PRISON, PUNISHMENT AND PENANCE IN LATE ANTIQUITY

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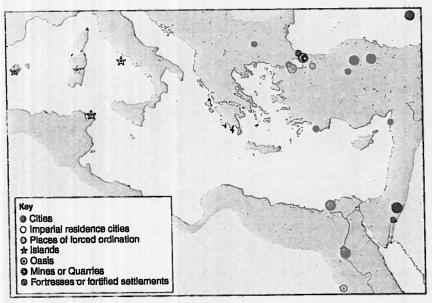# Contents

Acknowledgements

Map 3: Sixth century.

Introduction

This book revisits an old, but often dismissed question: did Roman ideas of justice encompass a concept of 'reform' of an offender through punishment, and, if so, did Roman society develop penal institutions in order to achieve this objective? In 1899, the great German scholar Theodor Mommsen investigated this very question in his seminal study of Roman criminal law, *Das Römische Strafrecht*. While acknowledging that an idea of 'reform' through punishment was at times entertained in Roman legal philosophy, Mommsen came to the conclusion that it was only a 'shallow thought'. For Romans, it was not the offender, but the victim and ultimately society, or indeed the Gods, who were to benefit from the infliction of punishment. In the same work, Mommsen wrote that punitive imprisonment, which is at the centre of many modern concepts of the social rehabilitation of criminals, was prohibited under Roman law. Roman law only allowed the use of prisons for preventive custody, a stage in processing criminals before trial or execution.[1] Mommsen's position has been influential, not only because he was one of the most important historians of Roman law and history of the nineteenth century (and, alone among his peers, noble-prize winning), but also because it corresponded well with social theories of punishment developed in the course of the twentieth century that linked the rise of a prison penalty to changing concepts of punishment between the pre-modern and the modern worlds.[2] While not denying retributive and deterrent purposes of punishment, or the values of social theories on punishment, I will show in this book that the penal landscape of the Roman world was more complex than these previous models allow, and that, particularly if we shift the attention to the late

[1] Mommsen (1899) 48, 299, 960–963; the quote is from 4: *[ein] flache[r] Gedanke*. On modern attitudes to the prison penalty and its relationship with an expectation of 'reform' of the criminal see Garland, D. (1990).

[2] For an overview of twentieth-century sociological assessment of the 'birth of the prison' see Garland, D. (1990), in particular Chapters 2 and 6. On Mommsen see Rebenich (2002).

Roman world and beyond the study of Roman legal texts, forms of imprisonment understood as 'reformative' had their place in this landscape. I will achieve this by taking seriously, on the one hand, late Roman normative discourses around punishment as education reaching back into classical antiquity and fuelled by Christian concepts of penance, and, on the other, the variety of social practices of coercive and punitive confinement happening in the late Roman world: in the public, the domestic, the ecclesiastical, and, most crucially, the monastic spheres.

Approaches to prison and punishment

Mommsen's *Römisches Strafrecht* is still the fundamental study of Roman criminal law and has cast a long shadow over subsequent scholarship. For most of the twentieth century, Roman concepts of imprisonment have received little attention. Standard works on Roman criminal law largely limited themselves to re-iterating Mommsen's statement that the prison sentence, when and if applied, was an illegal deviation from an ideal model of punishment, and hence dedicated only passing references to the institution of the Roman prison.[3] As a consequence, the first complete surveys of Roman prisons did not start to appear until only twenty years ago.[4] While it also adheres to Mommsen's perspective, Jens-Uwe Krause's *Gefängnisse im Römischen Reich* (1996) is outstanding, as it shifts the focus away from legal discussions of the prison to a socio-cultural history of imprisonment and those who suffered from it. The reader of *Gefängnisse im Römischen Reich* comes away with a dazzling impression of the sheer variety of forms of imprisonment that were imposed in the Roman world, well beyond the narrow context of public criminal prosecution. Krause, however, does not yet take into account that at his time of writing the traditional interpretation of punitive imprisonment in Roman law had also begun to be challenged. As early as 1972, Walter Eisenhut maintained, based on Caesar's proposal of a penalty of lifelong imprisonment for the Catilinarian conspirators in 63 BC, that punitive imprisonment was a common penalty even in Republican Rome.[5] While this is a debatable position, the most representative outcome of the reassessment of the Roman prison penalty is Andrea Lovato's *Il carcere nel diritto penale romano*

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[3] See e.g. Brasiello (1937) 367; Garnsey (1970) 148–149; Robinson (1995), 6, 13, 103; Bauman (1996) 30, 170 fn. 39.
[4] Lovato (1994); Krause (1996). On Lovato's position see also below Chapter 5 and Rivière (1994) 579–652, who again rejects the notion of the punitive prison sentence.
[5] Eisenhut (1972) 268–282.

dai Severi a Giustiniano (1994). His work is informed by an understanding of Roman law as a continuously developing system that drew on the experiences and choices of Roman officials, rather than just legal norms. These choices included the prison sentence, at least for lower-rank offenders, which, according to Lovato, had a legitimate place in the spectrum of Roman penal practice. While Krause and Lovato's interventions have finally woken the Roman prison from historiographical slumber and sparked the debate, particularly between continental historians, about the punitive role of the prison in Roman law,[6] a discussion of the link between punitive imprisonment and Roman justifications of punishment is still in its infancy.

In its most basic definition, punishment is the intentional infliction of something physically or psychologically unpleasant by someone with authority in a given context onto another individual or group as the consequence of that individual's or group's violation of established norms or customs.[7] Yet, justifications for and forms of punishment differ between historical cultures and historians have often used the study of these differences to trace attitudes to society and social values, as well as social change in a given period. Where the Roman period is concerned, scholars have traditionally tended to match justifications of state-inflicted punishment to more or less well-defined political phases of Roman history. More than half a century ago, the Italian legal historian Francesco De Robertis famously argued that archaic Roman law, as witnessed in the Twelve Tables of the fifth century BC, promoted a deterrent function of punishment, where the repelling nature of the punishment taught offender and onlookers not to commit crimes (again). In classical times, roughly from the first century BC to the third century AD, the embracement of stoicism led to the rise of retributive justifications, where punishment was seen as intrinsically moral and deserved and hence had to be crime-specific, proportionate to the nature of the crime. The late Roman empire, however, with its autocratic political culture and corresponding demands for brutal repression of crime, saw a return to endorsing deterrent punishment.[8]

More recent scholarship has called into question such somewhat one-dimensional approaches.[9] In accordance with Hellenistic ideals of good kingship and the model of the Roman *paterfamilias*, early imperial

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[6] See in particular Neri (1998); Pavón Torrejón (2003); and two conference proceedings Bertrand-Dagenbach (1999a) and Bertrand-Dagenbach (2004a).
[7] Zaibert (2006) 29–31.   [8] De Robertis (1948) 169–196; De Robertis (1954).
[9] Sitizia (1990) 211; Bonini (1993) 401; also see Humbert (1991) 137.

emperors were interested in portraying themselves and being portrayed as 'just' and 'moderate' in punishment, but what 'just' meant was open to debate and could shift according to context. Essentially philosophical definitions of punishment as retributive complemented, but also conflicted with, a politically opportune emphasis on deterrence and prevention of crime, or social expectations such as the vindictive or material satisfaction of victims and the re-establishment of communal integrity through the labelling of deviants as outcasts.[10] Furthermore, the paternalistic aspect of Roman imperial ideology also stressed clemency and the protection of the weak as fundamental imperial virtues, which led to different principles in punishment altogether, including discretion to demonstrate leniency.[11] The competition between different discourses on punishment continued in the late Roman period. On the one hand, we can see increasing imperial promulgation of harsh penalties.[12] On the other, we can observe an emphasis on mercy for the offender.[13] Both of these developments can be linked to the growing influence of Christianity, but also to the continuation of a political philosophy that centred on imperial philanthropy. Even though late Roman emperors stopped using the *pater patriae* title in the course of the fourth century, the rise of the idea that the emperor was chosen by God, the ultimate father, only increased the connection between emperor and fatherhood in late antiquity.[14] As Michael Gaddis has shown recently, the late Roman concept of imperial paternalism and the in-built endeavour for 'salvation' was decidedly authoritarian and frequently used to justify judicial violence and what one might call 'social hygiene', the removal of those labelled 'defiled' from the 'pure' community, by emperors, but also by imperial officials and by Christian bishops, who were progressively becoming part of the establishment.[15] While this is a very important observation, this book seeks to demonstrate that this very concept also left room for other experiments in punishment.

Approaches to punishment and penance: monastic confinement

The present book illuminates one such experiment in punishment: the replacement of more traditional penalties with penitential confinement of offenders as a form of exile. Over the last years, the penalty of exile and its relationship with the imperial debates about punishment alluded to above have attracted considerable attention. In his magisterial *'Plenum exiliis mare'. Untersuchungen zum Exil in der römischen Kaiserzeit* (2011), Frank Stini has demonstrated that the remarkable rise of the penalty of exile in both legal practice and legal norms during the early empire can be directly related to the described need of emperors, and their delegate judges, to meet diverse expectations of justice. Exile, and forced labour, its sister-penalty for lower-rank offenders, was a flexible penalty that could be temporary or lifelong, varied in severity, and, crucially, avoided the legal killing of an offender (although in the contemporary mindset forced labour was frequently associated with the death penalty due to its arduous conditions).[16] Daniel Washburn's *Banishment in the Later Roman Empire* (2012) has shown that the penalty became even more attractive in the fourth and fifth centuries because it was reversible and hence to some extent opened the avenue to imperial pardon, which increasingly became linked to Christian principles of 'reform'.[17] Washburn's excellent study takes us up to the mid-fifth-century empire. Yet, as this book will show, his conclusions are equally valid, if not more so, for the penalty of exile in the late fifth and the sixth century. Crucial here is the substantial evidence attesting the use of coenobitic monasteries as places of exile, linked to the obligation to perform penance, from the fifth century on.

The phenomenon of monastic confinement has so far mostly been studied from the medieval perspective, which reflects the fact that it was frequently applied throughout the early Middle Ages.[18] In a groundbreaking article published in 2001, Mayke De Jong has argued that monastic confinement, or monastic exile as she preferred to call it, can be related to the increasing quest of early medieval kings for punitive practices that offered the opportunity to further their image as Christian rulers.[19] The present book will build on these previous studies, but shifts the focus back to the fifth and sixth centuries and to the late Roman empire, where the

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[10] For the paternalistic foundation of imperial ideology and its Hellenistic and Roman roots see Alföldi (1971); Stevenson (1992) 421–436; Roller (2001).

[11] On Roman clemency see Dahlmann (1962) 188–202. On the often conflicting relationship between *clementia* and *iustitia* see Millar (1992) 516–517.

[12] Garnsey (1968) 141–162; Robinson (2007) 130–157.

[13] Biondi (1954) 425–428; Gaudemet (1979) 481–508. On the divergence between these two normative tendencies see Krause (2004) 75–80.

[14] Bowersock (1986) 298–307. For the continuation of Hellenistic principles of rulership into late antiquity see the fundamental Dvornik (1966); Pazdernik (2005) 195–196.

[15] Gaddis (2005) 133–149.

[16] Stini (2011); on forced labour see Millar (1984) 128–147; Gustafson (1994) 421–433.

[17] Washburn (2007), now published as Washburn (2012). References to Washburn's study throughout this book usually relate to Washburn (2007).

[18] Sprigade (1964); Laske (1973); Laske (1978) 321–330.

[19] De Jong (2001) 291–328; see also Busch (1996) 561–588, who connects the use of monasteries as places of exile under the Carolingians to a 'verstärkt christlich fundierten Herrscherethos'. For a discussion of terminology see further below in this Introduction.

penalty first appeared in legal practice and where it became incorporated into public law. The latter was a remarkable development, as for the first time a penalty that combined a focus on spatial confinement with the expectation of moral improvement or even social re-integration upon signs of moral improvement became part of written Roman law.

The immediate context of the establishment of monastic confinement as a statutory public penalty was the reign of Justinian (527–565).[20] Justinian is a Roman emperor who continues to attract modern biographers and whose name, alongside that of Augustus and Constantine, has been used to define an entire 'age' of Roman imperial history.[21] This is not surprising, as Justinian was a seemingly inexhaustible ruler. His political projects stretched from the military, with the re-conquest of the Roman west, over the administrative, particularly the combat against tax evasion, to the religious, the reconciliation of the opponents to the Council of Chalcedon, and, of course, the legal, with the codification of Roman law and a high output of legislation. All these ventures were fed by a vision of earthly unity, with the emperor at the helm, resembling the heavenly realm. Justinian, in fact, described the emperor as 'the common father of all' and the law as the method to bestow imperial welfare mirroring that of God.[22] Whilst profoundly Christian, this perspective also owed much to the principles of Hellenistic kingship mentioned above.[23]

Justinian is often described as a radical and autocratic reformer, who prescribed 'almost modern' policies to accomplish his envisaged social order.[24] Yet, as has also been stressed by historians, the emperor's proficiency and the universalising rhetoric of his laws should not mask that his style of government, particularly when it came to legally regulate social order, was often traditionally reactive, as Roman imperial government had been over centuries. As Charles Pazdernik has argued, what makes Justinian unique was his 'determination ... to articulate a vision of his role in the imperial office that elevated the opportunistic ... to the level of principle', where the guiding principle was the improvement of his subjects' Christian morality.[25] Based on these conclusions, this book will show

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[20] As noted by Noethlichs (1994) 18–40, who first collected the corresponding evidence.

[21] See Maas (2005). For biographies of the emperor see, among others, Barker (1966); Browning (1971); Moorhead (1994); Evans (1996); Meier (2003); Evans (2005); Leppin (2011).

[22] NJust 98.2.2 (539): κοινὸς ἅπασι πατήρ.   [23] Pazdernik (2005) 186.

[24] On the 'modern' aspects of Justinian's vision of government see Leppin (2011) 171.

[25] See Gray (1993) 241–270 for an excellent analysis of Justinian's legal output as reaction to influences from the provinces and court-circles. The quote is from Pazdernik (2005) 186. For the guiding principles underlying Justinian's legislation see Leppin (2011) 171–172, who rightly stresses the genuine Christian inspiration.

that, while the transformation of monastic confinement into an officially endorsed penalty, and as such, its incorporation into a vision of the Christian empire, was characteristic for Justinian's innovative rule, the practice of monastic confinement itself was not the result of an ideological sea-change in the mid-sixth century, but can be related to a variety of structural features and developments of late Roman justice. As such, its study provides a distinctive window into the mechanisms of 'creeping' change of the period which we are now wont to call 'late antiquity'.[26] Furthermore, monastic confinement was a phenomenon that appeared both in the East and the West of the late antique world, and should therefore be regarded as an expression of cross-Mediterranean cultural attitudes (while at the same time not excluding regional variation).

On one level, the appearance of monastic confinement can be linked to the institutionalisation of the monastic movement and its integration into the landscape of episcopal and imperial patronage particularly from the fifth century on.[27] Due to these developments monastic space came to be used for the administration of legal punishment, as had other non-civic spaces before. As Fergus Millar has shown, from the early empire on we can observe, indeed, the use of pre-existing spaces for Roman penalties with a spatial component, such as islands, mines, quarries, and imperial factories, and the very appearance of particular penalties, such as forced labour, once corresponding spaces became available. Seen from this perspective, the monastery was the last in a long line of institutions to be incorporated into the particularly Roman strategy of government, which Kate Cooper has recently called 'minimalist', 'light touch' and 'cost-effective'.[28] Furthermore, the appearance of monastic confinement also needs to be seen in the context of the Christian bishop's rise as a civic authority and the evolving relationship between bishops and monasteries, particularly after the Council of Chalcedon in 451, which established the subordination of monasteries under the control of their local bishop.[29] As we shall discover, monastic confinement played a role in bishops' management of their subordinate clergy, their lay communities and their relationships with rival bishops, and Justinian's public penalty sought to harness bishops' activities in these areas for the public good.

These are some of the arguments of this book. Yet, more importantly, the appearance of monastic confinement in public legal practice was not

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[26] The quote is from Garnsey, Humfress (2001) 20, and its significance for our understanding of the period has recently been re-emphasised by Uhalde (2007) 7.

[27] For this development see Diem (2005).   [28] Millar (1984); Cooper (2011) 328–329.

[29] Frazee (1982) 263–279.

purely pragmatic, but also responded to late antique ideas of what punishment was for. This is not dissimilar to the appearance of other punitive spaces, such as mines, which, as Millar has argued, fitted into an imperial mindset on the retributive and deterrent humiliation and removal of the criminal body.[30] Availability of spaces may have driven certain types of penalties, but spaces were also chosen in accordance with certain ideologies. As I shall argue in the course of this book, some crimes and some criminals were seen, during late antiquity, as in need of honourable treatment, but also of more repressive methods of surveillance and custody, which partly explains the rise of monastic confinement.

Crucially, however, all monastic confinement engaged with the emerging Christian ideas and practices of penance, whose study has had a renaissance in recent scholarship. As a result, our understanding of penance has been transformed. Earlier historians saw the imposition of penance in early Christianity as a rigorist once-in-a-lifetime chance to regain the favour of God, inflicted by authoritarian church leaders on a largely and increasingly unwilling laity, and hence only realised in contexts where church leaders were able to assert judicial control.[31] Yet, over the last twenty years a new scholarly perspective on penance has developed. Owing to the work of Peter Brown, historians now see a vision of the afterlife at play in the fifth and sixth centuries that combined apocalyptic anxiety with uncertainty over forgiveness on the day of final judgement. This vision gave rise to a wide social consensus that what was needed in this life was visible conversion to a Christian lifestyle centred on continuous atonement with the potential to mitigate God's judgement.[32] In consequence, to show oneself as penitent and hence 'truly' Christian enabled an individual not only to glimpse the prospect of salvation, but also to 'earn dignity back' in this life.[33] The latter was a crucial desideratum in a society like that of the late Roman empire, where social hierarchies were traditionally constructed by cultural views on individuals' ability to hold and defend honour and reputation, and where criminal conviction seriously impacted on this

ability.[34] Penance filled the gap towards social reintegration left by public legal procedure that, as we shall see, had hitherto only been able to be addressed by imperial pardon.

In his study of the medieval development of monastic confinement as an ecclesiastical penalty Guy Geltner has argued that the origins of the phenomenon need to be investigated in light of the cultural developments regarding the definitions of penance.[35] In a process that Robert Markus has aptly called 'ascetic invasion' of late Roman culture, it was real-life monastic communities and images of ascetic lifestyles advocated in saints' cults and sermons that cemented the Christian pre-eminence of a penitential lifestyle. Markus' emphasis rested on the west of the Roman and post-Roman world, but, as Averil Cameron has shown, ascetic discourse was perhaps even more pervasive in the East, penetrating ecclesiastical and political rhetoric alike during the sixth century.[36] Monks and nuns were at the same time seen as distinct from lay people, as something to aspire to, and as specialists of penance, from whose proximity lay sinners were to benefit.[37] It is this context that is also important for the beginnings of the public penalty of monastic confinement. To be sure, monastic confinement for the sake of performing penance, if to be pronounced as a public penalty, encapsulated the repressive character that earlier scholars of late antique penance have observed in the practice. Yet, it also shows that late Roman emperors increasingly appreciated the urgent need for penance of their subjects, and their own role in creating an orthodox Christian society within the parameters of imperial paternalism described above.

Prison, imprisonment, confinement and reform: concepts and definitions

This book brings together late antique concepts of confinement with late antique concepts of 'reform'. Neither of these is straightforward and it will be useful for the reader to know how I understand certain terms employed in this book and how they underpin my analysis.

I use the term 'prison' with reference to the institution of the public prison or a building that had the sole purpose of detaining people. I also

[30] Millar (1984) 144–145.

[31] The classic studies of Christian penance developing this model are Poschmann (1928); Vogel (1956), 1–26, 157–186; Vogel (1966). For critique and revision see De Jong (2000) 185–224. Meens (2008) 73–95 gives an excellent overview of traditional and recent debates.

[32] For the pervasiveness of penitential discourse in the fifth and sixth centuries see Brown (1997) 1247–1261; Brown (2000) 41–59; Rebillard (1994) 229–232 and *passim*, and Moreira (2010), who also stresses the rising belief, over late antiquity, that the severity of eternal punishment might be able to be moderated by penitential zeal during lifetime.

[33] The quote is from Uhalde (2007) 106.

[34] On Roman society as honour-based see the immensely influential work by Lendon (1997), in particular Chapter 2. For the continuing importance of honour in the definition of late Roman social relationships and the connection between honour and criminal conviction see Bond (2014).

[35] Geltner (2008a) 89–108.   [36] Markus (1990) 197; Cameron (1995) 147–161.

[37] Rapp (2007) 121–148.

translate the terms *carcer* or δεσμωτήριον as 'prison'.[38] In addition, I apply the term 'imprisonment', or at times 'incarceration' or 'carceration', to situations beyond the context of public criminal procedure, where individuals were faced, either legally or illegally, with conditions that resembled that of the public prison (detention in a confined space, with guards who embody the subversion of customary social hierarchy, and sometimes in darkness or underground). At times the parallel was made explicit by the individuals themselves, or those observing the practice, who used terms such as *carcer* or δεσμωτήριον to describe incidents of extra-judicial imprisonment, but also the somewhat broader expressions *custodia* (which, however, could also be used to describe public imprisonment), φυλακή or είρκτή (and derivatives). Such imprisonment, sometimes called 'private' in the contemporary sources, bears, where it was unlawful, some resemblance to what we would call 'false imprisonment' today.[39] Finally I employ the term 'confinement' both in a larger sense, to encompass the variety of custody prevalent in the late antique world, but also to describe situations that were distinct from the public prison and other more formal types of imprisonment, but nonetheless included a certain degree of spatial constraint and exclusion from spaces that other individuals had access to. Another phrase I use in this context is 'seclusion'.

As has already become apparent above, forced residence in a monastery is usually called 'monastic confinement' in this book, even though earlier scholars have at times called it 'prison' (or the corresponding term in other modern languages).[40] The term 'prison' is, however, problematic, because a specific institution that historians call 'prison' existed in the late Roman world and it also exists in modern society. As Mayke de Jong has warned with reference to the early medieval evidence, applying the label 'prison' to forced residence in a monastery would raise flawed associations with one or both of these institutions.[41] Furthermore, it would risk not sufficiently distinguishing between the ancient and the modern prison.

While the official function of the late Roman public prison was, as Mommsen has shown, that of preventive custody, the modern prison (as opposed to detention facilities) is a comprehensive penal institution. To understand its historical genesis, it is worth returning to the work of twentieth-century sociologists. Most influential, particularly on the historical profession, in this respect have been Émile Durkheim and Michel

Foucault, who both concluded that the prison penalty was an invention of the early nineteenth century, even though they interpreted its appearance differently.[42] Durkheim, who as an ancient historian by training was familiar with Mommsen's work, saw the rise of the prison sentence and the emerging critique of the death penalty as a largely positive change from a homogeneous collective conscience inspired by sacred norms to a pluralistic system of social values that could also afford to tolerate wrongdoing and be more lenient.[43] Foucault, on the other hand, argued that the crucial element of the modern prison penalty was not leniency, but the connection of confinement and discipline, which could be as repressive as pre-modern penalties, albeit in a more subtle way.[44] This connection reflected the rise of the modern state characterised by the absence of specific, personally located power. In the modern state, punishment serves not to visibly and ritually, yet irregularly assert political authority, but to foster comprehensive social conformity. Punishment in the form of the prison penalty is therefore less visible to outsiders, but all-encompassing to the individual. It aims to catalogue and train the individual to become socially useful. Imprisonment is hence accompanied by repetitive activities and exercises that thoroughly regulate time and space, to submit not only the body, but also, crucially, the 'soul' of inmates, to make individual identity readable.

Late Roman monastic confinement was a penal institution endorsed by legal norms and in that respect it was very different from the ancient prison, whose punitive qualities were at most, as Lovato has argued, recognised in legal practice. In fact, as I have already mentioned above, in legal texts monastic confinement was represented as a form of exile, not as prison. Yet, it cannot be stressed enough that as a legal form of the penalty of exile it was innovative, as the penalty was connected to a form of confinement and also envisaged for, and, as we shall see at times also imposed on, a socially diverse set of offenders. In that respect monastic confinement is not dissimilar to the modern prison penalty, and some observers of the phenomenon have indeed pointed at the leniency inherent in the measure, particularly where they discussed the introduction of the penalty for adulterous women and its substitution for the death penalty

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[38] Sometimes I have also seen it as appropriate to translate the terms *vincula* and δεσμοί as 'prison'; for discussion see further Chapters 5 and 6.
[39] Ley (2001).   [40] See e.g. Guillou (1983) 79–86; Wood (1994) 195.
[41] De Jong (2001) 292–293.

[42] Durkheim (1899–1900) 65–95; Foucault (1975).
[43] See for Durkheim's engagement with Mommsen's work Nandan (1980) 378–379.
[44] Discipline is understood by Foucault as systematic training to shape a particular set of behaviour or knowledge by regulating time, space and actions. Such training can encompass a whole spectrum of methods, from verbal instruction to physical punishment.

under Justinian.[45] Furthermore, the penalty was also connected to a notion of 'reform' or 'improvement' or even 'social reintegration', and can, in a Foucauldian spirit, be interpreted as aiming at a thorough transformation of the criminal's behaviour and thought away from the public gaze. Yet, this analogy does not hold throughout. To begin with, late antique definitions of 'reform' did not match entirely with modern ideas of 'social rehabilitation' or 'change of social conduct', a point to which we shall return below. Furthermore, this book of course accepts that modern states have been able to develop systematic and anonymous forms of punishment capable of shaping social behaviour which were unknown in the pre-modern world. In late antiquity the connection between punishment, reform and spatial confinement was not universally justified, but, due to the reactive nature of Roman government, only prescribed for a small group of crimes and criminals. Perhaps more crucially, it also did not lead to purpose-built and state-run institutions to accommodate such penal strategies, which made expectations of surveillance, restraint and discipline precarious. Nonetheless the penalty deserves a place in the history of the prison in Europe, all the more so, as it was not considered by either Durkheim or Foucault, who almost exclusively juxtaposed the modern prison penalty with painful and potentially lethal spectacles of bodily punishment in the pre-modern world, such as public flogging, maiming, penal parading and executions. What I propose in this book from a theoretical point of view, then, is to investigate the distinction between penal confinement and more spectacular forms of punishment not as a chronological shift of norms, but as an expression of practical choices in a complex penal landscape that offered both forms. In addition, these practical choices had the power to transform the penal landscape itself.[46]

In fact, while monastic confinement was distinct from the ancient 'prison', its relationship with late Roman concepts and practices of 'imprisonment' demands further investigation. Even though monastic confinement was represented as a form of exile in legal literature, and in practice it may have been at times difficult or even undesirable to police the aspect of 'confinement', it remains the case that, as a legal norm, it imposed a form

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[45] Goria (1974) 55–76; Noethlichs (1994) 18–40. Justinian's interest in the legal status of women has often been noted by his biographers as one of the most striking features of his legislation, see Browning (1971) 61; Moorhead (1994) 36–38; Evans (1996) 209–210.

[46] This approach draws on Pierre Bourdieu's theory of practice (Bourdieu (1977), in particular 3–71) as applied to the ancient world by Allen (2000) 17 with fn. 7 and *passim*; Turner, K. (2009) 53; and on Giddens (1984), which argues that social institutions such as law change through the way they are used by individuals.

of custody and spatial constraint on offenders, some of whom had hitherto been, by law or cultural norms, considered exempt from such measures. This book maintains that this change can only be illuminated by exploring the variety of practices of 'confinement' in the late Roman world beyond the narrow focus of the public 'prison', in households, local communities, churches and monasteries, and by establishing which forms of judicial or extra-judicial confinement were considered lawful (and for whom), socially useful (and in what context) or culturally acceptable, and how monastic confinement engaged with these traditions. The evidence suggests to some extent that the distinction between lawful and unlawful confinement, both in private and public contexts, responded to notions of class, gender and age. As we shall see, for some of those on whom monastic confinement was imposed, particularly where it concerned domestic wrongdoing, experiences of segregation, seclusion or even imprisonment were not unfamiliar and largely accepted. Yet, in other cases, particularly where it concerned adult elite men, whose identity was cemented by notions of liberty and honour, it was considered more controversial. In fact, some contemporary subjects and commentators of monastic confinement made explicit links between monastic confinement and unlawful imprisonment, which in itself suggests that the phenomenon cannot be detached from the history of imprisonment.[47] It is important, however, that late antique attitudes to confinement, and ultimately monastic confinement, are seen in the context of early Christian concepts of 'imprisonment'. Building on the work by Guy Geltner, this book will show that some late antique Christians gave the experience of 'imprisonment' an unusually positive reading and connected it to the expectations of conversion, penance, asceticism and Christian virtue described above.[48] It can be argued that, as a comprehensive legal penalty, exile to monastic confinement was only possible due to these connections.

Yet, the connection made between monastic confinement and penance raises questions about the principles underlying the penalty. As I have alluded to above, this book argues that its main aim, at least on a theoretical level, was the 'reform' of the offender, although I do not exclude more pragmatic motivations, such as the preservation of an offender's or their family's honour, the provision of material maintenance, or 'neutralisation', by which I mean the protection of the common good and social security

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[47] See below Chapter 10.

[48] Geltner (2008b) 83–86. I am much indebted to Geltner's work, although I will show in Chapter 8 that, for the late antique period, the martyr's prison was perhaps less defining for the Christian understanding of imprisonment than he and others have argued.

through segregating or isolating troublesome offenders.[49] Throughout the course of this book I use the term 'reform' whenever punishment was justified as 'educating' the offender. However, the outcome of such education, and the methods to ensure the desired outcome, were not always considered in a similar way, even where the same terminology for the act of 'educative' punishing was used (most notably Lt. *emendatio* and Gk. σωφρονισμός). A particular distinction needs to be drawn between justifications of 'reformative' punishment as ensuring 'moral or spiritual improvement', as opposed to 'social training'. Much of this book is concerned with an analysis of how 'reform' was defined in particular historical instances and cultural contexts, and of potential change from one of these justifications for 'reformative' punishment to another.

However, it would be unwise to apply too rigid distinctions informed by a modern perspective on punishment and modern definitions of punitive categories and methods to the late antique world. To begin with, it can be argued that in all ages, even where a spiritual or intellectual dimension of reformative punishment is postulated, it is only change of social conduct that can reasonably be measured.[50] As a consequence, penitential confinement in a monastery was, in essence, a social tool, even where the emphasis on its spiritual side was at times genuine and not just meant to mask, as certainly also happened, more 'worldly' aims of neutralising or humiliating offenders. As a social tool it could have social consequences. Offenders were to gain spiritually from being forced to reside in an ascetic environment, to redraw their relationship with God, but, as a visible change of behaviour, in some instances penance also became seen as a basis for social re-integration, also for those who had been hitherto seen as undeserving of such treatment.

Beyond such practical predicaments of assessing moral progress, we need to take into account fundamental differences in educative methods between historical periods. Modern discussions of punishment distinguish sharply between 'reform' and 'deterrence' as justifications of 'educative' punishment. While both are what have been called 'utilitarian' justifications,

foregrounding consequences of punishment, rather than a pure focus on 'just deserts', 'reformative punishment' is seen to instil a deeper understanding of wrongfulness, while 'deterrence' is seen as only being able to bring about a mechanical change of behaviour. Modern educational theorists have therefore suggested to adjust punitive methods accordingly, with, for example, work assignments being considered a more efficient way to bring about 'reform' than corporal punishment.[51] Yet, as we shall see, the threat or the imposition of humiliating or even painful experiences were credited with a far higher educative value in the socially more hierarchical ancient world than they are in some more egalitarian contemporary societies, where we might label such methods 'coercive' rather than 'educative'.[52] While monastic confinement to some extent put an emphasis on the ordering of time and space to ensure self-reflection, we should not exclude that it was the humiliation that came with spatial restraint and the degradation that came with insertion into the decidedly different inner-monastic social hierarchy which was meant to have the most educative effect of the penalty.

Sources and structure

This book draws on a large variety of sources, but its core is formed by late Roman legal texts. As these present a complex source base it is worth commenting briefly on their nature, benefits and limits, as well as the methodology I adopted to overcome these limits, which underpins the structure of this book. Over the last two decades the production and usage of late Roman law has received much attention by social and cultural historians of late antiquity (rather than purely legal historians). This is particularly true for the motivations and processes underlying the codification of imperial constitutions (imperial edicts or letters to officials) issued between Constantine and Theodosius II, known as the *Theodosian Code* (438), and the other great legal codification work of the late Roman world under Justinian, now known as the *Corpus Iuris Civilis* and completed in 534. In contrast to the *Theodosian Code*, the *Corpus* also included a juridical textbook (the *Institutes*), a collection of passages from the work of early imperial jurists (the *Digest*), alongside a collection of imperial rescripts (imperial letters to private individuals) and constitutions issued since the mid-second century up to the time of Justinian, of which an earlier edition

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[49] See De Jong (2001) who, with reference to evidence from the Merovingian and Carolingian contexts, argued that one aim of the measure was to give an offender opportunity to 'opt out', by offering protection from a more violent fate outside a monastery's walls, due the recognised holiness and the increasing immunity of monastic space. Given that the early medieval evidence mostly concerns high-elite political opponents to contemporary rulers, these conclusions cannot be translated fully to the more diverse forms of monastic confinement in the fifth- and sixth-century Roman empire.

[50] See Dunbabin (2002) 157, who makes the same observation with respect to the use of punitive imprisonment during the later medieval inquisition.

[51] For the term 'utilitarian' punishment and the distinction between 'deterrence' and 'reform' see Peters (1966) 267–268.

[52] Mackenzie (1981) 39 and see further Chapter 1.

had already been published in 529 (the *Code of Justinian*).[53] While Justinian explicitly ordered altering and rewriting early imperial jurists' commentary included in the *Digest*, such interference with their writing was probably less extensive than has previously been thought.[54] Late Roman laws also circulated outside these official codifications. For the purpose of this book particular mention should be made of Justinian's so-called Novels, roughly 150 constitutions that the emperor issued after the completion of the *Corpus*. Even though Justinian had planned an official collection of these laws, this was never accomplished, and the Novels were distributed either individually or in unofficial compilations, such as, in the West, in the so-called *Epitome Iuliani* and the *Authenticum*.[55]

In late Roman imperial law we come close to something that can be described as reasonably comprehensive legal theory, and specifically in the context of criminal law, as penology. While for the early imperial period punitive concepts mostly need to be pieced together from types of penalties prescribed, late Roman laws, by contrast, were often very outspoken about the justifications of punishment.[56] This is not to say that such penal theory did not exist in an earlier period. The gap in our record may be partly due to the fact that the majority of extant early imperial legal texts only survive in a truncated form transmitted through late antique channels. Yet, the particular genre of late imperial constitutions also furthered the formulation of philosophies of rulership that, as we shall see, in classical antiquity had been expressed in different formats and genres. The letter of the law (the form of which was, quite literally, usually a letter to a magistrate, although destined for public reading or posting[57]) was understood as a possibility to communicate universal motivations of imperial government to the wider empire.[58] This required substantial drafting work by trained language specialists, headed by the imperial chancellor, the *quaestor*, whose importance grew over the late antique period.[59] Where we have laws in the form of a more coherent rhetorical narrative, as in the case of Justinian's Novel, we are also presented with a personal involvement of the emperor in deciding on the detail and even the drafting of laws.[60] Justinian's level of engagement and micro-management was certainly unique, and the rhetoric of his laws reflects a peculiarly sixth-century Christianity. Still, his Novels provide a window into the customary loquacious nature of late Roman imperial constitutions and their aspiration to articulate the presence of the emperor. This also becomes apparent in a number of fourth- and early fifth-century constitutions that circulated independently and in full length, the so-called Sirmondian Constitutions.[61] It was in particular the preamble of constitutions, usually removed by the editors of the *Theodosian Code* and the *Code of Justinian*, that was seen as the most opportune place to transmit justifications of a universal nature for the ordering of specific cases.[62] Yet, the language employed in late Roman constitutions on the whole was subject to the purpose of publicising the parameters of imperial rule, and therefore usually held in a ceremonial and extravagant tone that reveals much about basic principles.[63]

Building on these approaches, the first part of this book (Chapters 1–4) traces the development of punishment as 'reform' in Roman legal thought. At the centre of my analysis are the terms *emendatio* and, to a lesser extent, its Greek equivalent σωφρονισμός (and derivatives), which appear in discourses on domestic discipline, and, by extension, on good rulership in the early empire, that utilised Platonic terminology, even though, as we shall see, not necessarily Platonic thought. From the mid-fourth century on these terms started to be used widely in legal texts on public punishment. Their frequency (and the frequency of laws employing these terms deemed worthy for inclusion in the legal codifications of 438 and 534) is high enough to warrant the assumption that they expressed a legal principle that transcended the individual outlook of single drafters of laws, even though the meaning of the concept clearly changed from the early empire

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[53] On the Theodosian Code see in particular Harries, Wood (1993); Matthews (2000). Justinian's codification project is extensively discussed in all the biographical works mentioned above in n. 21 (e.g. Leppin (2011) 167–170), but the most comprehensive study is still in Honoré (1978).

[54] *Const. Deo auctore* 8 (530; CIC 1/Digest:8–9); see Humfress (2005) 162; Pazdernik (2005) 199. On so-called Justinianic 'interpolations' see Johnston (1989) 149–166, who is able to demonstrate that many alterations to jurists' writing had already been made at various stages before the time of Justinian.

[55] For the collections of Justinian's Novels see Kroll (1912) v–xviii. For Justinian as a legislator see in particular Archi (1970); Krumpholz (1992).

[56] On the lack of legal theory in juristic writing of the earlier imperial period see Millar (2002) 69–88. A fundamental example for the method of inferring Roman punitive concepts from types of penalties is Garnsey (1970). On legal philosophy in the early empire see also below Chapter 2.

[57] Millar (2006) 7–13. On the posting of imperial constitutions see Matthews (2000) 168–169.

[58] See also further below Chapter 4.   [59] See Harries (1988) 148–172; Honoré (1998).

[60] Leppin (2011) 173; see also Honoré (1975) 107–123 for a meticulous philological method to detect Justinian's interventions.

[61] On the Sirmondian Constitutions see Matthews (2000) 121–167. This was an unofficial collection of sixteen imperial constitutions. Ten of these are also preserved in the Theodosian Code, but in a more abbreviated format. They are sometimes believed to be early medieval forgeries, but see Huck (2003) 181–196.

[62] For Justinian's preambles see Hunger (1964); Humfress (2005) 174. On the work of the respective editorial commissions see Honoré (1978) 212–222 (on the Code of Justinian); Matthews (2000) 55–57, 65–71 (on the Theodosian Code).

[63] On the language of late Roman law see Harries (1999) 137 and below Chapter 4.

and also over the course of late antiquity.[64] The method employed allows me to show that drafters of late Roman law drew on several traditions from both the classical and the Christian past, when they described punishment as 'reform'. It should be noted, however, that the main case studies of my analysis – the works of Cicero, Seneca, Aulus Gellius and Cassius Dio; the works of the Roman jurists as preserved in the Digest; Augustine's writing on the case of the Donatists in early fifth-century North Africa; and late Roman constitutions – have largely been chosen on the basis of my lexicological approach. They therefore only present the 'tip of an iceberg'. The responsibility of the emperor to educate and improve his subjects was expressed in a myriad of other texts that have not been taken into consideration, for example in the panegyrics of the fourth-century philosopher and orator Themistius.[65] Furthermore, the texts chosen did not necessarily depend on each other, or at least it is impossible for us to reconstruct dependency. It is very clear, for example, where the perspectives of Augustine of Hippo and, a century later, of the emperor Justinian are concerned, that the latter was not influenced by the former. Yet, reconstructing dependency would be beside the point, as the focus of these chapters is on general semantic trends and their employment to articulate purposes of imperial law.

The second part of this book (Chapters 5–8) surveys functions of confinement in the late Roman world. In these chapters, I largely shift the attention from legal norms to legal practice. The relationship between the two phenomena is a vexing one, for legal norms tell us little about how rules emanating from the imperial centre were interpreted, implemented or enforced by local authorities.[66] Furthermore, wrongdoing was also dealt with in other social contexts than the late Roman state, most notably in households or village communities, but also and increasingly in the ecclesiastical and monastic sphere. This included, on a basic level, the legal redress of violation of internal rules of such institutions, in a process of what sociologists have called 'substandard punishment'.[67] Yet, with regard

to a criminal system which mostly relied on the initiative of members of the public to bring issues to court we have to take also into account that some behaviour deemed 'criminal' by the late Roman state, in the sense that it could potentially justify public criminal procedure, was instead addressed within these institutions.[68] For the purpose of these chapters, I have therefore expanded the source base to include what I would call, broadly, 'circumstantial' literature. I have submitted these sources to a number of investigative methods, most notably a combination of, where feasible, quantitative and spatial analysis, to extract patterns of behaviour and the dynamics of space inherent in confinement,[69] and literary analysis, to establish how the memory of such behaviour and dynamics was subsequently manipulated for ulterior arguments, which also included establishing the social and cultural value of imprisonment. These 'circumstantial' sources consist of letters, sermons, treatises, papyri, hagiography and narrative sources which give us an understanding, even though sometimes quite indirectly, of the applicability of imperial laws, and a glimpse into 'non-official' coercive or punitive practices, by public, domestic, ecclesiastical or monastic authorities, beyond those enshrined or even allowed by the law. These practices frequently included forms of confinement. Whether these were legal, illegal, or neither, they often fulfilled the functions of 'reform' or neutralisation that imperial rhetoric also called for in the case of public crime, but for the realisation of which imperial penal administration did not provide the appropriate infrastructure. The second part of this book ends with an investigation of the distinctively Christian discourse about what went on in prisons. Some of those who underwent periods of coercive or punitive confinement, particularly in the context of the religious conflicts of the late antique period, have left us detailed accounts. Such accounts offer an invaluable insight not only into actual experiences and varied places of late Roman confinement, ranging from public prisons, to house arrest, to military compounds, but also, more importantly, into their literary representations. These representations helped to define the roles that both the memory of the Christian martyrs'

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[64] See also Harries (1988) and Washburn (2007) 56, reassessing Honoré's method of assigning individual constitutions to individual *quaestores* and their socio-cultural background.

[65] I would like to thank Hartmut Leppin for suggesting this term and the following references. See e.g. Themistius, *or.* 7 and 19 (ed. W. Dindorf (Hildesheim: Georg Olms, 1961) 101–120, 275–284), delivered in praise of two very different emperors and on two very different occasions: to Valens, in 366/7, after the usurpation of Procopius and aiming to invoke the emperor's clemency towards Procopius' supporters in Constantinople; and to Theodosius, in 384–386, delivered in the senate of Constantinople and providing a stock image of imperial virtues. See also Pazdernik (2005) 195.

[66] See Washburn (2012) 12–13 for an excellent analysis of this problem in the context of legal exile.

[67] Hart (1968, reprint 1995) 4–5; see Zaibert (2006) 25. Institution in this instance is understood as a norm- or custom-governed social system that seeks to shape the behaviour of its elements or

members. For the Roman imperial system legitimising various institutions such as *collegia* and the Christian church to develop their own disciplinary rules see also Bryen (2013) 141–142.

[68] See Krause (2004) 60–67, 80–86, who stresses the role of 'self-help' and 'extra-judicial' settlement in the Roman world; for the importance of considering legal pluralism in the late Roman world see also Humfress (2005); Humfress (2007); Humfress (2009) 377–391; Humfress (2013) 73–101; and see further below Chapters 3, 5, 6 and 9.

[69] Here I follow the assumption of Bourdieu (1977) 87–78, that social systems are reflected in the construction and use of space, which has been successfully adapted to the Roman world by e.g. Keegan (2013) 70.

prisons and concepts of late antique prisons played in the fashioning of Christian leadership, charity, asceticism and penance.

The last two chapters (Chapters 9 and 10) examine the process of incorporation of monastic space into the administration of ecclesiastical justice on the one hand, and public justice on the other over the fifth and the sixth centuries, up to the point of the eventual promulgation of monastic confinement as a public penalty. A particular emphasis in these chapters rests on the customarily reactive nature of late Roman law. Here the book's approach to late Roman legal sources comes full circle. While they adopted top-down rhetoric that aimed at portraying a stable image of imperial rule, most of the constitutions issued by late Roman emperors responded to cases brought to their attention by advisers, subjects, or most often by imperial officials, which were then interpreted in light of the political necessities of the moment.[70] Starting from these premises, I investigate how the penalty of monastic confinement engaged with the variety of confinement practices that I have described in preceding chapters on the one hand, and with the growing use of monastic confinement in episcopal jurisdiction on the other. At the same time I illuminate how the penalty was connected to the more overarching ideas of justice and of penance discussed in the first part of the book. A final emphasis of these chapters is on the experience of those submitted to monastic confinement, issues of enforcement and, ultimately, how observers related monastic confinement to imprisonment and the public prison. Perhaps the broadest conclusion we can draw from this study is that late Roman concepts of justice at both public and private levels of society engendered the need for punitive and educative confinement, and confinement in a monastery was the most comprehensive and least controversial method to address this need. It was in tune both with social practices and with penal discourses that engaged with new Christian principles of punishment and reached back to those of classical antiquity. Whether it was also a 'prison' may remain open to debate.

A note on terminology

For the sake of simplicity, throughout the book I will usually refer to offenders or victims as male, unless an individual case in question concerned a woman. I use the term monastery to refer to both male and female ascetic communities, although I add the term 'coenobitic' wherever I refer

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[70] Harries (1999) 47–53; Humfress (2005) 174; Humfress (2007) 105–106.

to stable, co-habiting communities. Practices and norms pertaining to the late Roman state are labelled as 'public', to distinguish them from 'ecclesiastical', 'domestic' and other non-state supported or endorsed contexts. For a further definition on how I understand 'public' and 'private' in the late Roman empire see the beginning of Chapter 6. I have avoided the term 'secular', as it does not give justice to the religious dimension of late Roman imperial authority. Although Roman legal terminology usually referred to all state law as 'civil' I have kept the modern distinction between criminal and civil law (the latter dealing with non-criminal disputes, e.g. property disputes). I refer to offences as crimes were they led or were understood to lead to a charge at a public or ecclesiastical court, following the Roman understanding of *crimen* as criminal procedure rather than the act of wrongdoing.

The humanity of our august generosity does not refer to those who, given freedom from punishment for an old offence, destine themselves to habit (*consuetudo*), rather than reform (*emendatio*).[92]

In the same year, Theodosius issued another amnesty law that expressed the hope that those freed by imperial pardon now followed the 'precepts . . . of a better life' (*melioris instituti praecepta*) rather than daring to commit another transgression.[93] Here 'reform' was linked to the gratitude of having received imperial pardon and the obligation created by this favour. The language was steeped in the image of general human redemption and restoration of life at Easter with a striking overlap of imperial and divine mercy.[94]

Around one hundred and fifty years later, however, Justinian linked the remission of a penalty through imperial pardon to clear signs of improved behaviour as a consequence of punishment. For example, he ordered that monks who had left their monastery to take up military or imperial office and had been punished with the transferral of their property to their city council were to be pardoned if they had returned to their monastery within a year of promulgation of the law. The reason stated was that 'reform (σωφρονισμός) that ha[d] been brought about by experience of law [was] sufficient'. The unruly Samaritans, who had staged a rebellion in 530, and had been punished with infamy in the form of prohibition to draw up wills, were pardoned in 551, because Sergius, bishop of Caesarea in Palestine, had provided fresh evidence of their improved behaviour (καλλίονας αὐτοὺς γεγονέναι; *meliores eos factos*) and their promise to be peaceful in future.[95] While these laws were tailored to specific cases, and still entertained a notion that pardon did not automatically follow signs of improved behaviour, they expressed and enshrined in law a more general understanding of the period of punishment as a period of improvement that included the possibility of social reintegration (in the sense of return to previous status and civic rights) upon tangible signs of such 'reform'. Quite in line with the emperor's arrangement to incorporate ecclesiastical justice into imperial administration discussed in the previous chapter, the law on Samaritans also accepted close monitoring of convicts' behaviour by a bishop and the bishop's subsequent intercession as justification for an early remission of a penalty. Never before Justinian had a Roman legal text expressed this concept so clearly.

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[92] CTh 9.38.6 (381) = CJ 1.4.3: *ne in eos liberalitatis augustae referatur humanitas, qui impunitatem veteris admissi non emendationi potius quam consuetudini deputarunt.*

[93] Sirm. 7 (381).   [94] Waldstein (1964) 200–203 and 216–217.

[95] CJ 1.3.52.11 (531); NJust 129.1 (551). On the rebellion of the Samaritans see Sivan (2008) 125–142. The promise was not kept, as some Samaritans staged another rebellion in 554/5.

Conclusions to Part I

(Philosophical + domestic foundations etc.)

Over the course of late antiquity, an emphasis on 'reform' through punishment competed more intensely with other punitive discourses than ever before. Late Roman law engaged with the concept of reformative punishment in three different ways. Firstly, laws themselves as literary products were understood to have the potential to educate subjects about the consequences of wrongdoing. Secondly, penalties for minor crimes were frequently framed as educative. In both instances, late Roman law continued traditions that originated in the early empire. Drafters of imperial laws kept the long-established principle alive that the lawgiver had the duty to educate about vice and virtue, and lifted this duty to new rhetorical heights, perhaps, as some modern historians would say, not always successfully. In terms of choice of penalties, emperors sought to distinguish between those that needed to be removed from society and those who could be re-integrated into society, because their shortcomings were permissible, because those who had committed them were socially useful or because they were deemed too ignorant to understand their actions. This concept of 'discretion' continued to be conveyed with the help of the customary Platonic distinction between 'incurables' and 'curables' and the according representation of the emperor as a father or as a physician, although the systematic use particularly of the term *emendatio* gave this traditional approach to justice a Christian rebranding. It is not coincidental that also the Digest preserved passages that engaged with the concept of *emendatio*, even though in the mid-sixth century it was understood in a broader way than it had been by the earlier imperial jurists.

The third notion of reformative punishment was the most innovative, for it incorporated the Christian practice of penance into imperial law, increasingly understood as part of the emperor's divinely instituted responsibility for sinful humankind, which arguably made him even more accountable than traditional expectations of *moderatio*. Christian discourses of penance did not reject punishment, and in fact increased the

use of terminology of wrongdoing as 'disease', but argued for 'curative' methods in preparation for the ultimate punitive moment, final judgement. What this means is that even serious social transgression came to be classed under the category 'curable'. Serious offenders were represented as deserving of mercy, and, in turn, harsh punishment was seen as merciful. Yet, it should be noted that initially penance was not seen as converging with public punishment, at least in the case of serious crime. In the late fourth and early fifth century, public confession of guilt could lead to annulment of a trial and hence of public punishment, but, failing this, potentially lethal punishment was to be applied for the benefit of the community, even though, remarkably, it was also often framed as 'salutary' for the offender himself. The evidence from the time of Justinian shows, however, an acceptance that tangible expression of guilt during punishment could also lead to remittance of a penalty after conviction was slowly developing, often linked to the ritual of a bishop's (or other intermediary's) intercession.

Despite the adoption of Platonic terminology, the focus of early imperial commentators of imperial justice stayed resolutely on the preservation of social peace, rather than changing an offender's moral state of mind to restore a pre-existing state of virtue. Change of social conduct, based on fear, was seen as the best possible outcome of educative punishment; an aspect that, as we have described in the Introduction, from a modern perspective we might rather call 'coercive'. Christianity shifted the focus onto the offender. Augustine's notion that penance and the continuous exposition to the truth would adjust sinners 'little by little' (*paulatim*) to a true Christian lifestyle is reminiscent of Plato's insistence on breaking bad habits through the ordering of space and time.[1] Yet, Augustine, as many other Christians, argued that the offender's 'improvement' meant his acceptance of sinfulness, not an (impossible) return to an innocent state of mind and this view over time became accepted as orthodox. The assessment of a true conversion of mind, and ultimate punishment, was the prerogative of God, and some Christian commentators hence accepted a mechanical change of social conduct (including the satisfaction of the victim) as a worthwhile outcome of temporal punishment. This arguably facilitated the use of painful and humiliating penalties (such as flogging) in ecclesiastical justice, but also underpinned practices of social reintegration and reconciliation of victim and offender.

[1] Augustine, *ep.* 185.30 (CSEL 57:28).

It is under Justinian that we can witness a fully conscious attempt to subsume the responsibility of the emperor in matters of faith and the responsibility of the emperor for the general morality of his subjects, particularly in matters of sexual *mores*, under the aegis of the 'fatherhood' of the Christian emperor and his resulting role in salvation. Justinian entertained the full range of Roman justifications of punishment, including deterrence, retribution, restoration of the victim's honour and safety of society, but gave credit to the 'education' of the offender too, particularly where moral issues were at stake, that exposed offenders to the wrath of God, as well as men.[2] Justinian's acceptance of by now customary criminal jurisdiction of bishops over clerics and ascetics, and of a bishop's right to intercede for defendants and convicts of public procedure was part of this vision. It is of course also under Justinian that we have the fullest record of an expression of the imperial mind through the medium of law due to the emperor's collection of previous legal texts and the unabridged status of large parts of his own legislation. This nature of the evidence may unduly contribute to the impression that Justinian was significantly different from previous emperors, but overall fits well with Justinian's definition of imperial *humanitas* as mirroring that of God and of his understanding of public and ecclesiastical law as two expressions of divine justice.[3]

The language of reform in late Roman laws was of course in many ways euphemistic, with the potential to become just a rhetorical cliché. If all, even lethal, punishment was purportedly meted out with fatherly, medicinal and merciful attitude, little could be argued against even the most brutal penalties that late Roman laws were so fond of.[4] Yet, in reality the death penalty itself, at least at elite level, was perhaps seldom used, either due to practical reasons, ancient ideals of *moderatio* and honour, or to the pressure bishops were able to put on imperial officials and emperors, something that was an entirely new feature in late antiquity.[5] Christian bishops on the whole did not subscribe to the 'salutary' nature of the death penalty (even where they appreciated the deterrent function of the legal rhetoric) and used its rejection as a way to cement their own superior authority as judges.[6] As I have already mentioned in the Introduction, the time-honoured principle of discretion as an expression of imperial

[2] For a comparison of justifications of punishment in Justinian's laws see Bonini (1989) 413; Sitizia (1990) 215–217.
[3] Wubbe (1990) 258–262. On Justinian's attitude towards the role of imperial law in God's plan see also Leppin (2011) 110–126.
[4] Brown (1964) 115; Gaddis (2005) 133; also see Robinson (2007) 183.   [5] Harries (1999) 150.
[6] Gaddis (2005) 146.

clementia had already concentrated the minds of early imperial emperors on the penalty of exile, which, as Frank Stini has demonstrated, led to an unprecedented increase in the use of this form of punishment from the first century on. Just judges were in need of penalties that protected society, but could also be adjusted according to severity and leniency, and were reversible.[7] In her speech to Augustus recorded by Cassius Dio, Livia hinted at this justification of the penalty of exile. Her vision of punishment as 'education' in fact focussed on exile, which she compared to a milder drug than the major surgery of the death penalty for those who needed to be removed, but were also emendable.[8] As Daniel Washburn has shown, the penalty of exile continued to be employed in the late Roman empire for exactly these reasons, which, one may add, were now made even more urgent due to a Christian re-interpretation of justice as ultimately only God's privilege.[9] As we shall see in the remainder of this study, it was not only the non-lethal and reversible aspect of the exile penalty that was of interest to late Roman judges, but also its spatial aspects. Legal exile underwent a major transformation during the late Roman period from expulsion to internment, to match the peculiar late antique perspective on wrongdoing as 'disease' and punishment as 'cure', but also to respond to very practical aspects of the imperial justice system.

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[7] Stini (2011) 135 and *passim*.
[8] Cassius Dio, *Roman History* 55.17–55.18 (Loeb 436–440); Rocovich (2004) 170. See above Chapter 2.
[9] Washburn (2007) 253 and *passim*.

PART II

Prison and punishment