Speaking the Unspeakable: Buggery, Law, and Community Surveillance in New South Wales, 1788--1838

Luke Taylor

“The general tendency of the evidence indicates that unnatural crimes are far more common in the penal colonies than would be supposed from the number of convictions for those offences.”

So declared the 1838 Report from the Select Committee on Transportation, chaired by Sir William Molesworth. The British perception of the Australian colonies as a southern Sodom in which buggery was practiced with alacrity played an important, if sometimes over-determined, role in the eventual cessation of convict transportation to New South Wales (NSW) in 1840.

The Report was no doubt correct that unnatural crimes or buggery, which in legal terms was a capital offence encompassing both sodomy (anal penetration by a man of another man or a woman, irrespective of consent) and bestiality (sex with animals), occurred with greater

---

1 Report from the Select Committee on Transportation; Together with the Minutes of Evidence, Appendix, and Index (London: House of Commons, 1838), xxvii. An earlier report was issued in 1837 but it is comprised almost entirely of Minutes of Evidence: see Report from the Select Committee on Transportation; Together with the Minutes of Evidence, Appendix, and Index (London: House of Commons, 1837).

2 Initially NSW comprised the entire eastern part of Australia, including present-day NSW, Queensland, Victoria and Tasmania (known as Van Diemen’s Land until 1856). In 1825 Van Diemen’s Land was made a separate colony: Order-in-Council separating Van Diemen’s Land from New South Wales, 14 June 1825. Victoria and Queensland were not made separate colonies until 1851 and 1859, respectively.


frequency in the colonies than conviction rates would suggest. However, the Report does not mention that in the decade prior to 1838 there was, at least in NSW, a discernible increase in the number of men tried in court with committing unnatural offences. In terms of raw numbers the trial rate was indeed small when compared with the number of men committed for trial on charges of buggery in England. However, when measured against population size a very different picture emerges. The “unspeakable” crime, it seems, was in fact productive of significant amounts of speech in colonial NSW, as the community voiced its collective intolerance of buggery by surveilling and informing on persons suspected of its practice, and providing lurid testimony in court regarding others’ sexual misdeeds.

This paper analyses the cases brought against men for buggery (i.e., sodomy and bestiality) and attempted buggery (a common law offence that is discussed further in Part I) in NSW in the period 1788--1838; that is, from the time of the First Fleet’s arrival at Sydney Cove

---

6 The first execution of a man for sodomy in NSW, Alexander Brown in 1828, involved apparently consensual anal sex with Richard Lester who, owing to his youth and, it seems, his receptive role in the encounter, was granted a reprieve. While consent was legally irrelevant, in practice it could, for evidentiary reasons, enable a husband to escape conviction for (perceived) consensual anal sex with his wife: R v. Jellyman (1839) 173 E.R. 637.

7 See Offences Against the Person Act 1828, 9 Geo. IV, c.31, s.15: “And be it enacted, That every Person convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall suffer Death as a Felon.”

8 See Cocks, Nameless Offences, 30.

9 The offence was buggery, whether committed with man or animal, but in practice the charges distinguished between sodomy and bestiality. The same distinction is adopted here: sodomy refers to sexual acts between men; bestiality to sexual acts between men and animals; and buggery to either or both.

10 Existing empirical work on colonial buggery cases tends to adopt a much longer time-scale without going into great detail about the cases. See Robert French, “‘Where the Action was’: Archival Sources for Gay History in Australia,” Gay Perspectives: Essays in Australian Gay Culture, eds. Robert Aldrich and Garry Wotherspoon (Sydney: University of Sydney Press, 1992): 181--95; Walter Fogarty, “Indecent Connection: Notions of the development of the homosexual in New South Wales law, 1788--1900,” BA (Hons) Thesis, University of New South Wales, Sydney, 1989. Robert Aldrich in his seminal work Colonialism and Homosexuality (London: Routledge, 2003) discusses prosecution rates in colonial NSW but relies on the figures contained in French’s aforementioned chapter. In The Fatal Shore, Robert Hughes accepted a version of the idea put forward in the 1838 Transportation Report, namely, that conviction rates in NSW were low in comparison with the prevalence of sodomy, extending this idea into a view that rates overall were insignificant. The premise may be reasonable, but the accompanying conclusion is questionable. See Robert Hughes, The Fatal Shore. A History of the Transportation of Convicts to Australia 1787--1868 (London: Pan, 1988), 264--67. The best discussion of male sexuality in colonial NSW is Catie Gilchrist, “Male Convict Sexuality in the Penal Colonies of Australia, 1820--1850,” PhD Dissertation, University of Sydney, Sydney, 2004. See also Paula J. Byrne, Criminal Law and
through to the Report from the Select Committee on Transportation.\textsuperscript{11} It shows that in the first forty years of colonization, up to the passage of the Offences Against the Person Act 1828 (Offences Act), which dispensed with the longstanding need to prove ejaculation to secure a conviction for buggery and rape,\textsuperscript{12} there was an irregular pattern of sodomy cases in NSW.\textsuperscript{13} In the next ten years, however, the number of men brought before the courts on sodomy charges rose dramatically, but also stabilized on an annual basis at rates significantly in excess of that seen in England when population size is taken into account.\textsuperscript{14} The charge rate for bestiality also stabilized on an annual level post-1828, but no comparable rise in frequency is apparent; nevertheless, when considered against population size, even this fairly static rate is shown to be surprisingly high. The data also reveal a distinct shift in the types of charges that were brought in sodomy cases that reached court: in the first forty years men were far more likely to be charged with attempted sodomy rather than completed acts. Between 1828 and 1838, however, trials for the capital offence were much more frequent than charges of attempt. No such shift is

\textsuperscript{11} Charges brought in Van Diemen’s Land up until 1825 are included, as are charges brought what is now Victoria and Queensland (though systematic settlement of those areas did not commence until the 1820s): see above note 2.

\textsuperscript{12} Offences Act, 9 Geo. IV, c.31, s.18.

\textsuperscript{13} To be clear, I am not concerned in this paper with exploring rates of conviction in detail. Data on convictions is provided in Part II, but I do not seek to explain these data and the changes they reveal in any causal way, ostensibly because of the unusual nature of criminal trials in this early colonial period, and the changes that came about in the mid-1830s concerning trial by jury. In essence, prior to 1833, criminal trials were tried before a Deputy Judge-Advocate and six military officers. Following more than a decade of agitation for reform, the Jury Trials Act 1833 provided for trial by a civilian jury of twelve members in the Supreme Court, but retained the option of trial by military jury at the defendant’s request. This option remained in place until 1839. See J.M. Bennett, “The Establishment of Jury Trial in Australia,” \textit{Sydney Law Review} 3(3) (1961): 463--85; Michael Chesterman, “Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy,” \textit{Law & Contemporary Problems} 62(2) (1999): 69--102. The records discussed herein indicate that criminal trials for buggery between 1834--1838 (when my analysis concludes) were heard before a mix of civil and military juries. Accordingly, I do not think it fruitful to engage in speculation as to what might have motivated these differently composed juries to reach the results that they did. That being said, a number of the cases that were either dismissed, or in which “not guilty” verdicts were reached, were based on an apparent lack of evidence, suggesting that the Supreme Court and juries (in both forms) took seriously the task of adjudging the evidence before them, and were not inclined to convict solely on the basis of the “unspeakable” nature of the offence before them.

\textsuperscript{14} Cocks, \textit{Nameless Offences}, 30.
apparent in bestiality cases because the tendency was always to charge the capital offence.

While it is not in every instance possible to determine the genesis of buggery complaints from the records,\textsuperscript{15} the vast majority of cases do provide detail on this question. Collectively, they show that most charges were the result of community surveillance; that is, most complaints were made by victims, participants\textsuperscript{16} or members of the public, and were generally not the result of official forms of policing.\textsuperscript{17} The cases also reveal an interesting tension between the putatively unspeakable nature of buggery and the evidentiary requirements for conviction.

Recalling Michel Foucault’s discussion of the “institutional incitement to speak” in nineteenth-century Western societies,\textsuperscript{18} the cases show that witnesses were far from circumspect in their descriptions of the acts which they claimed to have been subjected to or seen.

The paper then sets this empirical analysis in historical context. It suggests that the upswing in buggery charges after 1828 had less to do with the introduction of the Offences Act than with the exacerbation of longstanding tensions in the Colony revolving around crime, morality, and the place of convicts in NSW following the publication of John Thomas Bigge’s 1822

\textsuperscript{15} All of the cases in the period 1788–1828 provide sufficient detail to determine the origin of the complaint. Six of the forty-four cases in the period 1828–1838 do not provide sufficient detail to determine the origin of the complaint.

\textsuperscript{16} In a number of the cases it is unclear whether the putative victim was in fact subjected to sexual assault or if the law’s prohibition on same-sex intimacy meant that consent was retrospectively withdrawn once the act(s) were discovered. Acknowledging this murky aspect of the cases is in no way intended to undermine the fact that some men and boys were the victims of sexual aggression. Note also the possibility that victims might be held complicit in the commission of buggery: see Glanville Williams, “Victims and other exempt parties in crime,” \textit{Legal Studies} 10 (1990): 245–57, 247–48.

\textsuperscript{17} As discussed in Part III, it is possible that the increasingly organized nature of policing in the 1830s facilitated complaints by civilians. For an overview of the development of policing in colonial NSW see Bruce Swanton, \textit{The Police of Sydney, 1788–1862} (Sydney: Australian Institute of Criminology and NSW Police Historical Society, 1984).

\textsuperscript{18} In the first volume of \textit{The History of Sexuality}, Foucault observed how nineteenth-century society “takes great pains to relate in detail the things it does not say.” Alongside the typically repressive aspects of Victorian culture, Foucault noted a parallel “institutional incitement to speak” about sex, “a determination on the part of agencies of power to hear it spoken about, and to cause it to speak through explicit articulation and endlessly accumulated detail.” Far from a censorship of sex, there was “rather an apparatus for producing an ever greater quantity of discourse about sex.” Michel Foucault, \textit{The History of Sexuality. The Will to Knowledge. Volume I}, Robert Hurley trans. (Camberwell: Penguin, 2008), 8, 18, 23.
Report into the State of the Colony of New South Wales: those tensions, it is suggested, resulted in a heightened degree of community surveillance of convicts in the 1820s and 1830s, resulting in the increased reporting of unnatural sex and indocile bodies to an expanding police force. This social exposure of buggery was, in turn, augmented within the legal system by the evidentiary changes enacted by the Offences Act; in essence, the removal of the ejaculation requirement translated (albeit with a lag-time) into a prosecutorial practice of charging the accused capitally—at least in sodomy cases (this was always the practice for bestiality). At the final stage of the trial, the punishments meted out by judges moved away from spectacular, public forms of humiliation after 1828. This makes sense in light of the trend towards charging men with the capital offence because a guilty verdict in such cases resulted in a sentence of secondary transportation or death (which was usually commuted to transportation). More speculatively, this move may also be seen as part of a broader shift in the logic of punishment away from the exemplary and towards the disciplinary; in other words, eschewing the public spectacle of ritual bodily punishment in favour of more hidden forms of individual moral reformation.

The final part of the paper connects the morality-driven surveillance of convicts, and the law’s discursive impetus to speak of the unspeakable, to the evidence given to the Select Committee on Transportation concerning the prevalence of unnatural crimes in NSW and Norfolk Island, and the eventual cessation of convict transportation to NSW in 1840.

---

19 Report of the Commissioner of Inquiry into the State of the Colony of New South Wales (London: House of Commons, 19 June 1822). Two further reports were issued in 1823 concerning the judiciary and agriculture.

20 Michel Foucault, Discipline and Punish. The Birth of the Prison, Alan Sheridan trans. (New York: Vintage, 1995), 135–70. Foucault argues that in the eighteenth century, Western societies began to engage in “projects of docility” to make “possible the meticulous control of the operations of the body, which assured the constant subjection of its forces”; this “relation of docility-utility,” he says, “might be called ‘disciplines’.”


22 See generally Foucault, Discipline and Punish.
I. The Transplantation of English Buggery Law into NSW

In his Commentaries on the Laws of England, William Blackstone declared: “For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force.”

The logic of English political thought and public international law in this era meant that for English purposes, the lands that eventually comprised NSW were treated as “uninhabited country” -- a product of the European preoccupation with individual property rights and cultivation of land as a marker of ownership, and racist attitudes towards Indigenous customs. Consequently, English law automatically applied in the new Colony; but, in Blackstone’s words, “with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries.” To this list Blackstone might have added the English law of buggery.

Civil, rather than ecclesiastical, prohibitions on buggery emerged in England in 1533 under the reign of King Henry VIII. The Act for the Punishment of the Vice of Buggery criminalized “the detestable and abominable Vice of Buggery committed with Mankind or Beast” on pain of


24 See Cooper v. Stuart (1899) 14 App. Cas. 286.


death. In 1642 Edward Coke defined buggery as anal penetration of a man or woman by a man, or penetration of an animal by a man (whereas any sexual act between a woman and an animal seems to have been sufficient). In 1781, in the case of R v. Hill, it was held that in cases involving men ejaculation must have occurred in order for the offence to be proved. While this finding raised the bar in buggery cases, the common law also expanded the ambit for prosecution by treating attempts to commit buggery as offences, albeit of a lesser magnitude than completed acts.

In NSW, it took until 1796 for a buggery case to be heard by the Court of Criminal Jurisdiction, despite the first Governor, Arthur Phillip, having declared his preference for dealing with sodomites by “confin[ing] the criminal until an opportunity offered of delivering him to the natives of New Zealand, and let[ting] them eat him.” Joseph Pearce, a settler, complained that Francis Wilkinson, labourer, “had carnal connection with him when he had him on the ground.” Charges were brought against Wilkinson alleging that he “did make an Assault on him the said Joseph Pearce … with an intent [to commit] that most horrid detestable and sodomitic crime (among Christians not to be named) called Buggery.” Wilkinson was found not guilty based on evidence that Pearce had publicly declared “he knew not who it was that had assaulted him.” The case against Wilkinson was the first in NSW concerning sexual contact between men, but it was not the only buggery case heard by the Court on 23 April 1796. On that same day, charges were read against George Hyson alleging that he “diabolically

---

28 25 Hen. VIII, c.6 (1533). The Act was confirmed during the reign of Elizabeth I: Cocks, Nameless Offences, 32.
31 Cocks, Nameless Offences, 17.
32 Hughes, Fatal Shore, 264.
& against the Order of Nature, had a Venereal affair with [a] she dog & then & there carnally knew the said she Dog & … did commit and perpetrate that detestable and abominable Crime of Buggery.”

Evidence was given by a passerby that he “found the prisoner on his knees, with his trowsers down--that his private parts were close to the bitch’s.” Hyson was cleared of the capital offence but found guilty of assault with intent to commit it. He was sentenced to stand in the pillory on three separate occasions for one hour per time.

These cases made it clear that English buggery law in its entirety applied in NSW. Anal penetration of a man or woman (including a wife), and vaginal or anal penetration of an animal amounted to buggery under the terms of the 1533 Act if ejaculation occurred. In the absence of proof of emission, or in cases where the requisite forms of penetration did not occur (oral sex or mutual masturbation) or could not be proved, a man could still be convicted of the lesser offence of assault with intent to commit buggery. As in England, this position remained the law until 1828 when the Offences Act came into force. The Offences Act applied in NSW by virtue of the Australian Courts Act 1828. Section 15 of the Offences Act effectively mirrored the earlier law by providing that “every Person convicted of the abominable Crime of

35 See, e.g., R v. Jellyman (1839) 173 E.R. 637, in which a man was indicted for having committed “an unnatural offence with his wife,” who in turn testified that Mr. Jellyman had penetrated her anally, though not “so much as he did six years ago.” Justice Peterson noted that he had had the misfortune to try other buggery cases involving wives on previous occasions (i.e., Jellyman was apparently not the first case to raise this issue). In his Honour’s view, a woman who consented to sodomy was an accomplice and therefore her evidence “would require confirmation.” Accordingly, he directed the jury that, “[i]f you either disbelieve the evidence, or believe the prosecutrix did not resist, you ought to acquit; it was her duty to have resisted such an attempt to the utmost.” The jury found Mr. Jellyman not guilty, though on which ground is unclear. What this case shows, aside from the possibility of convicting a man for sodomy based on anal intercourse with his wife (but in practice only if she resisted), is how buggery law also functioned as a de facto rape clause for married women—at least if anal penetration was involved. While women were legally presumed to consent to sexual activity with their husbands, Jellyman indicates that this presumption did not extend to anal sex. Thanks to Kate Gleeson for pointing this out to me.
36 Though it seems that a woman could be found guilty of buggery if she engaged in any sexual contact with an animal. See Coke, Institutes, 58--59.
Buggery, committed either with Mankind or with any Animal, shall suffer Death as a Felon.”

Crucially, however, s.18 amended the common law approach to proof of carnal knowledge, providing “it shall not be necessary … to prove the actual Emission of Seed in order to constitute a carnal Knowledge, but that the carnal Knowledge shall be deemed completed upon Proof of Penetration only.”

II. The Cases

The primary archive for this investigation is Peter De Waal’s extraordinary collection of materials, Unfit For Publication, which is an online record of “NSW Supreme Court, Quarter Sessions and Police Court, Bestiality, Buggery, Sodomy, and other sex offences Trials, 1727--1930.” De Waal painstakingly located records from newspapers throughout NSW, along with judges’ notes and police records in rural and metropolitan areas, and catalogued the results by year and the name of the person charged. I supplemented De Waal’s material with further searches of early Australian court cases, which yielded limited additional results. In what follows, I present a breakdown of cases concerning buggery and attempted buggery in the period from January 1788 to July 1828, when the Offences Act came into operation, and the decade following the Act’s introduction, August 1828 to July 1838.

38 Subsequent references to cases archived on the Unfit for Publication website simply refer to the name of person(s) charged, followed by the year. All cases can be accessed via the “Trials” section of the website.

39 De Waal includes one case preceding English settlement, involving two Dutch sailors. See Adriaen Spoor and Pieter Engels (1727).


41 Bruce Kercher and Brent Salter, The Kercher Reports: Decisions of the New South Wales Superior Courts, 1788 to 1827 (Sydney: Francis Forbes Society for Australian Legal History, 2009); AustLII, “Legge’s Supreme Court Cases (NSW).”


43 While 1837 would have made a somewhat neater cut-off point in the sense of encompassing a forty-year period, I selected 1838 in order to capture a full decade’s worth of data after the passage of the 1828 Act, which
The baseline focus is the number of cases according to type: sodomy; assault with intent to commit sodomy; bestiality; and attempted bestiality. Where charges were brought against more than one individual in a single case, or multiple charges were laid against a single individual, I counted the number of charges. In order to account for the small (though rapidly growing) population in NSW, and to provide a basis for comparison with English data, I have converted the raw figures into charges per 100,000 persons; however, to account for the wild fluctuations in the early decades of the Colony, I present these data as an overall average for the period 1788--1828. For the period 1828--1838, when annual case numbers stabilized, I give an average annual figure per 100,000 persons.

The sodomy and attempted sodomy cases (only) are also sorted by reference to the sex and age of the accessory/victim. With respect to sex, the cases throughout the entire period disclosed only instance in which a man was charged with buggery involving a female. Concerning age, neither the 1533 Act nor the Offences Act distinguished between acts committed with/on adults and minors, but males under the age of fourteen were not considered

only came into force in NSW on 25 July 1828. Somewhat fortunately, I found no charges beyond May in 1838, meaning that even if a mid-1838 cut-off date were adopted the results would not be any different. In addition, including 1838 in the broader analysis enables proper consideration of the evidence presented to the Select Committee on Transportation.

For instance, a case from 1812 concerned allegations that Richard Bayly, Thomas Brown and Michael Simpson attempted to commit “an unnatural crime one with the other, & with brutal, grossly indecent conduct in violation of good morals & to the disgrace of Society”. I have treated this case as involving three charges. See also the case concerning William Thomas Williams (1833), in which two attempted sodomy charges were brought in respect of attempts made on two different men. Similarly, where a capital charge failed at trial and the accused was subsequently charged with the lesser offence, I have treated the matter as involving two charges. See, e.g., James Cullen and George Dutton (1834).

This is a recognized method for placing raw numbers of charges into context. See Cocks, Nameless Offences, 23; Michael Sturma, Vice in a Vicious Society: Crime and Convicts in Mid-Nineteenth Century New South Wales (St. Lucia, University of Queensland Press, 1983), 65.

To calculate average annual figures, I determined the number of charges per 100,000 persons for each year based on the actual number of charges for that year, and the population in the Colony in that same year. I then determined the average of these combined figures. This method yields a more accurate result than simply determining the average number of charges for an entire period, the average population for the same period, and converting those figures into an average per 100,000 persons.

See William Lee (1835). The case involved the anal rape of a ten-year old girl. The accused was found not guilty.
capable of committing the offence during the period in question. Accordingly, I have treated fourteen as the applicable age of majority and sorted the sodomy cases according to whether they were committed on or with adults or minors. I have not, however, sorted the sodomy cases according to whether consent was or was not given, partly because consent was legally irrelevant to buggery cases at this point, and also owing to the limited nature of the record in many of the cases and the clear incentive to retrospectively withdraw consent in the face of corroborating witnesses (the evidence of an accomplice alone being insufficient to ground a conviction). Nor have I distinguished between cases involving white settlers/convicts and Indigenous persons.

The next step involved determining whether the charge(s) resulted in acquittal or conviction and, in the latter scenario, the punishment imposed. I also analyzed the ways in which cases came before the courts to ascertain whether charges were the product of official or

---

48 Males under fourteen were not considered capable of committing rape: Chitty, Commentaries, 212. They were also not treated as liable to the charge of aiding and abetting sodomy (that is, of willingly taking on a receptive role): J.F. Archbold, A Summary of the Law Relative to Pleading and Evidence in Criminal Cases; With Precedents of Indictments, &c. and the Evidence Necessary to Support Them (London, 1822), 262. See also Williams, “Victims,” 247.

49 A measure of inference was occasionally necessary. In view of the general tendency of newspapers and courts throughout the period to specifically note when a child was involved (and the age of said child), I have classified records that include more than the bare mention of a charge or conviction, and which do not refer to a child victim, as involving males aged fourteen and over.


51 See John Langbein, The Origins of Adversary Criminal Trial (Oxford: Oxford University Press, 2003), 209--11. For an example of this principle in action see the case of Esau Cheeseman (1830).

52 The reason is simple: I found only one case that mentioned Aboriginality: R v. Wilson [1814] NSWSupC 1. This may be part of a general discursive erasure, but in light of the general infrequency with which Indigenous people were brought before colonial courts in the early decades of colonization it seems more likely that buggery charges were simply not brought against Indigenous men. See Brent Salter, “‘For Want of Evidence’: Initial Impressions of Indigenous Exchanges with the First Colonial Superior Courts of Australia,” University of Tasmania Law Review 27(2) (2008): 145--60.

53 See above note 13.
community policing (i.e., was the offence observed by a prying publican or a zealous constable?).

A. 1788--1828

Table 1: Buggery Charges, 1788--1828

<table>
<thead>
<tr>
<th></th>
<th>Number of Charges</th>
<th>Number Convicted</th>
<th>Usual Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sodomy</td>
<td>3</td>
<td>2</td>
<td>Death commuted to life as convicts</td>
</tr>
<tr>
<td>Sodomy (attempt)</td>
<td>11</td>
<td>6</td>
<td>Combination of lash, pillory and prison</td>
</tr>
<tr>
<td>Bestiality</td>
<td>8</td>
<td>6</td>
<td>Death (for completed offence) / Lash, pillory and prison or further transportation (attempt)</td>
</tr>
<tr>
<td>Bestiality (attempt)</td>
<td>1</td>
<td>1</td>
<td>Lash, pillory and prison</td>
</tr>
</tbody>
</table>

|                | 23                | 15               |

In the forty-year period between the arrival of the First Fleet and the introduction of the Offences Act in July 1828, there were only three sodomy charges laid against men in the Colony, and all of these cases appear to have involved acts with or on adult males. The first of these cases was not heard until 1808, and involved charges against two men, Richard Moxworthy and John Hopkins, for actions committed onboard a ship. The case (discussed further below) resulted in the only convictions for sodomy (in the specific sense in which I am

54 See further Swanton, Police of Sydney.
using the term here) in the entire period: both men were sentenced to death, but pardoned on condition of serving as convicts for life.

The same period saw a further eleven charges of assault with intent to commit sodomy;\(^{55}\) all of those charges related to acts committed with or on males, two of whom were under the age of fourteen. The results in those two latter cases were evenly split: Francis Hobra (1813),\(^{56}\) found guilty of assaulting a boy of seven, was sentenced to three years’ jail, 100 lashes and time in the pillory; John Wilson (1809) was found not guilty of the same charge. Of the attempt cases involving males over fourteen, the first being the trial of Francis Wilkinson (1796), five out of nine charges resulted in guilty verdicts, with sentences similar to that given to Francis Hobra.

Concerning bestiality, eight charges were brought alleging the capital offence, and a further one charge of attempt. Seven convictions resulted, but interestingly six of those were convictions for attempt only; that is, in six out of the eight cases in which capital charges were brought, guilty verdicts were returned only in respect of the lesser offence (the one case in which attempt only was charged also resulted in a guilty verdict). The only case in which a guilty verdict was returned in respect of the completed act of buggery with an animal resulted in the only sentence of death to be carried out for the crime of buggery in the entire period 1788--1827. James Reece (1799), convicted of sexual congress with “a Certain Sow,” was executed on 8 February 1799. The sentences for those found guilty of attempts varied between

---

\(^{55}\) An 1807 case involving an unnamed man is ambiguous. It refers only to an “unnatural attempt,” which could have referred to an attempt at sodomy or bestiality. I have not included this case in the figures for either attempted sodomy or attempted bestiality. Another case from 1809 involving one John Boulton concerned “acts of indecency,” resulting in a conviction and a sentence of one month’s imprisonment and the pillory. Again, owing to the uncertainty about the nature of the offence, I have not included it in the figures referred to in the text above.

\(^{56}\) Hobra’s record is found within that concerning one Giovanni Astardo (1813), who was charged with theft.
a combination of prison, lash and pillory, or further transportation to places such as Norfolk Island.

In all, then, there were twenty-three buggery cases against men in NSW between 1788 and 1828. Of those twenty-three charges, fifteen convictions resulted; somewhat surprisingly, only one man (Reece) was executed. While figures per 100,000 persons are of limited utility in a situation where more than a decade sometimes passed between the issuing of buggery or attempt charges, when averaged out over the entire period they give at least a baseline for further analysis. Thus, the fourteen sodomy-related charges result in an average annual rate of 3.165 charges per 100,000 persons. The nine bestiality-related charges give an average annual of 1.87 charges per 100,000 persons. The combined average annual rate is 5.035 buggery charges per 100,000 persons. By way of contrast, Harry Cocks’ investigation into committal rates for sodomy and related misdemeanors (not bestiality) in England between 1806–1900 showed a rate varying between just over 0.2 and around 0.9 committals per 100,000 in the period between 1806 and 1828. The two societies and their legal systems cannot, of course, be directly compared at this early juncture, but the figures from NSW serve to indicate that when considered in relation to population size, the number of sodomy and bestiality charges in the early decades was not quite as low as initial appearances might suggest.

---

57 To account for the fact that I split the year 1828 between two sets of data, I treated one year as running from August to the following July. That is, August 1788 to July 1789, August 1789 to July 1790, and so on. (While this method should exclude any charges before August 1788, there were none and so it was possible to extend the period back to the arrival of the First Fleet without affecting the results.) This was important due to the method adopted to calculate annual average figures. The population statistics that I used, obtained from Australian Bureau of Statistics (ABS), simply refer to population for each calendar year; since the population generally increased from year-to-year in the period in question, I erred on the side of caution and used the figure for the higher calendar year in determining rates per 100,000. For example, according to the ABS, the population in NSW in 1828 was 40,069, and in 1829 it was 40,916. So, for the year 1827–28, I used the 1828 population figure, and the 1829 figure for the year 1828-29. For population statistics see ABS, “3105.0.65.001--Australian Historical Population Statistics, 2014. Population Size and Growth.” Table 1.1. Population (a)(b)(c) by sex, states and territories, 31 December, 1788 onwards.

Given the structure of early NSW society it is not especially surprising to find that the majority of cases in this period were brought against convicts.\textsuperscript{59} Nor, in the absence of a modern police force,\textsuperscript{60} is it surprising that most cases came to court as a result of surveillance by fellow convicts, seamen and military officers operating within their respective milieus. The first man charged with bestiality in NSW, George Hyson (1796), convict labourer, was convicted (of assault with intent to commit buggery) based on the evidence given by another convict, James Ormond, who deposed: “That on the fourth of April [1796], between the hours of twelve and one in the (?), as he was returning from Cockle Bay, whither he went for some (greens? …) on passing by a house which had been used as a stable, hearing a noise he looked in, & in one corner of the room he saw the prisoner upon his knees with a (terrier? …) bitch … with his trowsers down—that his private parts were close to the bitch’s—close to her backside … that when he [Hyson] perceived him (the witness) he appeared much (flurried?) & immediately buttoned up his trowsers.” Ormond’s evidence was corroborated by a local constable who did not witness the act but simply recounted what Ormond had told him. (The constable, Henry Kable, was a prominent emancipist who, along with his wife Susannah, successfully brought the first civil action in the Colony in 1788, against the master of the ship that had brought them to NSW for the loss of goods shipped on board the vessel; the Court of Civil Jurisdiction’s acceptance of the Kables’ standing to sue established the legal personhood of convicts within the new Colony.\textsuperscript{61})

\textsuperscript{59} See Katrina Alford, \textit{Production or Reproduction? An Economic History of Women in Australia, 1788--1850} (Melbourne: Oxford University Press, 1984), 15, on the number of convicts as a proportion of population in the period 1788--1851.

\textsuperscript{60} See Swanton, \textit{Police of Sydney}.

\textsuperscript{61} David Neal, \textit{The Rule of Law in a Penal Colony: Law and Politics in Early New South Wales} (Melbourne: Cambridge University Press, 1991), 1--6. Under extant English law, persons sentenced to death—as the Kables initially were—were subject to the law of attainder, meaning that they were unable to assert civil rights.
Similarly, the first men convicted of sodomy in the Colony, Moxworthy and Hopkins (1808), were observed en flagrante by their fellow crew on board the American ship Hero. Moxworthy’s subsequent (1817) petition to Governor Macquarie for clemency records that the pair were “charged with Fellony on the Coast of [New] Mexico and … Tryed and convicted there for the said charge by the Illegal Government.” Presumably, then, the men were transported from New Mexico to NSW as prisoners, where they were tried, found guilty, and sentenced to death. Clemency, however, was extended to the men by Lieutenant Governor Joseph Foveaux, possibly in an attempt to avoid public spectacle in the wake of his assumption of temporary control of NSW following Governor Bligh’s arrest in January 1808 by the New South Wales Corps.62

Only one case in the entire period between 1788 and 1828 appears to have been brought against a man from the upper classes of NSW society: charges of attempted sodomy leveled against Captain David Dundas (1809) by numerous members of the NSW Corps. According to Sergeant Major Thomas Whittle, a number of officers “told me that an attempt was made by the Prisoner on three of the Centries to have an improper connexion with them.” While his accusers were free men, Dundas—reflecting the transplantation of English concerns with class into colonial NSW—nevertheless urged the Court to treat their evidence with the greatest care owing to “the looseness of Principles which prevails among the lower Classes of Persons in the

62 See further H.V. Evatt, Rum Rebellion, A Study of the Overthrow of Governor Bligh by John Macarthur and the New South Wales Corps (Sydney: Angus & Robertson, 1938). This reading fits with Foveaux’s apparent pragmatism on the administration of law in this period of the Colony’s history. See Lord v. Scott, in which Foveaux declared: “In a Colony so peculiarly circumstanced as this is, at such an immense distance from the Mother Country, not enjoying the advantage of a Professional Lawyer to preside as Deputy Judge-Advocate in the Civil Court, and not affording the assistance of advocates, or agents regularly bred, or at all qualified to give advice in Legal Questions it is impossible to regulate the dealings between Man and Man by the strict letter of the Law, or to judge of them by any other criterion than that of sound equity and common sense.” Bruce Kercher, Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales (Sydney: The Federation Press, 1996), 11 quoting Lt-Gov. Foveaux in Lord v. Scott (1808) Court of Appeal. Cf. the sadistic image of Foveaux presented by Hughes, Fatal Shore, 113–19.
Colony.” Whether or not the Court agreed with Dundas on this point is unclear. He was acquitted, but the evidence given by the various men (discussed below) was far from overwhelming, amounting to little more than assertions of importunate behaviour and groping.

B. 1828–1838

The decade following the introduction of the Offences Act saw a dramatic increase in the number of charges laid against men in NSW for sodomy. Soon after the Act’s commencement, sodomy charges were brought against the Chief Officer of the Royal Sovereign, Alexander Brown (1828), and two men with whom it was alleged he had been intimate, Edward Curtiss and Richard Lester. The charges against Brown and Curtiss alleged, “with force and arms upon the high seas within the jurisdiction of the Admiralty of England in and on board of a certain ship or vessel called the Royal Sovereign, [Brown] feloniously wickedly and against the order of nature had a venereal affair with one Edward Curtiss and did then and there … know the said Edward Curtiss and with him the said Edward Curtiss did then and there … perpetrate the detestable and abominable crime of Buggery.” Similar charges were made in the case against Brown and Lester. In both cases evidence was given by other seamen that, on separate occasions, they witnessed Brown sodomize Curtiss and Lester in Brown’s quarters. In the case brought against Brown and Curtiss, the jury returned verdicts of not guilty against both men. In the other case, however, guilty verdicts were returned and both Brown and Lester were sentenced to death. Brown was executed the following week, but Lester, presumably because of his youth (and perhaps the receptive role he appears to have taken with Brown) was reprieved on condition of his immediately leaving the Colony.
A similar case in 1828 involved four men belonging to a whaling vessel: Henry Airs, James Stephenson, Thomas Turner, and one unnamed man. According to The Australian newspaper: “Suspecting, from the apparent close intimacy of the parties, and their secluded habits, that all was not correct, the Captain and others took an opportunity of observing their conduct, with more than common circumspection, which finally induced the Captain to bring his vessel into port, and the merits of the case under legal investigation.” The observers would seem to have been either too suspicious or too circumspect in their surveillance—the four accused men were acquitted.

While these cases are something of an aberration in terms of the number of charges involved and the maritime location in which they were alleged to have occurred, they presage the remarkable increase in the prevalence and consistency of sodomy charges in the 1830s.

Table 2: Buggery Charges, 1828--1838

<table>
<thead>
<tr>
<th></th>
<th>Number of Charges</th>
<th>Number Convicted</th>
<th>Usual Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sodomy</td>
<td>26</td>
<td>8</td>
<td>Death (usually commuted to imprisonment on Norfolk Island for periods ranging from 7 years to life)</td>
</tr>
<tr>
<td>Sodomy (attempt)</td>
<td>8</td>
<td>7</td>
<td>Hard labour</td>
</tr>
<tr>
<td>Bestiality</td>
<td>8</td>
<td>4</td>
<td>Death commuted to life on Norfolk Island</td>
</tr>
<tr>
<td>Bestiality (attempt)</td>
<td>2</td>
<td>2</td>
<td>Hard labour</td>
</tr>
<tr>
<td></td>
<td><strong>44</strong></td>
<td><strong>21</strong></td>
<td></td>
</tr>
</tbody>
</table>
Between 1828 and 1838 there were thirty-four cases against men for sodomy and attempted sodomy. This compares with just fourteen such charges in the preceding forty-year period. Even when increasing population size is taken into account, the average annual rate nearly doubled, from 3.165 charges per 100,000 people in 1788–1828 to 5.87 charges per 100,000 people in 1828–1838. Again, a direct comparison between England and NSW at this point is problematic, but to give a measure of comparative context, Cocks’ work on English buggery committals (excluding bestiality) in the same period revealed a rate between 0.4 and 0.9 charges per 100,000 persons. Equally striking is the reversal in the nature of the sodomy charges that were laid. Whereas eleven of fourteen charges in the earlier period were for attempt, only eight of thirty-four charges in the second period alleged attempt; that is, twenty-six of thirty-four charges were for the capital offence (and there was no mistaking that the offence was capital--the Offences Act specifically provided that persons convicted of “the abominable crime of Buggery … shall suffer Death”).

In raw terms the figures for bestiality and attempted bestiality also suggest a significant increase compared with the earlier period: ten charges in 1828–1838 compared with nine in the previous forty-year period. In this instance, however, a different picture does emerge when population size is taken into account. Measured on that basis, the average annual rate for bestiality actually fell from an average of 1.87 charges per 100,000 persons to 1.72 charges in

---

63 I also analyzed six reports of “gross” or “disgraceful” conduct. While it is possible that those cases involved buggery or attempted buggery, the records preclude certainty, and the comparatively low sentences imposed on those found guilty of such offences suggests that something less than penetration was at issue. Accordingly, those cases have not been included. See Cornelius Brown (1834), Henry Mellor (1834), Edward Lawler (1837), John Daly (1837), John Saunders (1837), William Tighe (1837). Similarly, an 1835 case brought against Nicholas Heyden appears to have involved an “unnatural attempt”, but the charge in the case was murder and no details concerning the nature of the attempt are included. Hence, that case is also not included in the sample.

64 While a total of forty-eight cases over a fifty-year period is a relatively small sample, this fact does not, in my view, detract from the historical usefulness of the records in deepening our understanding of the intersection between law and male sexuality in colonial NSW. See further Byrne, Criminal Law and Colonial Subject, 3–4.

65 Offences Act, 9 Geo. IV, c.31, s.15.
1828–1838. When combined with the sodomy figures, the overall average annual number of charges for buggery stands at 7.6 per 100,000 persons, compared to 5.035 for the preceding forty-year period.

There is one other distinctive difference between the cases heard pre- and post-1828: a move away from punishment as spectacle. In the first period, six men were sentenced to punishments involving either or both the lash and time in the pillory. Not a single person in the second period was sentenced to punishment of this sort. By no means does this indicate a softening attitude towards buggery or crime in the 1830s–death and transportation for extended periods to Norfolk Island were not uncommon sentences; it does, however, suggest a shift in the logic of punishment. This is explored in greater depth below.

The profile of the men charged with buggery in this period closely resembles that seen in the first four decades: that is, the vast majority of the accused men were convict labourers. Again, this is not especially surprising in light of the number of convicts who were transported to NSW in the 1820s and 1830s.66 The notable exception is the series of cases in 1828 against Alexander Brown, Edward Curtiss, Richard Lester, Henry Airs and three others, all of who were seamen. This stands as something of a contrast to the situation in England, where it appears that a much broader cross-section of society were brought before the courts. Cocks’s research revealed that, “the largest single occupational/status groups represented in reported cases were artisans/skilled labourers and gentlemen” (although he noted that the preponderance of newspaper references to gentlemen and other professionals “reflects editorial decisions about what was likely to be of interest to a public fascinated by the transgressions of the respectable”).67

---

67 Cocks, Nameless Offences, 26.
Greater congruity between NSW and England is apparent in the routes by which cases came before the courts. According to Cocks, until the early 1840s in England, “prosecutions were still, as far as can be determined, initiated by individual men and women who were parties to the acts, or who claimed to be their inadvertent witness or unwilling ‘victim’.”68 The same can be said of NSW.69 The cases reveal that the majority of charges arose out of observation by passersby, masters, other convicts, or by way of complaint made by victims of assault (or, in the case of children, their parents).70 In other words, the majority of charges arose from community rather than official surveillance; and many of the lay witnesses in the cases surveyed herein gave evidence of having followed accused persons due to suspected criminal intent. To confirm their suspicions (and to satisfy their own prurient interest, one suspects), those witnesses would often remain watching the “action” for many minutes before intervening or calling for the assistance of officials.

Perhaps the best example is a case from 1834 against nineteen-year old Samuel Jones (labourer), who was found guilty of buggery after being witnessed having anal sex with an unknown man in the Sydney Domain (an area of public land situated on Sydney Harbour). The witness, Private James Crain, deposed that upon seeing the two men lying on the ground, “I stood for as much as 7 or 8 minutes watching them”; it was only when Jones realized Crain was watching that the activity ceased and the men attempted to escape. Crain caught Jones, at which

68 Ibid., 43.
69 See Byrne, Criminal Law and Colonial Subject, 106--9.
70 I found only two cases in which constables appear to have directly witnessed the events upon which charges were brought (as opposed to giving evidence of being informed about the commission of an offence by other eyewitnesses): Robert Stock (1826), found not guilty of buggery but convicted for the attempt; and William Smith (1834), found guilty of buggery and sentenced to death, commuted to hard labour in chains for life at Norfolk Island. (However, the constable who witnessed Smith only attended the scene after being informed of its commission by two other civilian witnesses.) It was more common for members of the military to bring complaints against civilians, convicts and other military men, but even then the numbers are comparatively low, with six cases over the entire period from 1788 to 1838: see David Dundas (1809) (complaint by various Privates against Captain); Daniel Gilmore (1812) (civilian witnessed by Private); Edward Bedford (1822) (Private witnessed by Corporal); Collins and Hogan (1832) (Privates witnessed by another Private); Samuel Jones (1834) (convict witnessed by Private); and Thomas McLean (1836) (complaint by Private against Private).
point, “I made him let down his trowsers. I examined his yard. It was quite red.” (Presumably Jones acquiesced to Crain’s demand in view of his superior position within the Colony.) For this apparently consensual encounter, Jones was sentenced “to be hung by the neck … until dead,” though this was quickly commuted to hard labour in irons on Norfolk Island for life.

An example of a complaint brought by the subject of an unwanted advance is the 1830 charge of assault with intent to commit “that detestable crime” brought against William Augustus Forsyth. The case arose after one James Roach made a complaint to Lionel Hay, who was in charge of the store ship on which both Forsyth and Roach worked. In Roach’s words: “The prisoner and I slept in the kitchen in the same bed. I was reading a book at the table & the prisoner brought both the beds & made them together alongside. This was unusual. After he made the beds I laid down & got up again. I left off reading & he went out. I went to bed & he came in again. I went to sleep. Between one and two morning I was awoken by this man [Forsyth]. He was attempting to bugger. I was lying on my side. My back was towards him. This man woke me by attempting to bugger.” Having been woken in this manner, Roach left the room in search of somewhere else to sleep, whereupon Hay discovered him and questioned him as to his movements. As Roach put it, “I told him the cause.” Forsyth was found guilty and sentenced to work on the roads in irons for twelve months—a common punishment in the 1820s and 1830s, and a significant contributor to the development of the Colony’s infrastructure.71

A particularly stark instance of surveillance of convict labourers is the set of charges brought against James Cullen and George Dutton in 1834. William Constable, a self-described stock-keeper, followed the men and observed “Cullen on top of the boy Dutton.” In Constable’s

---

words, “I had suspicions before--& that made me watch them.” According to Justice Dowling’s notebook, Constable gave the following evidence:

I saw Cullen & the boy walking down in front of the door. I saw the boy look back or around two or 3 times. He was about a foot space behind Cullen, who had no hat on. I saw them go towards the creek a hundred yards from where I sat. I saw them both look round in a very suspicious way as if going to do something they should not & immediately after that they both popped into the shrubb[ery]. It was about 4 or 5 yards (?) wide. I then got up from my seat & went down to the last place I saw them--the edge of the scrub. When I got there I could neither hear or see them at first. I listened a short time & I could hear them talk quite plain. … I hastened in quick--& I came opposite to a large brushy bush … I then peeped through the (bramble ?) as well as I could …

At which point Constable witnessed the two men semi-clothed and lying together on the ground. Cullen and Dutton, or “Bugger and Buggeree” as Dowling called them, were acquitted of the capital charge but found guilty of its attempt, and sentenced to two years’ work on the roads in irons.

C. Speaking the Unspeakable

The evidence given by witnesses in these cases was clearly far from circumspect. Indeed, the lurid nature of the testimony in buggery cases was a feature throughout the entire period in question.\footnote{As the cases against Jones (1834) and Cullen and Dutton (1834) show, the detailed descriptions in buggery cases were matched, and indeed sometimes based upon, detailed bodily inspection of accused men. Jones was forcibly examined by Private Crain, while in the case against Cullen and Dutton, the Assistant Surgeon gave evidence of having “examined the private parts of Cullen” and finding “some moisture on the end of the penis”.} Despite the mantra repeated in cases that buggery was a sin “not to be named
among Christians," and an unusual degree of reticence in popular reports of buggery cases (the euphemisms “unnatural” and “nameless” signifying the horrors of buggery), the records of trials conducted between 1788–1838 in NSW reveal that witnesses were by no means chary in their evidence of sex between men and bestiality. Far from being “unspeakable,” the evidentiary requirements for a buggery conviction meant that the various acts were in many cases the subject of detailed description. The buggery trial was, in Foucault’s terms, “an apparatus for producing an ever greater quantity of discourse about sex.”

As in England, buggery indictments in NSW generally alleged that the accused “did commit and perpetrate that detestable and abominable Crime of Buggery (not to be named among Christians) to the great Displeasure of Almighty God.” This was the precise allegation in the first case resulting in execution for buggery, that of James Reece (1799), charged with having had “a venereal affair” with “a Certain Sow the Property of the said Patrick Brannagh.” The evidence given against Reece, however, was about as far from euphemism as possible. According to the Minutes of Proceedings from the hearing on 31 January 1799, one of the witnesses deposed in court that “he saw the Prisoner withdraw his private parts from out of the Body of the said Sow and that his Semen or (nature ?) flew from him when the kind parts of the said sow— that the Prisoner’s Penis was also in a like condition and that this witness was particularly observant as to the Transition.” Indeed he was. The other witness was equally observant, noting that “upon viewing the Sow more minutely he discovered her private parts to be much inflamed and that the hinder parts of the Sow were besmeared with what he (believes

73 William Blackstone, whose Commentaries of the Laws of England were extremely influential in colonial NSW (see Bruce Kercher, An Unruly Child: A History of Law in Australia (Sydney: Allen & Unwin, 1995), xii), noted “the delicacy of our English law” with respect to this “offence of so dark a nature”, treating it “in it’s [sic] very indictments, as a crime not fit to be named.” Blackstone, Commentaries, Bk. IV, 215–16.

74 Foucault, History of Sexuality, 23. To be clear, I am not making any claim here about moral stance of these witnesses apropos buggery—the descriptions are in fact notable for their almost clinical tone. I am simply highlighting the discursive disjunction between the legal and social framing of buggery and the detailed descriptions required or generated by the law of evidence.
?) to have been Nature discharge from Prisoner.” In accordance with Scripture, the sow was also condemned to death for her role in the matter; Brannagh sought compensation for the loss of the sow and eleven piglets born after the assault, all of which “necessarily he lost by the Condemnation of the said Sow.” The record does not disclose whether his application was granted.

Not all of the evidence in buggery cases was quite as lurid as that in Reece’s case, but it still went far beyond the type of allusions used in the popular press (which often referred simply to the conviction or acquittal of a person charged with an “unnatural offence”). The case against Captain David Dundas (1809), for instance, rested in part on evidence from Corporal Peter Ashford that Dundas “stroked me down the fore part of my trousers with his hand” and asked him, “what shall I give you to give me a genteel F______g?” To similar effect, Private James Stephens deposed that Dundas “tickled me in the palm of my hand and took hold of me by my fingers, and rubbed the back of my hand down the front of his breeches or trowsers.”

In the cases against Alexander Brown, executed in 1828 for committing buggery on board ship, the ship’s steward gave evidence that upon witnessing Edward Curtiss enter Brown’s cabin, “I got up from my bed, looking thru’ a crack in Mr Brown’s cabin door,” at which point he saw Curtiss “on his hands and knees on the deck … Mr Brown’s head and the upper part of his body I could see and he was in motion backwards and forwards.” That evidence was supplemented by testimony from John Coombs (seaman on board the Royal Sovereign) to the following effect: “that whilst the ship was off Japan I heard the boy Phillips confess that Brown had been connected with him unnaturally and that the Captain asked him how much of Brown

75 The text in parentheses is as it appears in the record.
76 Leviticus 20:15–16. See also the case of James Strahan (1809), in which the owner of the bitch said to have been assaulted by Strahan “immediately hung” the animal. See further Robert F. Oaks, “‘Things Fearful to Name’: Sodomy and Buggery in Seventeenth-Century New England,” Journal of Social History 12 (1978): 268–81.
77 The text is reproduced as it appears in the record.
had been into him and he said that about 3 or 4 inches, he could not say exactly. The Captain said: ‘was it water that came from him?’ He said: ‘No. It was thick, flabby, stuff.’” In its report on the case, the *Sydney Gazette* primly noted: “The disgusting circumstances that were detailed, in the course of the trial, renders it unfit to be inserted in the usual place in our columns.”

A few years later, the *Sydney Herald* included a similarly clipped two-line report concerning two soldiers who “were indicted for attempting to commit an unnatural crime.” The description of the unnatural crime given by witnesses against the men, Privates John Collins (or Collings) and Michael Hogan (1832), was rather more vivid. According to the Proceedings of a Court of Enquiry held on 3 March 1832, Private Blake Dowling had, the previous night, “heard a noise under a bedstead a short distance from where [he] lay” in the Barracks and wakened one Corporal Newell, who in turn fetched a Serjeant and another Corporal: “Newell had a light with him, but he kept it concealed until he came up to the bed where we had heard the noise. When the light was shewn I saw the two Prisoners lying on the ground between two Bedsteads. Collings’ backside was close up against Hogan’s private parts. Corporal Tool took hold of Hogan’s legs and pulled him away from Collings [sic] backside. I saw Hogan’s Prick drawn from the Arse of Collings—-it must have entered the body of Collings.” To similar effect, Corporal Newell deposed that “the men were locked very fast and he had much difficulty in separating them,” while Serjeant John Smith “saw Hogan’s private member in a state of erection drawn from between Collings[’] legs.” Despite this wealth of eyewitness evidence of penetration, the men were only charged with attempting an unnatural offence, for which they were found guilty and sentenced to twelve months’ imprisonment with hard labour. As
discussed further below, it seems that in this case the Court--fortunatel for Collins and Hogan--incorrectly applied the pre-1828 rule requiring proof of ejaculation for a charge of buggery.

No such fortune befell the aforementioned Samuel Jones (1834), who was also observed engaging in anal sex--in this case in the Sydney Domain. The witness--in addition to his evidence of watching Jones for seven or eight minutes before making his presence known--declared: “I saw the prisoner have connexion with the other man. I mean that this man’s private parts was in the fundament of the other man. I could see the naked person of the man under him. I saw his yard.” Upon this evidence Jones was charged with and found guilty of committing buggery.

The evidence in these cases stands as an example of the nineteenth century’s “immense verbosity” in sexual discourse. The law (and the press) in colonial NSW whispered that buggery was an offence not to be named, but in the same instant it proclaimed the necessity for witnesses to loudly speak forth the truth of buggery’s existence and the manner of its commission in order to secure the convictions of those who stood accused.

III. Contextualizing the Data

The cases show that from around 1828 a distinct shift occurred in the pattern of prosecution and punishment of buggery in NSW: there was a marked increase in the overall number of sodomy charges brought before the courts (whereas the rate of bestiality charges remained steady); a tendency to charge those accused of sodomy with the capital offence, rather than the misdemeanor of attempt; and a move away from the use of lash and pillory as forms of punishment. This Part considers some of the possible links between these trends, the

78 Foucault, History of Sexuality, 33.
introduction of the Offences Act in 1828, the community-based manner in which complaints generally came to the attention of authorities, and broader socio-political factors within the Colony.

A. Community Surveillance and Colonial Tensions

At first glance, the simplest explanation for the increased rate of buggery charges post-1828 is the change in the law of evidence in the Offences Act. However, when it is recalled that charges were, by and large, the result of community surveillance, the existence of a causal relation between the Act and the increase shown by the data stumbles in the absence of clear evidence that the public was aware of the Act’s introduction and the changes it made to the law of buggery. The Act was certainly covered by local newspapers, but there was also a measure of uncertainty among the population as to its application in NSW. As it came to be understood that the Act did indeed operate in the Colony, and as more cases were tried under its provisions, it seems probable that awareness of the Act increased on a community level; however, it also seems unlikely that the Act alone can explain the surge in buggery cases.

Another explanation for the change might simply be that more men were having more sex with other men in situations that left them vulnerable to public censure. While the general climate of legal and social intolerance towards buggery suggests the implausibility of such a reading, other factors point to the possibility that it was at least part of the explanation. In

---


81 I am suggesting the possibility of an increase in the number of sexual acts between men, not an increase in any sort of self-identification related to sexual practices. See generally Foucault, History of Sexuality.
In particular, it seems relevant to note that, in the wake of Bigge’s 1822 Report into the State of the Colony of New South Wales (discussed further below), convicts were increasingly assigned to private masters in rural locations;\(^82\) in these areas, the male-to-female sex ratio was even more dramatically skewed against men than it was in Sydney (the overall rate for convicts in NSW in 1834 stood at roughly nine-to-one).\(^83\) In conjunction with the privacy (sometimes) afforded by the bush,\(^84\) the heavy drinking that is recorded to have been commonplace among convicts,\(^85\) and the difficulty for convict men of forming relationships with women (should they have desired them) in the post-Bigge environment, it is not entirely implausible that situational sodomy increased in the 1820s and 1830s.\(^86\) In relation to the specific cases under consideration here, however, this explanation—which pervades much earlier historiography on “unnatural” male sexuality in NSW\(^87\)—is also insufficient. Around half of the charges between 1828--1838 were brought against residents of Sydney, and in the cases from more rural locations the general paucity of contextual discussion makes it impossible to determine why, and indeed whether, sexual contact between men took place. In short, more sex may have been occurring, and it may have been the result of situational factors, but this alone cannot explain the rise in charges evident in the data.


\(^83\) Gilchrist, “Male Convict Sexuality,” 343, citing figures given in the Colonist, 11 February 1834 (21,845 male convicts and 2698 female convicts). As late as 1855, when sex ratios in the cities were almost balanced, the rate in rural NSW was still around four to one. See Alastair Davidson, The Invisible State: The Formation of the Australian State 1788-1901 (Melbourne: Cambridge University Press, 1991), 50.

\(^84\) See Hirst, Convict Society, 55--56: “In the pastoral areas of the interior convicts were at all times away from their masters’ eyes.” But see the case of Cullen and Dutton (1834).

\(^85\) Ibid., 12, 68.

\(^86\) In making this suggestion I absolutely do not seek to undermine the genuine preference some or even many of these men had for sexual contact with other men—or the fact that sexual preference and opportunism may have coincided.

\(^87\) See Gilchrist, “Male Convict Sexuality,” 26, for discussion of this earlier historiographical position.
A more complete explanation needs to consider the people who brought acts of buggery to the attention of authorities. As discussed in Part II, buggery charges in NSW in the first 50 years of colonization were primarily the result of community, not official, surveillance. That is, the steep increase in charges post-1828 was not the result of zealous policing in any official sense--victims or civilian observers made the vast majority of complaints. What, then, might explain this apparent increase in the extent of community surveillance of male sexuality? The motivations of individual witnesses are, and will remain, generally opaque, but it is possible to identify certain broader socio-political factors that seem likely to have played a role in the post-1828 increase in buggery charges.

Of particular salience in this context is the increasingly repressive treatment of convicts in NSW in the 1820s and 1830s. A crucial turning point was Bigge’s 1822 Report, which responded to growing (though hardly new) concerns in Sydney and London about the place of convicts--both emancipated and bonded--within NSW society. The years immediately preceding the Report had seen a distinct increase in the numbers of convicts being sent to NSW--the result of domestic unrest in Britain following the end of the Napoleonic Wars. Bigge was therefore commissioned by the British Government to determine whether, and if so

---

88 Frank Bongiorno has also noted this feature of buggery prosecutions in the early decades of the Colony: Frank Bongiorno, *The Sex Lives of Australians* (Collingwood: Black Inc., 2012), 7.
89 This is not to downplay the enormous emphasis placed on female sexuality, especially of convict women, and its role in social disorder: see Patricia Grimshaw, Marilyn Lake, Ann McGrath, and Marian Quartly, *Creating a Nation* (Ringwood: Penguin, 1996), 77.
91 In 1819 the Hyde Park Barracks opened as a place to house convicts working for the government in and around Sydney. According to Hirst, “[f]or the first time in the thirty years of the colony’s history, convicts were to be under constant surveillance”: Hirst, *Convict Society* 41.
how, transportation could be made “an object of real terror.” In the wake of his Report, “[p]unishment, rather than productivity, became the guiding principle” within the Colony, resulting in an “increasing militarisation of penal labour and discipline.” In particular, Bigge recommended a much greater use of private assignment of convicts to masters in rural areas, the establishment of remote penal settlements, and a generalized “legal and political subordination of convicts and emancipists.” As Ford and Roberts have noted, “[e]mancipists were to be excluded from public office, large land grants and patronage networks. Convicts were to be controlled with more administrative rigour, greater social isolation and fiercer regimes of exemplary punishment.” The nexus between crime and convictism was thus emphasized by Governor Ralph Darling, whose appointment in 1825 ushered in a particularly punitive phase in the history of NSW. By 1828, “state surveillance provided a police officer for every 96 persons in New South Wales”—a ratio more than ten times that in rural England.

---

96 As Ford and Roberts have noted, ‘Bigge’s “Directions for the New Settlements” designed a system that married transportation within New South Wales with many elements of the emerging principles of the penitentiary. … These outposts would exemplify many of the elements that Bentham and others thought absent from transportation.” Ford and Roberts, “New South Wales Penal Settlements.” Some two decades prior to the publication of Bigge’s Report, Jeremy Bentham had penned his comparison of the modern panoptic penitentiary with the existing system of transportation to NSW, advocating strenuously for the adoption of the former over the continuation of the latter. See Jeremy Bentham, “Panopticon versus New South Wales: or, the Panopticon Penitentiary System, and the Penal Colonization System, Compared,” in The Works of Jeremy Bentham, published under the superintendence of his executor, John Bowring (Edinburgh: William Tait, 1838–43), Vol. IV, 173. In this respect, the implementation of Bigge’s recommendations regarding penal settlements amounted to an endorsement of Bentham’s disciplinary model of penal reform—a process that would be repeated some fifteen years later in William Molesworth’s inquiry into transportation in NSW: see Part IV below. On panopticism see Foucault, Discipline and Punish, 195–228.
97 Ford and Roberts, “Expansion”, 122. For example, the previous practice of allowing convicts to work for wages in the afternoon was abandoned; thus, “after 35 years the last vestiges of the convicts ‘own time’ disappeared.” Hirst, Convict Society, 46.
99 Peter Grabosky, Sydney in Ferment: Crime, Dissent, and Official Reaction, 1788 to 1973 (Canberra: Australian National University Press, 1977), 63. See also Hughes, Fatal Shore, 428, noting a significant increase in the number of floggings between 1830 and 1835. For a more sympathetic picture of Darling see Richard Therry,
While the cases show that it was generally not police officers who performed the surveillance that led to buggery charges, it is possible that their increased presence facilitated the making of more complaints by civilians, particularly in the disciplinary environment of Richard Bourke’s governorship (1831–37).\(^{101}\) Indeed, it seems clear that official concern over convict behaviour extended to the general population of NSW, particularly since the “[n]ew technologies of subordination”--notably penal settlements at Port Macquarie, Moreton Bay and Norfolk Island;\(^{102}\) the new system of government gang labour;\(^{103}\) and the corresponding curtailment of convicts’ freedom of movement and their earlier abilities to engage in paid work outside of service\(^{104}\)-- “did not assure social order.”\(^{105}\) As Roberts has shown, the crackdown on convicts in the 1820s and 1830s was not met with passivity; rather, “this period produced a number of law-and-order emergencies, including serious conflict with Aboriginal populations and a surge of convict disorder that constituted a formative phase in the phenomenon of Australian bushranging.”\(^{106}\) In turn, this convict disorder produced within the general population a “specific fear of white, lower-class criminals,”\(^{107}\) which translated into acute

---


\(^{101}\) Evans, “An Object of Real Terror,” 57--58. On the “pitiful police force” in rural NSW prior to the 1820s see Hirst, Convict Society, 145--46.

\(^{102}\) David Andrew Roberts, “The ‘illegal sentences which magistrates were daily passing’: The Backstory to Governor Richard Bourke’s 1832 Punishment and Summary Jurisdiction Act in Convict New South Wales,” Journal of Legal History 38 (2017): 231--53, 233. According to Grabosky, “the years 1834 and 1835 were among the busiest ever for New South Wales hangmen”: Ferment, 65. See also Evans, “An Object of Real Terror,” 58.


\(^{105}\) Hirst, Convict Society, 46.


\(^{107}\) Gilchrist, “Male Convict Sexuality,” 46.
social anxiety over convicts who “were regarded as crime prone by definition.” Depending on the figures one uses, it may or may not be the case that criminal activity actually increased in the 1830s; the point, however, is that it was perceived as an issue requiring attention. In this context, and in view of the extensive coverage of criminal trials in newspapers of the time, it seems plausible to infer that at least part of the rise in community complaints regarding sex between men was the result of a heightened degree of surveillance of convicts by a population fearful of crime and contamination.

Bigge’s Report also highlighted an issue that had troubled administrators from the very beginnings of colonization: the imbalance in the sex ratio and the opportunities this created for social and sexual disorder. Official concern over sexual and relational practices in NSW was present from the very outset of the Colony’s establishment. In particular, “perceptions of marriage and familial life were central in establishing and solidifying the moral and social basis of a new colonial community.” Perhaps the clearest example in the first few decades after colonization is Governor Macquarie’s 1810 Proclamation to discourage cohabitation. Referring to the “Immorality and Vice prevalent among the Lower Classes of this Colony,” particularly “the scandalous and pernicious Custom so generally and shamelessly adopted throughout this Territory, of Persons of different Sexes COHABITING and living together, unsanctioned by the legal ties of MATRIMONY,” the Proclamation removed the previous ability of unmarried women to control the estates of their deceased male partners, henceforth confining

---

108 Grabosky, Ferment, 59.
109 Sturma, Vice, 86.
112 Ibid., 340.
113 Proclamation by His Excellency Lachlan Macquarie, Esquire (24 February 1810) (emphasis in original).
the privilege to married women, and effectively rendering legal marriage the norm in NSW.¹¹⁴ This emphasis on marriage was designed to encourage sexual self-responsibility, part of which involved channeling men away from liaisons with other men¹¹⁵ (and animals). Bigge’s Report emphasized the need to do more to counter the pernicious effects of an over-abundance of men in the colony: “As long as the great disproportion continues to exist between the male and female population in New South Wales, the temptations to illicit intercourse in both, and all the crimes that are committed for the purpose of supporting it, must be expected to prevail.”¹¹⁶

The British response to this dimension of Bigge’s report was to institute measures designed to address the sex imbalance. In particular, Edward Gibbon Wakefield’s plans for systematic colonization came to prominence. In Wakefield’s view, the “disproportion of the sexes” was “the greatest evil of all”; accordingly, his plan involved assisting the immigration of single women to NSW, using funds derived from the sale of land. While the implementation of this idea was not especially successful in the 1830s,¹¹⁷ troubled as it was by scandals concerning sexual impropriety on board the ships bringing the women,¹¹⁸ it served to highlight the apparent moral laxity in the Colony and the connection between this state of affairs and sexual misconduct.¹¹⁹

The Bigge Report and the assisted immigration scheme were each the subject of extensive coverage in local newspapers--part of what Bongiorno has described as “the

¹¹⁴ Grimshaw, Lake, McGrath, and Quartly, Creating a Nation, 57.
¹¹⁵ In a related manner, evidence of heterosexual inclinations could be used to cast doubt on the veracity of accusations of unnatural crimes. See R v. Wilson [1814] NSWSupC 1.
¹¹⁶ Grabosky, Ferment, 53.
¹¹⁷ See New South Wales, Legislative Council, Committee on Immigration, Final Report of the Committee on Immigration (Sydney, 1835), 4, 5, 7, 12.
¹¹⁸ Concern over sexual contact between young and adult male prisoners on ships bound for NSW also increased in the 1830s: see Catie Gilchrist, “The ‘Crime’ of Precocious Sexuality: young male convicts and the politics of separation,” Journal of Australian Colonial History 8 (2006): 43–66.
sensational exposure of ‘social evil’ to parliamentary and public view.”  

In this way, official concern (local and imperial) over moral laxity was transmitted to the general population via the release of official reports and newspaper coverage of official measures. The result was an exacerbation of longstanding colonial anxieties over the sex ratio and unnatural sexual practices. By the 1830s, “sodomy was coming to stand for the unnaturalness of convict transportation as a system of punishment,” and panic over its prevalence “was especially tied up with the threat it posed to the model of respectable family life” that was finally penetrating the lower orders of NSW society.

As Kirsten McKenzie has noted: “In the first half of the nineteenth century, the establishment of a respectable society along British lines was a global phenomenon coming into contact with the specific fluidities of local conditions. The creation of proper models of behaviour for inclusion within and exclusion from a white bourgeoisie was proceeding through internal transformations within Britain as well as on a wider imperial stage.” In both England and NSW, the idea of individual defilement was thus connected to social decay, and buggery became cathected to national strength (or weakness). In this context, surveillance of male sexuality, particularly male convict sexuality, was both a distinctly localized response to factors in the Colony, and part of a “bourgeois imperial culture of manners which stressed the importance of personal respectability and domestic morality.” The concomitants of this surveillance were, it seems, reports to officials and the levying of charges against alleged

---

120 Bongiorno, Sex Lives, 16
124 McKenzie, “Discourses of Scandal” (referring specifically to concern over domestic servants within the family).
125 Ibid.
offenders--a process of community complaint that may be viewed as a variation or extension of the “institutional incitement to speak” of sex that was so clearly on display in court cases throughout the period in question.126

On a broader level, these intersecting concerns over moral/sexual propriety and criminality may be seen as part of a more generalized social anxiety over the political situation in NSW. The 1820s and 1830s saw the beginnings of a shift away from autocratic control by the Governors, towards limited self-government.127 In 1842, a partially representative system was introduced with a newly constituted Legislative Council that was granted powers to make laws for the peace, welfare and good government of the Colony.128 Responsible government it was not129--that step had to wait until 1856.130 It was, however, a significant institutional and psychological break with England; and the prospect of this shift in the years between 1828 and 1842, when “[c]olonial agitation for self-government became general,”131 raised considerable social anxiety amongst the inhabitants of NSW over the moral standing of the Colony and its readiness for a partial severing of the Imperial umbilical cord. This is not to claim the existence of a direct causal linkage between nascent self-governance and the specific complaints referred to in Part II; rather, the suggestion is that political agitation in the 1820s and 1830s contributed to a general climate of colonial self-awareness amongst a population made acutely aware of its

126 See Foucault, History of Sexuality, 18.
127 The Legislative Council was first created in 1823 but it was a toothless entity beholden to the Governor. The Council was numerically, but not substantively, strengthened in 1828. Karl R. Cramp, The State and Federal Constitutions of Australia (Sydney: Angus & Robertson, 1913), 11--12, 18.
128 The Council consisted of thirty-six members, twenty-four of whom were to be elected by the enfranchised part of the population, while the remaining twelve members were to be selected by the Governor. The Governor could still withhold his assent from bills, but he could no longer guarantee the passage of his own legislative proposals: R.M. Hartwell, “The Pastoral Ascendency, 1820--50” in Australia: A Social and Political History, ed. G. Greenwood (Sydney: Angus & Robertson, 1955), 46--97, 67. Note, though, that all laws repugnant to British law remained invalid.
130 18 & 19 Vict., c.54.
131 Hartwell, “Pastoral Ascendency,” 66.
inadequacies by Bigge’s Report, a perceived need to refine the male population, and corresponding intolerance towards persons or acts which could impugn the moral standing of the Colony. An effort to identify and punish deviant sexual behavior was one of the results of this nation-building drive.

B. Augmenting Surveillance: Evidence and the Shift to Capital Charges

The discussion above suggests why the overall number of sodomy complaints increased. It may also go some way to explaining why that increase translated into a shift towards charging men with the capital offence rather than the misdemeanor of attempt, given that in the wake of Bigge’s Report, “[t]error and reform both marked a decisive turn away from the liberalisation of ordinary convict governance in New South Wales.” Here, however, in this more technical legal domain, it seems likely that the evidentiary changes to the Offences Act also played a significant causal role given that under the new law only penetration had to be shown to ground a charge of buggery.

The records unfortunately do not disclose how the Attorneys-General in this period determined the appropriate charges in buggery cases, but a measure of guidance can be gleaned from judicial notes and practices. (Unlike England, NSW never had a system of private prosecution in the superior courts.) These sources reveal that the NSW judiciary initially

---

132 For example, the number of colonial officials who were dismissed from their positions for personal immorality—usually cohabiting with a woman—increased noticeably in the 1820s and 1830s: see Bongiorno, Sex Lives, 17–19.

133 Ford and Roberts, “New South Wales Penal Settlements.”

134 R.R. Kidston, “The Office of Crown Prosecutor (More Particularly in New South Wales),” Australian Law Journal 32 (1958): 148–54, 149; Sturma, Vice, 79–80. Until 1823, the Deputy Judge-Advocate had combined duties of prosecutor and judge. In 1823, following the passage of the New South Wales Act and the creation of the Supreme Court, the office of Deputy Judge-Advocate was abolished and his prosecutorial duties were assigned to the Attorney General. See Woods, Criminal Law, 49. From that time on, offences cognizable in the Supreme Court were to be “prosecuted by information in the name of His Majesty’s Attorney-General or other officer appointed
viewed s.18 of the Offences Act as merely giving legislative backing to the common law of attempt rather than altering the nature of the offence of sodomy (or bestiality). This misapprehension is clearly demonstrated in the case of John Unwin (1830). On the evidence of a witness who deposed to having seen Unwin ‘having connection’ with a female dog, and other more tendentious evidence relating to previous instances, Unwin was found guilty of buggery and sentenced to death. However, the trial judge, Stephen J, subsequently wrote to the Governor noting that Unwin “had not effected his purpose by seminal emission” and recommended clemency. Minutes from the NSW Executive Council indicate that the other judges of the Court agreed with Stephen J’s interpretation. The Attorney General accordingly pardoned Unwin of the offence of buggery, though charges were laid for the misdemeanor of attempt, of which Unwin was later found guilty and for which he was sentenced to six months’ imprisonment.

The continuation of this misapprehension may well have saved the lives of Privates John Collins and Michael Hogan (1832), who were observed by a number of witnesses “locked very fast” together. Despite clear evidence of anal penetration, the men were only charged with attempting an unnatural offence and were sentenced to six months’ imprisonment. Less fortunate was Michael Connolly (1832). Assistant Judge Esquire’s report of the case to the NSW Executive Council records the following: “It appeared from the evidence that the prisoner enticed a bitch towards him and took her in his Arms and ran to the back of the Public-house.

---

for such purpose by the Governor”: Kidston, “Crown Prosecutor,” 149 quoting 9 Geo. IV., c.83, s.5. Thus, “all indictments here are strictly ex officio in the original sense of that term.” Ibid., 150. This feature of criminal procedure in NSW also suggests that, unlike in England, statutory provision for costs in cases of private prosecution probably did not contribute much to the rise in complaints or charges from 1828 onwards. See Cocks, Nameless Offences, 44; Sturma, Vice, 68, 79--80.

135 See John Unwin (1830). Justice Dowling’s notebook includes the following statement: “The 9 G 4. C. 31 s.18 does not make any alteration in the nature of the crime of Buggery. Therefore whereas prisoner penetrated the body of a Bitch dog but was disturbed before he sated his lust Held that he could not be capitally convicted.”

136 See also Thomas Maher (1830).
That he was immediately followed and found lying on his side with his Trowsers down and one of his Arms under the body of the bitch and Penis in her private parts.” The record discloses no evidence of ejaculation, yet Connolly was tried for and found guilty of the capital offence, with a sentence of death commuted to transportation to Norfolk Island for twenty-one years. It may be that the evidence of emission was deemed unspeakable and hence excluded from the limited reports of the case; but the case may also signal an emerging understanding that under the 1828 Act penetration alone was in fact sufficient to ground the capital charge.

By 1834 it seems to have been accepted by the Supreme Court that penetration alone was sufficient for a charge of buggery. In February of that year, the youthful Samuel Jones--whose amorous engagement in the Sydney Domain was, as previously noted, subject to the lingering gaze of Private Crain--was found guilty of buggery. Yet Crain’s evidence was unclear on the question of ejaculation--in his words: “I can’t say whether he remained long enough with the other man to say he had satisfied his lust.” Nevertheless, on Crain’s testimony Jones was sentenced to death, later commuted to life on Norfolk Island. The following month saw confirmation from the English courts that the approach taken in Jones’ case was, however harsh, legally correct under the law. The case, R v. Cozins,137 concerned a charge of bestiality in which the accused was interrupted prior to completion. According to Park J: “In the former state of the law, the prisoner would have been entitled to an acquittal, but, as the law is now, if there was penetration, the capital offence is completed, although there has been no emission, however, as the proof is less than was formerly required, it behoves judges and juries to see that the proof now required is satisfactory.”

From this point on, it is clear that the courts in NSW understood the effect of s.18 of the Offences Act. Tellingly, buggery charges from 1832, and particularly from 1834, were almost

---

137 R v. Cozins (1834) 6 Car. & P. 350.
always for the capital offence; the attempt charge became a backup that was resorted to when the principal charge failed to stick. For example, in 1835 James Dalton was found not guilty of bestiality with a cow, based on evidence given by one Samuel Davis that he had witnessed Dalton “with a dark brown cow in a bail with her leg tied & a small block behind her & the prisoner standing on the block with the flap of his trousers down. I saw him moving backwards against the cow’s behind. He was moving about a couple of minutes. When he got off the block he looked down at his private parts. … I did not see his private parts. I saw him only moving back--No penetration.” Justice Dowling’s notebook indicates that Dalton was subsequently remanded for misdemeanor.138 No record exists of the outcome of that subsequent charge.

These cases suggest that for the first few years of its operation, the 1828 Act may not have had a significant impact on the nature of the charges that were brought against men accused of buggery. However, it appears that from about 1832 onwards the legal profession in NSW was cognizant of the true effect of s.18 of the Act and prosecutors adopted a more aggressive approach to allegations of anal sex between men and penetration of animals, resulting in the upswing in capital charges evident in the cases.

C. Punishment Practices

One of the effects of the post-1828 tendency towards charging accused persons with the capital offence seems to have been an early move away from the whip and pillory as forms of punishment in buggery cases. In six buggery cases between 1796–1826, men were sentenced to the pillory (usually three sessions), while five of those same men were also sentenced to be whipped between fifty and 100 times. In all of those cases the charge was attempt to commit

138 The Sydney Monitor stated that Dalton was “remanded on a charge of assault”; presumably, however, it meant a charge of attempt.
buggery. In the 1830s, however, use of the lash and pillory abruptly halted in buggery cases. Even in the rare attempt cases after 1832, those found guilty were sentenced to hard labor rather than flagellation and public humiliation. This is somewhat curious given that whipping remained a common punishment in NSW throughout the 1830s (though it had ceased to be conducted in public in the 1820s),¹³⁹ and the pillory was not outlawed until 1837.¹⁴⁰

The simplest and most likely explanation for this abrupt shift in the sphere of buggery cases is the transition towards charging accused persons with the capital offence, in which case the default sentence, if guilt was found, was death.¹⁴¹ That trend gels with the fact that executions in general reached a peak in the 1830s.¹⁴² However, it is also noticeable that in the 1830s judges in NSW tended to commute death sentences for sodomy and bestiality to secondary transportation, usually to “that abomination on earth,”¹⁴³ the penal settlement on Norfolk Island, for periods ranging from seven years to life.¹⁴⁴ The exception was cases involving children, in which exemplary forms of punishment were still practiced. Indeed, in a case from 1834, Burton J ordered the ten-year old male victim of a rape, and the sixteen-year old male witness who gave evidence of the crime, to watch the execution of the man found guilty of the offence of buggery, Michael Carney. By the 1830s, though, this approach was comparatively unusual within the sphere of punishment for buggery, even though execution generally remained a public affair in NSW until 1855.¹⁴⁵

¹⁴⁰ Pillory [Final] Abolition Act, 1 Vict., c.23 (1837).
¹⁴¹ Offences Act, 9 Geo. IV, c.31, s.15.
¹⁴³ Therry, Reminiscences, 21.
¹⁴⁴ See Michael Connolly (1832); Samuel Jones (1834); William Smith (1834); William Hazleton (1836); James Sherwood (1836); Richard Norris (1838).
It may be that the numbers involved here are simply too small to draw large conclusions about the relationship between the trends noted above and broader changes in the logic of punishment in the nineteenth century. At the same time, an emphasis on hard labour and secondary transportation, rather than corporal punishment and public spectacle, clearly corresponds with influential currents in British penology in the 1830s--40s; it also comports with the more general trend over the course of the eighteenth and nineteenth centuries away from the spectacle of public torture and execution towards what Foucault called the disciplinary mode, involving the enclosure and partitioning of individuals and their constant surveillance in order to re-qualify them as subjects.\footnote{146} This shift was itself part of a reconfiguration of sovereign power away from ceremonies of autocratic punishment and the inculcation of fear through physical marking of the body, towards “technique[s] for the coercion of individuals” and “methods of training the body.”\footnote{147}

Alexander Maconochie’s 1838 Report on the State of Prison Discipline in Van Diemen’s Land is perhaps the best example of this attitudinal shift in the context of colonial Australia. Maconochie argued that punishment on its own achieved little if it was not accompanied or replaced with training and incentives for better conduct in future.\footnote{148} In the Report, he declared that the “essential and obvious error” in the system of private assignment that dominated the treatment of convicts in Van Diemen’s Land\footnote{149} (and NSW) was “its total neglect of moral reasoning and influence, and its exclusive reliance, in every relation of life, on mere physical coercion.” In his view, physical coercion ought only to be applied as direct punishment for past acts. In addition, it was imperative that convicts be subjected to a period of “training or

\footnote{147} Foucault, *Discipline and Punish*, 130--31.  
\footnote{148} Hughes, *Fatal Shore*, 498--99.  
\footnote{149} See above note 2.
probation, of which moral influence ought undoubtedly to be an ingredient.”150 In essence, “prisoners should be punished for the past, and trained for the future.”151 Punishment, Maconochie declared, “should consist of hard labour”; he also advocated “in favour of transportation as a secondary punishment, even for minor offences.”152 Moral training he recommended “to be in employment on the roads and in other public works” based on a system of mutual responsibility between groups of prisoners.153 Much of Maconochie’s plan was endorsed in the 1838 Transportation Report,154 and Maconochie himself was appointed Commandant of Norfolk Island in 1840.

Of course, the timing of Maconochie’s Report negates the possibility of any direct connection between it and sentencing practices in NSW for much of the 1830s. The point, however, is correlation not causation. The move away from exemplary punishment of men convicted of buggery towards sentences involving hard labour and secondary transportation fits within a broader intellectual and governmental shift towards a disciplinary society:155 having detected the deviant it was necessary to erase him from public view and retrain him in the art of responsible citizenship.156

---

151 Ibid., 9 (emphasis in original).
152 Ibid., 3.
153 Ibid., 10.
154 Hughes, Fatal Shore, 501.
155 Ritchie, “Unclean Thing,” 159.
IV. Speaking of Sodomy: The Select Committee and the End of Convict Transportation

Probably the most enduring institutional effect of official and community-based concern over sodomy in the 1830s was its role in the cessation of convict transportation to NSW in 1840.\textsuperscript{157} The Select Committee on Transportation’s interim and final reports, delivered in 1837 and 1838 respectively, painted “an image of New South Wales as a place in which drunkenness, prostitution, licentiousness and dissipation thrived, and where sodomy and buggery were not uncommon.”\textsuperscript{158} It is now generally accepted that the Committee was formed in such a way that its conclusion was effectively guaranteed; that is, the Commission was designed from the very outset to justify the end of transportation, and its chair, Molesworth, was chosen to ensure this end.\textsuperscript{159} He, in turn, took a selective approach to witnesses, and tended to emphasize the more salacious parts of testimony, which provided a moral basis upon which the government could assert the (pre-determined) necessity of ending transportation to the debauched land down under. In particular, Molesworth capitalized on the perception that sodomy was endemic to convict society in order to argue for the abolition of transportation; and prolix assertions of the sexual depravity of convict men were common throughout the Inquiry’s hearings. As noted at the outset of this paper, though, when it came to convictions the Committee seemed content to observe that, “unnatural crimes are far more common in the penal colonies than would be supposed from the number of convictions for those offences.”\textsuperscript{160}

According to the Superintendent of the Convict Barracks, E.A. Slade, “sodomy has been suspected to be common there” due to “[t]he boys making the complaint that they could not

\textsuperscript{157} Order-in-Council ending transportation to New South Wales, 22 May 1840.
\textsuperscript{158} Ritchie, “Unclean Thing,” 150 (citations omitted).
\textsuperscript{159} Like Bigge, Molesworth was also influenced by Jeremy Bentham’s work on the merits of penitentiaries over transportation: ibid., 153. See further Bentham, “Panopticon versus New South Wales.”
\textsuperscript{160} 1838 Transportation Report, xxvii.
remain in the room with the men.”\textsuperscript{161} Slade further deposed to having dispensed informal punishment on men found in compromising positions with other men, but where the evidence would have been insufficient to convict in court. When pressed as to the nature of this evidence, Slade responded: “Evidence of men being seen with their breeches down in secluded places with other men.” In his estimate, instances of buggery occurred in Sydney at 100 times the rate of that in the United Kingdom.\textsuperscript{162} (While this was a gross exaggeration, it is clear that the charge rate for sodomy in NSW was significantly higher than that in England at the time.)

Lieutenant Colonel Henry Breton was not prepared to make quite such grandiose claims as to frequency, but he nevertheless stated that in his view the small number of cases brought before him as police magistrate did not accurately reflect the frequency of the crime: “my district was a very large one, and the population so scattered, that I could hardly expect very many serious crimes brought before me; I was in an almost unsettled district, where the crimes which are generally committed [by convicts] the masters chiefly pass over.”\textsuperscript{163} The Committee’s star witness, the Reverend William Ullathorne, commenced his testimony on the subject by stating, “it is only a hope that something will be devised for preventing such horrible crimes, which will induce me to say anything at all upon the subject.” He went on to claim that “the crime” occurred on ships traveling from England (though not from Ireland!), and was “not uncommon in the barracks at Sydney.” In country areas, he said, “unnatural crimes” occurred “where a number of men are brought together on the large farms.” Ullathorne also testified that bestiality was practiced at a “not inconsiderable” rate.\textsuperscript{164}

\begin{itemize}
  \item \textsuperscript{161} 1837 Transportation Report, 66 [1031].
  \item \textsuperscript{162} Ibid., 67 [1061]. See also Hughes, Fatal Shore, 267.
  \item \textsuperscript{163} 1837 Transportation Report, 146 [2262].
  \item \textsuperscript{164} 1838 Transportation Report, 24 [237]--26 [263].
\end{itemize}
The most shocking evidence related to practices on Norfolk Island, where a number of the men convicted of buggery in the 1830s were sent.\textsuperscript{165} According to written evidence given by the Deputy Assistant Commissioner of Norfolk Island, Thomas Arnold: “[I]t is much to be feared that that horrible crime which brought down fire from heaven on the devoted cities of Scripture exists, and is practiced here to a great extent. … Crimes too of a bestial nature, it is also to be feared, are too frequent: the dying confession of an unfortunate being, who was executed here some time ago, proves the truth of this.”\textsuperscript{166} Testimony of this sort formed the backbone of the Select Committee’s recommendation to the British Government that it cease transporting convicts to NSW. While the records suggest that the Committee was itself established to justify a decision that had already been made, evidence of the apparently widespread practice of buggery in the Colony (if not its conviction) functioned as a useful discursive locus of moral outrage and helped to justify the cessation of convict transportation to NSW in 1840.

\section*{V. Conclusion}

The extent to which buggery was practiced in NSW in the first fifty years after the arrival of the British is both unknown and unknowable. What this paper shows, though, is that while the number of buggery cases brought before the courts may have been low in terms of raw numbers, when measured against the size of the population the charge rate was surprisingly high, dwarfing that seen in England. Throughout the entire period in question, it seems that buggery trials functioned as institutional incitements to speak of the apparently unspeakable.

\textsuperscript{165} See Therry, \textit{Reminiscences}, 19--21.
\textsuperscript{166} \textit{1838 Transportation Report}, App. (E.), No. 45, Enclosure (D.), 274.
The cases also reveal a distinct upswing in the number of charges brought against men for sodomy (but not so much bestiality) in the period between the introduction of the Offences Act and the 1838 Report from the Select Committee on Transportation. The community-based origins of most of these complaints suggests that factors beyond the introduction of the Offences Act in 1828 were at play; in particular, it seems likely that longstanding concerns over convict discipline and sex ratios in the Colony were exacerbated in the wake of Bigge’s 1822 Report into the State of the Colony of New South Wales, resulting in an institutional and social crackdown on convicts (and emancipists), and a corresponding increase in the degree of surveillance of convicts and reporting of their crimes and misdemeanours to an expanding array of law enforcement officials. Where the Offences Act does seem to have played a role was in the move towards charging men with capital crimes in the 1830s, though this shift was probably also influenced by harsher attitudes towards and treatment of convicts in the same period. At the final stage of these cases--punishment--there was a shift in the 1830s away from punishment as spectacle towards the use of hard labour and secondary transportation--moves that comported with Bigge’s recommendations and his Benthamite preference for what Foucault called “the disciplinary.”