



# Forbes Flyer

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## History reports itself

In the past few months the debate surrounding the organization and regulation of the legal profession has swelled. Recent reports have clarified that barristers in New South Wales will be able to accept briefs directly from clients. There has been media attention on plans to re-examine the regulation of the legal profession in Victoria, and of troubles emerging in the Australian Attorneys' General push to unify the regulation of lawyers nation-wide. The future seems full of controversy, intrigue and uncertainty.

It would be easy to dismiss this tumult as a function of Australia's 21st century re-examination of itself and its long-standing institutions. However, to the student of history, recent legal news reads as proof of the axiom 'the more things change, the more they stay the same'.

Today's reports resemble newspaper articles in New South Wales in the 1830s. On 1 November 1834, the New South Wales legal profession was formally divided into two separately regulated classes of practitioner: barristers and solicitors. Soon after, solicitor Francis Stephen, son of Supreme Court Justice John Stephen, and the second editor of *The Australian* newspaper began a series of scathing attacks on the judiciary and the immigrant brief-less barristers from England who he held responsible for depriving one half of the members of the profession of their income. Criminal charges were laid, and, in 1835, a very public trial ensued, bringing New South Wales' most eminent advocate Sir W.C. Wentworth out of semi-retirement to defend Stephen, who was ultimately convicted of contempt.

This was to be the first in a series of public skirmishes throughout the 1830s in which opponents of the bar, in newspapers and the Courts, attacked the bar publicly as an attempt to gain a monopoly benefiting the few over the many. The institution of the bar obviously prevailed in New South Wales, but not without upheaval, and the occasional fortune lost. It would be melodramatic to suggest that the

reforms being contemplated today will be as dire for some, but, in the context of times gone by, today's developments are to be watched with interest.

Speaking of events to be watched with interest, the second edition of the Flyer precedes the Society's second annual lecture. This year's speaker is Philip Powell who will give an address about '**The Origins and Development of the Protective Jurisdiction of the Supreme Court of NSW**'. The lecture will be held on 15 October 2003, in the Banco Court of the Supreme Court of New South Wales.

The inaugural lecture by Ian Barker QC on the history of the jury system, will be published by the Society in conjunction with the New South Wales Bar Association this month. Members can obtain a copy by visiting the Forbes Society web site at [www.forbessociety.org.au](http://www.forbessociety.org.au) and submitting an order form.

Also look out for Dr John Bennett's imminent publication of the diaries of Thomas Callaghan, who was a young barrister in 1840s New South Wales. The diaries promise a significant insight into practice at the New South Wales bar of Callaghan's time.

Finally, this edition of the Flyer whets the appetite with extracts from Norval Morris' upcoming book *Maconochie's Gentlemen*, an account of early penal society on Norfolk Island with analysis and contemporary comparison by Morris, who is Chicago University's Julius Kreeger Professor of Law and Criminology. Enjoy, and, as always, your contributions and feedback are welcome.

Catherine Douglas

Editor

In 1840, Alexander Maconochie, a privileged retired naval captain, became at his own request superintendent of the prison on Norfolk Island, where he was allowed to implement an experiment he called his 'Marks System'. Norval Morris, Julius Kreeger Professor of Law and Criminology at the University of Chicago and editor of *The Oxford History of the Prison*,

tells Maconochie's story in a fictionalised account (Part 1), and follows it with a critical commentary on prison reform (Parts 2-4). Morris uses a number of narrative voices - Maconochie himself, his daughter, a convict - to tell the story. Following are extracts from Parts 1 and 3 of *Maconochie's Gentlemen*.

**Extract from *Maconochie's Gentlemen* by Norval Morris**  
*Part 1, Norfolk Island, 1840-1844, pages 8-10, 21-27.*

They were called the "Heads," a misnomer to sailors, since they were the gates to the loveliest, safest anchorage in the world. The entire British fleet could be safe-harboured in this vast confluence of ocean and river, protected by the massive rock gates that shaped the entrance to Sydney town. The heads and the surrounding hills drew the sting from any weather these latitudes might produce. The heavy ordnance, perched on the heads, guarding the entrance to those waters, allowed entry to no hostile ship.

On the 23rd of February, 1840, I boarded the *Nautilus*, with a complement of over four hundred passengers, of whom three hundred were convicts, who had recently been transported from Ireland, and about one hundred soldiers and some of their families, including my wife, Mary, and our six children and myself. Leaving the heads we caught the easterly trade-winds, and the thousand-mile passage to the penal colony east-northeast of Sydney had begun. We reached Norfolk Island eleven days later and I was in charge thereafter of about 2,000 prisoners, of whom most were twice transported, doubly banished, once from England or Ireland, and then banished again for further offenses in New South Wales or Van Diemen's Land.

All Sydney had described them as incorrigible, the worst of the worst, but that was a superficiality. The three hundred on the *Nautilus* with me were merely the usual run of convicts - petty thieves, persistent poachers, political offenders, with a

sprinkling of robbers and housebreakers and an occasional killer who had been thought not to merit the hangman's noose. Those awaiting me on the island were of sterner stuff, since they had continued the same or similar behaviour in the colonies, together with some military offenders for whom the lash was thought inadequate. But, all in all, I saw all 2000 as presenting just the same problem to the penal authorities as I had seen around me in Van Diemen's Land and read about before then, a problem handled, it seemed to me, with inefficiency and cruelty, but capable of being largely replaced by a stern decency, a firm and fair administration, and the Marks System.

Nevertheless, I was well aware that my experience (even that period as a prisoner of war) did not fit me for the role I had sought, though I saw this as both an advantage and a disadvantage since I would not be bound by established, often injurious, routines.

With few exceptions, Norfolk Island would be populated only by prisoners and soldiers, the former outnumbering the latter by a factor of about five to one. The exceptions were my own family, and the dependents of a few of the soldiers who had accompanied their husbands or fathers to New South Wales and then on to Norfolk Island, and a handful of non-military prison administrators, also under my command, and their families. There would be no middle class, no artisans, no professional men other

than those who served with the army or among the prisoners, all but a few of whom had come from poverty, through one or another form of stealing, to their present situation. It would be a two-tier society, prisoners and soldiers, and, as I had already learned on Van Diemen's Land, the latter had neither inclination nor training to serve as prison guards.

I was told that nobody was ever quite sure of the number of convicts on Norfolk Island. Death from the lash, disease, suicide, and despair visited regularly and made a tally difficult. Nor had I at this stage had a careful count made of the Irish prisoners who were with me on the *Nautilus*. Counting convicts mattered little enough on Norfolk Island. There are but two accessible landings for ships, one where we landed, known variously as Sydney Bay or Sandy Bay, the other, extremely hazardous, on the other side of the Island. For the rest, the sea beats on steeply rising cliffs, seriously impeding any attempt at escape by sea.

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We convicts were allowed above deck, in the foc'sle, for an hour a day, in groups of twenty. Instead of peering at us from the upper deck, like animals being exercised below, Maconochie had made it a habit to join us on our deck and talk informally to any who wished to talk with him. At first the convicts had crowded around him, not threateningly, but anxious for information. Soon it became clear

that he knew little more than we did about Norfolk Island. He had heard the rumors of its being a brutal, hellish settlement, of excessive discipline and frequent scourging for the slightest offense; but so had we. He seemed more interested in our backgrounds, indeed in us, what skills we had, could we read and write, did we know a trade, could we farm, and so on.

"Your name, please," Maconochie said.

"Patrick Burke," I replied.

"Yes. I believe I have seen your record. Yes, I remember it now. I recall that you are one of those who claim to be innocent. Of what are you innocent?"

"Of many things," I replied, expecting at very least a rebuke for such disingenuous discourtesy, but he smiled slightly and reshaped his question. "Very well, I'll try to speak by the book. Of what crime were you convicted, though innocent you say, at the Clare Assizes, was it not, and sent here?"

"Sedition, Sir."

"And were you not seditious?"

"In general, I was; but not on the particular occasion which led to my conviction. I was trying to calm the mob, not lead them on, but that is not easy with an angry Irish mob. I was certainly there to listen if not to speak, and to advise if called upon, but I did indeed speak. I do not doubt that to English ears much of what was said, or shouted, was seditious. The court certainly thought so."

"So, all in all, you have no particular complaint. If not seditious on the occasion that led to your arrest, sedition was in the intention of your companions, and you knew it, and was probably in your intention too. So, if not seditious then, seditious earlier, and seditious in contemplation."

I could quibble no longer. It was my time for a rueful smile. Maconochie was obviously of a different stamp from others who ran prisons and it was not sensible for me to confront him in this flippant way. I found I didn't want to. This was the first occasion that I had had the chance to talk to him, and since I had come to respect his behavior on this voyage from Sydney to Norfolk Island I rather regretted my earlier evasive response to his inquiry.

"I know, Sir, that many aboard claim innocence of the crimes for which they have been transported. It happens that my claim is technically valid, but I am in no worse situation than many other convicts on this ship with you. It is not easy for the young, Irish, working man who has no work, to stay out of an English prison."

He made no direct reply but turned the conversation to my family and myself, teasing out the facts of my education and my work. I had been a printer and binder in my family's business, anticipating becoming its manager. But my resentment of English rule in Ireland, of their caring so little for our living conditions, of their hauteur and arrogance, had led me to my present situation. I said as much; he did not disagree. Rather, he asked if I had read any political philosophy and any studies on what he called "The Irish Question." I told him that my reading turned largely toward fiction, but that I had indeed read a few of the current pamphlets on Irish politics. He said he would like to talk to me further after we reached Norfolk Island, and then, most extraordinarily for a senior naval officer addressing a convict, excused himself and left the convict deck.

Mary and the children stayed on board with the rest of the ship's complement while I went ashore to arrange housing for my family, and whatever needed to be done to bring the Irish convicts ashore.

I had not met Major Charles Best, whom I was to replace as Superintendent of the Norfolk Island Penal Colony, and I rather dreaded the usual welcome at the military mess, soused in the rum, that was the votive substitute for both conversation and civility throughout the formal messes of the New South Wales Corps. I assumed he would be at the dockside when we berthed.

My first sight of my new posting was of a ramshackle pier poking out through a tropical downpour from a narrow bay, with a much larger beach to its right. A platoon of soldiers stood disconsolate on the pier. I moved to meet them as soon as the gangplank was down, my greatcoat heavy with rain. A major in charge of the small troop stepped forward to meet me, saluted, introduced himself as Major John Simmonds, and said, "Welcome to Norfolk Island, Sir" and held out to me an oilskin wrapped document.

I suggested we should all repair to the shed behind the pier on the shoreline. There we gathered, the soldiers drawn up at attention in three ranks, Simmonds, and me.

"The Commandant, Major Best, told me to present his compliments, to give you that letter, and to express his regret at his being unable to welcome you," Simmonds said.

I tried to put him at ease and suggested that the men be allowed to fall out and relax until the storm passed. I then read Major Best's letter.

It was hardly a welcome, rather a cry of relief at having escaped the Island. I was not to worry. Everything was in excellent order. Major Simmonds, who would meet me, was utterly reliable and knew everything necessary to run the colony. He, Charles Best, had had to depart a few days before I was expected to arrive since, unexpectedly, a supply boat with a contingent of new prisoners had arrived from Port Arthur and was heading immediately for Sydney. Such were the exigencies of shipping

to and from the Island that he thought it his duty to take the first available passage back to his new posting which he had been led to believe, and here joy shone through his syntax, would be with the unit from which he had been seconded, and which was soon to be on its way home to England.

He had not, he wrote, found the governance of the convicts and the soldiers and their families a challenging job. It was largely a question of an unrelenting insistence on firm discipline and adequate punishment; but he had not enlisted with this type of service in mind and he did find the behavior of the prisoners bestial beyond tolerance, and this seemed even to have adverse effects on the soldiers.

With a final commendation of Major Simmonds, and another reference to the disciplinary needs of convicts and soldiers alike, he wished me well. He clearly sympathized with me in this posting. I had the sense that he would have liked to know what misfeasance of mine had led to the appointment of a naval captain as the governor of a desolate encampment of twice-transported convicts. He clearly knew nothing of my career and nothing of the additional convicts coming with me.

Best would have been astonished to learn that I had volunteered for this posting, that I had indeed pulled such strings as I could grasp in London to get it.

For years I had followed the debate between Jeremy Bentham and John Stuart Mill and Sir James Fitzjames Stephen about the governance of prison, about transportation and the purposes the prison and the penal colony might serve. I had come to know and esteem the work of Matthew Davenport Hill in saving lives otherwise utterly lost. I had seen the horror of the hulks and I had heard the fashionable talk about the unredeemability of the criminal classes. I had closely observed

conditions in the Port Arthur colony. Philosophically, I had fallen under the influence of the Quakers, in particular of John Howard, and had come to believe, with him, that there is a spark in the breast of every man which if properly fanned and tended will lead him to an honorable life, and sometimes to a socially useful life. I had come firmly to believe in reformation of convicts by moral suasion, its stages encouraged and defined by a system of awarded merits and demerits.

I had published four articles in London which had attracted considerable attention, urging a prison regime in which the convict would be held in conditions of hardship and solitude for a period until by his behaviour he would earn a few privileges and some association with others in his situation, and so on, by stages of increasingly responsible work and increasing autonomy until by his industry and good behaviour he would merit trial release on parole, and ultimately complete freedom.

This staging system, which later became known as the "Marks System," seemed likely to me to fan that spark of decency I found in all men and would yet preserve the law's power over them for as long as necessary. When I phrased these ideas as a proposition—"the prisoner should hold the key to his own cell"—mockery knew no bounds. Few got beyond the phrase, which became the butt of jokes in the clubs.

Under the Marks System I had recommended in these papers, the prisoner would regularly be awarded marks for diligence and desirable behavior and would have marks deducted for disciplinary breaches and all forms of undesirable behaviour. These marks, his tally, would be known to the prisoner, and also the sum of marks he must attain to move to the next and less severe stage of his punishment; he would thus know where he stood in relation to his punishment. So, if he wished,

and if he was capable of doing so, he could shorten the period of his punishment by fitting himself for conditional and then final release. He would, in effect, keep the key to his cell.

Among my fellow naval officers such views rang hollow, not to say absurd, a poor and effeminate substitute for the proved efficacy of the hangman, irons, and the lash. But I came from a family whose name was known. My active naval service had not been without widely published success. And a few did read and listen to my ideas.

I still do not know whether it was those few or the sardonic mockers who brought me to the Island. "Let him try giving those marks and keys to prisoners who have been transported to Sydney and Port Arthur and have there committed further crimes and have been further transported to Norfolk Island. Oh, yes: for good measure let us add to those at Norfolk Island the similar failures of the convict settlements in New South Wales and Van Diemen's Land. Nobody in those colonies will object."

I had argued that it was unfair to test my Marks System on the twice transported, on those who were seen as incorrigible, on those who had deeply and long experienced the hell that was current practice. The Colonial Office had not disagreed. I was ordered to confine my Marks System to those convicts who would be transported to Norfolk Island directly from England or Ireland, in effect, those accompanying me on the *Nautilus*. I was to keep them separate from the twice-transported convicts at present on the island; for them, I was to maintain the existing regime.



**Extract from *Maconochie's Gentlemen* by Norval Morris**  
**Part 3, *Why do Prison Conditions Matter?*, 1840-1844, pages 172-76.**

**Why should anyone of reasonable ability see the conditions of prison life as meriting serious and sustained concern?**

That human rights are absolute and pertain to all persons, prisoners included, is clearly inadequate. It merely restates the problem. Why should prisoners be included? Many thoughtful persons have been and are prepared to exclude them, write them off.

To suggest, as I often have, that prison is a microcosm of the "outside" world, and thus provides a convenient microscope to observe the human condition, is a true but inadequate answer. It justifies interest, but hardly a close attention to details.

There are certain values to which we adhere as a group bound together by an overarching culture. One of those values is a firm rejection of torture as a means of achieving collective purposes. By torture we mean the infliction of unnecessary pain, pain beyond what is required to achieve those purposes, whatever they may be—the discovery of a terrorist's hidden bomb, the eliciting of a confession. These are deontological values, but they do meet some utilitarian considerations at their extreme (but not in criminal punishments). The thumbscrew and the rack are not to be used to coerce confessions; nor should the pains of imprisonment be used to punish criminality if lesser pains (or imprisonment of lesser duration) can achieve the same socially justified aim.

Is public opinion an appropriate determinant of what pain is reasonably necessary for this purpose? One cannot have absorbed the lessons of the twentieth century and believe that it is. The power of political leadership in pursuit of popular support by relentless and unscrupulous means has surely and frequently been demonstrated. Likewise, in relation to the punishment of crime, a public misled by false statistics, sensational and selective sound bites, and political leaders seeking votes is plain to see.

War after war are seen as necessary and clearly justified by the populaces on both sides of the conflict. Similarly, criminal punishments of obviously excessive brutality, inflicting grossly excessive pain—crucifixion, breaking on the wheel, flogging, and on and on—in their day attracted and held mass popular support.

If popularity is the justification of a punishment, we are indeed lost. Surely, it is the task of the collective, the group, the government, functioning with dispassionate but firm values, to define what deliberate infliction of pain is appropriate to the punishment of a member of the group. This is a moral task on which polls may be relevant, but must not be determinative.

Happily, that moral task properly undertaken brings in its wake a change in public opinion. As leadership defines criminal punishments with rational balance, that balance comes to influence public opinion to its acceptance. Hence capital punishment is now to be found among Western industrialized countries only in the United States, where it is now under serious attack and is unlikely to be part of the armamentarium of punishment for many more decades.

Thus, the beginning of an answer to our query why prison conditions merit attention is to be found in the fact that the criminal justice system exercises the greatest power that a state can legally use against its citizens. Consequently, a prison regime defines the razor edge between power and freedom, authority and autonomy. *Quis custodiet custodes?* becomes even more probing when extended to who will keep the prison keepers, who will control the ultimate controllers? The answer spreads governments over a wide range, from systematic torturers to tolerant democracies in which even prisoners retain many protections of citizenship.

Many philosophers and reflective politicians have appreciated that reality

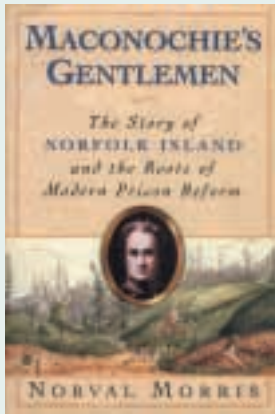
and have suggested that the treatment of the convicted criminal is a sound barometer to the civilization of a society. Churchill was an exemplar of this affirmation: "The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country." This may well be so, but why? A greater man, the greatest of men, who had been speaking a few moments earlier of visiting prisons, put the same point more powerfully: "What you do to the least of these, you do unto me."

Returning to the secular, Sir Owen Dixon, Chief Justice of the Australian High Court, a judge I greatly admired, as did virtually all lawyers who knew his work, offered me an answer. He said that when sentencing men in the dock, they often seemed to him very much like himself. Few of us can muster that degree of empathy, but we understand the point. We are all so very much alike, such weak and only occasionally strong vessels, little of human frailty is outside our understanding. There are a few outliers, but only a few. So, when devising prison conditions, you should devise them for yourself. That does not mean you should be self-indulgent. You should consider not only yourself but also how you are bound by the realities of the society in which you live and of the fact that prisons in the last resort exist *faux de mieux*—because we cannot think of anything better to do with a criminal than by imprisonment to make him feel our disapproval and our fear of him and others like him.

The belief is widespread in the United States today that the Reverend Sydney Smith had it right in 1822, though he and his words are not widely remembered. In his view, prison should be "a place of punishment from which men recoil with horror—a place of real suffering, painful to the memory, terrible to the imagination ... a place of sorrow and wailing, which should be entered with horror and

quitted with earnest resolution never to return to such misery; with that deep impression, in short, of the evil which breaks out in perpetual warning and exhortation to others." (Sydney Smith, *On the Management of Prisons, Essays*, Wardle, Locke & Co., London, pp. 226, 232.) In short, "horror" and "misery" will deter convicts and citizens at large from committing crimes. And, if not, the convicts at least will reap what they have sown.

By no great contrast, sympathetic friends, those who share my interest in improving prison conditions, and in providing academic, psychological, and vocational training programs in prison, often rest their case for these developments on the likelihood of thus reducing recidivism. And, if not, at least they have done their best to help wrongdoers become rightdoers.



***Maconochie's Gentlemen: The Story of Norfolk Island and the Roots of Modern Prison Reform***, by Norval Morris (Oxford UP USA, HB, rrp \$49.50), is distributed in Australia by The Federation Press.

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