptions, public officials did not take responsibility for detecting or prosecuting crime. Instead, the victims brought their complaints to a court official or a peace officer and even took primary responsibility for gathering evidence to support their own cases. The criminal justice system mainly provided a forum where private parties could accuse one another of crimes and a source of authority to compel defendants and witnesses to participate in that process (*e.g.* Lane 1967: 7; Steinberg 2014: 5; Beattie 1986).

Many aspects of criminal procedure in this era reflected that vision. Peace officers had limited authority to investigate lawbreaking on their own initiative: Their authority to search for

evidence and arrest those they suspected of breaking the law was sharply restricted. Instead, they made arrests or conducted searches mainly when a judicial officer ordered them to do so, and those orders in turn were usually issued in response to a sworn complaint by a private party (Davies 1999, 2002, 2010). Crime victims made their accusations under oath, and they could be held accountable if the accusations proved unfounded. Legal historian Thomas Davies (2010) contrasts this "accusatory" model of criminal procedure with today's "investigative" model.

Prosecution and investigation did not always conform to this paradigm, but in those exceptional cases the law and legal norms usually introduced additional restrictions. For example, over the course of the 18th century, British and American lawmakers established rewards for private individuals to file criminal complaints against people who had committed quasi-victimless crimes like counterfeiting, gambling, and hunting out of season (*e.g.* Scott 1930: 73-4; Beattie 2001), and that arrangement clearly departed from the accusatory model. Many critics worried that the reward system encouraged perjury and exaggeration, so legal doctrine and social norms began to devalue testimony by those who stood to profit from it (Langbein 2003: 151 ff). Those procedural devices protected the core commitments of the accusatory model in exceptional cases when it proved necessary to depart from that model's usual routines. Similarly, as courts increasingly granted immunity from prosecution in exchange for testimony against other lawbreakers, many critics once again insisted that this testimony should be handled skeptically. The norms and legal rules regulating accomplice testimony reviewed earlier arose out of these concerns (Langbein 2003: 209 ff.).

A few areas of law enforcement departed even more dramatically from the accusatory paradigm. Customs and excise laws obviously did not produce aggrieved victims, so governments established designated officials to enforce those laws proactively. Those officials

had broader authority to conduct searches and make arrests than other peace officers, and they faced less risk of liability when their suspicions turned out to be unfounded (Davies 2010: 31-8). In effect, mid-19th century prohibitionists tried to establish liquor law enforcement as a similar major exception to the accusatory model, but prohibition laws proved more controversial, and in practice they ended up overreaching. The original Maine law provision that allowed any three legal voters to initiate a search by swearing that they had reason to believe someone was violating the law went further even than the revenue laws at the time. Several decades before the American revolution, credible informers could sometimes secure a search warrant for excise violations simply by swearing that they had reason to believe someone was concealing untaxed merchandise, without any need to articulate the basis of those suspicions and convince a judge that they were well-founded (Davies 2010: 34); the infamous writs of assistance that James Otis's uncle had challenged in court went even further, giving revenue officers unilateral authority to conduct searches (Cuddihy 2009: chs. 17, 20). In the end, however, those expansive forms of search authority proved enormously controversial, and by the end of the 18th century, enforcement officials at least had to articulate the basis of their suspicions explicitly and convince a magistrate that they were reasonable. The original Maine law effectively tried to re-establish the broad form of search authority the Revolution had rejected. Unsurprisingly, the effort did not go over well.

The legal framework and social understandings that constrained early American policing are things of the past, and the limited understanding of the goals of vice regulation that prevailed through much of the 19th century may or may not be relevant to today's world (or to vices other than drinking). We may not want to reconstruct contemporary vice policing according to the model of the Aedile rather than the model of the Censor, and we might not be able to if we did.

The important lesson of this history is not that we should return to the past; it is the more general point about the scope and limits of policing that the relatively durable model of antebellum alcohol policing illustrates. Policing operates within a broad field of legal and social constraint that limits its capacity to accomplish any arbitrary goals that reformers might assign it. Like the temperance activists of the mid-19th century, many modern moralists still have not learned that lesson. At the same time, many critics of modern drug policing may underestimate the wide range of legal principles and social understandings that facilitate today's aggressive approach to drug policing, and therefore how easy it is for its defenders to sustain it. Durable transformations in policing may require a more broad-based and holistic approach than reformers of either stripe often recognize.

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