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Stephen White

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# CRIMINOLOGY

## ALEXANDER MACONOCHIE AND THE DEVELOPMENT OF PAROLE

STEPHEN WHITE\*

The appearance of Barry's compelling biography of Alexander Maconochie in 1958,<sup>1</sup> a foretaste of which had appeared in an article in the *Journal*,<sup>2</sup> made for a reexamination of the place conventionally accorded to Maconochie in the history of penal institutions. Among Englishmen and Australians the effect was, as Barry had intended, to rectify a considerable injustice symbolized in the omission of an entry for Maconochie in the Dictionary of National Biography.<sup>3</sup> To penologists in America, on the other hand, and to a few in England, Maconochie had always appeared a person of significance. Some had even overrated his importance, especially in the history of systems of what we now call parole.

It is difficult to say why American penologists came to do this. While it is certainly true that they were wrong to assume that the origins of parole could not be traced back beyond the system of tickets-of-leave developed by colonial administrators in the British penal colonies in the late eighteenth and early nineteenth centuries,<sup>4</sup> it is also true that the ticket-of-leave represented a very important stage in the development of the idea of parole.<sup>5</sup> Early writings about parole contained errors about the chronology

of the development of tickets-of-leave,<sup>6</sup> and about the timing<sup>7</sup> and extent<sup>8</sup> of Maconochie's administration in Australia, but none of the writings examined contain any suggestions that Maconochie contributed to the development of systems of parole. In 1927, however, Witmer could refer to a custom then prevailing of crediting Maconochie with being the "originator of the system in Australia,"<sup>9</sup> although she expressed some doubt about the validity of this view. In the Attorney-General's Survey of Release Procedures Maconochie, although stated definitely not to have been the inventor of tickets-of-leave, is given "chief credit for developing an early parole system"<sup>10</sup> in that he provided a transitional stage between captivity and complete freedom.<sup>11</sup> Probably the most influential dicta in consolidating what might be called the conventional view of Maconochie's part in the development of parole were those of Barnes and Teeters. In each of the editions of their *New Horizons in Criminology* they refer to Ma-

\*See, e.g., F. WINÈS, PUNISHMENT AND REFORMATION (6th ed. 1895); Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. CRIM. L. & C. 9, 11 (1925). Both Wines and Lindsey suggest, if not expressly state, that tickets-of-leave were first employed in connection with the probation system in Van Diemen's Land. On this system see Shaw, *The Origins of the Probation System in Van Diemen's Land*, 6 HISTORICAL STUDIES: AUSTRALIA & NEW ZEALAND 16 (1953).

<sup>7</sup>Witmer, *The History, Theory and Results of Parole*, 18 J. CRIM. L. & C. 24, 26 n.2, 28 (1927). Witmer gives the impression that Maconochie's administration of the mark system was part of the probation system in Van Diemen's Land. *Id.* at 28.

<sup>8</sup>E. SUTHERLAND, CRIMINOLOGY 508-09 (1924). Sutherland stated that in 1842 Maconochie put a system of remissions for good behavior into "general use . . . in the convict colonies of Australia," a statement which has remained unchanged in later editions of the book despite the appearance of Barry's biography. E.g., E. SUTHERLAND & D. CRESSEY, PRINCIPLES OF CRIMINOLOGY 581 (8th ed. 1970).

<sup>9</sup>Witmer, *supra* note 7, at 26-27 n.2.

<sup>10</sup>UNITED STATES DEPT OF JUSTICE, ATTORNEY-GENERAL'S SURVEY OF RELEASE PROCEDURES vol. IV, at 8 (1939).

<sup>11</sup>*Id.* at 12.

\* Research Fellow, Department of Law, Research School of Social Sciences, Australian National University.

<sup>1</sup>J. BARRY, ALEXANDER MACONOCHIE OF NORFOLK ISLAND: A STUDY IN PENAL REFORM (1958) [hereinafter cited as BARRY]; but for an important correction of Barry's view of the influence of phrenology on Maconochie's thought see D. de Guistino, *Reforming the Commonwealth of Thieves: British Phrenologists and Australia*, 15 VICTORIAN STUDIES 439 (1972) and D. DE GUISTINO, CONQUEST OF MIND: PHRENOLOGY AND VICTORIAN SOCIAL THOUGHT 145-64 (1975).

<sup>2</sup>Barry, *Pioneers in Criminology—Alexander Maconochie (1787-1860)*, 47 J. CRIM. L.C. & P.S. 145 (1956).

<sup>3</sup>BARRY, *supra* note 1, at 224.

<sup>4</sup>Moran, *The Origins of Parole*, 1945 NAT'L PROBATION ASS'N Y.B. 71.

<sup>5</sup>Although Moran described the view that parole "developed" from the system of tickets-of-leave as a misconception having "so little basis in fact that it is difficult to understand [its] widespread acceptance," it is clear from his argument that by "developed" he meant "originated." *Id.* at 71.

conochie as the originator of tickets-of-leave and as the progenitor of parole,<sup>12</sup> despite the fact that the second and third editions were preceded respectively by the publication of Moran's article on parole<sup>13</sup> and Barry's work on Maconochie, both of which showed that this view was wrong.

The mistake in this view was pointed out by Reckless in a review of Barry's biography;<sup>14</sup> but in his and subsequent writers' views, the error lay solely in the claim that Maconochie had initiated the ticket-of-leave system. Barry showed, as Moran had done, that the system had been in operation long before Maconochie turned his mind to matters penological.<sup>15</sup> Moreover, Barry never expressly claimed for Maconochie any credit for developing anything like parole. If he believed such credit due, this is an omission most odd for one who, while writing Maconochie's biography, became the first Chairman of the Victorian Parole Board.<sup>16</sup> American penologists, however, continue to think that even if Maconochie did not initiate the system, he contributed to its development. Thus Dressler writes:

But the ticket-of-leave plan lay comparatively fallow until Alexander Maconochie arrived on the scene. Although he cannot be credited with originating the ticket, he may be called the "father" of parole more appropriately than any other person. . . .<sup>17</sup>

.....  
Maconochie's distinctive contribution to parole was the mark system, which he made an integral part of the ticket-of-leave program. . . .<sup>18</sup>

.....  
An adjuvant of the mark system was Maconochie's gradations of servitude. . . His gradations were. . .

<sup>12</sup>H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 566-67 (3d ed. 1959), 780 (2d ed. 1951), 814, 817 (1st ed. 1943).

<sup>13</sup>Moran, *supra* note 4, at 78-79.

<sup>14</sup>Reckless, *Book Review*, 327 *ANNALS* 158-59 (1960).

<sup>15</sup>But perhaps it had not been in operation quite as long before as Barry believed. Ward, *Captain Alexander Maconochie, R.N., 1787-1860*, 126 *GEOGRAPHICAL J.* 459, 462, 467 (1960). See the correspondence on this point between Barry and Ward, Barry Papers, M.S. 2505/42/913, M.S. 2505/42/916, and M.S. 2505/45/402, on file at the National Library, Canberra, Australia. See also the entry on Maconochie, written by Barry, in 2 *THE AUSTRALIAN DICTIONARY OF BIOGRAPHY* 185 (1967).

<sup>16</sup>Penal Reform Act of 1956, 5 *Eliz. 2*, No. 5961, §§ 17, 19(1) (Vict.).

<sup>17</sup>D. DRESSLER, *PRACTICE AND THEORY OF PROBATION AND PAROLE* 61 (2d ed. 1969).

<sup>18</sup>*Id.* at 67.

(4) ticket of leave, which permitted the prisoner to live where he chose, but under conditions. . . .<sup>19</sup>

.....  
In the fourth gradation, individuals who had earned sufficient marks received ticket of leave and were permitted to live anywhere at all, even in England. However, they were to report their residence to police, and were expected to refrain from further illegal acts.<sup>20</sup>

Part of the fault of Dressler's account arises from his confusion between what Maconochie wanted to do on Norfolk Island with what he was allowed to do. Had it been in Maconochie's power to allow it, convicts probably would have been permitted to return to England from Norfolk Island. But none ever did so while Maconochie was on the island, let alone on tickets-of-leave which were not introduced into England until almost ten years after Maconochie left the island.<sup>21</sup>

Apart from this, however, Maconochie's influence on the development of parole has not yet been accurately identified. Certainly he contributed to the liberalization of penological thought which made possible the institution of systems of parole. It is also almost certain that those who developed systems of parole believed that Maconochie had thought favorably of the institutions existing in his time from which parole developed; in so far as his opinions carried weight with them, he can be said to have contributed to the development of parole. Nor can it be denied that Maconochie might have approved of systems of parole as they exist today. The basis of the claim for Maconochie's metaphorical paternity of parole, however, is the belief that he approved of those elements in the ticket-of-leave systems of his time that developed into parole, for clearly the position of a ticket-of-leave holder can be fitted very easily into any system of punishment which is conceived of as consisting of stages of increasing freedom through which a prisoner must pass before resuming his former status. Indeed, Maconochie spoke of the various stages of punishment as "melting" into one another.<sup>22</sup> The truth, however, is that although his views on the matter fluctuated somewhat, on the

<sup>19</sup>*Id.* at 68.

<sup>20</sup>*Id.* at 69. See W. RECKLESS, *THE CRIME PROBLEM* 558 (4th ed. 1967); P. TAPPAN, *CRIME, JUSTICE AND CORRECTION* 711-12 (1960).

<sup>21</sup>Penal Servitude Act of 1853, 16 & 17 *Vict.*, c. 99, §9.

<sup>22</sup>A. MACONOCHIE, *GENERAL VIEWS REGARDING THE SOCIAL SYSTEM OF CONVICT MANAGEMENT* 18 (1839) [hereinafter cited as *MACONOCHIE*].

whole they were unfavorable towards those elements in ticket-of-leave systems which developed into parole, especially when he had power to do anything about them. Indeed, in a sense, his views were too liberal to allow of the conception of a system of parole.

#### PAROLE AND TICKETS-OF-LEAVE

It is important, before embarking on an examination of Maconochie's place in the development of parole, to have a clear idea of what is involved in systems of "parole" and "tickets-of-leave." In this author's view, a system of "parole" refers to a system in which persons are released from prison to live in the free community, but subject to restrictions, not usually of a physical nature, to which those never convicted of an offense are not subject. Although the possession and retention of accommodation and employment is an important consideration in the granting and continuation of parole, the emphasis in the system is on the parolee being free to find, choose, and change his own accommodation and employment. The restrictions under which a parolee lives typically oblige him to refrain from certain behavior not in itself criminal as well as requiring of him certain behavior not required, by law at least, from his unconvicted neighbors. The task of enforcing these restrictions is entrusted sometimes to agents appointed specifically for this purpose and sometimes to the police, and their enforcement is carried out through a supervision which may range from a purely repressive surveillance, through benign indifference, to purely supportive counselling. Breach of the conditions of parole render the parolee liable to be returned to prison, and if the breach involves the commission of an act which is an offense in itself, the penalty for the breach and the new offense may be made cumulative on one another. Although the power to impose sanctions for breaches of parole originally arose through the operation of systems of conditional pardons and remissions under which prisoners were released from physical captivity before the expiry of the full term of their sentences, the power to sanction breaches does not necessarily depend on the operation of a system of remissions.

According to this view it is not an important element of a system of parole that admission to it take the form of *premature* release from prison. Nor, although one cannot deny the strong historical connection between the development of systems of parole and the theory and practice of indeterminate sentencing, should one consider any element of indeterminate sentencing to be an essential feature of

parole. This latter point is crucial in any consideration of Maconochie's contribution to the development of systems of parole, for this article does not intend to demonstrate that Maconochie had no effect on the development of the indeterminate sentence. This is an impossible task.<sup>23</sup>

All that need be said about the term "ticket-of-leave" is that like the term "probation," it was used to describe a variety of statuses, real and imaginary, through which it was intended a convict should pass on his way to regaining his complete freedom. On many occasions Maconochie spoke approvingly of tickets-of-leave. Given the indiscriminate use of the term, however, it is clear that in some instances the connection between parole and tickets-of-leave is tenuous and in some others non-existent. The only common feature of tickets-of-leave was that they allowed their holders greater freedom than in most cases<sup>24</sup> they had previously possessed.

#### MACONOCHIE ON TICKETS-OF-LEAVE<sup>25</sup>

It is true that to an explanation of his system of prison discipline, published in 1855, Maconochie appended the observation: "It is unnecessary to add

<sup>23</sup>For a discussion of his influence see BARRY, *supra* note 1, at 229-41.

<sup>24</sup>The qualification is necessary because it was possible for a convict who had progressed beyond the ticket-of-leave stage to be returned to it for some default.

<sup>25</sup>Much of the material which was relied upon for this article was published in the British Parliamentary Papers, although some is to be found only in the House of Lords' Sessional Papers, sets of which are thinner on the ground than are their House of Commons' counterparts. The main despatches between the Colonial Governors and the Home Government relating to Norfolk Island are reprinted in the first series of the Historical Records of Australia. The correspondence between Maconochie and Governor Gipps, copies of which were frequently enclosed in the main despatches, was omitted from the first series, but was to have been reprinted in the third series. The editing of this series, however, has never progressed beyond 1829. References are given primarily to the Parliamentary Papers, giving the page number of the particular paper to which reference is made as well as, in parentheses, the page number of the volume of the papers in which it appears, but, as the Historical Records of Australia, though incomplete, are more accessible than the Parliamentary Papers, a reference is also given to these where it is available. To avoid the references becoming too cumbersome the following abbreviations have been used:

Correspondence re  
Convict Discipline

Copies or extracts of any correspondence between the Secretary of State and the Governor of Van Diemen's Land, on the subject of Convict Discipline, part 1, ordered to be printed, Apr. 4, 1843. 42 H.C. PAPERS 353 (1843).

that a Ticket of Leave system thus prefaced would work satisfactorily.”<sup>26</sup> When considered along with his earlier writings, however, this passing observation is more correctly read as a further argument in support of his proposed system of prison discipline rather than as any indication of his enthusiasm for a system of tickets-of-leave: he is saying no more than that while such a system appended to his sys-

tem of discipline would work, it would also be redundant. The year 1855, however, was one of controversy about the system of release on licence that had been introduced into England by the Penal Servitude Act of 1853, and there is a passage in a pamphlet Maconochie wrote in 1856 which suggests that he approved of this system.

- Correspondence re Norfolk Island      Copies or Extracts of any Correspondence between the Secretary of State having the Department of the Colonies and the Governor of New South Wales respecting the convict system administered in Norfolk Island under the Superintendence of Captain Maconochie, R.N.; also, Copies or Extracts of any Reports on the same subject, addressed to the Treasury by the Commissariat in Norfolk Island or New South Wales, ordered to be printed Feb. 23, 1846. 7 H. L. PAPERS 425 (1846).
- H.R.A.      Historical Records of Australia, First Series.
- Papers re Secondary Punishment      Copies or extracts of any correspondence between the Secretary of State and the Governors of New South Wales and Van Diemen's Land on the subject of Secondary Punishment, ordered to be printed June 15, 1841. 17 H. C. PAPERS sess. 1, at 341 (1841).
- Papers re Transportation      Papers relative to transportation and assignment of convicts, ordered to be printed Aug. 27, 1839. 38 H.C. PAPERS 741 (1839).
- Report on Convict Discipline      Copy of a despatch from Lieutenant-Governor Sir John Franklin, to Lord Glenelg, dated Oct. 7, 1837, relative to the present system of convict discipline in Van Diemen's Land, ordered to be printed Apr. 26, 1838. 42 H.C. PAPERS 15 (1837-38). Maconochie's contributions to this Despatch are also printed in A. MACONOCHIE, SUMMARY OF PAPERS ON CONVICT DISCIPLINE SENT HOME (1838).
- Report on Prison Discipline      Report on the state of prison discipline in Van Diemen's Land. 40 H.C. PAPERS 237 (1837-38). This is also printed as an appendix to Barry's biography of Maconochie, *supra* note 1, and in A. MACONOCHIE, SUMMARY OF PAPERS ON CONVICT DISCIPLINE SENT HOME (1838).

A single word may be advantageously added respecting the ticket of leave system, which has lately been so much, and in great measure causelessly, reprobated. Its principle is excellent, and would act beneficially much extended. It provides a further security, besides good management in prison, against the danger of discharging, and thus reabsorbing great criminals among ourselves, by requiring them to be discharged partially at first, and only entirely after serving a further probation in free society before complete release. The principle is thus at once provident and defensive; and the prejudice against it is partly unfounded altogether . . . partly only justified by the defects of [its] administration.<sup>27</sup>

But these views on tickets-of-leave, expounded towards the end of his life, were probably only the reflection of the views of persons far more influential than he, in particular his friend Matthew Davenport Hill.<sup>28</sup> When Maconochie first made a serious study of penology in his examination of the penal system in Van Diemen's Land he was extremely critical of tickets-of-leave. He was moved to be so, moreover, not merely by features of the system which he considered characteristic of the penal system in Van Diemen's Land as a whole, such as the uncertainty pertaining to the granting of indulgences and the severity attaching to their forfeiture, but also by features unique to them. What good he saw in the ticket-of-leave system in Van Diemen's Land was directly related to the evil he saw in the stage preceding it. After remarking that assignment is a bad preparation for liberty because it encourages the reduction of convicts to a state of bondage he continues:

It is true that some provision is made at present to meet this objection, by the system of tickets of leave, which, after a certain period of service, most convicts obtain, unless very ill conducted indeed, and with which they are cast on their own exertions for support. But meanwhile they have acquired improvident and

<sup>27</sup>A. MACONOCHIE, PRISON DISCIPLINE 21 (1856).

<sup>28</sup>On his relations with Hill see BARRY, *supra* note 1, 187-95. For Hill's views on licences see M. HILL, SUGGESTIONS FOR THE REPRESSION OF CRIME 464 *et seq.* (1857), and his evidence to the House of Commons' Select Committee on Transportation, Second Report. 17 H.C. Papers ¶¶ 1787-1943 (1856).

<sup>26</sup>A. MACONOCHIE, THE MARK SYSTEM OF PRISON DISCIPLINE 24 (1855).

frequently dissipated habits, which they find it impossible altogether to throw aside; and to check the effects of these they are subject (I believe, in existing circumstances, necessarily and with good effect) to a minute supervision of the police, which still prevents them acquiring the feelings and habits of freemen.<sup>29</sup>

According to Maconochie's description, the average ticket-of-leave holder's position in society was a unique one. Once the ticket was obtained, the holder was assigned a particular district in which he was required to reside. Although he could choose his master and residence, he could not change that residence without informing the police; he had to sleep there at all times and was subject to a curfew. He could receive wages but not acquire property. More seriously, the ticket could be suspended or entirely taken away for the most trifling irregularities. In either case, the holder was usually sent to hard labor on a road party.<sup>30</sup> Thus, practically speaking, few ticket holders entirely escaped interruptions in their daily routine although they were otherwise in a comparatively free position. Because of this, Maconochie refers to these ticket holders as "slaves of the police."<sup>31</sup>

In proposing a scheme of prison discipline to replace that in Van Diemen's Land, Maconochie observed that convicts who had earned the indulgence of being thrown on their own resources should be subjected to fine, imprisonment, or loss of that indulgence but certainly not corporal punishment. Police interference should be limited to general supervision as regards their place of residence; yet they should be able to change masters and residences when they pleased if the proper notice is given first. The point was that while society should retain the power to coerce them should they abuse their liberty, the real goal was to instill the feelings of a free man in them. Paternal solicitude and protection rather than restraint should characterize the "fetters cast over them."<sup>32</sup>

These observations could certainly be read as an early program for parole. It is, however, vague as Maconochie admitted the first formulation of his ideas were intended to be. He remarked that "if my principles were approved of, . . . I should do wrong to hazard their abstract value by connecting them, as of necessity, with any set of arrangements. . . ."<sup>33</sup>

<sup>29</sup>Report on Convict Discipline, *supra* note 25, at 9(23).

<sup>30</sup>Report on Prison Discipline, *supra* note 25, at 5(241).

<sup>31</sup>*Id.* at 7(243).

<sup>32</sup>Report on Convict Discipline, *supra* note 25, at 11(25).

<sup>33</sup>*Id.* at 19(33).

Nevertheless, he was instructed to elucidate his ideas. As he was called on to respond to the comments of officials connected with the penal system of Van Diemen's Land to whom his report had been submitted, they became clearer and more detailed. Although he observed, "My views have gained in distinctness, but have in no degree become altered in character by reflection,"<sup>34</sup> it does seem that, as he filled in the details of his scheme, he retracted from the implications of the passage quoted above. He approved, for example, of the second stage of a system of double tickets-of-leave suggested by Foster, the Chief Magistrate of Van Diemen's Land, mainly because it would not have been enforced by a summary jurisdiction.<sup>35</sup> He came to propose a system of probationary gangs organized on a principle of mutual responsibility.<sup>36</sup> Successful service in these would entitle a convict to a ticket-of-leave; but he argued against clogging such tickets with all the restrictions then imposed. He particularly urged that the summary jurisdiction exercised by the police over men gaining this privilege should be banned; otherwise the men would never be able to habituate themselves to the freedom they were approaching. Having "dearly earned" his way to this position, nothing less than a solemn judicial sentence should deprive him of it.<sup>37</sup> When he prepared a summary of his papers about the Van Diemen's Land system for general publication he included a suggestion that instead of musters there should be "occasional signatures" in books kept for that purpose. They would be opened during particular weeks, thereby giving the men a choice of days and avoiding unnecessary congregating. Instead of fixed residences he proposed that the men be able to indicate a particular town or similar area. To avoid the traps lurking in such places, there could be a prohibition on some of the larger towns.<sup>38</sup> He does not appear to have pursued this suggestion in subsequent writings, however. In a paper written somewhat later he

<sup>34</sup>*Id.* at 75(89).

<sup>35</sup>Report on Convict Discipline, *supra* note 25, at 67(81), 72(86). It seems that he may also have approved of the first stage, though this is not apparent from his remarks in the Report on Convict Discipline. See A. MACONOCHE, THOUGHTS ON CONVICT MANAGEMENT 82-83 (1839).

<sup>36</sup>Report on Convict Discipline, *supra* note 25, at 19(33), 76(90); MACONOCHE, *supra* note 22, at 7.

<sup>37</sup>Report on Prison Discipline, *supra* note 25, at 11(247).

<sup>38</sup>A. MACONOCHE, SUMMARY OF PAPERS ON CONVICT DISCIPLINE SENT HOME 59 (1838). Maconochie's proposal was similar to the system that had been operating in New South Wales in relation to female ticket-of-leave holders. See *Regulations Respecting Tickets of Leave*, N.S.W.

admitted that any restrictions thought desirable could be imposed on a ticket-of-leave holder, but wrote that "on principle I would strongly deprecate the multiplication of such restrictions."<sup>38</sup>

While in Sydney, awaiting a passage to Norfolk Island to take up his appointment as Superintendent, Maconochie wrote a memorandum on Lord John Russell's Minute on Transportation.<sup>40</sup> In it he suggested that on conviction all offenders be branded in such a way that the brand be invisible generally, but apparent when sought for; between the toes he thought a suitable place. He continued:

With this hold over early criminals I should abolish entirely the system of Tickets of Leave and discharge men quite free from the Training Establishments. The Ticket of Leave, however secured, must always be a very dangerous weapon to the criminal; and it is expensive to the State to maintain. It impedes dispersion also, and the disappearance (from the known ranks of crime altogether) often of the best men because the most ashamed of their early conduct. Necessarily confining released Criminals too, to certain Colonies, it will retain to those Colonies that Penal Character which it is much to be desired that they should lose.<sup>41</sup>

#### NORFOLK ISLAND

There are three features of Maconochie's administration of Norfolk Island which might be thought to tell against the argument of this paper. They all indicate that Maconochie approved of certain types of ticket-of-leave systems, or at least of certain types of arrangements which were described as ticket-of-leave systems. However, a close examination of them, and his views about them, show that they were deficient in some of those very elements which this author has argued are central elements of modern systems of parole.<sup>42</sup>

GOV'T GAZETTE ¶ 8 (females), at 361 (May 25, 1835). It was also similar to that introduced for all ticket-of-leave holders except those resident in Sydney in 1841. See *Additional Ticket of Leave Regulations*, N.S.W. GOV'T GAZETTE ¶¶ 1, 4, 5, 6, 7, 19, 20, 21, at 1431 (1841).

<sup>38</sup>A. MACONOCHIE, *THOUGHTS ON CONVICT MANAGEMENT* 119 (1839).

<sup>40</sup>Papers re Transportation, *supra* note 25, at 1(741). Russell had been Home Secretary when he wrote the Minute.

<sup>41</sup>Enclosure No. 7 in Despatch No. 28, Gipps to Russell, Feb. 28, 1940, Papers re Secondary Punishment, at 27(371), *supra* note 25 (20 H.R.A. 540).

<sup>42</sup>For Barry's account of the features of Maconochie's experiment germane to my argument see BARRY, *supra* note 1, at 83-84, 99-111, 129-31, 133-34, 137-51. Barry did not enter into the details of the Norfolk Island ticket-of-leave system.

#### PROPOSED REGULATIONS FOR PENAL STATIONS

Maconochie had been appointed to Norfolk Island as a result of the Molesworth Committee's examination of transportation.<sup>43</sup> Its chairman, Sir William Molesworth, was opposed to transportation, and Maconochie's critical report on the system in Van Diemen's Land appeared at an opportune moment for him.<sup>44</sup> The committee recommended that a trial should be made of Maconochie's ideas,<sup>45</sup> and eventually Maconochie himself was chosen to conduct it.<sup>46</sup> Before the appointment was made, however, it had to be decided whether any or all stages of the experiment should be conducted at home, in insular penitentiaries, or in the penal colonies. Maconochie himself appears to have had no strong views on the matter although he did not particularly favor the use of insular penitentiaries<sup>47</sup> and protested vehemently against the particular choice of Norfolk Island as the site for the experiment.<sup>48</sup> Even while the experiment was in progress on Norfolk Island it remained an open question whether, if successful, a subsequent system based on it should be confined to insular penitentiaries.

After Maconochie had been on Norfolk Island for five months he sent his Proposed Regulations for Penal Stations to Gipps, the Governor of New South Wales. Under these Maconochie suggested that the ultimate stage of discipline should be a local ticket-of-leave. The features of this stage which would have distinguished it from its predecessors were that ticket holders would no longer have been responsible in any way for the actions of the small group to which they would have been attached in previous stages; that they would have been allowed to open shops with articles purchased with marks from the government store; and that they would have been allowed to sit as jurors or act as representatives in local courts of justice, for which services they would have been allowed marks. (In the stage previous to the ticket-of-

<sup>43</sup>Report from the Select Committee on Transportation, 22 H.C. PAPERS 1 (1837-38); Report from the Select Committee on Transportation, 19 H.C. PAPERS 1 (1837).

<sup>44</sup>BARRY, *supra* note 1, at 55, 61-64; A. SHAW, *CONVICTS AND THE COLONIES* 268-75 (1966).

<sup>45</sup>Report from the Select Committee on Transportation, 22 H.C. PAPERS xlv (1837-38).

<sup>46</sup>BARRY, *supra* note 1, at 65-66.

<sup>47</sup>MACONOCHIE, *supra* note 22, at 33-37. In this passage Maconochie advocates a liberal distribution of tickets-of-leave; but, as this author has been unable to find a copy of Howick's Minute on which Maconochie is passing comment, he is unsure of the exact significance of this. Maconochie may have been talking only of transitional arrangements to the new system.

<sup>48</sup>BARRY, *supra* note 1, at 66-68.

leave they would have been allowed to "lodge apart, as Circumstances may render possible," and to marry or have their wives and families join them.<sup>49</sup>)

Maconochie proposed very strict accounting procedures for the economy of shopkeepers;<sup>50</sup> but, in this author's view, this is the only evidence that he would have subjected local ticket holders to restrictions analogous to those placed on parolees today, beyond the more effective surveillance inevitably arising from the fact that they were in a penal station. Indeed, he openly admitted and advocated the very thing for which he was frequently criticized, namely the attempt to make penal stations as much like the free community as possible.<sup>51</sup> His point probably would have been that these restrictions are not part of free society, and thus should form no part of a ticket-of-leave scheme. Certainly he felt that when discharged from insular penal stations convicts should not be subject to them.

The more I consider the Subject, and the greater the Number of Lights in which I am lead to view it,<sup>52</sup> the more impressed am I with the Opinion that if the *System of Insular Penitentiaries is carried out*, there should be no Tickets of Leave issued from them to the adjoining Colonies, nor any subsequent Probation in these imposed, but Men should go to their respective Stations quite free.<sup>53</sup>

He argued both that a ticket-of-leave made its holder an object of constant suspicion, thus impeding his efforts to settle back into society, and that the abolition of the system of tickets-of-leave in the colonies would permit a reduction in the police presence there. Thus, expenses would be saved and the opportunity for colonial public opinion to influence the administration of justice removed. Maconochie did not think highly of colonial views on punishment.

<sup>49</sup>Proposed Regulations for Penal Stations under the New System ¶¶ 11–16 (Aug. 1, 1840), Enclosure No. 2 in Despatch No. 140, Gipps to Russell, Correspondence re Norfolk Island, *supra* note 25, at 10(428) (Sept. 29, 1840) [hereinafter cited as Proposed Regulations].

<sup>50</sup>*Id.* ¶¶ 12, 13.

<sup>51</sup>MACONOCHE, *supra* note 22, at 7; Memorandum founded on my Experience in Norfolk Island ¶ 4 (July 14, 1840), Enclosure No. 1 in Despatch No. 140, Gipps to Russell, Correspondence re Norfolk Island, *supra* note 25, at 2(430) (Sept. 9, 1840); Note on Proposed Regulations for Penal Stations under the New System ¶ 3 (Aug. 1, 1840), Enclosure No. 2 in Despatch No. 140, Gipps to Russell, *supra*, at 12(440).

<sup>52</sup>For some idea of Maconochie's change of mind see MACONOCHE, *supra* note 22, at 33–35.

<sup>53</sup>Memorandum founded on my Experience in Norfolk Island, *supra* note 51, ¶ 14, at 4(432).

#### CONDITIONAL REMISSION FOR DOUBLY TRANSPORTED CONVICTS

The second feature relates to the condition of the doubly convicted prisoners from New South Wales. They were ordered to be excluded, and but for a short time, were actually excluded from the trial of Maconochie's ideas. Under a local Act, passed in 1838,<sup>54</sup> the Governor was empowered to grant to such men conditional remissions of sentence which allowed them to return to New South Wales. Gipps was mindful of the opposition to the Act expressed in the Legislative Council on behalf of the graziers of the colony who were apprehensive of the freedom cattle thieves might enjoy under it.<sup>55</sup> He was therefore set against too liberal a use of the Act. Maconochie complained that although the effect of the Act was to remove from the island the best prisoners and leave the worst behind,<sup>56</sup> his recommendations for conditional remissions under this Act were too frequently rejected; whereas one recommendation in nineteen had been refused before he took over Norfolk Island, since his appointment almost half had been refused.<sup>57</sup>

Maconochie thought that the reason for what he considered to be a more careful selection was the result of the bad behavior of the prisoners first granted remissions under the Act. These prisoners, however, had not experienced Maconochie's regime. Maconochie thought, and was later able to show it to be so,<sup>58</sup> that prisoners returned by him to New South Wales, even though they had been excluded from the full trial of his ideas, would be better behaved than

<sup>54</sup>An Act for the Conditional Remission of Sentences of Convicts Transported to Norfolk Island and Moreton Bay, and to enforce the conditions thereof, 2 Vict., c. 1 (N.S.W. 1838).

<sup>55</sup>Despatch No. 22, Gipps to Glenelg (Jan. 26, 1839), *supra* note 25 (19 H.R.A. 775).

<sup>56</sup>On the Alleged Idleness on this Establishment ¶ 1 (Oct. 1, 1841), Enclosure No. 5 in Despatch No. 27, Gipps to Stanley, Correspondence re Norfolk Island, *supra* note 25, at 45(473) (Feb. 7, 1842); Letter, Maconochie to Gipps ¶ 6 (undated), Enclosure No. 5 in Despatch No. 194, Gipps to Stanley, Correspondence re Norfolk Island, *supra* note 25, 84(512) (Oct. 18, 1842).

<sup>57</sup>Report on Proceedings and Observations in Regard to Convict Management in Norfolk Island in 1842 ¶¶ 9, 11 (Jan. 10, 1843), Enclosure in Despatch No. 42, Gipps to Stanley, Correspondence re Norfolk Island, *supra* note 25, at 90-91 (518-19) (Apr. 1, 1843). This author cannot understand how the figures given by Maconochie in this report relate to ones given by him in a report written a year later which suggest a more liberal use of the Act by Gipps. Maconochie, *Criminal Statistics and the Movement of the Bond Population of Norfolk Island, to December 1843*, 8 J. STATISTICAL SOC'Y 1, 11, 20 (1845) [hereinafter cited as *Bond Population*].

<sup>58</sup>See *Bond Population*, *supra* note 57, at 20–22.



their predecessors. Gipps had apparently warned Maconochie several times that he was too liberal in making recommendations and pointed out, moreover, that Maconochie had misunderstood the "true Meaning or Object" of the Act.<sup>59</sup> This was indeed true; but had Maconochie correctly comprehended it, it is likely that he would have made more rather than fewer recommendations.<sup>60</sup> Nevertheless, it appears from an account written by Maconochie later that Gipps was more liberal in his use of the Act than Maconochie's complaint would suggest.<sup>61</sup> In Gipps' despatches conditional remissions under the Act are described as tickets-of-leave, and of these Maconochie clearly approved. It is clear from the Act, however, that these tickets-of-leave have little connection with parole, for convicts on their return to New South Wales were kept in irons at hard labor on the roads or on public works.

#### TICKETS-OF-LEAVE ON NORFOLK ISLAND

The third feature of Maconochie's administration indicative of approval for a ticket-of-leave system is the choice he made in 1842 for such a system when Gipps offered him the option of releasing men on Norfolk Island on tickets-of-leave or on conditional pardons. A consideration of the circumstances that lead up to that choice, however, and a study of the system itself show that it cannot be taken as evidence of Maconochie's real approval of anything that might develop into a system of parole.

The general principles setting forth the limits within which Maconochie was free to conduct his experiment on Norfolk Island had been communicated to Gipps by Normanby, the Secretary of State for War and the Colonies, in 1839. Apart from requiring the separation of the doubly convicted men on the island from the prisoners sent direct from England, to whom the experiment was to be confined, they required:

- 1st. that a fixed period of imprisonment should, in the first place, be allotted for the punishment of

<sup>59</sup>Despatch No. 42, Gipps to Stanley (Apr. 1, 1843), Correspondence re Norfolk Island, *supra* note 25, at 86(514) (22 H.R.A. 616).

<sup>60</sup>This is because Maconochie believed that the Act prescribed that prisoners returned to New South Wales under such remissions should become entirely free after three years in irons at most, whereas it laid down only that the state of working in irons should not exceed three years. Report on Proceedings and Observations in regard to Convict Management in Norfolk Island in 1842, *supra* note 57, ¶ 11, at 91(519); *Bond Population*, *supra* note 58, at 20.

<sup>61</sup>*Bond Population*, *supra* note 58, at 11.

the Crime of which the Prisoner has been Convicted;

- 2nd. that the actual period of imprisonment should be liable to a subsequent abridgment, according to the previous character of the prisoner, the nature of his crime, and his conduct during punishment;
- 3rd. that when allowed to leave Norfolk Island, he should not be assigned to any individual in Australia, but should enjoy the advantages at least equal to those of a ticket of leave.<sup>62</sup>

There is scope for some ambiguity in the conjunction of the first and second principles; but Gipps always held to the view that they required a convict, as the first part of his sentence, to serve a term whose length was both known in advance and incapable of being shortened in any event.<sup>63</sup> Apparently that period had been fixed at two years.<sup>64</sup> Certainly, on this view, they would have prevented the application of Maconochie's system of marks to this first stage of a sentence. There can be no doubt that Maconochie shared this understanding of the principles. It was exactly what he had advocated,<sup>65</sup> as Gipps correctly observed;<sup>66</sup> when taxed with failing to observe them, Maconochie replied that "the truth is, I never thought of these rules as a guide: I thought them a dead letter."<sup>67</sup>

Another limitation on Maconochie's freedom to put his ideas fully to the test was contained in an Act of 1832.<sup>68</sup> This fixed periods of considerable length

<sup>62</sup>Despatch No. 46, Normanby to Gipps (May 11, 1839), Papers re Transportation, *supra* note 25, at 17(757) (20 H.R.A. 152); Despatch No. 321, Russell to Gipps (Aug. 1, 1841), Papers re Secondary Punishment, *supra* note 25, at 71(421) (21 H.R.A. 455).

<sup>63</sup>Despatch No. 76, Gipps to Russell (June 27, 1840), Papers re Secondary Punishment, *supra* note 25, at 50(400) (20 H.R.A. 689); Despatch No. 42, Gipps to Russell (Feb. 6, 1841), Papers re Secondary Punishment, *supra* note 25, at 64(414) (21 H.R.A. 215); Letter No. 41/110, Thomson to Maconochie (Aug. 20, 1841), Enclosure in Despatch No. 165, Gipps to Russell, Correspondence re Norfolk Island, *supra* note 25, at 28(456) (Aug. 27, 1841) (21 H.R.A. 490).

<sup>64</sup>Despatch No. 28, Gipps to Russell, Papers re Secondary Punishment, *supra* note 25, at 17(361) (Feb. 25, 1840) (20 H.R.A. 527).

<sup>65</sup>MACONOCHIE, *supra* note 22, at 19.

<sup>66</sup>Despatch No. 43, Gipps to Stanley ¶ 15, Correspondence re Norfolk Island, *supra* note 25, at 42(570) (Apr. 1, 1843) (22 H.R.A. 626).

<sup>67</sup>Letter No. 17, Maconochie to Thomson ¶ 8 (May 27, 1840), Enclosure No. E in Despatch No. 76, Gipps to Russell, Papers re Secondary Punishment, *supra* note 25, at 58(408) (June 27, 1840).

<sup>68</sup>An Act for Abolishing the Punishment of Death in Certain Cases, and substituting a lesser Punishment in lieu thereof, 2 Will. IV, c. 62. § 2 (1832).

within which no ticket-of-leave or pardon could be granted to a convict by the Governor or Lieutenant-Governor of a colony. But Maconochie believed, somewhat foolishly, that he had been promised complete freedom to test his ideas, even to the extent of ignoring Acts of Parliament.<sup>69</sup> He not only merged the establishments for the new and old convicts and introduced the mark system for all prisoners on the island within a fortnight of arriving on Norfolk Island but also fixed scales of marks which would allow prisoners to earn the price of freedom before the expiry of the minimum periods fixed by the 1832 Act.<sup>70</sup>

Gipps had been given authority to terminate the experiment on Norfolk Island at any time,<sup>71</sup> and the experiment nearly came to an end with this departure from Maconochie's instructions. However, it was allowed to continue. The two convict establishments on the island were separated, and Russell instructed Gipps to remove to Tasman's Peninsular all those convicts in the New Establishment having more than three years to serve before becoming eligible for a ticket-of-leave under the ordinary regulations.<sup>72</sup> He later informed Gipps that in the future no one having more than four years to serve before becoming eligible for a ticket-of-leave under the ordinary regulations would be sent to Norfolk Island; to effect this those sentenced to transportation for fourteen years would be sent to Van Diemen's Land for two years first.<sup>73</sup> Because of Maconochie's protests,<sup>74</sup> however, the men were not removed from Norfolk Island.<sup>75</sup>

<sup>69</sup>Letter No. 17, Maconochie to Thomson, *supra* note 67, ¶ 4, at 58(408).

<sup>70</sup>Despatch No. 76, Gipps to Russell, and Enclosures, *supra* note 63, at 49(399).

<sup>71</sup>Despatch No. 147, Russell to Gipps, Papers re Secondary Punishment, *supra* note 25, at 40(384) (Sept. 10, 1840) (20 H.R.A. 802); Despatch No. 172, Russell to Gipps, Papers re Secondary Punishment, *supra* note 25, at 62(411) (Nov. 12, 1840) (21 H.R.A. 73); Despatch No. 165, Gipps to Russell, Correspondence re Norfolk Island, *supra* note 25, at 27(455) (Aug. 27, 1841) (21 H.R.A. 489); Despatch No. 147, Gipps to Stanley, Correspondence re Norfolk Island, *supra* note 25, at 63(491) (Aug. 15, 1842) (22 H.R.A. 206).

<sup>72</sup>Despatch No. 172, Russell to Gipps, *supra* note 71, at 62(411).

<sup>73</sup>Despatch No. 321, Russell to Gipps, *supra* note 62, at 71(421).

<sup>74</sup>Letter, Maconochie to Gipps (Dec. 26, 1840), Enclosure No. 1 in Despatch No. 42, Gipps to Russell, Papers re Secondary Punishment, *supra* note 25, at 65(415) (Feb. 6, 1841).

<sup>75</sup>Despatch No. 98, Gipps to Stanley, Correspondence re Convict Discipline, *supra* note 25, at 16(372) (May 29, 1842) (22 H.R.A. 96).

The result was that sooner than was convenient many convicts had accumulated the number of marks which Maconochie had promised them would be the price of freedom. Maconochie was continually pressing Gipps to honor these promises on his behalf. Gipps, for his part, although he felt that the fault for the situation was Maconochie's entirely, was aware of the risks of failing to do so.<sup>76</sup> But Gipps felt constrained for two reasons. First, he believed the Act of 1832 prevented him from shortening sentences to the extent demanded by Maconochie;<sup>77</sup> and second, he simply did not know where to send the men if they were released. He felt bound by what he considered to be a pledge given by Russell to New South Wales that no prisoners sent directly to Norfolk Island from England would be subsequently sent to New South Wales, and although Russell has said that all prisoners on the expiration of their sentences or on being granted a ticket-of-leave would be sent to Van Diemen's Land,<sup>78</sup> Gipps felt he could not send such prisoners there individually without the consent of the Lieutenant-Governor. This was not forthcoming.<sup>79</sup> No decision had been taken about either of these questions when Maconochie had been installed in Norfolk Island,<sup>80</sup> and Gipps claimed later, not en-

<sup>76</sup>Despatch No. 42, Gipps to Russell, *supra* note 63, at 64(414) (21 H.R.A. 215); Despatch No. 43, Gipps to Russell, Papers re Secondary Punishment, *supra* note 25, at 70(421) (Feb. 6, 1841) (21 H.R.A. 216).

<sup>77</sup>Despatch No. 60, Gipps to Glenelg, Papers re Secondary Punishment, *supra* note 25, at 2(346) (Mar. 29, 1839) (20 H.R.A. 74); Letter No. 40/54, Thomson to Maconochie (Apr. 28, 1840), Enclosure No. D in Despatch No. 76, Gipps to Russell, Papers re Secondary Punishment, *supra* note 25, at 56(406) (June 27, 1840); Despatch No. 42, Gipps to Russell, *supra* note 63, at 64(414); Letter, Thomson to Maconochie, (Jan. 27, 1841) Enclosure No. 2 in Despatch No. 23, Gipps to Russell, Papers re Secondary Punishment, *supra* note 25, at 69(419) (Feb. 6, 1841); Letter No. 41/110, Thomson to Maconochie, *supra* note 63, at 28(456).

<sup>78</sup>Despatch No. 6, Gipps to Normanby, Papers re Secondary Punishment, *supra* note 25, at 8(352) (Nov. 23, 1839) (20 H.R.A. 400); Despatch No. 96, Russell to Gipps, 20 H.R.A. 70 (July 6, 1840); Despatch No. 151, Gipps to Russell, Papers re Secondary Punishment, *supra* note 25, at 62(411) (Oct. 8, 1840) (21 H.R.A. 41); Despatch No. 42, Gipps to Russell, *supra* note 63, at 64(414); Despatch No. 248, Russell to Gipps, Papers re Secondary Punishment, *supra* note 25, at 63(413) (Apr. 23, 1841) (21 H.R.A. 332); Despatch No. 27, Gipps to Stanley, 21 H.R.A. 676 (Feb. 7, 1842); Despatch No. 96, Gipps to Stanley, 22 H.R.A. 82 (May 26, 1842).

<sup>79</sup>Letter No. 41/110, Thomson to Maconochie, *supra* note 63, at 29(457); Despatch No. 43, Gipps to Stanley, Correspondence re Norfolk Island, *supra* note 25, at 143(571) (Apr. 1, 1843) (22 H.R.A. 627).

<sup>80</sup>Despatch No. 27, Gipps to Stanley, *supra* note 78, at

tirely convincingly, that a timely and informed decision would have been possible had Maconochie not applied his system of marks from the beginning of the prisoners' sentences and dispensed with the first stage of punishment.<sup>81</sup>

Gipps, foreseeing the difficulty in which he would be placed by Maconochie's conduct, began early on to press for a decision.<sup>82</sup> When it came<sup>83</sup> it authorized the issue of conditional pardons<sup>84</sup> but left Gipps unsure whether those prisoners granted them were to remain on Norfolk Island. Gipps concluded that they were, for a short time at least.<sup>85</sup> He saw, however, that the usual form of a conditional pardon would be inappropriate for convicts remaining on Norfolk Island in that it would put them in a more favorable position than the non-convict population there, who were bound by regulations required for the operation of a penal station. To these regulations the holders of conditional pardons would have to be subject. Gipps also required the insertion in the pardon of a condition requiring its holder to leave the island when directed and to settle where directed by the government. He was aware too that it might be a little ambitious to expect every pardon holder on Norfolk Island "entirely to maintain himself, and be of no expense whatever to the Government,"<sup>86</sup> as was invariably expected of those given conditional pardons elsewhere. He therefore directed that each pardon should contain a condition requiring its holder either to maintain himself or, if

676; Despatch No. 96, Gipps to Stanley, *supra* note 78, at 82.

<sup>81</sup>Despatch No. 43, Gipps to Stanley, *supra* note 79, at 143(571).

<sup>82</sup>Despatch No. 42, Gipps to Russell, *supra* note 63, at 64(414); Despatch No. 43, Gipps to Russell, *supra* note 79, at 70(421).

<sup>83</sup>The decision came from Russell, then Secretary of State for War and the Colonies.

<sup>84</sup>Despatch No. 321, Russell to Gipps, *supra* note 62, at 70(420).

<sup>85</sup>Despatch No. 97, Gipps to Stanley, 22 H.R.A. 82 (May 26, 1842); Letter, Thomson to Boyes, Colonial Secretary of Van Diemen's Land (Feb. 28, 1842), Enclosure No. 1 in Despatch No. 97, Gipps to Stanley, C.O. [Colonial Office Records] 201/320 (May 26, 1842) (P.R.O. [Public Records Office, London; micro-film in National Library, Canberra, Australia] micro-film 340); Letter No. 42/8, Thomson to Maconochie (Jan. 28, 1842), Enclosure No. 2 in Despatch No. 97, Gipps to Stanley, C.O. 201/320, 497 (May 26, 1842) (P.R.O. micro-film 340).

<sup>86</sup>See also Letter No. 42/53, Thomson to Maconochie (May 10, 1842), Enclosure No. 8 in Despatch No. 97, Gipps to Stanley, C.O. 201/320, 571 (May 26, 1842) (P.R.O. micro-film 340); Despatch No. 97, Gipps to Stanley, *supra* note 85, at 84.

unable to do so, to repay in labor the cost of any supplies received from the government.<sup>87</sup> This instruction came with, or was followed shortly afterwards by, a gloss, apparently added on the advice of Deputy Commissary General Miller in Sydney, that only money or "productive" labor would be an acceptable payment. Labor was defined as "productive" only if it "produces a valuable article."<sup>88</sup>

Maconochie was authorized to draw from the government store whatever was needed to run the scheme and he was made responsible for the resulting account; pardon holders were prohibited from having accounts directly with the store.<sup>89</sup> He was also warned that he should ensure that convicts receiving supplies from him were charged the market price and that he should take special care in valuing the labor carried out by way of payment.<sup>90</sup> Despite the detailed consideration Gipps gave to conditional pardons when he transmitted his instructions to Maconochie, he allowed Maconochie to institute a system of tickets-of-leave rather than one of conditional pardons if he thought them preferable, and he pointed out that ticket holders were amenable to summary jurisdiction, whereas pardon holders were not.<sup>91</sup> Maconochie chose tickets-of-leave, expressing his agreement with what he took to be Gipps' opinion that they would be more appropriate than conditional pardons.<sup>92</sup>

<sup>87</sup>Letter No. 42/8, Thomson to Maconochie, *supra* note 85, at 499.

<sup>88</sup>New South Wales Colonial Secretary, *Copies of Letters to Norfolk Island*, Letter No. 42/24, Thomson to Maconochie, A.O.N.S.W. ref. 4/3823 (Feb. 8, 1842) (Mitchell Library, Sydney, Australia). For the sequel to this see, e.g., notes 92, 100, 120, 130 *infra*, and Letter, Maconochie to Colonial Office ¶ 1 (Apr. 23, 1846), Copies or Extracts of any Correspondence Respecting the Convict System Administered in Norfolk Island under the Superintendence of Captain Maconochie, R.N. [In continuation of Papers (No. 40) ordered by the House of Lords to be printed Feb. 23, 1846], ordered to be printed Apr. 23, 1846, 7 H. L. PAPERS 599 (1846).

<sup>89</sup>New South Wales Colonial Secretary, *Copies of Letters to Norfolk Island*, Letter No. 42/17, Thomson to Maconochie, A.O.N.S.W. ref. 4/3823 (Feb. 3, 1842) (Mitchell Library, Sydney, Australia).

<sup>90</sup>New South Wales Colonial Secretary, *Copies of Letters to Norfolk Island*, Letter No. 42/24, Thomson to Maconochie, *supra* note 88.

<sup>91</sup>Letter No. 42/8, Thomson to Maconochie, *supra* note 85, at 500.

<sup>92</sup>Letter No. 42/12, Maconochie to Thomson (Mar. 30, 1842), Enclosure No. 3 in Despatch No. 97, Gipps to Stanley, C.O. 201/320, 507 (May 26, 1842) (P.R.O. micro-film 340); Despatch No. 97, Gipps to Stanley, *supra*, at 83. For a similar account of events leading up to this decision but relying on sources additional to those relied on

Maconochie's preference for a system of tickets-of-leave must be seen in the context of conditions on Norfolk Island. As he wrote to Gipps:

I do not think that it would answer at all in this place, and amidst such a community, immediately and at one bound, to emancipate them [*i.e.*, the convicts] from Summary Jurisdiction.<sup>93</sup>

The island was nothing but a penal establishment. It was about five miles long and two and a half miles wide; its total area was about 8,528 acres.<sup>94</sup> No free settlers were allowed on the island.<sup>95</sup> The inhabitants of this small area then were either members of the convict establishment or prisoners. The former never at any time exceeded 170 persons, including soldiers and free officers.<sup>96</sup> The latter, at the time of Gipps' visit to the island almost a year after the institution of the ticket-of-leave system, included 876 doubly convicted men and 593 "new hands," a total complement considerably less than when Maconochie went to Norfolk Island. Of the 593, as many as 509 had island tickets-of-leave,<sup>97</sup> most of which had probably been given immediately on the inauguration of the scheme.<sup>98</sup> How could anything remotely resembling a system of parole be made to work in such circumstances? Clearly work and accommodation would have to be provided for ticket-of-leave holders and the government would have to provide them. In opting for what he called a system of tickets-of-leave Maconochie was merely adopting the terminology of Gipps. What Maconochie realized it was practicable to organize was better described as a system of tickets-of-leave rather than one of conditional pardons. Neither the system he planned nor the one he instituted, however, can be regarded as a forerunner of parole.

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by myself and, in this author's view, Barry, see S. McCulloch, *Sir George Gipps and Captain Alexander Maconochie: The Attempted Penal Reforms at Norfolk Island 1840-1844*, 7 HISTORICAL STUDIES: AUSTRALIA AND NEW ZEALAND 387, 390-98 (1957).

<sup>93</sup>Letter No. 42/12, Maconochie to Thomson, *supra* note 92, at 507.

<sup>94</sup>BARRY, *supra* note 1, at 86.

<sup>95</sup>Despatch No. 321, Russell to Gipps, *supra* note 62, at 71(421); *but see* the allegation in Letter, Smith to Miller (June 16, 1842), Enclosure No. 1 in Despatch No. 145, Gipps to Stanley, Correspondence re Norfolk Island, *supra* note 25, at 58(486) (Aug. 15, 1842).

<sup>96</sup>A. MACONOCHE, NORFOLK ISLAND 13 (1847) [hereinafter cited as NORFOLK ISLAND].

<sup>97</sup>Despatch No. 43, Gipps to Stanley, *supra* note 79, at 139(567).

<sup>98</sup>Despatch No. 144, Gipps to Stanley, Correspondence re Norfolk Island, *supra* note 25, at 49(477) (Aug. 15, 1842) (22 H.R.A. 201).

Maconochie had originally intended that ticket-of-leave holders should receive no allowances from the government.<sup>99</sup> This was, of course, in exact accordance with his instructions, although probably he had determined this before they reached him.<sup>100</sup> When; however, he drew up a scheme of accounts for use in connection with the ticket-of-leave system and submitted it for Gipps' approval, Miller noticed that Maconochie was proposing to allow ticket holders credit for "all rations saved,"<sup>101</sup> whether they worked for the government or not. Indeed, Maconochie now planned to allow to every ticket holder eleven marks a day in place of the clothing and rations with which the government had formerly provided him. Ticket holders were to be allowed to employ themselves as they wished—for example, as servants, shopkeepers, or farmers—but those who undertook a day's work for the government would be able to acquire about another twenty-five marks. These marks could be either accumulated towards the price of the convict's freedom, for which he was expected to set aside ten a day, or used to purchase food, clothing, or other supplies.<sup>102</sup> He proposed, moreover, that all supplies required for the ticket-of-leave scheme would be channelled into it only

<sup>99</sup>Memorandum on the Establishment that will be required adequately to carry out the New System of Convict Management in Norfolk Island, the accounts that it might be required to keep, and the expense that may be thereby incurred (Mar. 18, 1842), Enclosure No. 6 in Despatch No. 97, Gipps to Stanley, *New South Wales Governors' Despatches: Transcriptions* 562 (May 5, 1842) (Mitchell Library, Sydney, Australia, A1228) [hereinafter cited as Memorandum].

<sup>100</sup>His instructions were contained in letters dated Jan. 28, 1842, Feb. 3, 1842 and Feb. 8, 1842. In the letter accompanying the memorandum Maconochie states that the memorandum was referred to in his last report and would have been forwarded then had he not been anxious to "mature" it. Letter No. 42/14, Maconochie to Thomson (Apr. 2, 1842), Enclosure No. 6 in Despatch No. 97, Gipps to Stanley, C.O. 201/320, 532 (May 26, 1842) (P.R.O. micro-film 340). The report referred to is dated Dec. 31, 1841.

<sup>101</sup>Letter No. 42/12, Maconochie to Thomson, *supra* note 92, at 508; Letter No. 831, Miller to Thomson (May 6, 1842), Enclosure No. 9 in Despatch No. 97, Gipps to Stanley, C.O. 201/320, 573 (May 26, 1842) (P.R.O. micro-film 340).

<sup>102</sup>Memorandum, *supra* note 99, at 559-62; Letter, Maconochie to Smith (Mar. 22, 1842), Enclosure No. 3 in Despatch No. 97, Gipps to Stanley, C.O. 201/320, 512 (May 26, 1842) (P.R.O. micro-film 340); Despatch No. 97, Gipps to Stanley, *supra* note 100, at 84; Despatch No. 144, Gipps to Stanley, *supra* note 98, at 49(477); Letter No. 42/39, from Maconochie (June 2, 1842), Enclosure No. 1 in Despatch No. 144, Gipps to Stanley, *supra* note 98, at 51(479).

through the shopkeepers who would have accounts with him. He observed:

The risk in all such cases would be theirs, and no losses would be made up by the Government—the transactions would be strictly as between Wholesale and Retail Merchants; and both much trouble would be saved and a nearer resemblance be produced to life in free Society.<sup>103</sup>

Gipps had told Maconochie that tickets-of-leave were to be issued only to those who, having accumulated the necessary number of marks, had not thereafter for three months incurred any punishments whatever.<sup>104</sup> The basis for this instruction presumably was Russell's observation that conditional pardons should be issued to those who had not forfeited any marks "when indulgence was within their reach."<sup>105</sup> Maconochie also understood, although it is not clear why, that it was Gipps' intention that the credit allowed ticket holders should not exceed the value of one day's work.<sup>106</sup> Against both these restrictions, as against the limitation of labor that could be offered as payment for supplies to "productive" labor, Maconochie protested. The first, he argued, would merely add to the number of marks required for a ticket-of-leave while at the same time making it possible that a slight fault would incur a severe penalty. The second would prevent men from setting themselves up in occupations requiring something in the nature of a capital investment, which he wished to be open to ticket holders. The third would discourage ticket holders from following such occupations as clerking and schoolmastering. The purpose which these restrictions were designed to further, he informed Gipps, would be met by carrying out all accounting in marks and by allowing ticket holders credit up to the value of their accumulated marks once the number of marks required as the price of a ticket had been subtracted. Convicts would be encouraged thereby not to claim their tickets until they had accumulated a number of marks somewhat in excess of the price of a ticket. Maconochie told Gipps in effect that he was going to ignore what he took to be Gipps' instructions about the amount of credit to be allowed to ticket holders and that he would allow them to purchase supplies in whatever

<sup>103</sup>Memorandum, *supra* note 99, at 577.

<sup>104</sup>Letter No. 42/8, Thomson to Maconochie, *supra* note 85, at 499.

<sup>105</sup>Despatch No. 321, Russell to Gipps, *supra* note 62, at 70(420).

<sup>106</sup>Letter No. 42/12, Maconochie to Thomson, *supra* note 92, at 508.

quantity they desired up to the amount of accumulated marks standing to their credit.<sup>107</sup>

Maconochie had always wanted marks to be convertible into currency, and under his Regulations for Penal Stations convicts who had obtained a sufficient number for their freedom would have been allowed to remain at the stations for up to six months thereafter in order to accumulate a surplus of marks which they could exchange for cash on their return to freedom.<sup>108</sup> The notional value Maconochie assigned to a mark was one penny for convicts who had not yet obtained sufficient marks for their freedom,<sup>109</sup> and twopence for those remaining at the penal stations after having done so.<sup>110</sup> The exchange of marks for money was never approved,<sup>111</sup> though the possibility that it might be was one of the reasons Gipps became anxious to remove convicts from Norfolk Island as soon as they had obtained the number of marks Maconochie had led them to believe would procure their removal from it.

In authorizing the issue of conditional pardons Russell had remarked that

the discretion of spending money is one of the tests of reformation to which the convicts ought to be subject before they are allowed to leave Norfolk Island.<sup>112</sup>

It is very difficult to determine the extent to which the ticket-of-leave scheme extended opportunities of spending money on the island. It seems that even before its institution convicts on the island were buying and selling articles with money. Smith alleged that they obtained money from friends on the mainland, and no doubt the soldiers and free officers on the island also provided it for the convicts' economy.<sup>113</sup> Under the ticket-of-leave system the amount of convict produce for sale might have been expected to increase; though in assessing the extent to which the position of a ticket holder was really different from that of other convicts on the island, it

<sup>107</sup>*Id.*

<sup>108</sup>Proposed Regulations, *supra* note 49, at 9(437); Memorandum, *supra* note 99, at 561.

<sup>109</sup>Despatch No. 144, Gipps to Stanley, *supra* note 98, at 49(477).

<sup>110</sup>Proposed Regulations, *supra* note 49, at 10(438).

<sup>111</sup>Letter 42/53, Thomson to Maconochie, *supra* note 86, at 572; Despatch No. 97, Gipps to Stanley, *supra* note 100, at 84; Despatch No. 144, Gipps to Stanley, *supra* note 98, at 49(477).

<sup>112</sup>Despatch No. 321, Russell to Gipps, *supra* note 62, at 71(421).

<sup>113</sup>Letter, Smith to Miller (June 16, 1842), Enclosure No. 1 in Despatch No. 145, Gipps to Stanley, Correspondence re Norfolk Island, *supra* note 25, at 59(487) (Aug. 15, 1842).

should be remembered that even before the ticket-of-leave scheme convicts had been allotted gardens to work for their own benefit<sup>114</sup> and on two occasions had been issued pigs. Indeed fewer pigs were issued to ticket holders than to other convicts.<sup>115</sup> The obvious way to inject money into the convict economy, however, was for the government to purchase whatever the ticket holders chose to offer to it for sale.

Maconochie allotted farms consisting of areas of between six and ten acres to parties of four to six ticket holders who erected a hut or cottage on them. Each farm consisted of cleared and uncleared land. For each acre of the former he required an annual rent of twelve bushels of maize or one-third the average crop per acre of maize raised on government land.<sup>116</sup> One-half of this rent was to be paid in kind so that Maconochie could estimate the probable yield of the land. For the cultivation of the uncleared land no rent was payable in the first year. Ticket holders were allowed to purchase provisions and whatever was necessary to cultivate their farms with the surpluses of their accumulated marks or were given credit for these, with their first produce being put to the discharge of the debt. Thereafter, Maconochie proposed the government should buy the produce. For example, a sow would be sold for six marks a pound, and pork brought for threepence a pound.<sup>117</sup>

The Colonial Secretary, Commissariat, and Commanding Engineer had all criticized the scheme on the grounds that it would involve a greatly increased expenditure, and Gipps concurred in the criticism. He berated Maconochie for departing from his instructions. These departures included the grant of a credit for rations saved to men working for themselves, the payment of excessive wages to those on government work, the allowance of credit up to convicts' accumulated marks, and the provision by

the government of housing for the men.<sup>118</sup> Even before he received Maconochie's defense of his actions,<sup>119</sup> however, Gipps had decided to approve the scheme in general; and so Maconochie was told.<sup>120</sup> Only the permission to change marks into money, it seems, was refused.

From the first, the scheme ran into difficulties. Smith, the Commissariat Officer on Norfolk Island, refused Maconochie a shed in the Commissariat's yard to use as a store in connection with the scheme.<sup>121</sup> Gipps had directed that the prices of articles imported from Sydney and issued in connection with the scheme would have to include the cost of their freight.<sup>122</sup> Maconochie protested, ineffectively, to the high prices to be charged for articles issued to him; he pointed out that if ticket holders were charged such high prices they could hardly be refused them when they had goods to offer for sale.<sup>123</sup> Smith objected to the issue of pigs and maize to ticket holders.<sup>124</sup> The ticket holders, for their part, not only came forward so quickly with their first produce as to cause Miller to observe that "there is some doubt as to the source whence obtained,"<sup>125</sup> but they also refused to have it treated as the repayment of a debt and demanded payment in cash for it.<sup>126</sup> Maconochie thereupon proposed that they should be paid.<sup>127</sup> but Smith refused to make any

<sup>118</sup>Letter No. 42/53, Thomson to Maconochie, *supra* note 86, at 569.

<sup>119</sup>Letter No. 42/39, Letter from Maconochie, *supra* note 102, at 51(479).

<sup>120</sup>Despatch No. 97, Gipps to Stanley, *supra* note 100, at 84; Letter, Thomson to Maconochie (July 29, 1842), Enclosure No. 2 in Despatch No. 144, Gipps to Stanley, Correspondence re Norfolk Island, *supra* note 25, at 55(483) (Aug. 15, 1842); Despatch No. 144, Gipps to Stanley, *supra* note 98, at 55(483).

<sup>121</sup>Letter, Maconochie to Smith, *supra* note 102, at 511; Letter, Smith to Maconochie (Mar. 24, 1842), Enclosure No. 5 in Despatch No. 97, Gipps to Stanley, C.O. 201/320, 526 (May 26, 1842) (P.R.O. micro-film 340).

<sup>122</sup>Letter No. 42/17, Thomson to Maconochie, *supra* note 89.

<sup>123</sup>Letter, Maconochie to Smith, *supra* note 102, at 512; Letter, Smith to Maconochie, *supra* note 121, at 525; Letter, Maconochie to Smith (Mar. 26, 1842), Enclosure No. 5 in Despatch No. 97, Gipps to Stanley, C.O. 201/320, 529 (May 26, 1842) (P.R.O. micro-film 340).

<sup>124</sup>Despatch No. 144, Gipps to Stanley, *supra* note 98, at 50(478).

<sup>125</sup>Letter No. 845, Miller to Thomson (July 26, 1842), Enclosure in Letter, Trevelyan to Stephen, Correspondence re Norfolk Island, *supra* note 25, at 164(592) (Jan. 14, 1843) (22 H.R.A. 510).

<sup>126</sup>Letter, Smith to Miller, *supra* note 113, at 60(488).

<sup>127</sup>Letter No. 845, Miller to Thomson, *supra* note 125, at 164(592).

<sup>114</sup>On the Alleged Idleness on this Establishment, *supra* note 56, at 45(473).

<sup>115</sup>Letter No. 42/55, from Maconochie (Sept. 17, 1842), Enclosure No. 1 in Despatch No. 194, Gipps to Stanley, Correspondence re Norfolk Island, *supra* note 25, at 68(496) (Oct. 18, 1842).

<sup>116</sup>In his reports Maconochie states the rent to be such, but Gipps reports that he was told on his visit to the island that the figure was eleven bushels of maize. Letter No. 42/39, from Maconochie, *supra* note 102, ¶ 7, at 53(481); Report on Proceedings and Observations in regard to Convict Management in Norfolk Island in 1842, *supra* note 57, ¶ 33, at 101(529); Despatch No. 43, Gipps to Stanley, *supra* note 43, ¶ 13, at 141(569).

<sup>117</sup>Despatch No. 144, Gipps to Stanley, *supra* note 98, at 50(478).

such payments either for their first, or for any other, produce without express authorization from his superiors.<sup>128</sup>

When the matter came before Gipps, he upheld Maconochie's right to issue the pigs and maize, while reporting to Stanley that he had "reserved his opinion as to the discretion of the measure";<sup>129</sup> but he refused to sanction the purchase of ticket holders' produce by the store. Thomson, Gipps' Colonial Secretary, wrote to Maconochie:

Whether such payment may or may not be ultimately sanctioned is one of the most important questions as yet undecided in respect of your Experiments. If His Excellency could adopt your sanguine views of the Success of these experiments, he would not hesitate to determine that the Ticket men should be so paid; but it is scarcely necessary to remark that they should be paid only for such articles as they may *honestly* produce by their own care, skill, and industry. . . .

To pay them at present for Pork, there not having been time for them to rear the Pigs, would, I am desired to say, be only to buy back from them at a money price the very articles [Pigs] which have been issued to them at a nominal price in Marks.<sup>130</sup>

Gipps also refused to overlook the debts;<sup>131</sup> this does not appear to have had much effect on the ticket holders, for at the beginning of 1843 Miller reported to the Treasury that no repayment whatsoever of the debt had been made.<sup>132</sup> Gipps did permit unlimited purchases with marks at the store,<sup>133</sup> but Maconochie felt unable to take advantage of this because Gipps still hesitated to give him a favorable decision on a feature of the scheme which Maconochie considered essential to its success. This was the fixing of a definite number of marks as the price of a passage to the next stage of discipline.

The next stage, whether total or conditional

<sup>128</sup>Letter No. 42/38, Maconochie to Gipps (June 2, 1842), Enclosure No. 5 in Despatch No. 144, Gipps to Stanley, Correspondence re Norfolk Island, *supra* note 25, at 57(485) (Aug. 15, 1842).

<sup>129</sup>Despatch No. 144, Gipps to Stanley, *supra* note 98, at 39(467).

<sup>130</sup>Letter, Thomson to Maconochie (July 29, 1842), Enclosure No. 4 in Despatch No. 144, Gipps to Stanley, Correspondence re Norfolk Island, *supra* note 25, at 56(484) (Aug. 15, 1842) (22 H.R.A. 511).

<sup>131</sup>Letter, Thomson to Maconochie, *supra* note 120, at 56(484).

<sup>132</sup>Letter, Miller to Trevelyan (Jan. 20, 1843), Enclosure in Letter, Trevelyan to Stephen, Correspondence re Norfolk Island, *supra* note 25, at 167(595) (June 28, 1843).

<sup>133</sup>Despatch No. 144, Gipps to Stanley, *supra* note 98, at 49(471).

freedom in Van Diemen's Land or elsewhere, involved a convict's removal from Norfolk Island. This, despite all the improvements on Norfolk Island and the respect in which most convicts apparently held Maconochie, was what the convicts desired most.<sup>134</sup> Maconochie reported that, although convicts remained willing to work to acquire the number of marks required to obtain a ticket-of-leave, ticket-of-leave holders lacked any further incentive to obtain marks and were in danger of lapsing into complete idleness. He eventually succumbed to the pressure put upon him to state the number of marks that would gain a man release from the island. The figure was placed at 5,000 marks, though he "guarded against this being considered certain by every Means in my Power."<sup>135</sup> Finally he was forced to alter the system. He required each ticket holder to do a day's work for the government, for which he received between twenty-two and thirty marks a day, and he limited his daily purchases at the store to the value of eleven marks a day. These eleven marks had to be earned each day in government service and could not be paid from an accumulated surplus of marks or from loans or gifts of marks from other convicts.<sup>136</sup> Gipps summarized the effects of these changes accurately enough:

[T]hey [ticket holders] are nearly if not exactly in the same position, as before they received their Tickets of Leave, the difference merely being that, after the performance of their day's work or task, they now have greater facilities afforded to them than they formerly had for employing themselves for their own advantage; and that more of them are allowed to live out of Barracks; some of them more over being placed on Farms. . . .<sup>137</sup>

<sup>134</sup>Despatch No. 43, Gipps to Stanley, *supra* note 66, at ¶¶ 6, 22, at 138(566), 146(574).

<sup>135</sup>Letter No. 42/39, Maconochie to Thomson, *supra* note 102, at 53(481); Despatch No. 43, Gipps to Stanley, *supra* note 66, at 140(568); Letter, Maconochie to Gipps ¶ 3 (June 30, 1842), Enclosure in Despatch No. 147, Gipps to Stanley, Correspondence re Norfolk Island, *supra* note 25, at 159(587) (Sept. 17, 1843).

<sup>136</sup>It is not clear whether ticket holders were allowed to select their own purchases up to the value of eleven marks, as I have stated in the text, or whether fixed rations were issued to them, for which eleven marks were debited against them. See Letter No. 42/39, Maconochie to Thomson, *supra* note 102, ¶ 6, at 53(481); Report of Proceedings and Observations in regard to Convict Management in Norfolk Island in 1842, *supra* note 57, ¶¶ 31, 33, at 101(529); Letter, Maconochie to Gipps, *supra* note 135, ¶ 1, at 158(586); Despatch No. 43, Gipps to Stanley, *supra* note 66, at 139(567).

<sup>137</sup>Despatch No. 43, Gipps to Stanley, *supra* note 66,

Maconochie put it more tersely: "[T]his, no doubt, prevented the immediate Inconvenience, but it totally defeated the ultimate Object."<sup>138</sup>

The initial opposition of the Commissariat has already been referred to. Although Maconochie had his way to a certain extent in this dispute, he subsequently fell foul of the Commissariat by ignoring proper procedures for disposing of the agricultural produce of the island in connection with the ticket-of-leave scheme. By the time a decision on the matter had been made in London, however, it had been decided to recall Maconochie on other grounds.<sup>139</sup>

At the beginning of the scheme 373 convicts were given tickets-of-leave. Of these about 135 were put on twenty-seven farms. By the time of Gipps' visit to the island about a year later, there were 509 ticket holders, but only seventy-eight farmers. Gipps attributed the decrease of farmers to three causes: the forfeiture by some of their tickets-of-leave, the expulsion of others by their partners, and sickness. Maconochie, however, put it down to the fact that he had been unable to give any assurances that the government would purchase their surplus produce. Maconochie had prepared a detailed system of account-keeping to support the ticket-of-leave scheme, whose "Particularity" he admitted to be "in existing Circumstances . . . almost a Farce;" "yet," he added, apparently without malice, "we are thus acquiring Experience in Book-keeping." He did, in fact, prevail on Gipps during his visit to the island to allow the store to purchase ticket holders' surplus produce.<sup>140</sup>

Mention has already been made of the rapidity

¶ 8, at 139(567).

Gipps had commented on Maconochie's original plan for island tickets-of-leave by noting:

So novel an arrangement as the issue of Tickets of Leave at Norfolk Island, and the conversion into small farmers or Crottiers of several Hundred convicts, has created a sensation in the confined society of the place; and the whole proceeding is condemned and ridiculed in an almost unqualified manner, by persons accustomed only to the old system of convict discipline.

Despatch No. 144, Gipps to Stanley, *supra* note 98, at 50(478).

<sup>138</sup>Report of Proceedings and Observations in Regard to Convict Management in Norfolk Island in 1842, *supra* note 57, ¶ 32, at 101(529).

<sup>139</sup>Despatch No. 11, Stanley to Gipps, 22 H.R.A. 508 (Jan. 23, 1843).

<sup>140</sup>Letter No. 42/39, Maconochie to Thomson, *supra* note 102, at 53(481); Report of Proceedings and Observations in Regard to Convict Management in Norfolk Island in 1842, *supra* note 57, ¶ 33, at 101(529); Despatch No. 43, Gipps to Stanley, *supra* note 66, ¶ 91, 13, at 139(567), 141(569).

with which ticket holders came forward with their first produce. It had been anticipated and was subsequently claimed by critics of the scheme that ticket holders would make up for their idleness by plundering government crops, both for food for themselves and their animals and to sell to the government. The Commissariat noted how easy protecting the government crops had been when no convicts were allowed to possess any crops whatever, and how difficult it had now become when proof of illegal possession could be guaranteed only if the thief were caught in *flagranti delictu*.<sup>141</sup> Maconochie put the alleged short-fall in the production of land cultivated by ticket holders down to the poor quality of their allotments, and absolved them from any exceptional responsibility for plundering the crops.<sup>142</sup> Gipps, when he visited the island, reported that depredations on the government crops had decreased rather than increased but he attributed this to the low price of maize, which reduced temptation to steal, and the fact that ticket holders had largely given up rearing livestock because they were expecting constantly to be removed to Van Diemen's Land.<sup>143</sup> Gipps judged the farming element of the ticket-of-leave system a success,<sup>144</sup> while Maconochie marvelled at what the system as a whole had achieved despite all the obstacles placed in its way.<sup>145</sup> But he cautiously and scientifically pointed out exactly what had and had not been proved by the experiment:

It may be said . . . to have proved . . . with how little minute *Surveillance* Men previously well conducted under a rigorous Discipline will continue to do the same Things as were required by it, and not abuse the greater Latitude allowed them; but I have not been able to prove how steady, how industrious, or how

<sup>141</sup>Letter, Smith to Miller, *supra* note 113, at 59(487); Despatch No. 147, Gipps to Stanley, *supra* note 135, at 63(491); Letter No. 849, Miller to Thomson (Aug. 7, 1842), Enclosure in Letter, Trevelyan to Stephen, Correspondence re Norfolk Island, *supra* note 25, at 165(593) (Jan. 14, 1843) (22 H.R.A. 512); Despatch No. 43, Gipps to Stanley, *supra* note 66, ¶ 8, 14, at 139(567), 141(569).

<sup>142</sup>Letter, Smith to Miller (June 24, 1842), Enclosure in Letter, Trevelyan to Stephen, Correspondence re Norfolk Island, *supra* note 25, at 166(594) (Jan. 14, 1843); Letter No. 42/55, Maconochie to Thomson ¶ 3 (Sept. 17, 1842), and Letter No. 53, Smith to Miller ¶ 3 (Sept. 20, 1842), Enclosures Nos. 1 and 2 in Despatch No. 194, Gipps to Stanley, Correspondence re Norfolk Island, *supra* note 25, at 69(497), 78(506) (Oct. 18, 1842); Report of Proceedings and Observations in Regard to Convict Management in Norfolk Island in 1842, *supra* note 57, ¶ 33, at 101(529).

<sup>143</sup>Despatch No. 43, Gipps to Stanley, *supra* note 66, ¶ 14, at 142(570).

<sup>144</sup>*Id.* ¶ 13, at 141(569).

<sup>145</sup>NORFOLK ISLAND, *supra* note 96, at 12 *et seq.*



well-conducted generally they would be if not required to do anything at all. Yet this is to be their Station in free Life; it was to ascertain their Competence for this that I wished to try them with Tickets . . . .<sup>146</sup>

By August 1842 Gipps had decided that in the following March or April he would remove all the "new hands" to Van Diemen's Land.<sup>147</sup> The reason was partly that the experiment would then have run long enough to allow its effects to be judged and partly that Gipps was apprehensive of the expense that would be caused if it were decided that marks accumulated by convicts in excess of the number required by them to gain their liberty should be bought from them with money.<sup>148</sup> Because of difficulties the convicts would face if discharged in Van Diemen's Land in winter, and because he believed that the cost of maintaining the establishment was less than he had anticipated it would be under Maconochie's original proposals for the ticket-of-leave system, Gipps subsequently decided not to remove them until six months later.<sup>149</sup> Norfolk Island itself was annexed to Tasmania on September 28, 1844 and became an integral part of the ill-fated "Probationary" System of convict discipline established there.<sup>150</sup>

Maconochie's system of tickets-of-leave lacked essential elements of parole, namely the freedom of the parolee to live and work where he chooses. To have allowed such freedom would clearly have been impossible on Norfolk Island, as Gipps subsequently and rather grudgingly admitted. He noted that whereas the ticket-of-leave holders should have cost the government nothing, they had instead cost as much as other convicts.<sup>151</sup> The moral was taken by

<sup>146</sup>Report of Proceedings and Observations in regard to Convict Management in Norfolk Island in 1842, *supra* note 57, ¶ 30, at 100(528).

<sup>147</sup>Despatch No. 147, Gipps to Stanley, *supra* note 71, at 64(492); Despatch No. 194, Gipps to Stanley, *supra* note 142, at 68(496).

<sup>148</sup>Despatch No. 43, Gipps to Stanley, *supra* note 66, ¶ 7, at 138(566).

<sup>149</sup>Despatch No. 44, Gipps to Stanley, Correspondence re Norfolk Island, *supra* note 25, at 152(580) (Apr. 1, 1843) (22 H.R.A. 641); Despatch No. 139, Stanley to Gipps, Correspondence re Norfolk Island, *supra* note 25, at 154(582) (Sept. 5, 1843) (23 H.R.A. 107).

<sup>150</sup>Despatch No. 14, Stanley to Gipps, 22 H.R.A. 514 (Jan. 26, 1843); Despatch No. 64, Stanley to Gipps, 22 H.R.A. 691 (Apr. 29, 1843); Despatch No. 165, Stanley to Gipps, 23 H.R.A. 209 (Oct. 30, 1843); Despatch No. 170, Stanley to Gipps, 23 H.R.A. 215 (Nov. 10, 1843); An Act to amend so much of an Act of the last Session, for the Government of *New South Wales and Van Diemen's Land*, as relates to *Norfolk Island*, 6 & 7 Vict., c. 35 (1843); SHAW, *supra* note 44.

<sup>151</sup>When I first sanctioned the issue of Tickets of Leave at Norfolk Island, it was plainly stated to

the Treasury in London. When considering the deficiencies in Maconochie's accounting procedures, Trevelyan, the Assistant Secretary to the Treasury, wrote to Stephen, the Under-Secretary of State for the Colonies:

Lord Stanley will not fail to observe the strong additional evidence which these papers contain of the unsuitableness of Norfolk Island as a place of residence for convicts who have obtained Tickets of Leave.<sup>152</sup>

Had Maconochie been able to provide this freedom, his previously expressed views on tickets-of-leave would lead one to expect that he would not have placed obligations of reporting and the like on ticket holders.

These views, moreover, seem not to have changed as a result of his experiences on Norfolk Island. In his general report written at the end of 1841 he stated his opposition to the proposed discharge of any of the prisoners to Van Diemen's Land on tickets-of-leave.<sup>153</sup> Again, shortly after Gipps' visit to Norfolk Island, when he was aware that the experiment was near its end and the convict establishment there

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Captain Maconochie that the Holders of them ought entirely to maintain themselves. It might have been difficult or even impossible to make them do so; but the principle, so clearly laid down, should scarcely have been overlooked or passed by, as it has been by Captain Maconochie, without notice.

Despatch No. 43, Gipps to Stanley, *supra* note 66, ¶ 8, at 139(567).

<sup>152</sup>Letter, Trevelyan to Stephen, Correspondence re Norfolk Island, *supra* note 25, at 163(591) (Jan. 14, 1843) (22 H.R.A. 509).

<sup>153</sup>Nothing would, I think, be more unfair to them, or more certainly tend to their second Fall. Dropping, as it were, from the Clouds, without Friends or Experience, or the Habits of Evasion or Suspicion which in existing Circumstances must and do characterise the Mass of the Convict Population there,—likely to be regarded with Dislike by the inferior Authorities as having been trained on different Maxims from their own,—indifferently supported thus by their Superiors when they do get into Difficulty,—and jeered and tempted, if but for the fun of it, by their Equals,—I can see but one Fate for them, and that too melancholy to be further dwelt on. On the contrary, if discharged quite free, and I should recommend by way of New Zealand, where Labour is in demand, whence it can easily distribute, and where there is no Taint of old Convict Management at all, I am well persuaded that we would scarcely hear any more of them. The whole Colonies in the Hemisphere would gradually absorb them, or they would quietly, unostentatiously, and without Expense, lay the Foundation of new ones throughout the Pacific.

Letter from Maconochie ¶ 18 (Dec. 31, 1841), Enclosure No. 1 in Despatch No. 27, Gipps to Stanley, Correspondence re Norfolk Island, *supra* note 25, at 38(466) (Feb. 7, 1842).

probably about to be dispersed, he wrote to Gipps urging that none of the prisoners be sent on tickets-of-leave to any of the adjoining colonies. The whole system appeared vicious to him; as long as the government persisted in the plan, morale in the prison colonies would never improve. In addition, he pointed out that it was very expensive to the government by multiplying the number of police establishments necessary to cope with the situation.<sup>154</sup> The men were little better than working prisoners in the midst of a free society; discharged progressively with growing privileges, but always under some disabilities, they could never free themselves from their early history and associates.<sup>155</sup> After outlining a plan for penal settlements within which convicts would have had tickets-of-leave similar to those he had devised on Norfolk Island, he remarked: "On discharge, every reasonable assistance should be given to the men to disperse . . ." <sup>156</sup> Two years later, commenting on an article in the *Edinburgh Review*,<sup>157</sup> Maconochie emphatically summarized:

Nothing would be more unfortunate, both for the science of punishment and humanity, than success in this [the qualified revival of assignment in New South Wales]; and so also with tickets of leave, another form of the same erroneous system. By whatsoever plausibilities supported, the existence of a Penal class in a civilised community *must* morally injure.<sup>158</sup>

<sup>154</sup> Letter, Maconochie to Gipps "C" 5, 12 (undated). Enclosure in Despatch No. 66, Gipps to Stanley, Correspondence re Norfolk Island, *supra* note 25, at 155(583), 156(584) (May 9, 1843).

<sup>155</sup> A. MACONOCHE, ON THE MANAGEMENT OF TRANSPORTED CRIMINALS 10 (1845).

<sup>156</sup> *Id.* at 13.

<sup>157</sup> (Rogers), *What Is to Be Done with our Criminals*, 86 EDINBURGH REV. 214 (1847).

<sup>158</sup> NORFOLK ISLAND, *supra* note 96, at 23.

#### CONCLUSION

The foregoing account shows that, although not always formulated with consistency, Maconochie's views on the types of tickets-of-leave most closely related to parole were hardly favorable to them. In so far as he was favorably disposed towards tickets-of-leave, this was either because they compensated for an ineffective system of discipline in preceding stages of the Van Diemen's Land penal system, or because if properly prefaced they would be redundant. It is true that he commented favorably on the system of release on licence introduced into England in 1853, but this was a late conversion and did not reflect the views he expressed when in Van Diemen's Land and Norfolk Island. He objected to tickets-of-leave, and particularly the summary jurisdiction to which ticket holders were subject. He believed that once a convict was allowed to live in free society he should be subject to no special restrictions which marked him off from his fellows. He wanted convicts removed from Norfolk Island to go away from it completely free, and even be allowed to return to England.

He instituted what was called a ticket-of-leave system on Norfolk Island only when it was decided that men who, in his opinion, had qualified for complete freedom should not have it. But even this system cannot be claimed as an early parole system simply because there was no free society on Norfolk Island. There is little doubt that Maconochie must be given credit for thoroughly developing the idea of stages of prison discipline, and for providing convicts with the opportunity for exercising choices upon which their progress or regress would depend. But to those aspects of ticket-of-leave systems from which modern conceptions of parole developed and which now constitute some of their most important elements, he was most strongly opposed.