Historians’ War On Criminals

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You could be forgiven for thinking that a criminal’s treatment in 19th century Britain was one of oppression by their aristocratic rulers. That is the consensus among historians. But if we observe this period of history objectively and in detail, the clear upshot is that the British culture of liberty and liberalism, and institutions such as the separation of powers, protected the poor and vulnerable from exploitation. This is important because today Western ideas and institutions are under great threat from the rise of identity politics. Yet this critique doesn’t withstand historical evidence regarding the benefits of the key tenets of Western Civilisation.

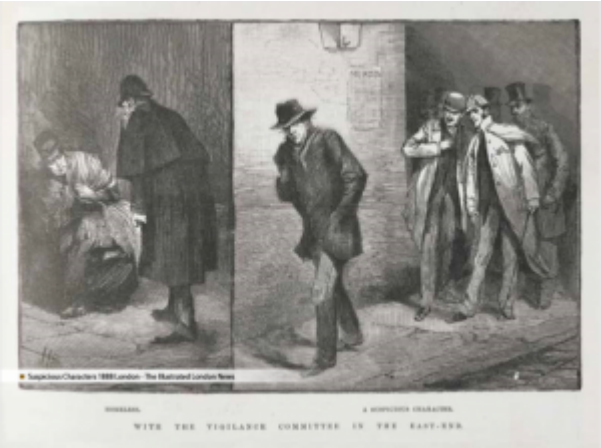
Until 1868 the British, quite understandably, were very happy with their penal system and saw no need to change. Over the eighty years from 1788 to 1868, more than 168,000 convicts were sent to New South Wales, Van Diemen’s Land and Western Australia, thereby significantly thinning the ranks of the so-called criminal class in Britain. But from 1840 the system was in decline, largely due to the strong opposition of many colonists who wanted to rid their adopted homeland of the ‘convict stain’. The very last convicts docked at Fremantle in 1868.

Later that year the new British Liberal government of William Gladstone asked the obvious question: ‘What will we do with our convicts?’ The answer was provided through a series of harsh and controversial measures, enacted via the *Habitual Criminals Act 1869* and the *Prevention of Crime Act 1871.* These included police supervision of repeat offenders and a registry with personal information about all those convicted of most major categories of crime, both of which were intended to ensure—in an era before fingerprints—that repeat offenders were recognised as such by the courts and harshly dealt with as a result. Due to the perceived importance of individual liberty, Britain had never before adopted systems of surveillance and registration that were commonplace on continental Europe. On the publication of *Les Misérables* in English in 1862, for example, much self-satisfaction was expressed by the British that local Jean Valjeans would never be so ill-treated by their authorities. Yet in 1869 the British government deemed that, due to the cessation of transportation to Australia, the criminal threat was so grave that security must now trump liberty.

Despite the high hopes of both major parties and the press, in its early years this new system was a shambles. Poor drafting meant that information about every single person convicted of crime was collected and housed at the registry, in London. This made its volumes huge and utterly unworkable. One senior Home Office official called the requirement to collect and store information concerning all criminals a *reductio ad absurdum* of the system of registration, as no fewer than 28,000 names were being added to the registry’s databases each year.

With information about so many criminals, it is hardly surprising that the police forces of several major cities were not able to make one single successful identification through the registry in its early years. Police supervision was also ineffective. The legislation—this time intentionally as a concession to the forces of liberty in the parliament—did not require those under supervision to report themselves to the police, or even to notify the authorities when their place of residence changed. As a result, authorities lost sight of many dangerous criminals, especially in the big cities where crime was of most concern. So, on numerous occasions from the 1870s to the 1890s changes were made in an effort to make the system of registration and supervision more effective. The registry’s focus was limited to repeat offenders and supervision was made at least theoretically possible through provisions compelling recidivists to regularly report themselves to the police.

According to most historians to have studied the impacts of this legislation it was harsh and oppressive. They claim that the registration of criminals as a result of the legislation of 1869 and 1871 had a stigmatising effect, leading to severe treatment by the police, magistrates and judges. As one scholar has said, it served to ‘brand certain criminals as habitual’. Thus they were an easy target for the forces of the law, leading to a cycle of arrests and prison terms. And the consensus in the relevant literature regarding police supervision is that, as refinements were made over time, the police were increasingly able to monitor repeat offenders in a manner that endangered employment and, consequently, left them with little option but to commit further crimes. The legislation therefore actually created what it was intended to destroy: a criminal class.



The evidence, however, tells a wildly different story. The habitual criminals' legislation of the Gladstone government certainly had the potential to be oppressive. Indeed, numerous parliamentarians and commentators hoped that this would be the case. London's *Morning Post,* for instance, predicted the legislation would be a 'terror' to those who 'prey on society'. Yet it was not. Magistrates, judges and senior police officers went out of their way to ensure that the legislation did not unduly encroach upon Britain's liberal culture and didn't disproportionately impact upon the poor. They recognised that the interests of law and order were indispensably served by the maintenance of good relations with working-class communities. This is attested to by numerous accounts of nineteenth century criminals themselves.

The notorious East End gangster Arthur Harding, for example, said both that policemen were kind to working class families and that they gave areas he described as being of 'bad character' a 'wide berth'. So known criminals were not hounded by policemen, who faced stiff penalties, including sacking, for disobeying orders to do nothing that would lead to known criminals being identified as such by their landlords or bosses. This was because the police understood that outing people as criminals through heavy-handed surveillance would impinge upon their liberty and make their reintegration into society harder. Magistrates and judges also used their significant discretion in sentencing to, in actual fact, impose increasingly short sentences. In the pages of *The Times* it was correctly claimed that many sentences were so brief that they left criminals laughing. In 1875 one serial recidivist in London was so happy at being sentenced to six months' imprisonment for the theft of a valuable watch that she mocked the judge, saying, 'I can do that little lot upon my head'. Across Britain sentences for repeat offenders in the second half of the 19th century continued their existing trend towards greater leniency.

While sentencing practices are a question in themselves, the upshot of these examples is to beg the question: how could the historical consensus regarding the treatment of criminals in the nineteenth century be so wrong? Well, the academic literature concerning this legislation is dominated by scholars who utilise social control interpretations to determine its impacts. Key to these interpretations is the belief that a ruling class seeks to control the working class through various means, including legal systems, police forces and prisons, and social institutions such as the family and religion. Using this framework, several scholars claim that the legislation was an

oppressive tool that was part of a broader apparatus of control. But, as we have seen, politicians, senior police officers, magistrates and judges— all members of the ruling class, if indeed such a construct exists— had very different views about the way criminals should be treated. While some politicians undeniably wanted sections of the working class controlled, senior police officers, and most magistrates and judges, actively worked against them. Thereby the historic importance of liberty in Britain was upheld.

Recent editions of this publication have carried articles concerning the proud heritage of many elements of Australia's democratic system, which are currently under threat from identity politics. A thorough study of Britain's criminal law in the 19th century demonstrates the great worth of our shared tradition of individual liberty and the importance of the separation of powers to safeguard freedom. It also shows the folly of identity politics, which claims that our institutions perpetuate privilege. Entirely to the contrary, our British institutions protect the weak and the vulnerable.