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## Introduction

**In 1836 Alexander Maconochie accepted the post of private secretary to Sir John Franklin, the recently appointed Lieutenant Governor of Van Diemen's Land. Before his departure he was commissioned by the Prison Disciplinary Society to undertake a review of transportation within the Australian penal colony. On arrival in Hobart Maconochie swiftly drafted this report, which Franklin sent, together with the largely unfavourable responses of local officials, to the Colonial Office in October 1837. He enclosed in the bundle sent to London a summary of the findings Maconochie had prepared for Lord John Russell, the Home Secretary. Russell saw the report's relevance to the ongoing Molesworth Committee's review of transportation and published Maconochie's summary as a Parliamentary Paper<sup>1</sup>. The Colonial Office ordered the full set of dispatches to be printed for consideration by Molesworth and his committee.<sup>2</sup> Maconochie's reports not only provided a damning indictment of the operation of the transportation system but also set out an innovative alternative penal theory, which was to become known as the 'Mark System'.**

Sheldon Glueck's claim that 'there is hardly a reform in the correctional field in our epoch that cannot be traced, at least partially, to the fertile imagination of Maconochie' remains true.<sup>3</sup> Not only did Maconochie inspire the Irish Convict system and the Reformatory Movement in the United States but indeterminate sentences, borstal, open prisons, reward schemes and stage regimes can also all be directly traced back to his ideas.

## Maconochie's 'Mark System'

Maconochie's 'Mark System', which he claimed was equally applicable to both men and women, had five key

characteristics. Firstly it was unashamedly reformatory, placing the individual reform of the lawbreaker over both deterrent and retributive objectives. Secondly it advocated task sentences rather than time sentences. The convict was not guaranteed liberty after a set period but only on completion of the required task. Thirdly, it introduced marks as a currency through which task achievements could be measured, rewards for desirable behaviour paid, fines for misconduct levied and rations and indulgences purchased. Fourthly it developed a staged approach to penal discipline with a clear division between the punitive, punishment stage and the subsequent reformatory or moral training stages. Lastly Maconochie's system was not tied to a particular institution; whilst other theories focused on the best prison regime his was a theory of punishment and reform with wider applications than 'any other form of mere imprisonment.'<sup>4</sup> He was not 'suggesting a form of apparatus' but seeking 'to introduce a new object and spirit into our whole penal administration.'<sup>5</sup>

A convict would therefore be sentenced to complete a certain task, measured in marks. Release required the lawbreaker to achieve a balance of marks on her or his account equivalent to the sentence. But marks were also required for provisions, so the convicts' purchase of anything other than bare necessities prolonged the length of their subjection to penal discipline. A refusal to co-operate resulted in a bread and water diet and an increasing debt to be paid off.<sup>6</sup> The system was carefully designed so release could not be obtained by mere endurance of the punishment; his system was intended to 'uniformly subjugate all brought under its influences'.<sup>7</sup> The system was calculated to internalize approved behaviour; convicts' desire to complete their punishment provided the initial incentive but Maconochie believed the good habits promoted would persist, becoming, with respect to the discharged convict's future life, 'fetters which would be only the more effectual because they are unseen'.<sup>8</sup>

1. Home Office, (1838), *Report on State of Prison Discipline in Van Diemen's Land*, London.
2. Colonial Office, (1838), *Despatch from Lieutenant Governor Sir J Franklin, October 1837, relative to present System of Convict Discipline in Van Diemen's Land*. London.
3. Glueck, S. (1958), Foreword to J.V. Barry *Alexander Maconochie of Norfolk Island*, Melbourne: Oxford University Press p.xi.
4. Maconochie, A. (1839a) *General Views regarding the Social System of Convict Management*, Sydney: Tegg & Co. p.19; Maconochie, A. (1846), *Crime and Punishment: The Mark System*, London: Hatchard & Son p.27.
5. *Ibid* p.28.
6. Maconochie, A. (1853), *Penal Discipline: Three Letters*, London: Thomas Harrison p.6.
7. Maconochie, A. (1857), *The Mark System of Prison Discipline*, London: Mitchell & Son p.1 (emphasis in original).
8. Maconochie (1839a) p.24.

Maconochie's penal philosophy asserted that the primary aim of public punishment should be the reformation of the criminal. Deterrence, whilst 'highly useful in its place', was, for Maconochie, always subsidiary to reformation.<sup>9</sup> This was not a common perspective; within official and public discourse the overwhelmingly dominant justification for state punishment was deterrence. Under the Bloody Code deterrence had operated on the basis that the spectacular execution of a small minority of felons was more effective than a high probability of arrest and conviction. Whilst the first half of the nineteenth-century saw a revision of these arrangements, with new penal economies requiring the arrest and punishment of far greater numbers, it was still generally considered necessary to retain the public spectacle in punishment for it to be a successful deterrent.

Beccaria proposed public enslavement and Bentham's Panopticon incorporated public viewing galleries, both schemes providing the visibility their authors perceived essential for deterrence. Maconochie's view of the causes of crime was fundamentally different, anticipating future psychological, social and medical theories, he believed the criminal was morally deficient and socially inadequate; a person whose faults needed correcting through training and treatment rather than a rational being whose criminality could be controlled by a fine tuning of crime's cost benefit ratio.

Maconochie's opposition to deterrence highlights the significant differences between his philosophical beliefs and those of the Utilitarians for whom punishment was 'an evil' justifiable only where its benefits to society outweighed the pain inflicted on the individual. For Beccaria and Bentham punishment was state-inflicted pain, justified by its deterrent effect on future crime; criminals were in effect sacrificed for the greater benefit of the whole society. Maconochie claimed that the promotion of deterrence was 'selfish' and inevitably led to 'injustice' and 'disproportionate severity'.<sup>10</sup> Society's right to sacrifice any member,

whatever their crime, was an attack on the 'sacredness (of) *individual* interests' which he believed characterized 'the advance of true freedom and civilization'.<sup>11</sup> By rejecting the Benthamite assertion that punishment was always an evil Maconochie was able to develop an alternative legitimization. In his hands the infliction of punishment became 'medicine for the individual'; transforming it, in its reformative guise, from a necessary evil to a desirable end in its own right.<sup>12</sup>

The concept of 'less eligibility' was continually exploited in this period to critique reformative aspirations. Charles Dickens gave voice to these concerns when he claimed:

*we have come to this absurd, this dangerous, this monstrous pass, that the dishonest felon is, in respect of cleanliness, order, diet, and accommodation, better provided for, and taken care of, than the honest pauper.*<sup>13</sup>

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Although Maconochie was not insensitive to the demand that punishments retain a punitive dimension, from his earliest writings he had recognized an inherent conflict between the infliction of punishment and the promotion of reformation. The failure of the existing system

resulted, he argued, directly from its attempt to simultaneously deter and reform, requiring 'existing Penal Institutions ... (to) constantly fluctuat(e) ... between these two horns of a dilemma'.<sup>14</sup> The infliction of punishment, Maconochie argued, inevitably placed a person in an 'unnatural position' that 'interferes especially with the free agency' crucial to appropriate social life.<sup>15</sup> Reformation involved promoting 'voluntary exertion and self denial', which could only be generated when, on however an unlevel playing field, the choices of idleness and immediate gratification were also made available.<sup>16</sup>

Maconochie criticized the existing 'penal apparatus (as being) nearly all retrospective (and) framed to punish the past' whilst failing to 'guard against the future'.<sup>17</sup> It

9. Maconochie (1853) p.2.

10. Maconochie, A. (1848) *Secondary Punishment: The Mark System*, London: John Olivier p.4

11. Maconochie (1839a) pp.9-10 (emphasis in original).

12. Maconochie, A. (1847), *Comparison between Mr Bentham's views on punishment, and those advocated in connexion with the Mark System*, London: Compton p.2.

13. Dickens, C. (1997), 'A Walk in the Workhouse' (Household Words, 25th May 1850) in *Selected Journalism 1850-1870*, Edited by David Pascoe, 239-245, London: Penguin Classics p.241).

14. Maconochie (1839a) p.18.

15. Ibid p.18.

16. Ibid p.18 (emphasis in original).

17. Maconochie, A. (1846), *Crime and Punishment: The Mark System*, London: Hatchard & Son p.3.

was for this reason that the many reformatory initiatives failed and he therefore rejected the usual compromise in which '(r)eformation and example must be conjointly provided for', instead arguing for 'dividing the processes employed into specific *punishment for the past* and *specific training for the future*'.<sup>18</sup> The two objectives were 'essentially different', one 'subdued the individual ... in just retribution for past offences' whilst the other 'raised him again ... (and) made him again worthy to be a free man.'<sup>19</sup> They could not be practically combined; each had its own 'science' which demanded radically different regimes to achieve their diverse objectives.<sup>20</sup> The initial punishment phase, Maconochie argued, 'should be severe, — but short' and be enforced 'if necessary, by *direct physical violence or constraint*, because in this stage it is desirable to subdue the prisoners' minds, and fix them, in painful retrospect, on their past guilt'.<sup>21</sup>

Punishment's focus, Maconochie declared, should be on achieving 'a comprehensive and manly reform' requiring the convict to display 'sustained submission and self-command'.<sup>22</sup> Progress towards release would be the convicts' responsibility, the system being designed to require that 'all must confess themselves subjugated, for otherwise they would never be released from it.'<sup>23</sup> The key to his system's inevitable success, Maconochie argued, was that it aligned the interests of the prisoner with those of society. He saw his penal system as including a corporal dimension, advocating that punishment's 'iron should enter both soul and body,' though its application required skilful measurement, for its purpose was to reshape rather than 'to scar and harden'.<sup>24</sup> Physical suffering, inherent in punishment, was to be given a new function; those undergoing punishment were to be 'trained to virtue, and not merely sentenced to suffering.'<sup>25</sup> In this sense

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Maconochie and other advocates of reformation were not concerned with abolishing the corporal, their task was rather to legitimize and civilize it.

In reviewing transportation Maconochie had claimed that the records of convicts focused exclusively on their misdeeds, whilst 'good ordinary behaviour, (such) as diligence, sobriety, obedience, honesty, fidelity, zeal, or the like' was unrecorded.<sup>26</sup> As a result they had no impact on decisions on matters such as the issuing of tickets of leave and tended 'to warp the judgement in forming estimates of moral character'.<sup>27</sup> In the hulks and local

prisons, as well as in the Australian penal colonies, the regimes' focus on misbehaviour he felt removed any incentive for good or virtuous behaviour. The inevitable consequence of this was that the 'good prisoner ... (was) usually a bad man.'<sup>28</sup> Refocusing attention on positive behaviour Maconochie argued would allow 'the manly virtues ... to be ... sedulously cultivated'. By structuring the regime to reflect the adversity experienced in ordinary life the Mark System sought to make the prisoner the agent of his or her own reformation.<sup>29</sup> From this adversity there was to be 'no escape but by continuous effort',

rations beyond bread and water, indulgences, and eventually freedom all depend on the prisoner's capacity to 'struggle manfully'.<sup>30</sup>

Sentences to imprisonment, hard labour, the galleys and transportation prior to this period were either in perpetuity or for a fixed period of time. Where forfeiture of the lawbreaker's labour was part of the intention of the sentence its measurement was problematic. Release came with time and the quantity and quality of the labour extracted were normally poor. Maconochie advocated a system that 'would set a proper value on time' and in which evasion from labour would be penalized.<sup>31</sup> Whilst English prisons under Du Cane later in

18. Maconochie (1839a) p.7 (emphasis in the original).

19. *Ibid* p.7.

20. Home Office (1838) p.9.

21. Maconochie (1839a) p.18 and Maconochie, A. (1839b), *Australiana: Thoughts on Convict Management and Other Subjects Connected with the Australian Penal Colonies*, London: John W Parker p.100 (emphasis in original)

22. Maconochie (1853) p.2 and Maconochie (1839a) p.5.

23. Maconochie (1857) p.1.

24. Colonial Office (1838) p.7.

25. Maconochie (1839a) p.15.

26. Home Office (1838) pp.5-6.

27. *Ibid* p.6.

28. Maconochie (1846) p.29.

29. Maconochie (1853) p.4.

30. Maconochie (1846) p.43.

31. House of Commons, (1850) *Report from the Select Committee on Prison Discipline; together with the proceedings of the committee, minutes of evidence, appendix and index*, London p.5.

the nineteenth century were to be characterized by deliberately useless labour, Maconochie advocated 'useful labour in the open air, in employments in which improved skill would facilitate the subsequent earning of honest bread'.<sup>32</sup> Hard labour needed to act both 'as (a) warning to the idle' and as 'preparation for the penitent to meet the difficulties which necessarily beset them after their discharge.'<sup>33</sup>

Time sentences, Maconochie argued, were 'the root of very nearly all the demoralization which exists in prisons' and gave prisoners 'a direct interest in idling, and whiling away time instead of employing it, directly corrupt them, and destroy whatever little habit of industry they may previously have had'.<sup>34</sup> Instead of time sentences Maconochie proposed the introduction of task sentences 'with *minima* times annexed to them, but not *maxima*', under which completion of punishment would not be determined by the passage of time but by the completion of a specific task.<sup>35</sup> Maconochie argued that the minimum period of punishment, even for 'the least offence', should be two, or ideally, three months.<sup>36</sup> These prisoners would, like everyone else subjected to Maconochie's system, have received, in terms of time, no maximum sentence, effectively removing their capacity to endure and resist their gaoler confident in the knowledge that there was a future date beyond which they could not be detained. When asked how long an 'obstinate' man who 'does nothing' could remain in confinement Maconochie responded: 'For ever; but that is an unsupposable Case.'<sup>37</sup> He was confident that his system was so carefully crafted that whatever intentions the prisoner arrived with, it would soon be clear that it was in their interest to co-

operate, they would realize that once 'under the lash of the law ... (they) must work out of it (and) no time will take them out'.<sup>38</sup> For prisoners who had traditionally received longer sentences Maconochie's system offered the prospect of much speedier release. Maconochie suggested that a prisoner sentenced to transportation for life was likely to be released in five or six years as incarcerating them for longer would compromise his

reformatory objectives.<sup>39</sup> Those exposed to his system who were reconvicted, Maconochie argued, should have their second sentences significantly increased irrespective of the severity of their subsequent offence.<sup>40</sup>

At the heart of Maconochie's system were marks; the currency of his model penal institution. They measured the length of sentence, rewarded work and other desirable conduct, purchased both the necessities of life and luxuries and were deducted as fines for misconduct. The exact value varied over time, sometimes linked to a monetary value, normally a penny, and on other occasions to an hour's labour.<sup>41</sup> In his theoretical writings Maconochie argued for a wide range of behaviours to be evaluated daily and marks allocated accordingly. In his initial report written in 1837 he advocated awarding marks to convicts who had been:

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*orderly, obedient, zealous, attentive, active, industrious, cleanly in their persons and rooms, civil, temperate under provocation (should such have been offered), punctual in their attendance at prayers, school, work etc., or have in any other way deserved commendation.*<sup>42</sup>

32. Maconochie (1846) p.31.

33. Ibid p.7.

34. House Of Commons (1850) p.447; Maconochie (1846) p.6.

35. (Maconochie (1857) p.1 (emphasis in original).

36. Maconochie (1846).

37. House of Lords, (1847), *Second report Select Committee of the Lords into the execution of the criminal law, especially respecting juvenile offenders and transportation*, London p.106.

38. House of Commons (1850) p.455.

39. House of Lords (1847) p.108.

40. Maconochie (1857) p.2.

41. Maconochie, A. (1856), *Prison Discipline*, London: T Harrison p.18; House of Lords (1847) pp.100-101.

42. Home Office (1838) p.10.



Two decades later Maconochie was proposing that they be allocated in prisons on the basis of seven criteria:

*General demeanour, Diligence in labour, Efficiency in Labour, Amount of Religious instruction possessed, Zeal exhibited in acquiring more, Amount of Literary instruction possessed, and Zeal shown in acquiring more of it.*<sup>43</sup>

Marks were also central to maintaining discipline. Fines were levied in marks and thus impacted both on a prisoners existing purchasing power and ultimately on the length of their sentence.

During the initial punitive stage prisoners would be required to earn a specific proportion of the total marks required for their release before being allowed to progress to the training stage. For women, Maconochie argued the initial stage should involve 'a Magdalen seclusion ... (with) moral and religious instruction and ... tuition in ... arts and occupations' but which was less punitive than the regime for men.<sup>44</sup> Whilst solitary confinement could be incorporated into the initial stage of Maconochie's system, the training stages always involved association. The importance of association was stressed during the second stage by the establishment of groups of convicts. These groups, who in the case of single male convicts he believed should be of about six men, would be formed by the men themselves, who became accountable for each other's conduct.<sup>45</sup> Women were to be organized in smaller groups as Maconochie considered that selfishness was not a female vice.<sup>46</sup>

Once the convicts had been organized into groups the Mark System became collective with all the marks earned by group members being pooled. Likewise when one member was fined the whole group suffered, generating a common interest among group members.<sup>47</sup> Groups would be disbanded if members fell out or if a

member committed a serious offence. Members of disbanded groups would return to the punishment stage where they were required to form themselves into new groups. Trouble makers, the lazy and dishonest, Maconochie was confident, would, under this arrangement, be marginalized within the convict community.<sup>48</sup> Central to this thinking was his belief that vice and criminal behaviour were evidence of selfishness. By forcing convicts to consider the interests of others he believed he was promoting their social feelings and that they would learn to modify their behaviour both during the group stage and when they re-entered society. These groups, Maconochie argued, would make all prisoners: 'Mentors, entitled to advise, restrain, instruct, and influence their neighbours to good'.<sup>49</sup> Maconochie planned that during this group stage married men should be assigned cottages where they would live with their families. His family's conduct, as well as his own, would determine the convict's progress, providing the married convict with a strong incentive to be a disciplining force within his own home.<sup>50</sup>

The major mechanism of reform for Maconochie was not solitude or religious instruction but productive labour. Penal Labour, he argued, should be demanding, making a prisoner 'work both out of this position, and into the means of subsequently keeping out of it' thereby developing 'those habits of independent voluntary exertion which constitute at once the best proofs of immediately improved character.'<sup>51</sup> Work should be meaningful and relevant to the convicts' future employment and in particular women should be engaged in 'feminine' employment.<sup>52</sup> His regime was not however to be entirely focused on hard work, he believed strongly in providing prisoners with access to education, a wide range of literature and the capacity to make and enjoy music. When Governor Gipps offered twenty pounds towards establishing a Library at Norfolk Island Maconochie, in characteristic style, responded with a long and detailed memorandum setting out why

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43. Maconochie (1857) p.1.

44. Maconochie (1839b) p.130.

45. Home Office (1838) p.10.

46. Maconochie (1839b) pp.130, 105-106.

47. Maconochie (1846) p.44.

48. Home Office (1838) p.10.

49. Maconochie (1839b) p.74 (Emphasis in original).

50. Ibid p.106.

51. Maconochie (1848) p.7; Maconochie (1846) p.15 (emphasis in the original).

52. Maconochie (1839b) p.155.

his specific and considerable requirements made a significantly higher sum necessary. Gipps increased the library budget to a hundred pounds. Maconochie then persuaded Gipps to allocate a further hundred pounds for the purchase of musical instruments, which he followed up by forwarding to the Governor the invoice for the cost of the entire stock of a sheet music retailer which Maconochie had impulsively purchased at an auction for another forty six pounds.<sup>53</sup>

Whereas for advocates of deterrence the fate of the discharged prisoner was often of limited importance, for those promoting reformation as the primary function of punishment it was crucial. Cynicism about the chances of reform were widespread; Prison Governor, George Chesterton, spoke for many when he declared that

*the discharged convict will fly to his accustomed haunts, and the most superficial knowledge of those polluted localities will determine the question, as to how long his recent appreciation of wholesome counsel and pastoral instruction may be expected to survive!*<sup>54</sup>

Such views, anticipating the environmental criminology of the early twentieth-century, claimed that the neighbourhoods from which 'criminals' emerged where so thoroughly 'polluted' that, whatever the merits of prison regimes, the discharged prisoners were virtually doomed to return to their criminal lifestyle. Maconochie agreed that many ex-convicts were returning to crime and former prisoners were a criminogenic influence within the communities they were released into. However, he placed the blame primarily on the failure of the regimes. His system, by resisting the temptation to construct an artificial world within the prison, acknowledged the problems prisoners would face on release and through his training regime he

believed it would produce individuals not only able to resist the temptations offered by the 'polluted localities' but capable of returning to them as civilizing influences.<sup>55</sup>

His confidence in the success of his reformatory regime led him to argue against restrictions and supervision for released convicts; who should be dispersed 'unknown and unrestricted, at their own free will,' able to engage fully in life free from any stigma.<sup>56</sup> Maconochie (1857:2) even argued that prisoners at the end of their sentences 'should have the power of remaining, up to a given time, in precisely the same circumstances as before'.<sup>57</sup> This extended confinement would earn the convict, on their eventual discharge, 'a money payment (say a penny per mark), for whatever surplus they may have within this time accumulated.'<sup>58</sup>

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### From Theory to Practice

Although this paper has focused on his theories Maconochie had two opportunities to put his theories into practice. In 1840 he was appointed as Superintendent of the Norfolk Island penal settlement nine hundred miles east of Sydney, a post he held until 1844. In 1849 a second opportunity presented itself when he was appointed as the first Governor of the new Birmingham prison at Winston Green.

Most of the available literature on Maconochie focuses on his time at Norfolk Island. The island's second settlement between 1825 and 1855 has been widely portrayed as a 'hell on earth' populated by prisoners who were 'incurable doubly convicted capital respites, guilty of awful crimes' and subjected 'to extra-legal punishment and tortures' by 'commandants (who) were brutal and sadistic'.<sup>59</sup> Recent research by Tim Causer based on a detailed examination of the convict records has revealed a somewhat different picture; in fact the majority of convicts were sent to Norfolk Island for non-

53. Colonial Office (1841) pp.121-122, 17, 23, 27-28.

54. Chesterton, G.L. (1856), *Revelations of Prison Life; with an enquiry into Prison Discipline and Secondary Punishments*, Volume 2, London: Hurst & Blackett. p.41.

55. Maconochie (1839a).

56. *Ibid* p.36.

57. Maconochie (1857) p.2. This idea was not novel. William Brebner, Governor of the Glasgow Bridewell, allowed prisoners to remain beyond the term of their sentence and permitted the poor and destitute of Glasgow voluntary entry. By 1842 there were nearly forty voluntary prisoners.

58. Maconochie (1857) p.2.

59. Causer, T.J. (2010) '*Only a place fit for angels and eagles*': the Norfolk Island penal settlement, 1825-1855, Unpublished PhD Thesis, Kings College London p.23.

violent property offences, their average length of detention on the island was three years, and that the scale of punishments imposed on the prisoners was significantly less than previously claimed.<sup>60</sup> Maconochie's regime on the Island has been portrayed an exceptional event in the history of the second settlement; a period of enlightened penal management characterised by the humanitarian treatment of convicts; who responded by rejecting their criminal habits and adopting civilised modes of behaviour. This account can be found widely in the literature with the most recent example being Norval Morris's fictionalized account of Maconochie's regime which he used as a platform to argue for humane reforms of the contemporary prison.<sup>61</sup> All these accounts rely heavily on John Barry's hagiographic *Alexander Maconochie of Norfolk Island* which celebrated Maconochie as 'a man of great nobility of soul who dedicated himself in the prime of his life to the reform of a barbarous penal system.'<sup>62</sup>

The evidence however suggests a more ambiguous story. The remote location allowed the Superintendent scope for a level of autonomy way beyond what is usually experienced by those running penal institutions. Instructions from London had to firstly be dispatched by ship to Sydney and then forwarded, again by ship, to Norfolk Island. A request for the Secretary of State to confirm an instruction would gain the colonial administrator over a year's grace and Maconochie was an administrator who had no qualms about declaring the Colonial Secretary misguided, requesting he reconsider whilst continuing his own local policies. He used this facility to remove the obstacles on the Island that impeded his full implementation of his Mark System.<sup>63</sup>

The system of marks implemented on the Island was focused on the convict's labour; a 'Tariff of Wages' was applied covering 'every description of labour.' Significantly these tariffs allocated greater value to some labour than others with Maconochie declaring that: 'A

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Person possessing Skill would have more than a working Man.'<sup>64</sup> Maconochie also encouraged the growth of an informal economy, rewarding convicts who advanced through his stages firstly with small plots of land to cultivate and later tickets of leave which allowed them freedom within the Island. They were encouraged to grow vegetables, rear stock and cultivate tobacco; all of which they were free to trade. He embarked on an ambitious programme of public works; Roman Catholic and Anglican churches, new barracks and a new prison were all constructed. He established a local police force employing in excess of a hundred convicts and many other convicts were directly employed on Government business. With these factors in mind it is perhaps not surprising that the production of maize and wheat fell significantly during Maconochie's time. What he was unable to do however was give his marks his true intended value — release from the Island was not within his gift — and as a result the initial decline in both disciplinary infringements and the consequent corporal punishments was soon reversed.

One of the most powerful Maconochie myths is that he rejected corporal punishments. Whilst it was true that the marks fine provided an alternative punishment to the existing options of solitary confinement, the wearing of irons and flogging, Maconochie used them all on Norfolk Island. Under Maconochie being absent from prayer earned a fine of 25 marks; refusing to bathe, 12 marks; careless field labour, 84 marks; insolence 100 marks; stealing potatoes, 200 marks and the false confession of a murder, 1,000 marks. However serious offences were often dealt with by a mark fine accompanied by a corporal or carceral punishment: 'being in the bush in an improper situation' earned a 2,000 marks fine and 6 months in jail, 'insolence and threatening language to Captain Maconochie', earned a fine of 2,000 marks and one month in jail; whilst a conviction for an 'unnatural crime' earned a 1,000 marks fine and 100

60. Ibid pp. 100, 50.

61. See for example Hughes, R (1987) *The Fatal Shore*, London Collins and Clay, J. (2001) *Maconochie's Experiment*, London, John Murray. Morris, N. (2002) *Maconochie's Gentlemen*, New York, Oxford University Press.

62. Barry, J.V. (1958) *Alexander Maconochie of Norfolk island*, Melbourne, Oxford University Press, p.2.

63. For example he advised the Governor of New South Wales that his instruction to restrict the Mark System to new prisoners transported from England and Ireland was impractical so he had unilaterally included the colonial prisoners already on the Island. When Governor Gipps rebuked Maconochie he responded that as the colonial prisoners had already been included it was unfeasible to reverse the policy.

64. House of Lords (1847) p.96.

lashes.<sup>65</sup> It is clear that under Maconochie the number of floggings decreased significantly; Causer has shown that number of lashes which were over 11,000 in 1839 and over 10,000 in 1845 but did not reach 5,000 in the Maconochie years and indeed in 1840 had reduced to 1,000.<sup>66</sup> Paradoxically the average lashes administered on Maconochie's order, ninety-three, was higher than under any other Governor in the penal settlement's history. The evidence suggests that although life properly improved for convicts during Maconochie's tenure the scale of changes claimed by Barry is overstated.

In 1849, with the construction of Birmingham prison nearing completion, the local Justices met to discuss the appointment of a Governor. They agreed to appoint Maconochie with the specific intention of allowing him to carry out an experiment with his 'Mark System'. However the local authorities attempt to gain the approval of the Home Secretary to the introduction of the 'Mark System' was refused and instead a local arrangement was made permitting Maconochie to carry out a modified 'Mark System' experiment with prisoners under sixteen. Maconochie's second practical attempt to achieve the reformation of prisoners was carried out in a mid-nineteenth-century local prison where sentences were short — more often measured in days rather than years — and the Governor was subject to detailed national and local regulations and supervision. He also faced many of the everyday practicalities which are all too often ignored in theoretical models. In particular his 'Mark System' had identified productive labour as the key mechanism for reforming prisoners but whilst at Birmingham Maconochie had difficulty providing work and most of the adult male prisoners were confined alone in their cells without work or other occupation. His experimental regime however required the boys to work for their food and to achieve this Maconochie resorted to the crank mill and shot drill. Labour was performed on the crank machine by turning the handle upon which a 5lb weight had been attached. The boys were required to make 10,000 revolutions a

day, 2,000 before breakfast, 4,000 before lunch, and a further 4,000 to receive their supper. Those who did not earn their food by meeting this target were issued with a bread and water diet.<sup>67</sup> The shot drill involved boys moving a pile of cannon balls from one side of the exercise yard to the other. When completed they would be required to return them to their original location.

Maconochie rapidly found himself in conflict with the local justices and his own deputy. His attempts to experiment were increasingly curtailed and within two years he was dismissed from his post. Two years after his dismissal the prison was the subject of a Royal Commission investigation following the suicide of Edward Andrews a 15 year old prisoner. The report of the Commission was detailed and in particular highlighted a number of illegal punishments Maconochie

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had introduced into the prison. These included, for idleness, standing against the wall during work hours, more dramatic was his introduction of flogging by instalments. Under this arrangement, he admitted in evidence to the Royal Commission, obstinate and strong-willed boys who were not co-operating with his regime would be flogged on a daily basis until their submission was obtained. He introduced the straight jacket into the prison and on a number of occasions had

women strapped to the railings in the prison's central hall on display to the other prisoners; a humiliation that he ended only on obtaining the woman's compliance to his authority. He also on a number of occasions delayed the lawful release of prisoners.<sup>68</sup> Michel Foucault writing about the emergence of the prison in France has highlighted the conflict between the discourses of law and discipline. For Foucault reformatory discipline draws on 'a theoretical horizon that is not the edifice of law, but the field of the human sciences'.<sup>69</sup> Under deterrent and retributive punishments the focus is on the offence for which the court can determine a specific punishment. For reformation this focus moves to the offender and the court must inevitably hand them over to the gaoler to manage their treatment. This process leads to what Foucault has termed the 'declaration of carceral

65. Colonial Office, (1843) 'Letter from Maconochie to the Colonial Secretary New South Wales 4th April 1842', in *Convict discipline. correspondence between the Secretary of State and the Governor of Van Diemen's Land, on the subject of convict discipline Part I*, London pp.17-22).

66. Causer (2010) p.238.

67. Royal Commission (1854) *Report of the Commissioners appointed to Inquire into the Condition and Treatment of the Prisoners confined in Birmingham Borough Prison*, London p. vii.

68. Royal Commission (1854) p. xxviii.

69. Foucault. M. (2003), *'Society Must Be Defended' Lectures at the College de France 1975-76*, London: Picador p.38.



independence'; with the gaoler increasingly operating unrestrained by the law.<sup>70</sup> In Birmingham Maconochie, committed to introducing a reformatory regime, constantly felt the virtue of his intentions allowed him to introduce and implement illegal punishments.

### Maconochie's Legacy

Walter Crofton's appointment to the Chairmanship of the newly established Board of Directors of the Irish Convict Prisons in 1854 provided an opportunity for Maconochie's ideas to be put into practice on a significant scale. Crofton's progressive stage system, developed in the 1850s, incorporated Maconochie's belief that convicts should be prepared for release. The 'intermediate prisons' of the third stage of that system can be regarded as the first 'open' prisons.<sup>71</sup> Back in England both the regimes of Joshua Jebb (1850-1863) and Edward Du Cane (1869-1895) incorporated elements of the Mark System. Lionel Fox the Chairman of the English Prison Commission in the middle of the twentieth century claimed that 'from the time of Maconochie on Norfolk Island, the conception of Progressive Stages, coupled with Maconochie's mark's system, became almost the dominating idea in prison reform in both Europe and America.'<sup>72</sup> Maconochie's ideas directly influenced popular writers like Hepworth Dixon, Henry Mayhew and Charles Dickens and made an important contribution to the changing conceptualization of the criminal during the nineteenth century.

In America Maconochie's penal theory made a deep impact on the leading reformer Enoch Wines who sought to place him at the very pinnacle of prison reformers proclaiming in a report to Congress that:

*among prison reformers Maconochie holds the most conspicuous place; that he stands pre-eminent in the 'goodly company.' In him head and heart, judgement and sympathy, the intellect and the emotional element, were developed in harmonious proportions; were equally vigorous and equally active; and all*

*consecrated to the noble work of lifting the fallen, reclaiming the vicious, and saving the lost.*<sup>73</sup>

Maconochie's penal theory underpins the *Declaration of Principals* adopted in 1870 by the American Prison Association. His ideas and Crofton's deployment of them within his Irish system provided the inspiration for the highly influential regime developed at the Elmira Reformatory in New York State from 1876. Elmira in turn impressed the Gladstone Committee whose report of 1895 raised the possibility of engaging in an experiment along similar lines; an aspiration which led to the initiation of the borstal experiment from 1909 in England. The ideas of Alexander Paterson, who dominated the English Prison Commission between the two World Wars, are a faithful reproduction of Maconochie's.

The penal theories developed by Maconochie anticipated subsequent developments in state punishments: group dynamics, indeterminate sentences, behavioural modification, token economies, and incentive schemes can all be traced back to his penal blueprint. Yet whilst his theories remain embedded within the contemporary penal system and central to the agendas of prison reformers we need to also recognise that his own attempts to implement these ideas were highly problematic. Indeed on his death *The Athenaeum* highlighted that the two opportunities he had been given to try out his theories had 'both ended in failure, one in misery and disaster.'<sup>74</sup> If it is to Maconochie's ideas we must, as Norval Morris suggests, look to for 'the roots of modern prison reform' then maybe it is to his penal experiments at Norfolk Island and Birmingham that we should look to understand why so often prison reform fails.<sup>75</sup>

70. Foucault, M. (1979), *Discipline and Punish: The Birth of the Prison*, London: Penguin p.247.

71. Open Prisons were introduced in England early in the twentieth century on the initiative of Alexander Paterson using arguments identical to those set out by Maconochie to justify the innovation. (Thomas, J.E. (1972) *The English Prison Officer since 1850: A Study in Conflict*, London, p.155) Many of the criticisms directed at Open Prisons in the twentieth century are almost identical to those directed at Crofton's 'Intermediate Prison'. With one opponent asserting 'that to call it a *Prison* is a misnomer.' (An Irish Prison Chaplain, (1863) *The Intermediate Prisons, A mistake*, Dublin, p.7; emphasis in the original).

72. Fox, L. W. (1952) *The English Prison and Borstal Systems*, London p.149.

73. Wines, E, C (1872) *International Congress on the Prevention and Repression of Crime including Penal and Reformatory Treatment: Preliminary Report of the Commissioner appointed by the President to represent the United States in the Congress in Compliance with a Joint Resolution of March 7, 1871*, Washington p.204.

74. *Athenaeum* 3 November 1860.

75. Morris (2002).