

PRISON SERVICE JOURNAL

July 2017 No 232



Special Edition
Small Voices

An exception too far: 'gentleman' convicts and the 1878–9 Penal Servitude Acts Commission

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In 1877, local and county prisons in England and Wales, hitherto run by local magistrates, were placed under direct central government authority. This gave effective control of these establishments to one man, Colonel Edmund Du Cane, chairman of the newly constituted Prison Commission. Since 1869, Du Cane had also been responsible for running England's convict prisons. Established in the 1840s and '50s, these held prisoners who would once have been transported to Australia (or else languished aboard prison hulks, which was as far as many serving shorter terms of transportation ever travelled) but who were now sentenced instead to penal servitude, introduced in 1853 to replace transportation. Thus by the end of the 1870s, all prisoners in England and Wales, whether in local, county or convict prisons, found themselves subject to a regime that embodied Du Cane's philosophy of harsh deterrent punishment applied with rigid uniformity.

The latter was a central tenet: writing in 1885, Du Cane asserted that penal servitude should be 'applied on exactly the same system to every person subjected to it. The previous career and character of the subject makes no difference in the punishment to which he is subjected'. To do otherwise, he explained, would not only undermine the authority of the courts, but leave prison authorities open 'to charges of shewing [sic] favour to or prejudice against certain particular prisoners'.¹ As Martin Weiner has argued, however, prison regimes under Du Cane, by their very uniformity, made visible categories of prisoner for whom treatment of this kind was increasingly felt inappropriate: juveniles; women; prisoners sentenced for offences arising from political activity, and those designated 'lunatic', 'imbecilic' or 'weak minded'. Another exceptional category, one to which Weiner alone

among historians has ascribed even marginal significance, were so-called 'gentleman' convicts. These Weiner describes as prisoners 'of a higher social class and generally more delicate constitution than a Fagin or a Sikes'.² Of course, the presence in English prisons of middle- or even upper middle-class prisoners was nothing new. But though they remained a tiny minority, there were by the 1870s many more 'gentlemen' in English prisons than early nineteenth-century penal administrators and reformers would ever have anticipated.

This increase was due principally to the rapid transformation of Britain's business and financial structures during the century's middle decades, affording new and tempting opportunities to the less-than-scrupulous. Though not all 'gentleman' convicts were embezzlers and fraudsters (prison memoirs for instance mention among their number doctors and surgeons sentenced for offences relating to the illegal termination of pregnancy³), the type of offence for which Chicago School sociologist Edwin Sutherland would, in 1939, coin the term 'white collar crime' was from the 1840s a staple of court reports in English newspapers.⁴ Writing in 1859, the financial journalist David Morier Evans, who labelled such offences 'high art crime', went so far as to describe the preceding two decades as 'one of the darkest pages in the commercial history of this country'.⁵ The realisation that criminal behaviour was not confined to the lower classes but could be found among the most 'respectable', and hence presumed the most honest, components of the Victorian social order was a disturbing one. In practice, the courts struggled to determine the line between entrepreneurial and criminal activity and the appropriate penalty for the latter, veering between the severity of the fourteen-year sentence for embezzlement handed down to disgraced banker John Dean Paul in 1855, and the

1. Edmund Du Cane, *The Punishment and Prevention of Crime* (New York; London: Garland, 1984 [1885]), p.155.
2. Martin J. Weiner, *Reconstructing the Criminal: Culture, Law and Policy in England, 1830–1914* (Cambridge: CUP, 1990), pp.308–10.
3. E.g. 'Our Convict System by an Ex-Prisoner', *The Weekly Times*, December 28, 1879, p.2.
4. See George Robb, *White-Collar Crime in Modern England: Financial Fraud and Business Morality, 1845–1929* (Cambridge: CUP, 1992), pp.11–30.
5. David Morier Evans, *Facts, Failures and Frauds: Financial Mercantile Criminal Revelations* (New York: Kelley, 1968 [1859]), p.1.

leniency of the relatively short (between eight and 18-month) sentences for fraud received in 1878 by the directors of the collapsed City of Glasgow Bank, the latter causing widespread public dissatisfaction.⁶

In addition to such high profile cases, the publication in the 1870s of numerous articles and memoirs by former prisoners sharpened still further the contours of the 'gentleman' convict as an exceptional category of prisoner. Never an unpopular genre, the period represents the prison memoir's golden era, a proliferation of titles testimony to Victorian readers' appetite for such fare. Often published anonymously, the majority of these volumes' authors were 'gentlemen', the memoir serving as both a ready source of income and a means of self-exculpation for disgraced ex-businessmen and professionals. Foremost among them was the author of *Five Years' Penal Servitude by One Who Has Endured It* (1877), identified posthumously as Edward Callow, a railway company secretary sentenced in 1868 for his part in an attempt to defraud a City bank.⁷ Callow was among former prisoners called to give evidence before an 1878 royal commission on convict prisons and penal servitude, as was a witness identified only as 'G.H', the author of an article entitled 'Our Present Convict System', published in the *Westminster Review* in April that year. Another equally damning account of penal servitude by an anonymous former 'gentleman'

convict, *Convict Life; or, Revelations Concerning Convicts and Convict Prisons by a Ticket-of-Leave Man*, coincided with the publication a year later of the commission's report. That such books were widely read is suggested by a cartoon entitled 'JUST OUT!' - (AT ALL THE LIBRARIES)' that appeared in *Punch* magazine in July 1880, in which an elderly lady is alarmed by the conversation of the two well-dressed young women with whom she shares a railway carriage: 'How did you like *Convict Life*, dear?' asks the first young woman, to which her companion replies, 'Pretty well. We've just begun *Ten Years' Penal Servitude*...'⁸

Rather than identify themselves as belonging to a narrow elite, however, these authors sought common cause with others they described variously as 'novice' criminals, 'criminals by accident' or 'casual' criminals (the latter, of course, today carries a different meaning). Callow, for instance, insisted that:

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*criminals may be divided into two classes. The one consisting of those who have deliberately and in cool blood ... set to work to rob or defraud, and those who have been led astray by others, or who have given way to a strong temptation in a moment of difficulty. ... I cannot but consider that there is a great difference between the two men, and they should be treated differently.*⁹

Within the second category, he included men such as himself, 'driven for the moment into a tight corner ... convicted and punished for crimes that may be termed 'commercial lapses' — say, embezzlement, forgery, and breach of trust'. Conceived, then, as wholly distinct from the reviled 'criminal class', this broad 'accidental' category, according to these authors, included junior clerks sentenced for stealing from their employers, Post Office employees who had been sentenced (subsequent to an Act of 1767 that classed any postal theft as a felony) to penal servitude for the embezzlement of trifling sums, and representatives of the impoverished rural poor (though seldom their urban counterparts), driven to steal in order to feed hungry families. In removing these prisoners from the 'criminal class', 'gentleman' memoirists attempted to distance themselves from the latter, which perhaps accounts for

a near universal reticence on the exact nature of their own offences. This is understandable: men sentenced for large-scale acts of premeditated fraud enjoyed little public favour and, it could be argued, had far more in common with professional thieves than with temptation-prone office boys and light-fingered postmen.

In asserting that fundamental distinctions could and should be made between different types of offender, these authors challenged the principle of uniformly applied punishment; recognition of variation within prison populations led logically to the idea that punishment should instead be varied to suit these different types. 'G.H', for instance, condemned a system that 'subjects all to a Procrustean process, treating men of the most opposite characters and antecedents alike'. 'In determining the amount and kind of punishment inflicted,' he argued, 'the case of each criminal must be carefully investigated and considered'. To accommodate

6. On Paul, who in the event served only five years, most of it at Woking convict hospital, see Robb, *White-Collar*, pp.61–2; Evans, *Facts*, pp.123–4; on the City of Glasgow Bank trial, see Robb, pp.73–4.

7. David Cox discusses Callow at length in this issue.

8. *Punch*, July 24, 1880, p.27.

9. Anon. (Edward Callow), *Five Years' Penal Servitude by One Who Has Endured It* (New York; London: Garland, 1984 [1877]), pp.373–4.

different kinds of criminal, 'G.H.' envisaged separate prisons — indeed, entirely distinct types of establishment. Those judged capable of reform would be 'sent to a special prison where the general rule should be solitude', while 'incurables' would be banished permanently to an overseas penal colony.¹⁰ Similarly, 'a Ticket-of-Leave Man' prescribed three or four years separate confinement for all prisoners serving a first sentence of penal servitude, 'accompanied by good educational, moral, and religious training'. 'Incorrigibles', on the other hand, would be put to work 'in a coal-mine, with an occasional taste of the 'cat' as an incentive to industry', followed by permanent exile to a penal colony under military law.¹¹ Some penal administrators echoed these proposals: for instance, Arthur Griffiths, Millbank convict prison's deputy governor and Du Cane's trusted subordinate, favoured separate prisons for 'persons who had committed their crime through a lapse, of superior intelligence and better disposed than the others.'¹²

Behind such proposed reforms lay concern that penal servitude bore more heavily on some prisoners than others. In a letter to the commission, Richard Harington, a Worcestershire magistrate, argued that:

*When a director of a joint stock company commits a fraud, or a banker's clerk embezzles or forges, he commits, no doubt a grave and most serious crime deserving of condign punishment. But ... although his crime may be equal to, it is not worse than, the act of brutal violence or wanton mischief committed by the vagabond. Why then should he be tortured while the other is merely punished?*¹³

This 'torture' was understood to be spiritual as well as physical; indeed, for Callow, the former far outweighed the latter. Penal servitude, he wrote,

falls very unequally upon different classes. To a large number of criminals it is merely so many years being shut up in prison, restricted from

*doing their own will, and being compelled to labour, to a certain extent, whether they like it or not. To the man of good position, it is moral death accompanied with ruin and disgrace to his family and relatives.*¹⁴

Far worse, then, than a convict prison's material conditions was the disgrace of conviction itself. As 'G.H.' observed, for men such as himself, 'the physical privations entailed by their sentence are trifling in comparison with the fact of having received a sentence at all'. By contrast, a prisoner who 'belongs to the habitual class ... has no feeling of disgrace; he has lost no caste for he has none to lose'.¹⁵

'Moral death' aside, when it came to performing heavy manual labour 'gentleman' convicts were again at a distinct disadvantage. 'A Ticket-of-Leave Man' had been passed fit for 'ordinary hard labour' by a doctor at Portland convict prison, where what is still today Europe's largest man-made harbour was built using convict labour. He recalled that:

*All the previous exercise of which I had partaken had been for amusement. I once won the silver sculls in a sculling match at Henley; I had taken some tolerably rough horse exercise in my time in different parts of the world; and I could handle a rifle as well as most civilians; but up to now I had been a total stranger to the pick and shovel.*¹⁶

He 'resolved to make the best of it and try to do my duty', but lasted only four months before reassignment to lighter work. 'A.B.', another of the ex-convicts who gave evidence to the commission, had received eight years' penal servitude for forgery. He spent just three months at Portsmouth convict prison, where prisoners worked extending the port's Royal Navy dockyard, before being transferred permanently to an invalid prison. 'A.B.' was asked whether he would 'propose that a different and lighter class of work should be given to men like clerks

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10. Anon., 'Our Present Convict System', *Westminster Review*, 109 (1878), p.419; pp.421–2; pp.427–8.
 11. Anon., *Convict Life; or, Revelations Concerning Convicts and Convict Prisons by a Ticket-of-Leave Man* (London: Wyman & Sons, 1879) p.2; p.242; pp.244–5.
 12. *Penal Servitude Acts Commission. Report of the commissioners appointed to inquire into the working of the penal servitude acts...* (1878–9) PP [C.2368] [C.2368-I] [C.2368-II] XXXVII.1, 67, XXXVIII.1, p.273 at p.342, qq.3216–20.
 13. *Ibid.*, p.931 at p.1004, q.11707.
 14. Anon. (Callow), *Five Years*, p.365.
 15. Anon., 'Our Present', p.413; p.418.
 16. Anon., *Convict Life*, pp.79–80.

and men who have not been accustomed to hard work?' 'Yes,' he replied, 'because the work kills those men. ... You will find that a great number of those men are soon in hospital.'¹⁷

This dramatic assertion was borne out by convict prison medical officers. The M.O. at Portland, for instance, had 'found by careful investigation, that educated men of sedentary habits suffer far more in health from imprisonment than do the uneducated of the labouring class ... The number of deaths are greater in this class than in the other.'¹⁸ Giving evidence to the commission, George Clifton, Portland's governor, claimed that:

*In the case of educated men, by sending them on to the public works to dress stone and so on, you render them unfit for the position which they have held in life; when they return to free life their hands are injured and their minds lessened in power for intellectual employment.'*¹⁹

This disparity in the effect of penal servitude was of evident concern to the commission's chairman, the Liberal politician John Wodehouse, 1st Earl of Kimberley. Griffiths, having confirmed that the punishment was indeed 'very much lighter' for an agricultural labourer than for a 'clerk or a shopman', was asked by Kimberley, whether it 'might ... not be proper to alter it by not sending every man to work on the clay?' When Griffiths pointed out the administrative difficulties this would present, Kimberley reminded him: 'Our object ... is that punishment should be equal. If, as you have stated, it is unequal, is it not possible to devise some system by which it can be made less so?' The problem, Griffiths explained, was that all convicts would then claim to have been clerks or shopkeepers.²⁰

Conversely, just as heavy manual labour bore more heavily on 'educated' convicts than others, these same prisoners were thought better suited than their fellows to the rigours of so-called 'separate confinement'. This was

the system that operated in local and county gaols, where prisoners were confined to individual cells (for up to two years, though frequently only a week or two) in which they slept, worked and ate; prisoners serving penal servitude in convict prisons endured the same conditions for the first nine months of their sentence. Given a choice between this and work in a gang, one former convict administrator felt there was 'no doubt the better educated man would prefer the separate confinement.'²¹ 'G.H.', who advocated three years' separate confinement for first offenders in lieu of five years' penal servitude, believed that 'persons belonging to the educated classes will stand it better than the lower classes, because they have mental resources and they have not the same

gregarious instinct...as ordinary thieves and habitual criminals'.²²

However, in applying the alternative sentence not to those guilty of particular crimes such as embezzlement and fraud but instead to first offenders per se, the principle of equal punishment would again have been compromised, though now in relation to the unequal, and it was feared potentially damaging, effect that lengthy separate confinement might have on, say, an agricultural worker.

In his *Westminster Review* article, 'G.H.' had stressed that his proposed reform would entail 'no suspicion of class legislation'.²³ In his evidence to the commission, however, having acknowledged Kimberley's point that 'an

uneducated man [would] be enfeebled and less able to earn a living after 3 years close confinement than if employed on public works', he had had to explain:

*I do not think that the majority or anything like the majority of what I have described as the casual class do belong to that class of society; the majority of them are either persons belonging to what may be called the educated classes, or mercantile clerks and the like, who are certainly not accustomed to much open air exercise.'*²⁴

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17. *Penal Servitude Acts*, p.407 at p.476, q.5032.

18. *Report of the directors of convict prisons ... for the year 1870 (1871) PP [C.449] XXXI.1*, p.184 at p.215.

19. *Penal Servitude Acts*, p.167 at p.236, q.2229.

20. *Ibid.*, p.288 at p.357, qq. 3424-8.

21. *Ibid.*, p.984 at p.1057, q.12286.

22. *Ibid.*, p.897 at p.970, qq.11370.

23. Anon., 'Our Present', p.424.

24. *Penal Servitude Acts*, p.898 at p.971, qq.11375-6.

As 'G.H.' was now forced to concede, his proposal therefore amounted to different punishment for the 'educated' and the 'uneducated', the former repenting in austere seclusion while the latter toiled in work gangs 'on the clay'. Such a recommendation plainly wouldn't wash with the public. As put by one commissioner, the brewing magnate and Liberal MP Samuel Whitbread, to 'G.H':

*If a labourer and a clerk were both at the same assizes tried for the same description of offence, and the judge passed sentence thus; here is an educated gentleman, three years' imprisonment under the new law is the right sentence for him, five years' penal servitude is the right sentence for the labourer, do you think in such a case that the friends of the labourer or the outside public would think he had been justly treated?*²⁵

It was left to the commission's next witness, the eminent judge Sir Robert Lush, to bury the proposal, and with it the prospect of punishment varied to suit different types of criminal or, indeed, different social classes. When it was explained to him that the purpose of varying punishment would not be to imprison, merely for the sake of it, the 'uneducated man' for longer than his 'educated' counterpart, but rather to ensure that the latter was 'punished in a way which he would feel in a manner corresponding to the way in which the uneducated man feels his punishment', Lush responded unequivocally:

*I think that is wrong in itself, and I think it would be wrong in its bearing upon the public. The public would not understand that distinction; they would think that the rich man was treated in a very different way from the poor man.*²⁶

Lush explained that for a 'person of education', 'whatever increased severity there is in the punishment applicable to him is a just retribution, because his position and education make it more criminal in him to do the act; therefore he justly suffers the increased severity.'²⁷ This straightforward equation resolved the problem of penal servitude's disproportionate effect. Having squandered the blessings of privilege, the 'gentleman' convict, rather than inhabiting a higher moral plane, was in moral terms *beneath* the 'habitual criminal' and therefore deserved the harsher punishment. Kimberley agreed with Lush that 'the exact proportion in which [the educated man] suffers

the more is the measure of the greater crime he has committed against society'.²⁸ Articulated in this way, the formula affirmed that, far from being loaded, the scales of justice were calibrated with mathematical precision.

'Gentleman' convicts can, then, be seen to have influenced the royal commission's eventual recommendations, albeit in a somewhat unexpected fashion. Due to the commission's sensitivity to charges of class prejudice, the presence of 'gentlemen' within the convict population in the event inhibited the adoption of radical proposals to vary the punishment of different types of criminal. The commission explicitly rejected proposals both for an alternative sentence of imprisonment under separate confinement for first offenders and for the classification of prisoners according to the offence for which they had been

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sentenced. Instead it recommended a blunter, yet more egalitarian, policy: the separation from other prisoners of all first offenders in convict prisons, coupled with a guarantee that all convicts would continue to be treated uniformly.²⁹ Thus the imprint of the 'gentleman' convict upon the commission's recommendations and upon subsequent penal practice, though wholly negative, is clear. At the moment the English penal system began to recognise and accommodate variation within prison populations, the 'gentleman' convict proved an exception

25. *Ibid.*, pp.901-2 at pp.974-5, q.11412.

26. *Ibid.*, p.931 at p.1004, q.11710.

27. *Ibid.*, p.930 at p.1003, qq.11704-5.

28. *Ibid.*, q.11706.

29. *Ibid.*, p. xviii at p.27, paras.75 & 76; p. xxix at p.28, para.78; pp. xxix-xxx at pp.28-29, paras.78 & 79; the commission specified that convicts 'guilty of unnatural crimes and indecency' would be excluded from the new division, see Ben Bethell, "'Unnatural crime" and the English convict system, 1850-1880', Sean Brady & Mark Seymour (eds.), *Same-Sex Relationships in History: International Perspectives* (London: Bloomsbury Academic, forthcoming).

too far. The majority of such prisoners would henceforth be subsumed within the broader category of first offender, whose membership, including as it did many prisoners sentenced for serious violent non-property offences, including rape and attempted murder, could hardly be described as select. From 1880, first offenders were held in separate sections of convict prisons, and eventually in separate establishments altogether, a practice extended to all English prisons in 1898, remaining official policy until 1967.

In terms of penal historiography, the 'gentleman' convict has been similarly (though not totally) erased. The reason for this is three-fold. First, in the narrative of late nineteenth- and early-twentieth century prison reform, 'gentlemen' have been eclipsed almost entirely by three categories of prisoner sentenced for offences committed in the pursuit of political goals: Irish nationalists; female suffragettes; and First World War conscientious objectors. Some (but by no means all) of the prisoners belonging to these categories were of a middle- or upper middle-class background and similar arguments were made regarding the disproportionate effect upon them of prison work and conditions. However, unlike men such as Callow, prisoners such as the Home Rule MP Michael Davitt or the suffragist Constance Lytton, both of whom authored prison memoirs, or the conscientious objectors Stephen Hobhouse and A. Fenner Brockway, who went on to co-author the Independent Labour Party's landmark 1922 report on English prisons, are not only understood to have sacrificed their liberty for noble causes but can be seen to have had demonstrable positive impact upon public opinion and the subsequent course of penal reform.³⁰

Secondly, in the popular imagination, the figure of the Victorian 'gentleman' prisoner has come to be associated with just one individual, Oscar Wilde, whose enduring fame and literary reputation is based partly on his 1897 poem *The Ballad of Reading Gaol*, published following his release from prison, and on the long letter written during his imprisonment published posthumously in 1905 as *De Profundis*. It is of little surprise that the infinitely lesser talents of prison memoirists such as Callow remain to this day in Wilde's shadow. Moreover, a focus on Wilde has served to blur the contours of the 'gentleman' convict as a distinct category: sentenced for

gross indecency under the 1885 Criminal Law Amendment Act, Wilde, unlike Callow, was not a 'white collar' offender but belonged instead to another exceptional category, one almost wholly overlooked by penal historians: men imprisoned for offences relating to consensual sex with men.³¹ As such, Wilde is seen today as Callow would have wished to be: not as a criminal, but as the tragic victim of a gross injustice.

Instead, however, and this is the third reason for penal history's neglect of the 'gentleman' convict, historians have tended to uphold the verdict of those of their contemporaries who dismissed 'gentleman' prison memoirists and correspondents merely as whiners. Leon Radzinowicz and Roger Hood, for instance, observing that the viciousness with which many of these authors caricatured their fellow prisoners does them little credit, suggest that they exaggerated the dangers posed by 'habitual' to 'accidental' criminals simply in order to obtain 'separate better treatment'.³² This view chimes with that of Richard Quinton, a former convict prison

medical officer who, writing in 1910, recalled 'Classify us' as the 'continual cry' of the 'gentleman lags' he encountered in the 1870s. For Quinton, however, this only begged the question of whether such prisoners should be classed 'as the greater or the lesser rogues of society'. In his view, it was the former; he echoed Kimberley in

arguing that it was 'natural that prison life should be more disagreeable to educated prisoners than it is to ordinary criminals. The punishment is of necessity much heavier for them, but surely their responsibility is also greater.'³³ Ultimately, history has judged nineteenth-century 'gentleman' convicts with similar dispassion. Unlike men and women imprisoned for offences committed in the course of political activity, and unlike men who fell afoul of sex laws now seen as unjust — and, indeed, unlike many of the illiterate and impoverished petty thieves and drunks who formed the bulk of Victorian prison populations — men like Callow and 'a Ticket-of-Leave Man' had committed offences which, far from 'accidental', involved peculations and breaches of trust that were significant and premeditated. Though as prisoners they were atypical (and atypically articulate), claims for their exceptional status were groundless and they are remembered today, if at all, as ordinary unsuccessful criminals.

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30. See Alyson Brown, *English Society and the Prison: time, culture and politics in the development of the modern prison, 1850–1920* (Woodbridge: Boydell, 2003), pp.137–173; Leon Radzinowicz & Roger Hood, *A History of English Criminal Law and its Administration from 1750: Volume 5: The Emergence of Penal Policy* (London: Stevens, 1986), pp.401–461.

31. See Bethell, "'Unnatural crime'": Wilde's experience of prison was hardly typical: once transferred to Reading he was given agreeable work and allowed books, newspapers and writing materials.

32. Radzinowicz & Hood, *A History*, pp.546–7.

33. R.F. Quinton, *Crime and Criminals 1876–1910* (New York; London: Garland, 1984 [1910]), p.72; pp.213–14.