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# Reformation or Rebellion:

Convict Discipline and the  
Lash, 1788 - 1838

Matthew Firth  
Masters,  
University of New England

No tongue could tell I'm certain sure  
What we poor convicts do endure  
To the colonies I was sent with speed,  
It would make your tender heart to bleed  
There I was flogged early and late  
For trying to make my escape.

Unknown author<sup>1</sup>

Flogging was a systematised and institutionalised punishment in the convict colonies of early colonial Australia.<sup>2</sup> The crack of the whip and the screams of a sentenced convict, lashed to the flogging triangle, were not unfamiliar sounds intruding into daily life in the colonies and penal stations of New South Wales and Van Diemen's Land. Convict memoirs, the accounts of colonial agents and the salacious tales recounted by travellers for audiences in Britain invariably depict dramatic, sadistic scenes of torture when recounting floggings. The reports provided in evidence to the various parliamentary inquiries into transportation and the colonies throughout the early nineteenth century were equally damning of the divisive practice, and often no less vivid. Yet in the parliamentary accounts and the memoirs of those in authority in the colonies, it is also possible

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<sup>1</sup> Anonymous, 'The Returned Convict,' reproduced in Hugh Anderson, *Farewell to Judges and Juries: The broadside ballad and convict transportation to Australia, 1788 - 1868* (Hotham Hill: Red Rooster Press, 2000), 287.

<sup>2</sup> The name 'Australia' will be used throughout this article to refer to the geographical area of modern Australia. The term was not in contemporary use to refer to the disparate British colonies, though it was attached to the landmass early in colonial history.

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to find defenders of flogging as a key coercive tool for the colonial administrators. The rich variety of sources relating both the tales and the statistics of flogging allow a broader view of the practice. Official reports and correspondence, alongside the eye-witness memoirs and chronicles, set lashing amongst a wider program of labour extraction and contrast the practice with other coercive tools of work discipline. Further, they highlight both the subjective and evolutionary nature of flogging as it related to convict productivity throughout the first fifty years of European settlement.

The colonial administrators were not exclusively reliant on flogging to encourage work discipline within the colonies. Secondary punishments such as transportation to penal stations or assignment to chain-gangs complemented flogging to break incorrigible convicts, while the beacon of probation, ticket-of-leave or pardon beckoned to compliant convicts. The authorities attempted to balance discipline and inducement in order to exact maximal performance from their labour force. Yet the nature of the balance varied dependent on when a convict was serving their sentence, where they were engaged to work and who they were labouring for. Between 1788 and 1838 official punitive ideology would evolve in response to circumstances experienced within the fledgling settlements, and policy dictated from Britain. In turn, this would mean that the convict experience of labour inducements was dependent not only on when they were serving their term, but also whether the convict was assigned to the employ of a private or public master, and whether the convict was employed at a penal station or within a colonial settlement. In considering the success or otherwise of flogging in enforcing work discipline we must consider the situation of the convict.

While the threat of the scourge was a constant reality in convict Australia, the zeal of its application varied in line with dominant penal philosophy. The period in which the colonies of New South Wales (NSW) and Van Diemen's Land (VDL) were being established was a period of extensive penal reform in Britain.<sup>3</sup> Agitation for prison reform, with particular attention to prisoner wellbeing, had gathered pace throughout the eighteenth century and had drawn the practices of flogging and transportation into the debate. In response, between 1779 and 1839 the British parliament had passed a series of acts affecting extensive penal reform.<sup>4</sup> The distant convict outposts being established in Australia did not feel the effects of these reforms immediately. However, as the settlements began to develop from subsistence penal outposts to profitable communities with free citizens in the early nineteenth century, parliament began to examine the punitive practices of the colonial administrators. Two parliamentary reports demarcate distinct periods in early colonial Australia in which the balance of discipline and inducement shifted: the *Report of the Commissioner of Inquiry of 1822 - 23*, or Bigge reports, and the *Report of the 1838 Select Committee on Transportation*, or Molesworth committee.<sup>5</sup> The colonial administration of 1788 - 1822, prior to the release of the Bigge reports, focused on the establishment of self-sufficient settlements, and approached convict discipline in a manner that would ultimately be deemed too lenient. The period between the Bigge reports and Molesworth committee, 1822 - 38, saw the colonial authorities refocus upon the didactic nature of transportation, leading to both an increasingly punitive approach to convict discipline, and a subsequent reaction against flogging within the

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3 Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1780 - 1850* (New York: Columbia University Press, 1980), 53 - 54.

4 J.M. Beattie, *Crime and the Courts in England, 1660 - 1800* (Oxford: Oxford University Press, 1986), 573 - 576.

5 *Report of the Commissioner of Inquiry into the state of the colony of New South Wales*, ordered by the House of Commons to be printed 19 June 1822, (448); *Report from the Select Committee on Transportation*, communicated by the Commons to the Lords, ordered to be printed 16<sup>th</sup> August 1838, (374).

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wider debate on transportation.<sup>6</sup> The period following the report of the Molesworth committee in 1838 saw the staged abolition of punitive transportation, and affected the gradual decline of the whip. While flogging continued as a coercive punishment after 1838, the focus of our examination will be upon the evolution of work discipline between 1788 and 1838.

When John Bigge delivered his reports on the state of the colony of NSW to the British House of Commons in 1822, he concluded that the punitive controls used by the colonial administrators in Australia had been too lax.<sup>7</sup> Bigge's criticisms reflect the fact that the early colonial period of 1788 – 1822 saw the inducements of emancipation vie most actively with corporal punishments to exact performance from convicts. This does not mean that the colonial governors or convict masters would hesitate to use lash on an incorrigible convict, but rather indicates recognition of the unique needs of the newly established colonies. In his study of convict labour relations, William Robbins highlights the urgency within the fledgling settlements for productive labour and their limited capacity to entirely control the convict population, leading to a collaborative approach to discipline and inducement.<sup>8</sup> As a result, the colonial authorities began to favour incentive over coercion to encourage work discipline. Flogging damaged a valuable commodity in settlements with finite labour resources, and a need for those resources to be working at full capacity to enable self-sufficiency. Further, rather than enforcing discipline, the lash often engendered resentment and rebellion. Indeed, the lash was used in the earliest accounts of punishment in the colony and met with immediate resistance.

In his *Account of the English Colony in NSW*, David Collins, the deputy judge advocate of the new colony, records the first flogging of an indolent convict merely sixteen days after the first settlers arrived in 1788.<sup>9</sup> Yet he further states that this did not act as a deterrent to the other convicts and within another fifteen days a further round of punishments had to be issued.<sup>10</sup> The attitudes of the colonial authorities to flogging and the liberal use of inducements to motivate convict workers find their genesis in this early period of settlement in NSW and the immediate need of the settlers for self-sufficiency. The authorities of the new colony had an economic necessity to extract maximum labour from convicts by any means. In a 1789 letter to Under-Secretary Nepean of the Home Department in Britain, Governor Phillip (1788 – 92) represents the struggles of the young colony for viability and labour productivity:

You will see by my letters to Lord Sydney that this colony must for some years depend on supplies from England...in our present situation I hope few convicts will be sent out for one year at least, except carpenters, masons, and bricklayers, or farmers, who can support themselves and assist in supporting others. Numbers of those here now are a burthen [sic] and incapable of any kind of hard labour, and, unfortunately, we have not proper people to keep those to their labour who are capable of being made useful.<sup>11</sup>

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6 Isobelle Barrett Meyering, 'Abolitionism, settler violence and the case against flogging: A reassessment of Sir William Molesworth's contribution to the transportation debate,' *History Australia*, Vol. 7, No. 1, (2007), 1 - 18.

7 *Commissioner of Inquiry, state of the colony*, 1822, (448), 17 – 20.

8 William Murray Robbins, 'Management and Resistance in the Convict Work Gangs, 1788 – 1830,' *The Journal of Industrial Relations*, Vol. 45, No. 3, (2003), 363 – 365, 374 – 375.

9 David Collins, *An Account of the English Colony in New South Wales*, (London: T Cadell & W Davies, 1804), 13.

10 *Ibid.*, 14.

11 Phillip to Nepean, 9<sup>th</sup> July 1788, reproduced in, *Historical Records of Australia (HRA)*, Series 1: *Governors' Despatches to and from England*, 26 vols, (Sydney: Library Committee of the Commonwealth Parliament, 1917), i, 55 – 56.

Phillip made decisions on the structure of the new colony based on the current situation, which informed the approach to convict discipline right up to Governor Macquarie's government (1810 – 21). In his discussion of the assignment of convicts to masters, Barrie Dyster proposes that there were three labour structures available to Phillip. Convicts could be placed in public service, though this represented a significant cost to the Colonial Office; they could be emancipated, which would allay the expense, but at the cost of the instructional nature of transportation to British criminals; or they could be assigned as servants to private masters: free settlers, discharged soldiers and emancipated convicts.<sup>12</sup> What resulted was a hybrid system which encompassed public and private assignment of convicts, a practice that was to prove divisive throughout the convict period. This in turn led to diversity in, and constraints on, the practice of flogging, again indicating innate limitations in the threat of the whip to exact performance from convicts. Yet it also indicates likely abuses in its application to the backs of a scarce labour force.<sup>13</sup>

Flogging was utilised in early NSW as a cost effective punishment for minor infringements. It is notable, however, that during this stage of settlement alternative secondary punishments were limited.<sup>14</sup> Norfolk Island was established only temporarily as a penal settlement in this period, VDL was not established until 1803 nor Newcastle until 1804, and corporal punishments such as the treadmill were yet to reach Australian shores. When combined with Phillip's naval background, and the endemic flogging discipline meted out to soldiers and sailors, it is little surprise that magistrates relied on flogging for petty offences.<sup>15</sup> Phillip left the colony with a legacy of severe corporal punishment. The occasions of flogging recorded by David Collins note only one instance when less than one-hundred lashes were given, and numerous instances when soldiers and convicts alike were given seven-hundred lashes.<sup>16</sup> Phillip had been given powers over sentencing by the British Colonial Office and mandate to establish a magistracy in the new colony.<sup>17</sup> As such, a sentence of flogging had been initially intended as a result judicial process. However, Phillip set a precedent of arbitrary punishment as he began to bypass the justice system, ordering summary floggings. In one case, for example, Phillip would pass an immediate sentence, without judicial recourse, of one-hundred lashes on a convict who had been lax in his guard duties, allowing an Aboriginal to escape the settlement.<sup>18</sup> By the time Governor King (1800 – 06) entered office in 1800, such summary floggings were evidently customary for private masters in disciplining their convicts, and his injunction forbidding the practice met with resistance, requiring the reissue of the order in 1802.<sup>19</sup>

Nonetheless, flogging to enforce work discipline in this early period seems to have been less common than the use of incentive to exact performance. In a new colony with a scarcity of labour resources, flogging damaged the labour capacity of that workforce, and promoted convict hostility

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12 Barrie Dyster, 'Public Employment and Assignment to Private Masters, 1788 – 1821,' in Stephen Nicholas (ed.), *Convict Workers: Reinterpreting Australia's Past*, (Cambridge: Cambridge University Press, 1988), 129.

13 Robbins, 'Management and Resistance,' 365.

14 John Hirst, *Freedom on the Fatal Shore: Australia's First Colony*, (Melbourne: Black Inc., 2008), 56.

15 Alan Atkinson, *The Europeans in Australia: A History*, 2 vols, (Oxford: Oxford University Press, 2004), i, 92.

16 Collins, *Account of the English Colony in NSW*, 37, 46, 50, 52.

17 *Ibid.*, 13 – 16.

18 Atkinson, *The Europeans in Australia*, 92 – 93.

19 Government Order, 26<sup>th</sup> December 1800, reissued, 1<sup>st</sup> March 1802, reproduced in *HRA, Series 1*, iii, 473; Hirst, *Freedom on the Fatal Shore*, 51.

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to their masters.<sup>20</sup> The paucity of labour and supervision meant that convicts under public employ operated in work-groups within set hours on a task-work basis. To make up the labour short-fall the convict, upon completion of their allotted work or hours, could request pay for additional work, or organise employment with a private employer for wages.<sup>21</sup> This arrangement was intended that work-groups would increase productivity in order to complete their task-work early and grasp the opportunity to earn money or liquor in supplementary employment. Yet this incentive did not necessarily have a punitive partner in flogging. Private masters could have a sentence of five-hundred lashes passed on an idle convict, however such a sentence certainly denied the master of even unwilling labour, and not all idle convicts were taken to the triangle.<sup>22</sup> The fear of the lash was losing some of its hold over the minds of convict workers. In his *Inquiry*, Bigge makes note of an instance in VDL where a prisoner who had absconded went entirely unpunished other than the repayment of an amount equal to the labour time lost.<sup>23</sup> Collins records a scene of idleness in Rose Hill farmlands, with convicts who ‘by no means exerted themselves to their utmost’.<sup>24</sup> Yet despite his numerous mentions of flogging in the colony, Collins does not correlate it with these idle convict labourers, and he further implies that neither the threat of lash nor the incentive of payment necessarily exacted performance from convicts:

The public works went on as usual very slowly; those employed on them in general barely exerting themselves beyond what was necessary to avoid immediate punishment for idleness.<sup>25</sup>

However, the ineffectiveness of the lash in harnessing the labour power of the convicts was more evident in the skilled convict workers. The scarcity of skilled labour noted by Phillip mitigated the utility of flogging as a generalised punishment to enforce work discipline. As David Neal has noted, ‘the lash, while useful in coercing unskilled work, is more limited for skilled work’. In order to marshal the abilities of skilled convict workers, for the benefit of the colony, they were necessarily given autonomy of action within their sphere of employment.<sup>26</sup> This autonomy extended to workers under both private and public masters. As Dyster has neatly summarised: ‘Private employers found, often regretfully, that convicts, like hired people, responded best to incentives.’<sup>27</sup> Fundamentally, flogging in the early colonial period was highly subjective. The employer, the availability of labour, the nature of the employment and the skill required to undertake it were all weighed before a flogging sentence or summary lashing were delivered.<sup>28</sup> Importantly, though brutal, flogging did not take away the hope of emancipation.

In NSW, the colony to which other settlements of the period were subordinate, the policy of emancipation found its fullest expression during the governorship of Lachlan Macquarie. In

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<sup>20</sup> Robbins, ‘Management and Resistance’, 365.

<sup>21</sup> Dyster ‘Public Employment’, 129; Hirst, *Freedom on the Fatal Shore*, 29.

<sup>22</sup> AGL Shaw, *Convicts and the Colonies*, (London: Faber and Faber, 1966), 72 – 73.

<sup>23</sup> *Commissioner of Inquiry, state of the colony*, 1822, (448), 45.

<sup>24</sup> Collins, *Account of the English Colony*, 496.

<sup>25</sup> *Ibid.*, 40.

<sup>26</sup> David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales*, (Cambridge: Cambridge University Press, 1991), 33.

<sup>27</sup> Dyster ‘Public Employment’, 129.

<sup>28</sup> Stephen Nicholas, ‘The Care and Feeding of Convicts,’ in Stephen Nicholas (ed.), *Convict Workers: Reinterpreting Australia’s Past*, (Cambridge: Cambridge University Press, 1988), 183.

Britain, Macquarie's extensive use of emancipation as an alternative inducement to the lash would give an impression of undue leniency within NSW, and lead directly to the commissioning of the Bigge reports. Macquarie was not, however, the sole progenitor of incentive based labour motivation in early NSW, rather representing the culmination of policies on convict pay, probation and tickets-of-leave born of the circumstances of the first settlers and formalised by Governor King.<sup>29</sup> Though the regulations for the granting of these inducements were further tightened in Macquarie's administration, the steadily increasing volume of convicts in public service led to a corresponding rise in emancipation and tickets-of-leave.<sup>30</sup> Throughout his eleven year tenure as governor, Macquarie was to grant 1,731 conditional or absolute pardons and 2,319 tickets-of-leave.<sup>31</sup>

Nonetheless, emancipation, while key, was not the preeminent inducive tool advocated to exact convict labour in early NSW and floggings continued throughout the period. Macquarie certainly did not advocate the dissolution of flogging and continued to promote its use as a disciplinary device. Having said this, both King and Macquarie demonstrated a desire to moderate the use of the lash. Governor King's prohibition of 1800 had legislated against private masters beating their convict servants, and in 1811 Macquarie assuaged excessive sentencing by limiting the number of lashes that could be proscribed by a single judge to fifty lashes.<sup>32</sup> Records of corporal punishments do not allow for a comprehensive analysis of flogging data in this period. The most accurate flogging data was kept in the 1830s, an era of settlement with distinct penal philosophies in reaction to the policies of King and Macquarie.<sup>33</sup> Yet despite the lack of data for the period 1788 - 1822, the very fact that King and Macquarie were regulating flogging demonstrates that, by the early nineteenth century, it was an endemic punishment within the colony, but also that it was not achieving desired results in enforcing work discipline.<sup>34</sup>

This was not a view shared Colonial Office in Britain, and by 1817 they had developed a perception that the administration of convicts in the Australian settlements was insufficient in its pursuit of punitive discipline, detrimental to the didactic example it was intended to provide criminals in Britain. Emancipation had grown fourfold per year over the thirty years since Phillip's arrival, and this did not escape the notice of the free settlers who relied on convict labour.<sup>35</sup> Neither did it escape their notice that the colonial governors were legislating against their right to discipline their convicts and these settlers began to disparage the colonial administration to their contacts in Britain. As a result, in 1817, the Secretary of State for War and the Colonies, Lord Bathurst, commissioned an inquiry into the state of the colony of NSW, to be undertaken by John Bigge. Bathurst's 1819 letter of instruction to Bigge expresses the prevailing concerns of the British government:

If therefore, by ill considered Compassion for Convicts, or from what might under other circumstances be considered a laudable desire to lessen their sufferings, their Situation

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29 Dyster, 'Public Employment,' 129; Shaw, *Convicts and the Colonies*, 72 – 73.

30 Dyster, 'Public Employment,' 128 – 131.

31 John Ritchie, *Lachlan Macquarie: A Biography*, (Melbourne: Melbourne University Press, 1986), 133.

32 Government Order, 26<sup>th</sup> December 1800, reissued, 1<sup>st</sup> March 1802, reproduced in, *HRA, Series 1*, iii, 473; Macquarie to Liverpool, 18<sup>th</sup> October 1811, reproduced in, *HRA, Series 1*, vii, 410 – 411.

33 Hirst, *Freedom on the Fatal Shore*, 50 – 51; Robbins, 'Management and Resistance,' 364; Shaw, *Convicts and the Colonies*, 200 – 201.

34 Robbins, 'Management and Resistance,' 364 – 365.

35 Shaw, *Convicts and Colonies*, 76.

in New South Wales be divested of all Salutory Terror, Transportation cannot operate as an effectual example on the Community at large, and as a proper punishment for those Crimes against the Commission of which His Majesty's Subjects have a right to claim protection, nor as an adequate Commutation for the utmost Rigour of the Law.<sup>36</sup>

The period of 1822 – 38 is demarcated from the early colonial settlement by the resultant reports of Bigge's commission of inquiry. The Bigge reports reiterate the perceived leniency toward serving convicts, and made recommendation to increase the severity of the convict experience.<sup>37</sup> Subsequently, this period reflected an increasingly punitive approach to convict discipline. While not specifically recommended by Bigge, this extended not only to the introduction of new coercive punishments such as the treadmill, but an increase in the number of flogging sentences.<sup>38</sup> It also marked a sharp decline in the number of tickets of leave issued, and the end of convict wages.

It is easy to overstate the prevalence of flogging during this period, it is heavily coloured by the tales of life in the colonies brought back to Britain by freed convicts and colonial workers. This is certainly the view of John Hirst in his examination of flogging and work.<sup>39</sup> Hirst posits that, in the tales being told of life in the colonies, flogging had become a trope that the British public expected to hear, a symbol of the colonial penal system.<sup>40</sup> The larger part of Hirst's analysis is an apologetic in which the actions of the colonial governors, combined with anti-flogging sentiment in Britain, moderate the practice of flogging as a work-discipline; comparing the treatment of convicts favourably with the treatment of slaves.<sup>41</sup> A comparison that, in echoes of the abolitionist debate of nineteenth century Britain, David Neal systematically refutes in his own study of convict flogging.<sup>42</sup> Yet Hirst is likely correct in identifying the hyperbolic nature of many convict accounts, and the hold the image of the flogged convict has on the imagination. However, to deny convict memoirs and traveller's tales of any veracity would be a mistake. Governmental reports and legislation only indicate the administration's objectives and their perception of the impacts of their renewed punitive policies. The anecdotes of people living under the system provide a clearer view of their actual effect, and it is evident that after the release of the Bigge reports, NSW and the newly autonomous colony of VDL (1825) began a far more punitive approach to convict discipline.

Secondary punishments diversified quickly. The new governor of NSW, Brisbane (1821 – 25) and his successor, Darling (1825 – 31) increasingly relied on flogging and chain-gangs to discipline convicts, the treadmill was introduced as an alternative coercive punishment, and Norfolk Island was reoccupied as a penal settlement for incorrigibles.<sup>43</sup> Similarly, Governor Arthur (1825 – 36) established the penal settlement of Port Arthur (1830) in VDL, in addition to the extant settlement at Macquarie Harbour. The penal settlements gave ample fodder for tales of brutality. As Catie Gilchrist has advanced, it is unsurprising that convict memoirs are unanimous in their

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36 Bathurst to Bigge, 6<sup>th</sup> January 1819, reproduced in, *HRA, Series 1*, x, 7 - 8.

37 *Commissioner of Inquiry, state of the colony*, 1822, (448), 16 – 20, 155 – 156.

38 JJ Spigelman, *The Macquarie Bicentennial: A Reappraisal of the Bigge Reports*, 2009, 26, <http://historycouncilnsw.org.au/wp-content/uploads/2013/01/2009-AHL-Spigelman.pdf>, accessed 9 September 2014.

39 J.B. Hirst, *Convict Society and its Enemies: A history of early New South Wales*, (Sydney: George Allen & Unwin, 1983), 57 – 69.

40 *Ibid.*, 57.

41 *Ibid.*, 58 – 65.

42 Neal, *The Rule of Law*, 35 – 37.

43 Robbins, 'Management and Resistance,' 366 – 367; Shaw, *Convicts and Colonies*, 189 – 191; Spigelman, *The Macquarie Bicentennial*, 26.

condemnation of flogging.<sup>44</sup> Yet this condemnation is not found only in the sensationalist tales of convicts such as Thomas Cook, but also in the writings of free settlers such as Alexander Harris and employees of the colonies such as William Ullathorne and Thomas Atkins, members of a burgeoning abolitionist movement, decrying the evils of transportation.<sup>45</sup> The rhetoric of abolitionism equated convictism with slavery, a theme that would be expounded at its fullest in the Molesworth committee, and focused heavily on flogging.

An increasingly punitive approach to the convict experience and a corresponding rise in flogging sentences do not necessarily correlate to an increase in floggings as a way to exact productive labour from convicts. Flogging as a work discipline had already lost much of its coercive impact within the colonial settlements, losing some of its instructional power by going behind closed doors in 1820, though the crack of the lash would still be heard to ring out over the settlements.<sup>46</sup> While this may have heightened the effect on the listener, as demonstrated in Harris' famous passage, listening to the rhythmic sounds of 'the legalised abomination,' the visual demonstration of power was removed.<sup>47</sup> Yet these lashings were unlikely to enforce work discipline. Many of the recorded floggings in this period were for crimes only tangentially related to labour, and even those that were intended as punishment for idleness were lessened in impact by their removal in time and location from the event.<sup>48</sup> The earlier limitations set on the practice meant that flogging was no longer an immediate punishment for idle or intractable convicts. Instead, they needed to be conveyed to, and sentenced by, a magistrate. This system inconvenienced convict masters and increased lost labour hours, making it likely that only incorrigibles were sent for punishment.<sup>49</sup> The absconding prisoner mentioned by Bigge had previously tried to negotiate wages for his work, realising that his master 'would have suffered by complaining to a magistrate.'<sup>50</sup> In this his assessment was proved correct, and though he absconded when his wage request was refused, neither action resulted in flogging.<sup>51</sup> This kind of anecdotal evidence indicates a systemic decline in the use of the lash to enforce work discipline. According to A.G.L. Shaw, by the time accurate sentencing records were being kept in the 1830s, less than 20% of all floggings were directly related to work productivity.<sup>52</sup>

The cessation of flogging as a public punishment in this period reflected the reform movement that had been developing in England from the late eighteenth century, a core tenant of which was that convict reform and redemption could only be found in hard labour.<sup>53</sup> However, the moral imperative of this philosophy was being undermined in the Australian colonies. Magistrates treated the

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44 Catie Gilchrist, 'This Relic of the Cities of the Plain': Penal Flogging, Convict Morality and the Colonial Imagination,' *Journal of Australian Colonial History*, Vol. 9, (2007), 18.

45 Thomas Atkins, *Reminiscences of twelve years residence in Tasmania and New South Wales; Norfolk Island and Moreton Bay; Calcutta, Madras and Cape Town, the United States of America and the Canadas*, (Malvern: The Advertiser, 1869); Thomas Cook, *The Exile's Lamentations*, (North Sydney: Library of Australian History), 1978; Alexander Harris *Settlers and Convicts: Recollections of Sixteen Years' Labour in the Australian Backwoods*, (Melbourne: Melbourne University Press, 1953 (1847)); William Bernard Ullathorne, *The horrors of transportation briefly unfolded to the people*, (Dublin: Richard Coyne, 1838).

46 Gilchrist, 'Penal Flogging,' 21.

47 Neal, *The Rule of Law*, 52; Harris, *Settlers and Convicts*, 69.

48 Hirst, *Freedom on the Fatal Shore*, 57 – 58.

49 Nicholas 'The Care and Feeding of Convicts,' 181.

50 *Commissioner of Inquiry, state of the colony*, 1822, (448), 45.

51 *Ibid.*

52 Shaw, *Convicts and Colonies*, 202.

53 Randall McGowan, 'The Well Ordered Prison: England, 1780 – 1865,' in *The Oxford History of the Prison: The Practice of Punishment in Western Society*, eds. Norval Morri and David J. Rothman, (Oxford: Oxford University Press, 1998), 77 – 80.

testimony of masters as evidence of convict behaviour, and sentencing often represented a cynical collusion between magistrate and master. Thomas Cook provides an example of a convict in private employ in 1833. He had worked for his master without censure for five years, nine months and, given such good behaviour, would soon be eligible for a ticket-of-leave. The master, loathe to lose such a labour asset, had him charged with insolence. The magistrate duly awarded the convict fifty lashes, and the convict lost the opportunity of emancipation.<sup>54</sup>

Of perhaps more concern was when masters were also magistrates. David Neal cites James Wright of Lanyon as a case in point. As a magistrate, Wright could rely on the support of his fellow magistrates to authorise whatever punishment he requested. Together they exploited a legal loophole, dividing a single charge into multiple offences, in order to have sentences passed for more lashes than were strictly legal.<sup>55</sup> Nonetheless, in this instance flogging may have regained some impact as a coercive punishment, as some of the immediacy of the punishment was restored.

In a vain attempt to bridle such arbitrary sentencing by magistrates, Governor Bourke (1831 – 37) had further codified flogging in the *Summary Jurisdiction Act* of 1832. Yet both of these examples occurred after the passing of the Act, demonstrating the ongoing inconsistencies in the use of flogging to enforce work discipline in the colonial settlements. Thomas Atkins, a chaplain in NSW, in reflecting on cases of capricious flogging by unscrupulous masters and magistrates, noted that rather than resulting in increased work productivity, it resulted in frequent desertion and the formation of bushranger gangs.<sup>56</sup> That convicts were willing to risk being caught attempting to abscond and being sent back to the triangle demonstrates that the fear of the lash was being outweighed by the prospect of freedom from the lash.

The same concerns did not prevail in the penal settlements. The commandants of the penal stations fulfilled the role of master and magistrate for these convicts.<sup>57</sup> Here we see the old order restored, flogging as a work discipline was immediate, public and vicious. In retaining a public aspect, the punishment was intended as an example to the audience of incorrigibles who had found themselves subject to secondary transportation. The policy of public flogging also provides a legacy of eye-witness accounts. Atkins noted that the commandant of Norfolk Island in 1836 had authority to order up to three-hundred lashes. It was a prerogative he regularly exercised on malingerers. In one instance it cost the life of a convict who, upon attending the infirmary to report sick, was accused of idleness by the station's doctor.<sup>58</sup> Cook paints a similarly bleak picture of Norfolk, recalling an instance in which two prisoners were charged for not seeding the tilled land as they walked. Both were sentenced to three-hundred lashes, the same sentence as would be passed for an attempted escape.<sup>59</sup> Similarly, Martin Cash, in writing of his experiences in VDL, enumerated the punishments used to enforce work productivity at Port Arthur, noting that any convict deemed to be skulking was immediately flogged.<sup>60</sup>

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54 Cook, *The Exile's Lamentations*, 24.

55 Neal, *The Rule of Law*, 134 – 136.

56 Atkins, *Reminiscences*, 16.

57 Hamish Maxwell-Stewart, *Closing Hell's Gates: The Death of a Convict Station*, (Crows Nest: Alan and Unwin, 2008), 86.

58 Atkins, *Reminiscences*, 28, 34 – 36.

59 Cook, *The Exile's Lamentations*, 55 – 56.

60 Martin Cash, *The Bushranger of Van Diemen's Land: A Personal Narrative of his Exploits in the Bush and his Experiences at Port Arthur and Norfolk Island*, fifth impression, (Hobart: J Walch & Sons, 1929 (1870)), 52.

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The Quaker missionary, James Backhouse, provides a less sensationalist view of discipline in the penal settlements. Yet Backhouse does not promote the use of the lash. As a member of a society promoting penal reform in Britain, he reflected the current trend in penal philosophy away from corporal punishment. In touring the Australian penal stations he observed that ‘restraint rather than reformation has been the object of the British government in the institution of the penal discipline of New South Wales.’<sup>61</sup> Though the use of flogging to punish idle convicts was more universal and uniform in the penal stations than in the colonies, the arbitrary enforcement of corporal punishment was limited in its ability to produce productive labour. The results were similar to those seen in the colonies. Martin Cash would flee and take up the life of a bushranger upon return to Hobart Town, Hamish Maxwell-Stuart notes the similar case of James McKinney, declaring that these ‘act[s] of rebellion had almost certainly been wrought on the triangle.’<sup>62</sup>

In 1837, Thomas Lempriere, a government employee in VDL stated that ‘there were few cases of reform amongst the prisoners,’ however he goes on to give an example of a man for whom the lash provided a reformatory experience.<sup>63</sup> Accorded one-hundred lashes after an attempt to escape Macquarie Harbour, the convict resolved to reform and sought his freedom through productive labour, rising through the hierarchy of the penal settlement, then moved to Hobart Town and was ultimately the recipient of a ticket of leave and finally freedom, becoming a landholder before his death. Though reform born of the lash was unusual, this tale demonstrates the hierarchy of punishment and inducement used in this period to extract maximal performance. From the penal settlements and their punitive labours and corporal punishments, convicts could rise to public service in the colonies ‘distinguished by some mark of trust,’ as Governor Arthur would declare, and eventually benefit from the ‘conferring of differing degrees of liberty.’<sup>64</sup> Ultimately however, the shift of penal philosophies in Britain and the perceived limited success of the convict system in Australia in reforming convicts led to the 1838 Select Committee on Transportation, marking the culmination of the abolitionist movement. The prevalent view as to the efficacy of flogging was reflected in the testimony of Major TL Marshall, when asked by the committee as to how labour was enforced in the iron-gangs:

That was corporal punishment I suppose?

Yes, it was flogging; but I did not find that system operate efficiently [sic], generally, to produce as much labour from these men as an equal number of free men employed at work in England would perform.<sup>65</sup>

Flogging had inherent limitations in enforcing work discipline in the early colonies, and the abuses of the lash drove convicts to further depredations as often as they exacted reform and facilitated improved labour productivity. Each period of settlement had its corresponding policy of discipline

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61 Backhouse to Bourke, *The report of James Backhouse and George Washington Walker, on various subjects connected with the state of the colony of New South Wales*, reproduced in, *Extracts from the letters of James Backhouse whilst engaged in a religious visit to Van Diemen’s Land, New South Wales and South Africa. Accompanied by George Washington Walker*, 2 vols, (London: Harvey & Darton, 1841), i, 54.

62 Maxwell-Stewart, *Closing Hell’s Gates*, 85.

63 Thomas James Lempriere, *The Penal Settlements of Van Diemen’s Land: Macquarie Harbour, Maria Island and Tasman’s Peninsula*, (Launceston: The Royal Society of Tasmania, 1954 (1839)), 50 – 51.

64 Arthur to Hay, 25 July 1832, reproduced in *Crime, House of Commons Accounts and Papers*, 9 vols, (London, 1834), v, ‘Correspondence on the Subject of Secondary Punishment,’ 7.

65 *Report from the Select Committee on Transportation, British Parliamentary Papers*, 1838, in *British Parliamentary Papers: Crime and Punishment, Transportation*, 16 vols, (Shannon: Irish University Press, 1969), iii, ‘Minutes of Evidence’, 76.

and inducement, evolving in response to local circumstance and penal practices dictated from Britain. Through the period of 1788 – 1838, flogging had becoming progressively more systematised and savage, yet also more institutionalised and structured. The lash was certainly feared and colonial authorities had no reservation in using it. However, flogging was neither the sole, nor the favoured means at their disposal to exact performance from convict labourers. Parliamentary reports, reactionary legislation from local administrators and traveller's tales combine to reveal a practice with limited efficacy and open to systemic abuse and inconsistency in application. In attempting to balance discipline and inducement, colonial authorities would ultimately find flogging to be an obtuse instrument in coercing labour when work based incentives and punishments were available as alternative motivations. The assignment of convicts to masters and their detentional location all affected the ability of the lash to exact performance from convicts, and many masters came to the realisation that their employees responded best to incentives. Flogging did not take away the hope of emancipation and the behaviourally based incentive of a ticket-of-leave and ultimate pardon was the most valuable tool at the disposal of the colonies to induce a compliant, productive labour force.

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