

The public prison in late antiquity

Throughout all the intervening time which flows between such venerable and celebrated days [of Easter] we relieve from chains (*catenis*), we release from exile (*exilio*), we withdraw from the mines (*metallo*), we free from deportations (*deportationibus*), because it is clear that there is almost no day on which we do not order something merciful (*clemens*) and holy . . . Because we do not suppress this well-known leniency (*lenitatem*) in our favours (*beneficiis*), we indeed open the prison (*carcerem*), put aside the fetters (*vincla*), and properly remove the uncombed hair, filthy from the gloomy confinement (*tenebrosae . . . custodiae*).¹

In 386 Valentinian II, Theodosius and Arcadius issued a law on imperial amnesties. The emperors described the extent of imperial *indulgentia* as reaching far beyond the regular events at Easter that amnesties had become in the course of the fourth century, as we have seen in the previous chapter. The law claimed an incessant release from punishment for criminals throughout the calendar year. While it is difficult to verify the real impact of such claims, the law gives us a crucial overview over the kind of penalties the emperors considered their judges to pronounce beyond the death penalty – penalties they themselves could then humanely brush aside through imperial pardon.

From this perspective, penalties in the late fourth century included exile (often, though not in this law, called *relegatio*), and its aggravated form *deportatio*, which combined exile with loss of property and civic rights, and hard labour in imperial quarries or mines (*metallum*). Such penalties were all of a type that was non-lethal and incorporated a spatial aspect. How

¹ Sirm. 8 (386): *quin per omne hoc, quod inter venerandos et celebres dies medium fluit tempus, catenis levamus, exilio solvimus, a metallo abstrahimus, deportationibus liberamus, cum satis constet nullum prope diem esse, quo non aliquid clemens sanctumque iubeamus . . . Unde notam beneficiis nostris non supprimimus lenitatem, aperimus quin etiam carcerem, vincla deponimus, impexos tenebrosae pedore custodiae crines decenter amovemus.*

common these were in comparison with other types of non-lethal penalties is difficult to conclude from the amnesty laws alone, or, for that matter, from other contemporary evidence, which is either prescriptive, anecdotal or polemical. Penalties such as corporal punishment or fines as a momentary rather than spatial form of punishment would of course not have been mentioned in a law on amnesty.² The frequent evocation of exile and mines in the reiterative amnesty laws however suggests that they were common or at least that they were present enough in the collective mindset to be an effective target for imperial clemency.

As other contemporary amnesty laws, the above law eloquently emphasised the prison as the primary burden of which individuals were to be relieved. Such acts of kindness were often directed at those who were detained on a criminal charge awaiting trial, in a form of investigative custody.³ In this law, however, they seem to have also been directed at those who were confined in the dark and filthy part of the prison following conviction, almost away from the living to whom amnesty restored them. If we interpret *catenae* as an allusion to the public prison, the law put an emphasis on the prison even before mentioning the penalties on mines and exile. All of this might be a literal allusion to a prison penalty, or else it might suggest that those who were exiled or banished to the mines were equated to public prisoners. We will therefore begin our discussion of late Roman forms of confinement with the public prison, which for contemporaries seems to have been a primary context against which all other penalties with a spatial aspect were measured.

As we shall see, late Roman emperors were anxious to reduce the function of the public prison, and its sister-institution for the elite, house-arrest, to that of preventive custody of the accused and, to a lesser degree, of those awaiting execution of a sentence. The main aim of public imprisonment by law was to prevent escape and ensure that a defendant or convict could be swiftly produced, if needed. This was a classic function of the Roman prison, and the laws very probably meant to re-emphasise this tradition, although we should note that, contrary to earlier custom, late Roman laws also demanded such levels of control for members of the elite, by prescribing a more restrictive form of house arrest than these had hitherto been accustomed to. Yet, as I will argue in this chapter, the narrow vision of late Roman laws did not correspond to the functions assigned to

² On the range of non-lethal penalties in Roman law see Garnsey (1970) 111–152.

³ Other amnesty laws that reference the prison are CTh 9.38.3 (369); Sirm. 7 (380–381); CTh 9.38.6 (381) = CJ 1.4.3 (385); CTh 9.38.7 (384); CTh 9.38.8 (385); CTh 9.38.10 (405) only mentions exile and forced labour.

public imprisonment in judicial and social practices, which drew on a conventional understanding that particularly those lower down the social hierarchy could be compelled to change their conduct through submission to unpleasant experiences. In light of what we have discussed in earlier chapters, late Roman commentators sympathetic with such practices may have called these experiences ‘educative’ (and some did, as we shall see below), although I will from now on mostly use the term ‘coercive’.

Legal purposes of the public prison

Late Roman laws on prisons concentrated on four aspects.⁴ To begin with, they aimed to limit the number of prisons. Late Roman provinces featured the presence of officials of various competences, ranging from the imperial, provincial and municipal to the military. One of the objectives of late Roman laws was to clarify their competences and rights regarding the use of imprisonment. Secret agents (*agentes in rebus*) and soldiers acting as a police force in rural areas (*stationarii*) were urged not to put people in prison (*carcer*), but to refer their matter and the offenders themselves to a magistrate with judicial powers.⁵ The late Roman *agentes in rebus*, who were officials of the imperial court outside the control of provincial governors, were employed in a wide array of activities, ranging from the management of the imperial post to the communication of imperial orders at the provincial level and ensuring that these were carried out. Their official duties were purely supervisory and not judicial, but the laws show that these competences were sometimes exceeded.⁶ *Stationarii*, in turn, were soldiers from the larger group of the *limitanei*, the troops stationed in the frontier regions of the empire, who had been posted to guard places of particular imperial interest, such as road posts, mines or troublesome regions. Again, they were not subordinated to the provincial governor, but the military commander of a region, such as, in early fourth-century Egypt, the *dux Aegypti*.⁷ Emperors also prohibited officials at the municipal level, the *curator*, the *defensor* and members of the municipal council in general (*ordo*) from sending people to prison. Contrary to the *agentes in rebus* and the *stationarii* municipal officials did have judicial competences, but they were limited to civil litigation. This was certainly true for the *defensor*, a lesser judge, which increasing numbers of late Roman cities

⁴ For an excellent brief overview see also Raspels (1991) 289–306.

⁵ CTh 8.4.2 (315); CTh 6.29.1 (355); CTh 6.29.8 (395).

⁶ On the *agentes in rebus* see Kelly, C. (2004) 206–207.

⁷ On *stationarii* see Fuhrmann (2011) 211–216.

appointed for the protection against abuse and corruption at the hands of landlords.⁸ While it was acknowledged that all these officials played a crucial role in the maintenance of civic peace, they were only to arrest and then escort those charged with a crime, together with the accuser, 'to a court', *ad iudicium*. Prisons therefore were to be located only in the provincial capitals, although at this level there was no limit on the number of prisons, as different judges based in provincial capitals could maintain their own prisons. In Antioch, for example, both the *consularis Syriae* and the *comes Orientis* had their separate prisons.⁹ Prison registrars, called *commentarienses*, were to be part of the bureaux of imperial officials, and receive their salary from this source, and members of a magistrate's office staff were also entrusted with arresting people.¹⁰

The second concern of late Roman laws on prison was to ensure that only the right people ended up in prison, namely those undergoing criminal procedure. Constantine, in a law from 326, decreed that every arrest had to be accompanied by a report that justified the action.¹¹ The *carcer*, he stressed in another law, was a place for those subject to punishment (*poenaliū*), of guilty men (*hominum noxiorum*). Elsewhere Constantine explained that only those whose crime had been established in a court hearing should 'sustain the punishment of imprisonment' (*poenam carceris sustineat*).¹² Constantine did not refer to punitive imprisonment here, a controversial concept as we will see below. Rather, he used terms like *poena* and *poenalis* to emphasise that the prison was part of the criminal, not the civil process, and not to be used for tax exaction.¹³ It seems, in fact, that prisons were full of defendants in civil causes, and fiscal or private debtors, at least judging from the laws prohibiting their confinement. For those who had lodged an appeal against a civil sentence, Constantine prescribed military custody.¹⁴ Constantine, and later Constantius, also ordered that fiscal debtors should not be held in public prisons, and there submitted to flogging by 'angry and perverse judges'. Fiscal debtors should be assigned to military custody or be released on bail

and, if they still were unable to pay, their property was to be confiscated. Valentinian III even allowed for the sale of land belonging to *curiales*, to pay for their tax debt, in order to avoid their flogging and imprisonment.¹⁵ Yet, not all emperors excluded the employment of prison in the exaction of taxes. A law by Valentinian II from 379 had condoned the use of *supplicia*, which may have included imprisonment, for fiscal debtors. Maiorian legislated in 458 against the interference in provincial tax exaction of officials of the imperial court, *palatini*, or those belonging to the office of the Praetorian Prefect, including the practice of imprisonment of insolvent tax debtors. He prohibited this, but had nothing to say, in this instance, about the same practices at provincial level. Leo only explicitly prohibited physical coercion in tax exaction for clerics. Justinian, finally, allowed for fiscal debtors' short-term incarceration, for a period of thirty days.¹⁶

Thirdly, late Roman laws advocated swift trial and implementation of penalties for those held in preventive custody. Already Constantine had urged judges to start trials 'at once' (*statim*) when they had arrested a person on criminal accusation, so that 'the guilty will be punished and the innocent absolved'. Sixty years later Theodosius emphasised, again, the need for 'swift punishment' (*velox poena*), condemning judges who let innocent people linger in prison. He also ordered that the prison registrar, the *commentariensis*, should report to the judge within thirty days the number of prisoners, and the crime they were charged with, presumably so due trial could commence. In 396 Arcadius and Honorius deplored the 'idleness' (*desidia*) of judges and exhorted them to subject prison inmates to trial and to pass sentence 'according to what the laws have decreed' (*quod leges suaserint*). In a law by Justinian, the registrar duties had passed onto the local bishop, who should record why people were held in prison, whether for debt, a capital or a sub-capital crime. Justinian also established a maximum stay for the accused. If a trial had not begun for slaves, they should be flogged and returned to their masters within twenty days, while a free man should only be held up to twelve months, if accused by a private citizen, or six months, if the investigation had been started by the governor himself. Only where guilt was manifest or the crime was serious, defendants could be held indefinitely.¹⁷ The general amnesty laws were also part of the larger attempt to combat the overpopulation of prisons. By ordering

⁸ CTh 9.2.5 (409) = CJ 1.55.7. On the *curator* see Burton (1979) 465–487; on the *defensor*: Harries (1999) 54.

⁹ Libanius, *or.* 45.31 (Loeb 188–190).

¹⁰ *Commentarienses* are mentioned in CTh 9.40.5 (364); CTh 8.15.5 (365?/368?/370?/373?); CTh 9.3.5 (371) = CJ 9.4.4; CTh 9.3.6 (380) = CJ 9.4.1; CTh 9.3.7 (409) = CJ 1.4.9; sub-ordinated officials sent to arrest suspects: Ammianus Marcellinus, *Roman History* 28.1.49 (Loeb 116); Augustine, *ep.* 115 (CSEL 34:661–662); Augustine, *ep.* 153.25 (CSEL 44:425); see Krause (1996) 265.

¹¹ CTh 9.3.2 (326) = CJ 9.4.2. ¹² CTh 11.7.3 (320) = CJ 10.19.2; CTh 9.3.2 (326).

¹³ Rivière (2004) 210–212.

¹⁴ CTh 11.30.2 (314); CTh 11.30.15 (329). On military custody see below, pp. 125–133.

¹⁵ CTh 11.7.3 (320) = CJ 10.19.2 (320) and CTh 11.7.7 (346); NVal. 1.3.2 (450) and 32.4 (451).

¹⁶ CTh 4.20.1 (379); NMaI 2.2 (458); CJ 1.3.32.6 (472); CJ 9.4.6 (529).

¹⁷ CTh 9.3.1.pr (320): *ut natus puniatur, innocens absolvatur*; CTh 9.3.6 = CJ 9.4.5 (380); CTh 9.1.18 (396); CJ 1.4.22 (529); CJ 9.4.6 (529); CJ 9.47.26.3 (529): the last three were originally part of the same promulgation.

an annual release of prisoners charged with a sub-capital crime, emperors effectively overrode formal criminal procedure, presumably also because they expected such criminal procedure not to ever happen in the first place.¹⁸

Finally, emperors tried to protect prisoners on remand against abuse by prison staff. This concerned in particular the wearing of chains. For Constantine, those accused of a crime and awaiting trial should not wear heavy manacles, but only chains of a 'more extended' kind (*prolixiores catenas*), to allow for less regimented movement of the limbs. According to Theodosius, defendants should not wear chains altogether before conviction, while Justinian, in his version of the Constantinian law, only allowed chains for those charged with a capital crime.¹⁹ Emperors also legislated against prison staff accepting bribes from plaintiffs to mistreat or even kill prisoners, and against prisoners bribing prison staff to speed up their admission to trial. The laws deplored the negligence of prison staff in reporting on prisoners, and demanded that those prisoners who did not have friends or family to provide them were given food from the public supplies, that prisoners awaiting trial were separated from the convicts in the 'inner prison' (*sedes intima*), and let out in the fresh air each day, or even, a law by Honorius added, escorted to the baths once a week. The same law, dated to 409, required the judge to interview prisoners each Sunday to avoid corruption of the prison guards. The local bishop was to check both on the judge and on the prisoners, tending to the sick and hungry, and interceding for those found to be innocent. Some emperors were also concerned about the occasions for promiscuity prisons provided. Constantius ordered a separation of the sexes.²⁰

A restricted number of public prisons were hence meant to hold those on trial or those awaiting execution of a sentence only, and these were to be processed quickly. We can certainly note some potential Christian influences in these laws, particularly where the treatment of prisoners was concerned, but overall the laws aimed at restoring a traditional legal distinction between different kinds of stages and outcomes of criminal procedure. To underline the different categories of custody in the public prison, Constantine in fact ordered that prisons' outline should follow a certain scheme, with an inner or subterranean prison for more serious criminals and those sentenced, who deserved 'squalid' custody, and a

¹⁸ On late antique amnesty laws see above Chapter 4.

¹⁹ CTh 9.3.1pr. = CJ 9.4.1pr (320); CTh 9.2.3 (380).

²⁰ CTh 9.3.1pr. and 1 (320) = CJ 9.4.1pr. and 1; CTh 9.3.5 (371); CTh 9.3.6 (380) = CJ 9.4.5; CTh 9.3.7 (409); Sirm. 13 (419); CJ 1.4.22 (529); women in the prison: CTh 9.3.3 (340).

vestibule for those still awaiting trial.²¹ This was to physically enshrine the nature of the former as outcasts, who had to be further distanced from society. This outline was inspired by that of the *carcer Tullianum* in Rome, one of the most ancient public prisons, which, according to Livy, dated from the period of the kings and was still in use in the fourth century.²² Some municipal prisons may have indeed sported underground features like the *Tullianum*; for example, a prison in Edessa, called 'the dark pit', or one in Antioch, which was so dark that the guards would take bribes to let the inmates use lamps.²³ Augustine of Hippo described as the standard outline of the prison accommodation above and below ground, the latter reserved for those charged with serious crimes.²⁴ Yet, despite such imperial attempts at ordering prison space, a systematic arrangement was probably more ideal than real. Archaeologically, we know very little about late Roman prison, or Roman prisons more generally, and this may be due to the often improvised nature of legal imprisonment in a variety of public spaces. For example, there is some evidence from late antique Egypt that unused temples were used as prisons.²⁵ Make-shift prisons may have particularly appeared whenever the number of prisoners exceeded the capacity of existing prisons. For example, in Antioch, after the so-called riot of the statues in 387, a wall was torn in between the prison, which also lacked a roof, and the adjacent yard of the *bouleuterion*, to create more space for the great number of arrested individuals.²⁶

Custodial house arrest and the increase of surveillance

Not every criminal defendant or convict awaiting execution of a sentence was meant to end up in prison in late antiquity.²⁷ Holding those subject to criminal procedure under house arrest was an age-old tradition, first mentioned in the context of the abolishment of the Bacchanalia cult in

²¹ CTh 9.3.1 (320); CTh 9.3.2 (326): *custodiae squalore*.

²² Ammianus Marcellinus, *Roman History* 28.1.57 (Loeb 120). On the history of the prison see Cadoux (2008) 202–221.

²³ Edessa: *Acts of Shmona and Gurya* (transl. in J. Segal, *Edessa. The Blessed City* (Oxford, New York: University Press, 1970), 83–84); Antioch: Libanius, *or.* 45.10 (Loeb 168); see also Lavan (2001) 39–56 and Pérez Martín (2003) 230–239.

²⁴ Augustine, *tract. in ev. loh.* 49.9 (CC 36:425).

²⁵ P.Oxy xvii 2154 (fourth century) (mentions the use of the temple of Hadrian in Oxyrhynchus as a prison); also see P.Lond.inv.2229 (sixth century).

²⁶ Libanius, *or.* 22.29–22.32 (Loeb 396–398). On its location see Matter (2004) 53–69.

²⁷ On alternatives to the public prison in earlier periods see Mommsen (1899) 317; Garnsey (1970) 147; Rivière (1994) 643–644; Krause (1996) 180–188. See Neri (1998) 428 on *custodia militaris* in particular.

186 BC, when the (senatorial) priests of the cult were detained in their homes, guarded by the *triumviri capitales*.²⁸ Examples from late antiquity include the former *vicarius urbis Romae* Aginatus, who was held under guard in his own villa in 375/6 on a charge of adultery and magic during the trials that haunted the city of Rome under his successor Maximinus.²⁹ The late fourth-century Roman historian Ammianus Marcellinus, to whom we owe this information, also told the story of the noble woman Hesychia, who was guarded in the house of an *apparitor*.³⁰ Around the same time, the pagan orator Symmachus and the Christian bishop Ambrose both mentioned senators put into *custodia militaris*.³¹ In 469, we hear of the case of Arvandus, the former *praefectus praetorio* of Gaul, who had been brought to Rome to be put on trial for conspiring with the Visigoths and held under arrest at the house of his friend, the *comes sacrarum largitionum* Eugenius Asellus.³² When the Ostrogothic king Theodoric sentenced his former Master of Offices Boethius to death for treason in 524, Boethius was held under guard at a country estate near Milan or Pavia called *in agro Calventiano*, where eventually he was beheaded. Although Boethius deplored the loss of his customary lifestyle, it is clear that he enjoyed reasonable freedom, leisure and reading material as he was able to write his *Consolation of Philosophy* during this time.³³ There is little reason to assume that Theodoric was more lenient towards people of senatorial rank than his Roman predecessors. Rather, he probably emulated an established practice of how to deal with senatorial convicts.

Although they are often hard to distinguish in the sources, as all of these arrests happened in private homes, there are different institutions at play here. The early third-century jurist Ulpian declared in his treatise *De officio proconsulis* that the governor, when required to hold a defendant on remand, should decide whether to put him into prison (*carcer*), into military custody (*custodia militaris*), in the care of a guarantor (*fideiussor*) or allow him to reside at his own house (*sibi*). Elsewhere, Ulpian

enumerated as places of imprisonment the *vincula* (here evidently an equivalent for the public *carcer*), the *custodia militaris* and the *custodia libera*.³⁴ *Custodia libera* was hence clearly distinguished from *custodia militaris*. The former referred to arrest that could happen in the defendant's own home or in the house of a friend or colleague, who acted as a guarantor. The adjective *libera* probably referred to the absence of chains (*vincula*) in this practice.³⁵ In the late fourth century, the Christian ascetic Jerome juxtaposed the terrors that imprisonment in a public prison held with *libera honestaque custodia*, which was open to senators.³⁶ The keyword was *honesta*, for this type of imprisonment was designed to safeguard honour, which the prison experience could jeopardise.³⁷ For the same reason members of the senatorial aristocracy rarely had been imprisoned at all throughout the Republic, but were usually allowed to name a guarantor. It was an arrangement that fell within the parameters of hospitality, a sacred duty in the ancient world, but one traditionally exchanged between individuals of the same status, as an act of *amicitia*, expected to be mutually beneficial for the prestige of both host and guest.³⁸ The privilege of avoiding any form of custody altogether when on trial seems to have decreased during the empire, yet the *custodia libera* remained an honourable alternative to the public prison.³⁹ It was also a way to deal with noble female defendants, whose arrest, for considerations of modesty, was usually not looked upon well.⁴⁰ To be sure, *custodia libera* habitually concerned custody prior to and during trial, before a verdict was reached. After guilt had been established, also senators were moved to the public prison until the execution of the sentence.⁴¹ This duly happened to Arvandus in 469 who after his verdict (the death penalty) was stripped of his rank and sent to a prison on the Tiber island.⁴²

The *custodia militaris*, in turn, was a later development than the *custodia libera*, which emerged during the early empire.⁴³ While we can observe

²⁸ Livy, *Roman History* 39.14 (Loeb 258).

²⁹ Ammianus Marcellinus, *Roman History* 28.1.54 (Loeb 118). See PLRE I, Aginatus, 29.

³⁰ Ammianus Marcellinus, *Roman History* 28.1.47 (Loeb 114).

³¹ Symmachus, *Relatio* 49.2 (Barrow 234); Ambrose, *de obitu Valentini* 18 (CSEL 73:339).

³² Sidonius Apollinaris, *ep.* 1.7.4 (Loeb 368). On Arvandus see PLRE II, Arvandus, 157–158; on Asellus PLRE II, Fl. Eugenius Asellus 2, 164.

³³ The events are described by Boethius in *Consolation of Philosophy* 1.4 (Loeb 142–154); the name of the estate is mentioned in *Anonymus Valensianus* 87 (ed. I. König, *Aus der Zeit Theoderichs des Großen* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1997), 90; for comment on the location, 201). See also PLRE II, Boethius 5, 235–236.

³⁴ D 48.3.1 (Ulpian): *de custodia reorum proconsul aestimare solet, utrum in carcerem recipienda sit persona an militi tradenda vel fideiussoribus committenda vel etiam sibi*; D. 2.11.4.1 (Ulpian).

³⁵ Mommsen (1899) 305; Krause (1996) 187; Pavón Torrejón (2003) 183 and 202–203.

³⁶ Jerome, *Contra Vigil.* 6 (PL 23:359).

³⁷ D 26.10.3.16 (Ulpian): *ceterum eos, qui sunt in aliqua dignitate positi, non opinor vinculis publicis contineri oportere* ('I do not think that those who have been placed in some position of rank ought to be confined in the public prison').

³⁸ Bolchazy (1977) 33–34; Hilbrunner (2005) 157.

³⁹ Rivière (1994) 643–644; Krause (1996) 186–188.

⁴⁰ See Suetonius, *Tiberius* 61.4 (Loeb 396) who was shocked that Tiberius had women arrested and executed in prison.

⁴¹ D 48.3.5 (Venuleius Saturninus). ⁴² Sidonius Apollinaris, *ep.* 1.7.11–1.7.12 (Loeb 376–378).

⁴³ Arbandt, Macheiner (1976) 327.

defendants being put under military guard in a domestic setting already in the first century, we encounter the legal term only from the early third century on, in the Digest passages of Ulpian and his pupil, Modestinus, when it appears to have been firmly established.⁴⁴ According to Ulpian, *custodia militaris* was, in the first place, custody assigned to soldiers proper (*milites*). Ulpian's statement does probably not refer to soldiers being employed as guards in public prisons, which regularly happened in the early empire, and was still occasionally mentioned in late antiquity, although at this point a magistrate's office staff featured more widely.⁴⁵ It may have indicated sending someone to a prison within a military compound. We know that such military prisons were employed also for non-military individuals, for example, in early third-century Carthage. According to the *Acts of Perpetua and Felicitas*, the martyrs were sent to such a prison under supervision of an *optio* because they were to be part of games put on in the camp.⁴⁶ This of course was a different matter than custodial arrest of defendants as it was already part of execution of the sentence. Nonetheless, particularly with the increase of soldiers stationed in the provinces during the empire, we can imagine that there may also have been greater use of military infrastructure to keep defendants on remand. Augustine, for one, mentioned that custody of defendants could be assigned to *optiones*, a military rank that re-called that of the prison officer in the *Acts of Perpetua and Felicitas*.⁴⁷

Ulpian further mentioned custody under supervision by a member of a magistrate's office staff, when he referred to *custodia* entrusted to a *stator*, a term denoting a governor's orderly or messenger.⁴⁸ Such an official was charged with arresting Cyprian of Carthage in 258, who was then taken to the house of the *princeps* of the proconsul's *officium*. Augustine mentioned supervision by the *lictors*, the carriers of a magistrate's *insignia*.⁴⁹ Both *statores* and *lictors* were, alongside scribes, standard ranks within the salaried body of *apparitores*, a magistrate's attendants, whose origins stretched back to the fourth century BC.⁵⁰ A law by Gratian also referenced *apparitores* charged with custody.⁵¹ The guard of the matron Hesychia in 375/6, mentioned by Ammianus Marcellinus, was one of these *apparitores*,

⁴⁴ D 4.6.10 (Ulpian); for use of the term see also D 48.3.3 (Ulpian); D 48.3.14.1 (Modestinus).

⁴⁵ Soldiers are mentioned for example by Callinicus, *Life of Hypatius* 21.3 (SC 177:136); see Krause (1996) 265.

⁴⁶ *Acts of Perpetua and Felicitas* 7 (Musurillo 116); see Millar (2004) 129.

⁴⁷ Augustine, *tract. in ev. loh.* 49.9 (CC 36:425). ⁴⁸ Lewis, Short (1963) s.v. 'stator', 1752.

⁴⁹ Pontius, *Life of Cyprian* 15–16 (CSEL 3.3:cvi–cviii); *Acta proconsularia* 2 (CSEL 3.3:cxix–cxli); Augustine, *tract. in ev. loh.* 49.9 (CC 36:425).

⁵⁰ *Oxford Latin Dictionary* (2003) s.v. 'apparitores' 129; Kelly, C. (2004) 134. ⁵¹ CTh 8.8.2 (379).

presumably an official attached to the bureau of the *vicarius urbis Romae*. At the municipal level, Ulpian suggested the custody could be entrusted to *ministri*, municipal attendants, often slaves, who fulfilled secretarial and administrative functions within city councils.⁵² Again, these should not be confused with the slaves who were often employed as guards in the public prison within cities.⁵³ By the fourth century, the salaried and permanent office staff of imperial magistrates, widely expanded and professionalised, had come to be subsumed under the label *militia*.⁵⁴ It is hence reasonable to conclude that, where in fourth-century and later texts the *custodia militaris* was mentioned, this could refer to supervision by either soldiers or by imperial officials and their subordinate staff.

Custodia militaris could hence be within genuine military space; yet it is clear from the examples of the ex-*vicarius urbis Romae* Aginatus and the afore-mentioned philosopher Boethius that soldiers or sub-officials could also be dispatched to guard someone in a domestic setting, even in the defendant's or convict's own home. *Custodia militaris* could also occur in the residence of the magistrate as it seems to have done with Cyprian of Carthage. In the early fifth century, Augustine mentioned the case of the estate-steward Faventius, who for some undisclosed reason was due to be taken from Hippo to Carthage for trial.⁵⁵ Faventius, apparently on advice by Augustine, took advantage of the thirty-day period to arrange his affairs afforded by imperial law in a case where a defendant had to travel to court. During that time, he was under guard by an *apparitor* of the *comes Africae* called Florentinus, who had come to collect him. Florentinus trekked around Hippo with his charge, making use of several private houses (*domus*). We can imagine that these belonged to friends of Florentinus, a stranger himself in Hippo, who granted him hospitality on the basis of their *amicitia* or on the basis of quartering.⁵⁶

Yet, sometimes it is also clear that the houses where people were held belonged to the guards themselves, as in the case of the lady Hesychia mentioned by Ammianus Marcellinus, who had been held in the *domus* of an *apparitor*. Members of late antique imperial officials' staff were reasonably privileged and wealthy, as they were salaried, received fees and were usually employed over a longer period.⁵⁷ Possessing a house was not

⁵² Fuhrmann (2011) 64–65.

⁵³ On slaves as prison guards at the municipal level see Krause (1996) 255.

⁵⁴ Jones, A. H. M. (1964) 377–378.

⁵⁵ Augustine, *ep.* 113–115 (CSEL 34.2:659–662), written between 409 and 423.

⁵⁶ The law in question is CTh 9.2.3 (380); see also CTh 9.2.6 (409) = CJ 1.55.7, which cites the law of 380.

⁵⁷ See Jones, A. H. M. (1964) 586–596.

beyond their reach. We know only very little about the living conditions of such middling 'public sector workers', although from Roman provincial archaeology some examples of more modest single-occupied houses are known. In late antique Rome, small and middle-sized *domus* proliferated in the fourth century, which may reflect the increase in imperial bureaucracy during that time.⁵⁸ Contrary to the *custodia libera*, however, under *custodia militaris* the guard's hospitality towards his guest was not given voluntarily, but ordered by a superior. The *custodia militaris*, where it happened in the official's own home, hence represented a much higher interference of the state with private space and its intended use, to the extent that little distinction was made between the official's profession and his role as a *dominus* and host. In this sense, *custodia militaris* can perhaps be compared to the late antique requirement of lodging travelling members of the military and the imperial administration, a kind of indirect tax on propertied households. Members of the high elite were exempt from this liturgy, at least for the house in which they primarily resided (the imperial family, *consulares* and *patricii*, senators, doctors and teachers funded by the state, Christian clerics, and also higher civil servants, such as *primicerii*, the chief notaries of the imperial palace bureaux).⁵⁹

We can reasonably assume that under the *custodia libera* a defendant was treated with the customary reverence afforded to any guest by a Roman host. It is more difficult to imagine the living conditions under *custodia militaris* within a guard's own home. Pilar Pavón Torrejón doubts that, when in 371 Valens ordered to hold a large number of citizens of Antioch charged with helping an usurper in private houses (*domicilia*), the prisoners were supposed to cohabit with the families in question.⁶⁰ Following Ammianus Marcellinus, who described the prisoners as 'crammed together' (*inclusorum catervas . . . constipatione vaporata confertas*), she assumes that more 'prison-like' conditions within the home would have been found, such as putting people in storage rooms or windowless accommodation or private flour mills, which, as we shall see below, were favourite punitive spaces for household slaves.⁶¹ Augustine alludes to *custodia militaris*, where the defendant inhabited the very same room as his guard, so that the room became a *carcer* to one while it was a home to the other. To Augustine, this was similar to perspectives on worldly existence, which could widely differ between two

⁵⁸ Ellis (2000) 80–85; in late antique Rome: Guidobaldi (1986) 165–237.

⁵⁹ On quarrelling see Hiltbrunner, Gorce, Wehr (1972) 1100–1102; Hiltbrunner (2005) 101–103. The respective laws are CTh 13.3.3 (333), CTh 16, 2, 8 (343); CTh 7.8.3, 5, 7, 10 (384); NTh 25 (444).

⁶⁰ Ammianus Marcellinus, *Roman History* 29.1.13 (Loeb 194). ⁶¹ Pavón Torrejón (2003) 214.

individuals.⁶² If this can be taken literally, it certainly suggests very restricted living conditions for those subject to such custody.

The reason why defendants were put into *custodia militaris* is less clear than that underlying *custodia libera*. Ulpian explained that a judge, when making a decision on where to imprison a defendant, should take into consideration the gravity of the crime, the public function, honour and wealth of the person in question, and their 'harmlessness' (*innocentia*).⁶³ Unfortunately, he did not say which aspect merited which form of custody. *Custodia militaris* was, like the *custodia libera*, still thought of as being lighter than public prison. In the mid-second century Antoninus Pius ordered in a rescript not to put defendants accused of grave crimes with guarantors or in the care of soldiers, but to put them in the *carcer*, to make them suffer even before actual punishment.⁶⁴ Constantine prescribed *custodia militaris* to detain tax debtors, and, as we have seen above, strictly distinguished it from prison, reserved for criminals.⁶⁵ Overall, *custodia militaris* seems to have been a measure that was flexibly applied; still less harsh than the public *carcer*, and reserved for those charged with minor crimes, or tax debtors, even if of lower status, or for those who had to travel to court.

At the same time, due to its higher form of surveillance, its restriction of movement and the possible subordination of a defendant to someone likely to be of lower social status, *custodia militaris* visibly emphasised the defendant's submission to the power of the state. This motivation was perhaps even more important than the prevention of escape. Such considerations seem to have become more common during late antiquity and increasingly affected members of the elite. For the early empire we lack any evidence about individuals of senatorial rank in *custodia militaris*. This may mean that most criminal defendants of this rank were held in *custodia libera*, in acknowledgement of their honour, or not submitted to custody at all. During the fourth century, however, *custodia militaris* became the legal norm in criminal accusations, also for senators. In 362, Julian, in a traditionalist spirit, tried to return to a situation where senators, at least for minor crimes, should 'be absolutely undisturbed and unrestrained' before their crime had been proven in court.⁶⁶ His law suggests that under Constantine and his sons at least, there had been an increase in putting defendants of senatorial rank under some sort of surveillance, either in the public *carcer*, or under military guard. The latter is more

⁶² Augustine, *en. psalm.* 141.17 (CC 40:2057). ⁶³ D 48.3.1 (Ulpian). ⁶⁴ D 48.3.3 (Ulpian). ⁶⁵ CTh 11.7.3 (320) = CJ 10.19.2.1. ⁶⁶ CTh 9.2.1 (362) = CJ 12.1.8: *vacuus sit prorsus et liber*.

likely, for three years later Valentinian and Valens declared in a law that attempted to overturn Julian's that there should not be any distinction of rank: every defendant on a criminal charge should be put in *custodia*. While those of higher rank should still not suffer confinement in the public prison, they were to be put under surveillance by the respective judge's office staff.⁶⁷

Literary evidence also implies that the privilege of *custodia libera* was diminishing in the fourth century and being replaced with a form of *custodia militaris*.⁶⁸ Employing, as ever, the example of public jurisdiction to explain divine forms of justice, in this case differentiation between the dead, Augustine distinguished between the 'humane, gentle and civilised' *custodia* assigned to *lictores* (*humanum et mite officium atque civile*), that assigned to soldiers, *optiones*, considered harsher, and that in the public *carcer*, the most severe form of all. According to the bishop of Hippo, the choice depended on the type of crime (or sin in the metaphorical translation), rather than social status, although one suspects that in reality social considerations by the judge may have played a role. Strikingly, however, he did not mention the option of *custodia libera*, unsupervised house arrest, or bail, which may mean that, at least to his knowledge, all defendants had to be under some form of surveillance.⁶⁹ Of course, criminal trials against senators may not have been very frequent at Hippo, so Augustine is perhaps not the most fertile source on the treatment of the high elite in this respect. However, a case discussed by Symmachus as prefect of Rome in a letter to Theodosius in 384 featured *custodia militaris* also for senators. It concerned the young *agens in rebus* Africanus who had imprudently accused two *virii clarissimi*, Campanus and Hyginus, of violence, apparently under Symmachus' predecessor. As it happened, the two were cleared of the charge, so that Africanus now faced punishment for false accusation, *calumnia*. Symmachus's point of writing was to plead for clemency for Africanus, quite conventionally pointing at his youth. At the same time, he took the time to express disapproval of the way Campanus and Hyginus had been treated. They had in fact been put under *custodia militaris*, which probably meant supervision by the urban prefect's office staff.⁷⁰ While this had been what procedure demanded, Symmachus did point out that it really disregarded their rank.⁷¹

⁶⁷ CTh 9.2.2 (365) = CJ 9.3.1. The expression was *ex officio non recedat*.

⁶⁸ See Neri (1998) 427–428.

⁶⁹ Augustine, *tract. in ev. loh.* 49.9 (CC 36:425). See further Augustine, *serm.* 256.1 (PL 38:1191), where the alternatives are also *custodia militaris* (literally: *ab optione*) or *carcer*.

⁷⁰ Neri (1998) 428.

⁷¹ Symmachus, *Relatio* 49.2 (Barrow 234): *reus custodia militaris distimulata dignitatis <reverentia> circumdedit*.

What Symmachus's story shows is that the judge at least in this case had taken on board legal changes on forms of custody, which essentially restricted their freedom of choice concerning custody forms, but also that people of senatorial rank took issue with it, mindful of different custom and traditions of honour. The latter may have contributed to the fact that the application of *custodia militaris* to people of senatorial rank was not in any way systematic. For example, the ex-praetorian prefect Arvandus was free to enjoy his friend Asellus's hospitality at his house on the Roman capitol as late as the mid-fifth century. In the eastern empire it was also legally acknowledged around the same time that senators charged with a crime could give financial sureties or be put on bail just on the basis of an oath, rather than being put in prison, but this was limited to those of *illustris* rank, that is, to the highest functionaries of the state.⁷² Social privileges took time to die out, even though they increasingly became reduced to an ever narrower elite.

Towards punishment and coercion

Comments in contemporary literature seem to confirm the view transpiring from late antique legislation that the prison system was often corrupt.⁷³ Many late antique authors described or condemned the negligence of governors in observing correct criminal procedure, leading to long-term detainment of people because trials were never held and sentences not implemented. The pagan orator Libanius provides us with the most vocal example of such criticism. In his denouncement of the misbehaviour and corruption of the *consularis Syriae* Tisamenus to Theodosius (late 386), Libanius discussed the governor's attitude to justice. Tisamenus was quick to arrest those accused, but slow to put the arrested on trial or execute their sentences. The result was prison-overcrowding, even leading to some prisoners' death, whose guilt had not even been established yet. The governor would turn a blind eye on his prison staff torturing inmates and extorting money from them and their families.⁷⁴ In the same year, Libanius also delivered to the emperor a more general report on prison conditions, an urgency which may demonstrate the wide-spread nature of

⁷² CJ 12.1.16 (442/3); CJ 12.1.17 (485/6?); see Krause (1996) 183–185. On the rank of *illustris* in the fifth century see Jones, A. H. M. (1964) 528–530.

⁷³ On literary descriptions of late antique public prisons in general see Krause (1996) 197–200; Neri (1998) 25; Lovato (1994) 216–217.

⁷⁴ Libanius, *or.* 33.30–33.31 and 41–42 (Loeb 220–222; 230–232); on Tisamenus see PLRE I, Tisamenus, 916.

the situation described. Here, Libanius addressed similar issues as in the invective of Tisamenus: governors arrested many, but then forgot about them, prison inmates were tortured if they could not stump up the bribes for the prison staff, judges disregarded the reports made by the prison registrar. Libanius boldly claimed that governors were murderers because people died in prison without having been given a trial.⁷⁵ Also Christian sources confirm that long imprisonment of people who were only on remand and even their death in prison before due judgement were prevalent in the late Roman period.⁷⁶

At times literary sources described imprisonment that was technically for preventive custody as the punishment (*poena*) itself.⁷⁷ For example, Ammianus Marcellinus referred to the long-term imprisonment of those who had consulted pagan oracles by Constantius's agent Paul 'the Chain' at Scythopolis in 359 as *claustra poenalia*. He used the same term for the treatment of participants at a banquet, who had criticised Constantius, were taken to Milan in 355, tortured and imprisoned (*attineri poenalibus claustris*) with only slight hope that they would be released again.⁷⁸ Ammianus here emphasised Constantius and his cronies' disregard for justice and due procedure prescribed by imperial law itself. Ammianus's approach, aiming at denouncing Constantius' incompetence, however demonstrates that complaints about abuse of the prison system could have a particular literary purpose. They were meant either to discredit an unloved judge by revealing the extent to which he diverted from the letter of the law, in particular where elite defendants were concerned, or to elaborate on human suffering more general, as was the case in many of the Christian sources on the topic. These approaches obscure, however, that for judges and victims of wrongdoing forms of imprisonment that were more flexible than the short-term preventive custody in a few select prisons or in house arrest allowed by law may have served a real social purpose. The fact that late Roman laws had to be issued continuously between the fourth and mid-sixth century on often similar aspects of prison attest that such aspects were systematically entrenched in late Roman cultures of justice and hence could not have been due to the incompetence

⁷⁵ Libanius, *or.* 45.6–45.11, 45.32 (Loeb 164–170, 190).

⁷⁶ See e.g. Pelagius, *de divit.* 6 (PLS I:1386); Ambrose, *ep.* 50 (25).3 (CSEL 82.2:57); John Moschus, *pratum spirituale* 165 (PG 87.3:3032); John Chrysostom, *ad stagirum a daemone vexatum* 1.8 (PG 47:444); deaths in custodial prison: John Chrysostom, *Homily on I Corinthians* 9.1 (PG 61:77).

⁷⁷ On this phenomenon see Mommsen (1899) 952, 963; Rivière (1994) 628–632; Krause (1996) 85–86.

⁷⁸ Ammianus Marcellinus, *Roman History* 15.3.7.11 (Loeb 124) and 19.12.7; see on these passages Chauvot (2004) 33–40. Also see Cassiodorus' definition of long-term detention before trial as *longae custodiae poena* in *var.* 9.17.2 (MGH AA 12:282).

of single individuals only. We will now turn to the many faces of the late antique prison beyond preventive custody, and in particular its punitive and coercive aspects, which served both new Christian ideas and persistent popular perceptions of justice.

Punitive imprisonment

While, as we have seen, preventive custody was a well attested legal function of the Roman prison, scholars of Roman legal and social history have hotly debated the penal character of the Roman prison. Many historians argue that, at least in terms of legal norms, a prison penalty did not exist officially. This means that Roman law, in the form of *leges* establishing the jury-courts, plebiscites, magistrates' edicts, imperial pronouncements and jurists' comments on all of these never established confinement in a public *carcer* as a regular penalty based on a legal rule. Where incarceration was pronounced by a judge as a judicial penalty this was in defiance of the legal norm, an abuse that was, when revealed, also officially and sharply rebuked. This view, going back to Theodor Mommsen, rests on a famous passage from the work of the early-third-century jurist Ulpian.⁷⁹ His words in the version edited by Mommsen himself can be translated as follows:

Governors are in the habit of condemning men to be kept in prison or to be kept in chains, but they ought not to do this. Penalties of this type are forbidden. Prison indeed ought to be employed for confining men, not for punishing them (*Solent praesides in carcere continendos damnare aut ut in vinculis contineantur: sed id eos facere non oportet. Nam huiusmodi poenae interdictione sunt: carcer enim ad continendos homines, non ad puniendos haberi debet.*).⁸⁰

Mommsen's view has, however, not gone unchallenged.⁸¹ Attention has been drawn in particular to the circumstance that Ulpian's passage is the only evidence we have that prohibits the prison penalty outright, against a number of legal sources from the early empire that may point at a legal form of a temporary prison penalty for minor crimes committed by lower-rank people (*humiliores*); for example, the failure by a guardian to draw up

⁷⁹ Mommsen (1899) 299, 952, 963. Supporters include: Brasiello (1937); Grand (1940–1941) 58–87; Mayer-Maly (1957) 323–334; Garnsey (1970) 150; Rivière (1994) 579–652; Krause (1996).

⁸⁰ D 48.19.8.9 (Ulpian).

⁸¹ Supporters of the legal character of the prison penalty during the empire include: 'Carcer' [Hitzig], RE 3.2:1578; Solazzi (1956) 345–348; Eisenhut (1972) 268–82; Balzarini (1984) 2865–2890; Lovato (1994); Neri (1998) 422–424; Pavón Torrejón (2003) 193–198.

an inventory of a warden's property. Even though the interpretation of these passages is somewhat hindered by the fact that they speak about *vincula* rather than *carcer*, which could point at a sentence to forced labour, rather than a prison penalty, they have given occasion to review the complex transmission history of Ulpian's passage.⁸² In particular in light of Ulpian's uneven use of grammar, it has been argued that the *aut* after *damnare* may have been a later interpolation or an even later copyist error. If this was the case, the original prohibition may have been not to condemn someone to imprisonment, but to order someone already condemned to imprisonment to be held additionally in chains.⁸³ Furthermore, it has been pointed out that the passage also needs to be seen in its wider context within the Digest.⁸⁴ It is indeed embedded not in a discussion on penalties in general, but in Ulpian's elaboration on the much more specific issue of what was to happen to those who had been sentenced to forced labour (*opus publicum*) and tried to escape. Ulpian's conclusion was that the period of punishment the convict had not served yet when he ran away was to be doubled. The passage in question, which follows this conclusion, may therefore very well emphasise a prohibition to put such convicts into the *carcer* or in (perhaps perpetual) chains as punishment – as such withdrawing them from the workforce – instead of applying the punishment of doubling the length of forced labour. The *carcer* alluded to by Ulpian may be the place where those condemned to forced labour were held at night. Its purpose was to provide shelter, not punishment. The passage therefore separates prison and punishment, but it may be a very particular prison sojourn that was meant here.

The evidence from the Ulpian passage is therefore inconclusive and can be interpreted in a variety of ways, due to a potential double distortion of its content, first through its abridgment for the Digest, and subsequently through its manuscript transmission. Yet, even a positivist reading of Ulpian's passage as a prohibition of the prison penalty would suggest that provincial governors applied it in their sentencing practice. The nearly proverbial status in literary texts ranging from the late republic to late antiquity seems to confirm the widespread use of punitive imprisonment during the empire. The *carcer* regularly appears in catalogues of penalties

⁸² D 48.19.35 (Callistratus); CJ 9.47.6 (214); D 48.19.8.13 (Ulpian); D 26.10.3.16 (Ulpian); D 48.19.33 (Papinianus); on the terminology of *vincula* and *carcer* see also Arbandt, Machéner (1976) 319. For a reading of these passages as referring to a penalty to be passed in a public prison see Balzarini (1984) 2889; Lovato (1994) 114–117; Neri (1998) 424.

⁸³ Messina (1991) 65–208; Lovato (1994) 129–132; Neri (1998) 421–422.

⁸⁴ Lovato (1994) 140–147.

Roman authors cited to make a particular rhetorical point, be this to describe the extensive power of a Roman magistrate, or the extent of human suffering on earth. It is of course likely that such catalogues derived from literary transmission, rather than an accurate observation of sentencing practice at a particular moment in time.⁸⁵ For the early fourth-century senator, legal advocate and astrological writer Firmicus Maternus, however, the threat of punitive imprisonment was real enough to name it frequently to his readers as the outcome of unfortunate stellar constellations.⁸⁶ In his invective against the emperor Galerius, Lactantius described him as a judge who would habitually and indiscriminately resort to the harshest penalties, crucifixion, exposure to wild beasts and burning, while he would never inflict 'lighter' punishment: exile on an island, forced labour and imprisonment (*carceres*).⁸⁷ Augustine contrasted imprisonment in the *carcer* following a public condemnation to incarceration for a reason only known to God, by which he probably meant imprisonment without trial. Jerome mocked his great adversary Rufinus for having claimed that he had suffered imprisonment and exile when he was living in Alexandria in the 370s: surely everyone knew this must be a lie, for prisons (*carceres*) and exile could not have been imposed without the decree of judges (*iudicum sententiis*), of which any record was lacking.⁸⁸ In all of these cases, authors were operating with a notion that a judge could sentence culprits to imprisonment in a public *carcer*.

We cannot, of course, assume that literary authors always accurately described criminal procedure and did not in each of these cases conflate separate procedural stages, in particular the period of preventive imprisonment and the subsequent execution of the judicial sentence. Prolonged imprisonment of defendants before trial and of convicts due to non-execution of the actual sentences was, as we have seen, a pervasive habit of provincial governors. Yet, the pronouncement of imprisonment as a judicial penalty should not surprise us. With the disappearance of the jury-courts since the time of Augustus and the rise of a new criminal procedure, the *cognitio*, magistrates with judicial power, such as provincial governors,

⁸⁵ Cicero, *de oratore*, 1.43.194 (Loeb 134–135); Cicero, *leg.* 3.6 (De Plinval 83–84); Seneca, *de ira* 1.16.2 (Loeb 144); Tertullian, *de anim.* 33.7 (CC 2:834); Augustine, *en. psalm.* 57.17 (CC 39:722); Augustine, *City of God* 21.11 (CSEL 22:539), referencing an unidentified Cicero passage on penalties fixed by *leges*; John Chrysostom, *Homily about the Statues* 5.4 (PG 49:74); Libanius, *or.* 21.8 (Loeb 354).

⁸⁶ Firmicus Maternus, *Mathesis* 3.4.20; 4.8.3; 4.14.2; 4.24.9; 5.5.2; 6.14.2; 8.14.2 (Kroll, Skutsch, Ziegler, vol. 1 120, 208, 224, 276; vol. 2 58, 99, 308–309).

⁸⁷ Lactantius, *Mort. pers.*, 22.2 (SC 39:103): *nulla <poena> penes eum levis, non insulae, non carceres, non metalla, sed ignis, crucis feræ, in illo erant cotidiana et facilia.*

⁸⁸ Augustine, *en. psalm.* 122.10 (CC 40:1822); Jerome, *ap. adv. Ruf.* 2.3 (CC 79:35).

were in fact less bound to statutory punitive measures. As a consequence, a range of new penalties developed, some of which originated in the summary measures of magistrates, based on the power of *coercitio*, to ensure civic peace and to break opposition of unruly members of society. As Cicero reminds us, even under the Republic such measures had always included fines, corporal punishment and temporary detention also for Roman citizens, unless they had appealed against their arrest to the people.⁸⁹ Because the unwieldy and time-consuming criminal procedure of the republic, first before the *iudicium populi* and then the *quaestiones*, had focussed on trials with a political significance, it is likely that most day-to-day disturbances of public order, particularly where they had been committed by slaves, foreigners or lower-rank people, had been dealt with through such swift out-of-court actions.⁹⁰ When under the empire magistrates became regular judges and increasingly dealt with petty misdeeds in the provinces, as well as defendants and plaintiffs from a wide social background, the boundaries between the nature of court sentences and summary measures became blurred. Furthermore, social classifications of Roman citizens into *honestiores* and *humiliores* meant that the latter, even were they were free, were associated with people who had always been subject to demeaning punishment that affected their bodies, including imprisonment, such as slaves and foreigners.⁹¹

It should be pointed out that Mommsen fully recognised this development and, in fact, historians owe to him its first analytical descriptions. Yet, Mommsen believed that sentences which were not based on a legal rule could not be called legal penalties in a juridical sense and, more importantly, he assumed on the basis of Ulpian's passage mentioned above that Roman legal authorities shared this view when they prohibited certain sentencing practice, such as that to imprisonment. Quite apart from the doubts surrounding the Ulpian passage, more recent historians have pointed out, however, that any consideration of the Roman criminal system as a legalistic one, adhering to an absolute norm, would be misleading. Mommsen's firm rejection of the legal foundation of any Roman penalty which was not endorsed by a legal norm should be seen in the context of the idealistic belief in legality and the power of legal codes that

⁸⁹ Cicero, *leg.* 3.6 (De Plinval 83); cf. *Pauli Sententiae* 5.26.1 (FIRA II:408); D 1.2.2.16 (Pomponius); D 47.10.13.2 (Ulpian), dismissing a charge of *iniuria* against the magistrate who arrested someone for not having obeyed an order.

⁹⁰ Robinson (2007) 187; Krause (2004) 68–69.

⁹¹ See on these developments Garnsey (1970) 103, 150; Balzarini (1984) 2865–2890; Lovato (1994) 4; Pavón Torrejón (2003) 187.

characterised the study of Roman law in the late nineteenth century. This understanding of Roman law cemented a contemporary battle for civil rights, particularly in imperial Germany. Yet, such a systematic and rational approach to legal categories may not be appropriate for describing the Roman situation, where a degree of arbitrariness was prevalent at all times.⁹² Furthermore, the judge in the provincial *cognitio* had to deal with a wide range of wrongdoing, which may have gone beyond that defined in any written norms or records of precedent cases, and certainly went beyond the crimes established by the *leges*. It was therefore only natural that judges also developed new and practical penalties. Their relatively free role in ~~being~~ so was in fact recognised and emphasised by the jurists themselves. Men in power were trusted to behave according to the principles of *moderatio*, as Ulpian stated:

These days it is permitted to the judge who is investigating a crime *extra ordinem*, to cast a lighter or a graver sentence, if he so wishes, yet in a way that does not exceed moderation in either direction.⁹³

As we have seen in Chapter 4, however, late Roman emperors tried to return to a system of fixed penalties that bound individual judges. Whether this was successful in practice is a matter of doubt. Even more than in earlier periods, the power of late antique magistrates was frequently presented as arbitrary, and one that could be altered by public opinion, the lobbying of powerful locals, including bishops, and their individual sense of correct behaviour. In fact, Justinian enshrined Ulpian's above statement in his Digest.⁹⁴ Yet, he also incorporated the jurist's statement about the illegality of the prison penalty into his codification. Ulpian's passage in question may even have been interpolated at that moment to make the prohibitive aspect stronger. What this means is that, perhaps, it was during the late Roman empire that the prison penalty was seen as most controversial from the legislators' point of view, which would correspond with the overall tenor of late Roman laws trying to reduce the function of the public

⁹² This 'zeitgeist' also coined the nineteenth-century aphorism *nullum crimen, nulla poena sine lege*, whose Latin wording added to the illusion of the ancient origin of the principle. See Balzarini (1993) 371–395; Lovato (1994) 79–81; Pavón Torrejón (2003) 175.

⁹³ D 48.19.13: *hodie licet ei, qui extra ordinem de crimine cognoscit, quam vult sententiam ferre, vel graviolem vel leviolem, ita tamen ut in utroque moderationem non excedat*. See also D 50.17.155.2 (Paulus); D 48.19.42 (Hermogenianus) on judges' interpretation of statutory penalties. On the freedom of the Roman judge in the *cognitio* see Lovato (1994) 85–90; Neri (1998) 422; Harries (2007) 36–37.

⁹⁴ Krause (1996) 196–198, 333–340. See above Chapter 3 for the encouragement this principle gave to bishops' and other patrons' intercession for those on public trial.

prison to one of preventive custody only.⁹⁵ This may be related to a more legalistic attitude at the level of imperial law production in this period, or to the particularly contentious character of the prison in late antiquity, which we will explore further in Chapter 8.

When judges sentenced individuals to imprisonment, whether legally or illegally, the question remains what the purpose of such sentences was. The evidence suggests that the reasons behind them could vary. The only incident for which late Roman legislation prescribed the prison penalty derives, curiously, from a law by Justinian. In 529, Justinian ordered that anyone who kept a debtor in a private prison for a certain period of time was to be punished by imprisonment in a public prison for the same period of time and would lose their claims on repayment of the debt.⁹⁶ Here imprisonment was a neat talionic penalty, where the prison penalty was tailored exactly to the crime in question, but also, in accordance with late Roman views on the prison penalty described above, was intended as a lesson on the utter impropriety of imprisonment. This very specific function cannot be generalised for all incidents of punitive imprisonment. The so-called *Sententiae of Paul*, a legal handbook usually dated to the early fourth century and hence thought to reflect Diocletian and Constantinian law, suggested that one reason why some offenders would be put into prison was the protection of society and the neutralisation of the offender. The offenders in question were soothsayers, corrupters of public *mores* and exploiters of human credulity, who resisted expulsion from society. Hence, other means of controlling them, and impeding the spread of their unwanted teaching, had to be sought, and the prison penalty (*vincula publica*) – provided that forced labour was not meant here – was named as a possible alternative to exile on an island.⁹⁷

The *Sententiae of Paul*'s distinction between prison and exile as two ways to solve the continuous threat of soothsayers is not, or not only, a reflection of pragmatic considerations, where prison would be chosen, for example, in provinces devoid of islands.⁹⁸ The juxtaposition of prison and exile on an island also appears in the astrological writing of Firmicus Maternus, who explained that 'long-lasting' imprisonment (*diuturna carceris custodia*)

⁹⁵ Lovato (1994) 229–249, who also suggests interpolation of Ulpian's passage either at the time of Justinian or at some point during the fourth or fifth centuries.

⁹⁶ C.J. 9.5.2 (529).

⁹⁷ *Pauli Sententiae* 5.21.1 (FIRA II:406): *Vaticinatores ... civitate expelli placuit, ne humana credulitate publici mores ad spem alicuius rei corrumpantur, vel certe ex eo populares animi turbarentur. Ideoque primum fustibus caesi civitate pelluntur: perseverantes autem in vincula publica coniciuntur aut in insulam deportantur vel certe relegantur.*

⁹⁸ This has been suggested by Neri (1998), but we lack evidence that such considerations happened.

was a similar penalty for lower-rank people (*humiliores*) as exile was for those of higher social status.⁹⁹ What this means is that judges may have chosen imprisonment as a means to address wrongdoing committed by people who, by tradition, were seen as eligible for punishment affecting the body, in particular because it was hoped that such demeaning treatment would deter them from future misbehaviour. As such, prison was on a par with corporal punishment as a measure, as the early third-century jurist Callistratus suggested, of *admonitio* and *castigatio*.¹⁰⁰

Alongside considerations of practicality and 'education' of lower-rank offenders, increasingly in late antiquity considerations inspired by Christian thinking seem to have played a part in the imposition of a prison penalty. In 358, while living an ascetic life at his country estate in Annesi, Basil of Caesarea approached his friend Candidianus, the provincial governor, with the request to put a man, a peasant on his estate, who had burgled his house and abused his female servants, in prison for a short time, as a sufficient punishment and as a guarantee of Basil's 'safety'. Basil clearly expected the governor to teach the man, and whoever was planning to act like him, a lesson.¹⁰¹ This letter is important in three respects. It firstly shows that, in a conversation between two elite men of the mid-fourth century, imprisonment could be discussed as punishment for a lower-rank criminals. It secondly shows, perhaps more importantly, that such imprisonment may have come about through the pressure of victims on certain judges, who hence clearly thought they stood to gain from such outcome. Basil may not have desired the expense and outrage of a public trial, which also potentially, depending on the penalty, would have removed the peasant from his sphere of influence as a landlord. We will return to the role of victims in the imposition of imprisonment below. Finally, it is important to note that, in the case of Basil, the request for imprisonment was presented as an alternative to other, more severe, although unspecified penalties. Basil, even though he was the victim of the wrongdoing, styled his intercession for the accused as Christian patronage.

A source from Ostrogothic Italy indicates, in fact, that at some point during late antiquity the prison penalty acquired a decidedly Christian connotation. After discouraging the immoderate use of the death penalty, which we already discussed briefly in Chapter 4, Cassiodorus wrote in his model letter for the appointment of a Gothic count:

⁹⁹ Firmicus Maternus, *Mathesis* 5.5.2, 4.8.3 (ed. P. Monat (Paris: Les Belles Lettres, 1992) 277, 140).

¹⁰⁰ D 48.19.7 (Callistratus).

¹⁰¹ Basil, *ep.* 3.2 (PG 32:236): ἀλλὰ καὶ τῆς πρὸς τὸ λοιπὸν ἀσφαλείας δέομεθα.

Those driven by the ill-will for minor crimes should be confined by the bonds of chains (*claudantur nexibus catenarum*).¹⁰²

The letter, referring to the work of judges as a 'judgement of health' (*qui iudicat de salute*) was steeped in the Christian language of reform that, as we have seen, also increasingly featured in late Roman laws and from which Cassiodorus certainly took inspiration. The prison penalty was, so Cassiodorus argued, a way to avoid the death penalty, at least for less severe crimes, which he deemed appropriate for a Christian judge. This is what Ambrose of Milan had already suggested to the Christian judge Studius in the fourth century, who had been concerned about how to match his earthly duties and his account to God. Ambrose explained that, where possible, he should use imprisonment as a punishment for less severe offences (*sine gravi severitate*), to avoid any blood shed.¹⁰³ Crucially, Libanius, Ambrose's contemporary, suggested that governors' Christian-inspired reluctance to apply corporal punishment and the death penalty was the reason why many people lingered in prison.¹⁰⁴

In the early sixth century, then, not only advice against the death penalty, but also a campaign for the prison penalty, at least in the case of petty crime committed by lower-rank offenders, had become part of mainstream administrative rhetoric in the post-Roman West. It has a curious echo in a much later law, again from an Italian and a 'Barbarian' context. The Lombard king Liutprand (712–744) ordered in an addition to the seventh-century *Edictum Rothari* that each judge should build a subterranean prison in his *civitas*, to hold thieves in temporary imprisonment of two or three years if they were not able to compensate their victim.¹⁰⁵ After that period he was to be dismissed as 'healed' (*sanum*). It was, Liutprand added, only the lightest form of the penalty for theft. Repeated theft would lead to the physical punishment of shaving, branding and possibly flogging, and, if the thief was still not 'reformed' after this (*si nec sic emendare voluerit*), he was to be sold into slavery. The use of terminology strongly betrays late Roman rhetorical influence and so, perhaps, does the prescription of imprisonment as a light penalty. There was, however, a material aspect to the *emendatio* assigned to the prison penalty in this text, beyond a hope for a change of conduct upon release. Liutprand saw the prison penalty, or the threat thereof, in the case of theft, as a method of coercion

¹⁰² Cassiodorus, *var.* 7.1.3 (MGH AA 12:185): *habes etiam et ferrum nihilominus incruentum. Claudantur nexibus catenarum, quos leuius criminum pulsat invidia. Cunctator esse debet, qui iudicas de salute: nulla sententia potest corrigi, de vita transactum non patitur immutari.*

¹⁰³ Ambrose, *ep.* 50 (25) (CSEL 82:56–59).

¹⁰⁴ Libanius, *or.* 45.27–45.28 (Loeb 184–186).

¹⁰⁵ *Liutprandi leges* 80 (MGH LL 4:115–116).

to make an offender pay financial compensation. This shows its particular usefulness wherever the function of the penalty was considered to be material satisfaction or some other tangible gain of a victim. As we shall now see, also late antique public imprisonment was often made to serve this function, even though contrary to the later Lombard context it was not laid down, or in fact was even prohibited, in legislation.

Coercive imprisonment

Probably even more than for punitive imprisonment following a public sentence, late antique prisons were frequently used for short-term extrajudicial arrests, or the threat of arrests, to put pressure on people to change their habits, to divulge information, to provide financial compensation or to pay private and fiscal debts. A crucial part of a late antique governor's literary characterisation was his power to imprison people without difficulty, particularly in Christian texts which had the ephemeral nature of earthly authority or the inexplicability of God's will as their subject.¹⁰⁶ It is likely that the numerous sections of Christian literature that discuss this phenomenon distort our understanding on how frequent it was. Yet, the late antique laws attempting to restrict prisons' use to detain only criminal defendants suggest that it was fairly wide-spread. Nominally Roman citizens could appeal against such treatment to the emperor, but already under the Republic and early empire it was difficult to enforce this provision, and even more so in late antiquity, where Roman citizenship did not carry much privilege anymore.¹⁰⁷ At least some inhabitants of the empire were aware of their rights, however. In an Egyptian papyrus of the second half of the fifth century one Aurelius Sarapion, who had given a security for debt, complained that he had been put in a public prison and tortured when the creditor was unable to pay. In his petition to the *defensor civitatis* of Hermopolis, he pointed out that such treatment of Roman citizens was illegal.¹⁰⁸ Such provincial views, if they managed to find the ear of the emperor, may have prompted some of the late Roman prison legislation.

¹⁰⁶ Pelagius, *Div.* 6.2 (PLS 1:1386); for similar views see also Ambrose, *In Luc.* 7.155 (CSEL 32.4:351); John Chrysostom, *Homily on Matthew* 76 (77).5 (PG 58:700–702); Augustine, *serm.* 62.8 (PG 38:421); on all: Krause (1996) 196–198.

¹⁰⁷ Krause (1996) 333–340.

¹⁰⁸ Chr. Mitt. 71 (= FIRA III 180). The *defensor* was a lesser judge, who increasing numbers of late Roman cities appointed for the protection against abuse and corruption at the hands of landlords, see Harries (1999) 54. Aurelius may have referred to the *Lex Iulia de vi*; on this see Krause (1996) 8–9 and below Chapter 6.

It is clear that many authorities in the provinces employed coercive imprisonment, or the threat thereof, for their own gain. For example, a law by Valentinian III rebuked imperial officials for their use of prisons to enforce sales, donations and other services in their favour.¹⁰⁹ It is equally clear, however, that overstepping such competences at times helped a magistrate to actually do his job. In the early sixth century, the Nestorian monk Leontius of Byzantium, possibly writing in Constantinople, observed that many judges circumvented the duty of releasing prisoners at Easter, by imprisoning them in their own residence or that of a subordinate official.¹¹⁰ The passage reveals that late antique magistrates may have been anxious about the consequences regular amnesties could create for law and order, and their own public image, and hence preferred to keep prisoners out of reach of the law. Furthermore, as the anonymous author of the early fifth-century Pelagian treatise *On Riches* pointed out, the arbitrary power of officials to imprison easily could equally be exploited by members of the public, for spurious reasons and their own gain.¹¹¹ We have already seen such dynamics at play in the case of Basil of Caesarea's plea to the governor of Cappadocia for imprisonment of a thief mentioned earlier. Libanius also deplored that governors were approached by a growing number of victims about the smallest issues of wrongdoing, which allegedly led to an explosion of imprisonment.¹¹² It is hence worthwhile looking at the phenomenon also from victims' point of view.

As we have seen above, emperors had in particular singled out *stationarii* as illicitly imprisoning people. From a rescript by Diocletian we know indeed that local people frequently called upon soldiers stationed in the provinces to address conflicts at the community level, certainly because usually these were the nearest official authority at hand.¹¹³ Often such demands included requests for arrest of alleged offenders from people of the area. The archive of Abinnaeus, a commander of the cavalry stationed in Dionysias in the Arsinoite nome in Egypt in the first half of the fourth century, is full of petitions of this type.¹¹⁴ Particularly after the mid-fourth century, when the power of the army began to decline in Egypt, requests for arrest were also directed at the local village officials drawn from the curial rank, the *praepositus pagi*, *riparius* or *ekdikos*. Their primary function

¹⁰⁹ NVal 32.1 (451). ¹¹⁰ Leontius of Byzantium, *serm.* 1 (PG 86:1993); see Neri (2004) 250.

¹¹¹ Pelagius, *Div.* 6.2 (PLS 1:1386).

¹¹² Libanius, *or.* 45.3 (Loeb 162); for immoderate wishes of vengeance also see Augustine, *en. psalm.* 54.14 (CC 39:666) and John Chrysostom, *Homily about the Statues* 1.12 (PG 49:32).

¹¹³ CJ 9.2.8 (284–292). See Fuhrmann (2011) 211–216.

¹¹⁴ On Abinnaeus and his duties see van Berchem (1962) 6–12, 13–21 and Turner, E. G. (1962).

was to assist with the collection of taxes, but the populace clearly expected them also to be responsible for law and order and to maintain a prison facility.¹¹⁵ Most common were demands for arrests for *iniuria* (verbal and bodily assault) and theft.¹¹⁶

With reference to the evidence from late antique Egypt, Roger Bagnall has pointed out that at the Egyptian village level justice was often considered a matter of restoration of status and compensation of property, also with a view to re-integrating offenders into the usually close-knit community, rather than of seeking retributive punishment.¹¹⁷ These are expressions of what social anthropologists have called 'quotidian notions of justice', prevalent in particular in societies characterised by the absence of a strong state authority and by legal pluralism.¹¹⁸ What this means is that most demands for the arrest of wrongdoers may have been made as a last resort to coerce them into compensating their victims, similarly to what was envisaged by the much later law of Liutprand mentioned above, rather than in the hope of seeing public punishment executed. While such attitudes cannot be generalised where social offences are concerned, which might well have generated strong feelings of revenge, this function of demanding public imprisonment is particularly notable in the context of theft and debt.¹¹⁹ Where the latter is concerned, numerous Egyptian papyri, but also sources deriving from other parts of the late Roman world, attest creditors' habit of asking officials, in particular the *defensor*, to lock up debtors in their prison, with a view to compelling them or their family to find an affluent sponsor, or to take out a loan.¹²⁰ The pressure was

¹¹⁵ On civic officials in late antique Egypt see Bagnall (1993) 62, 165 and 168–169 on the predominance of petitions to civic officials over military ones after the mid-fourth century. On the decline of military power in Egypt after this period see also Bagnall (1989) 215.

¹¹⁶ For imprisonment demanded for those accused of *iniuria* see e.g. CJ 9.2.8 (284–292); P. Abinn 15 (see Bell (1962) 59–60); P. Herm. 20 (fourth century); P. Abinn. 51–52 (see Bell (1962) 110–112); P. Lips. I 37 (389) (see Bryen (2013) 270); imprisonment on charges for theft: P. Abinn. 42 (see Bell (1962) 96–97); arrest for theft demanded: P. Abinn. 53 (see Bell (1962) 112–113); P. Sakaon 48 (343) (see Bryen (2013) 263–264); P. Cair. Masp. I 67091 (528?); on the evidence from the papyri see Krause (1996) 115–116 and Torallas (2006) 101–110.

¹¹⁷ Bagnall (1993) 168. See also for the earlier imperial period Hobson (1993) 193–219.

¹¹⁸ Blom Hansen, Stepputat (2006) 295–315.

¹¹⁹ Neri (1998) 435–438; Krause (1996) 156. On 'revenge' being a motive for enlisting official judicial help see e.g. P. Abinn. 51–52 (ed. Bell (1962) 110–112). See also Bryen (2013) 128–140 who stresses that many petitioners asked for both punishment and compensation, and the latter may often have been seen as a token for the restoration of honour.

¹²⁰ Stud. Pal. XX 129 (497); P. Oxy XVI 1886 (fifth/sixth centuries); P. Oxy XVI 1883 (504). On private debtors in public prisons see also Ambrose, *nab.* 5.21 (CSEL 32.2.478); Ambrose, *lob.* 10.36–10.37 (CSEL 32.2.537–538); John Chrysostom, *Homily on John* 67 (66).2 (PG 59:372–373); Augustine, *serm.* 22A.1 (CC 41:303); Krause (1996) 161 thinks that arrest was only a last resort, while most creditors insured themselves against insolvency through deposits and mortgages.

twofold, as successful coercion was probably expected both from the painful experience of imprisonment or related torture and from the family's experience of income loss due to the incarceration of a wage earner. Sometimes, however, creditors would also have a wife or children arrested to put pressure on debtors, certainly if they could not lay hand on them physically.¹²¹

Physical coercion of private debtors to compel them or their family to come up with the sums owed was prohibited by law.¹²² It is likely, however, that practices particularly in the Eastern provinces still followed customs of debt bondage, where debtors unable to pay could be assigned to their creditors for a certain period of time, which Hellenistic law, but also archaic Roman law, allowed.¹²³ This may explain the readiness of village or city officials to give in to demands of arrest for debt. We may imagine, however, that networks of power also played a role in the success of such demands. From a mid-fifth-century papyrus we learn of a petition of one Macarios to the *defensor* of Cynopolis to help him against his landlord, who had held him in the city prison (δεσμοκτήριον) for three months, long enough for Macarios to lose his cattle.¹²⁴ The landlord, it turned out, was the brother of one of Cynopolis's town councillors, so clearly had an opportunity to exploit public facilities for his own gains. Macarios now claimed financial compensation and release from his bonds (δεσμῶν), but of course we do not know whether he was successful.

Many papyri confirm the impression we gain from imperial laws that public prisons were also used to coerce fiscal debtors and those charged with the collection of public taxes.¹²⁵ The archive of Dioscorus, a landowner, legal advocate and village administrator from mid-sixth century Aphrodito in the Thebaid, provides a particular colourful insight into such customs.¹²⁶ Most notably, Dioscorus composed a petition on behalf of

villagers from Aphrodito to complain about their confinement and torture during three successive periods of imprisonment, in the prison of Thynis, the prison of Antinoopolis, and finally the prison of Antaiopolis (in the later for at least six months) by the pagarch Menas, the chief tax-collector of the city's territory and a man who also had tried to seize property from Dioscorus himself and arrest his son. As Aphrodito had a special tax status, which allowed the villagers to collect taxes themselves and send them directly to Constantinople, Menas may have considerably overstepped his competences by probably coercing this group of people to transfer the taxes raised to him. Nonetheless, the petition, addressed to the *dux* of the Thebaid, was unsuccessful and the villagers were only released after they had paid up.¹²⁷ As we have seen, imperial law, certainly under Justinian, to some extent allowed the use of public imprisonment in the exaction of taxes, so it might have been hard to convince the *dux* of the aggressive nature of Menas' behaviour.

From the archive of Dioscorus also derive two papyri which describe the public prison respectively as a 'place of chastening' (σωφρονοστήριον) and as a place that aided 'reform' (σωφρονισμός). In the former case, it was officials attached to a pagarch's finance department who used the term in an account describing different tax categories (the so-called Antaiopolis register). The text only survives in fragmentary form at this point, which makes it difficult to assess the circumstances under which it used the term σωφρονοστήριον, but its formulaic nature supports the conclusion that the public prison, perhaps particularly where it held those liable for tax, was habitually and officially referred to by a label that foregrounded its 'educative' function.¹²⁸ The second papyrus is a petition from the villagers of Aphrodito to a high official attached to the *dux* of the Thebaid to release a group of people held in the public prison, probably at Antaiopolis, for tax liabilities, which may be the same as those in the incident described above. The petitioners pointed at the inmates' 'reform', which probably meant that they had agreed to pay.¹²⁹ Similar to late Roman legal justifications of punishment, the two papyri framed the imposition of a painful experience, in this case imprisonment, as a process of learning and healing. Strikingly,

¹²¹ See, e.g., PSI VII 824 (sixth century): An unidentified official orders to a woman kept in prison until her husband's debts are repaid. On women in prison for debt, often that of their parents or husbands, in late antique Egypt see Beaucamp, vol. 2 (1992) 74–77. For further evidence from outside Egypt see John Chrysostom, *Homily on Romans* 10.2 (PG 60:477).

¹²² On prohibition of physical coercion to repay private debt: CJ 4.10.9 (294); CTh 11.7.5 (345); CJ 7.71.8 pr (531/2); NJust 135 (556). Any dispute about debt had to go through the courts, with a view to gain a sentence of *cessio bonorum* to the creditor: see Kaser, vol. 2 (1971 and 1975) 329–330.

¹²³ See Rivière (1994) 648; Lintott (1999) 18–25; Pavón Torrejón (2003) 211–212. For debt bondage in Hellenistic Greece and Egypt see Lewald (1910).

¹²⁴ P.Oxy VI 902 (c. 464); see Feissel, Gascou (2004) 174–175.

¹²⁵ P. Abinn. 29 (ed. Bell (1962) 78–79); P.Oxy XLVI 3302 (300/1); P.Oxy XVII 2154 (fourth century); P.Oxy XLVIII 3409 (fourth century); P.Oxy XVI 1835 (fifth to sixth century); P.Flor III 296 (sixth century). Imprisonment for tax debt is also mentioned in Libanius, *ep.* 1318.1 (364) (ed. R. Foerster (Leipzig: Teubner, 1921) 377); Ammianus Marcellinus, *Roman History* 30.5.6 (Loeb 338); John Chrysostom, *Homily on Matthew* 66 (67).4 (PG 58:630–631).

¹²⁶ The literature on Dioscorus is vast; see in particular MacCoull (1988).

¹²⁷ P.Cair.Masp. I 67002 (567). On the pagarch in late antique Egypt see Liebeschuetz (1974) 163–168; Mazza (1995) 169–242. On Dioscorus' petition see also Feissel, Gascou (2004) 145–146, 170 and Keenan (2008) who argues perceptively that Dioscorus was drawing on literary discourses of suffering to make his text more persuasive, including common images of imprisonment.

¹²⁸ P. Cair. Masp I 67057 (c. 540); on this text see also Zuckerman (2004) 54–56.

¹²⁹ P. Cair. Masp I 67020 (566–570/573); see Feissel, Gascou (2004) 153–154; on both these papyri see also Torallas Tovar (2006) 107 n. 20.

both those who imposed and those who suffered the experience used the same rhetoric, which must in consequence have been fairly conventional.

We find this kind of coercive activity not only at the level of local communities, but also as a practice that evolved from the imperial court. Julian, for example, imprisoned the town councillors in Antioch who had boycotted his fixed grain price for a day in the autumn of 362. Although Libanius tried hard to make the emperor's behaviour look almost like a benefit – he could have chosen a far harsher measure for his unruly subjects and, in any case, they hardly spent any time in prison – he would not hide the emperor's aim to use this kind of treatment to make the town councillors tow the line.¹³⁰ It is particularly and increasingly in the context of inner-Christian conflict that we encounter the use of the prison as an extra-judicial method to compel a change of behaviour at a high governmental level. For instance, in 386, during holy week, Valentinian II and his Homoian mother Justina demanded from the Catholic bishop Ambrose of Milan the surrender of a number of churches, including the extra-mural basilica Portiana and Ambrose's very cathedral in the city. Ambrose refused, supported by large sections of the population who staged a sit-in at the basilica Portiana, assaulting a Homoian priest on the way there. As a consequence, the court imposed a corporate fine of two-hundred pounds of gold on the corporation of merchants (*corpus negotiatorum*) to be paid within three days, presumably because the assailants had been members of the *corpus*. A number of merchants were imprisoned, to coerce the others to come up with the sum. Ambrose lamented in a letter to his sister that the innocent had to suffer imprisonment at a time when tax debtors were released, a reference to the general imperial amnesties at Easter, which benefitted all prison inmates. Ambrose here conflated imprisonment to coerce debt and to coerce the payment of a fine for the sake of rhetoric. Eventually, the traders agreed to pay the money 'if they could only keep their faith'.¹³¹ Although the court had not demanded a profession of belief – the fine was for assault, not for religious behaviour – the merchants seem to have understood that they were also coerced to denounce Ambrose.

The conflict surrounding John Chrysostom's stint as archbishop of Constantinople provides evidence for a more formal use of the prison, and the conditions prison inmates were exposed to, as a method of religious coercion. After John had been deposed and exiled to Cucusus in Armenia

¹³⁰ Libanius, *or.* 18.196 (Loeb 418–419).

¹³¹ Ambrose, *ep.* 76.6 (CSEL 82.3:111): *dummodo servarent fidem*; on the incident see also McLynn (1994) 196–208. The *corpus* was later compensated.

in 404, the citizens of Constantinople faithful to John were sought out on order of Arcadius, thrown into prison and compelled to renounce him, most probably in a public ceremony.¹³² When John's successor Atticus tried to force the Eastern bishops and their clerics into communion with himself and John's enemies, Theophilus of Alexandria and Porphyry of Antioch, many refused and were exiled by imperial edict. The monk Stephen, however, Palladius of Helenopolis told in his *Life of John Chrysostom*, was put into prison and promised to be released if he would change his mind. Despite the torture of flogging, he persevered and was eventually also exiled. It is not quite clear why (or whether) this monk received a different treatment than the clerics, but it may have been due to his lower social rank. As we shall see in Chapter 7, exile was another way to coerce certain religious behaviour.¹³³

Many more anecdotes, particularly from the fifth and sixth centuries, referred to this use of public prisons.¹³⁴ Most of these stories have, of course, the illegal aspect of coercive imprisonment at heart, to associate their heroes with persecution and martyrdom. Yet, depending on the perspective, imprisonment for religious coercion could also be presented in a positive way. In the mid-sixth-century *Life of Symeon Stylites*, the *magister militum* Amantius, having been sent to eradicate paganism, manichaeism and any kind of sorcery in Antioch, probably in the context of persecution of pagans under Justinian in the 550s, was described as throwing many dissidents into the public prison; most, however, he let go free, the author of the *Life* reported with satisfaction, after they had promised to repent.¹³⁵ This account perhaps shows that over time such cases of imprisonment for religious coercion became part of a routine governmental strategy, to the extent that they made for a plausible literary tale that highlighted the salutary nature of orthodox Christianity and its methods of bringing people into line. What such anecdotes show is that also high magistrates, just like village elders and tax collectors at other levels of society, employed imprisonment to enforce a change of habit, if not of mind, as a convenient way to restore order in a community and to cement

¹³² Sozomen, *Ecclesiastical History* 8.23 (GCS 50:379–381).

¹³³ Palladius, *Life of John* 20 (SC 341:205).

¹³⁴ See e.g. Theophanes, AM 5980 (De Boor 132) on the two Italian bishops and papal ambassadors Vitalis of Truentum and Misenus of Cumae, who were thrown into prison at Abydos *en route* to Constantinople in 483, in order to force them into communion with the patriarch Acacius; also Theophanes, AM 6005 (de Boor 158) on the imprisonment of John of Jerusalem in 516 to 'persuade' him into communion with Severus of Antioch.

¹³⁵ *Life of Symeon Stylites* 164 (ed. P. van de Ven (Brussels: Société des Bollandistes, 1962), 146). On Amantius see PLRE III, Amantius 2, 52–53. See also below Chapter 9.

authority. Such in theory often illegal, but in practice widespread, accepted and often court-evolved uses of prisons considerably complicated the imperial aim to narrow the function of prison to one of just preventive custody. In addition, they complicated the distinction between 'public' and 'private' imprisonment, to which we will turn in the next chapter.

CHAPTER 6

Private power and punitive confinement

In an attempt to define correct legal terminology to describe imprisonment, the early third-century jurist Venuleius Saturninus argued that the term 'chains' (*vincula*) could be used to denote both private and public forms of restraint. *Custodia*, he continued, was to be used, however, only with reference to publicly authorised containment.¹ This advice was certainly not heeded as even in the legal literature instances of confinement in private households, for example that of slaves, were often called *custodia*.² Nonetheless, with this statement Venuleius tried to make sense of the fact that there were other institutions apart from the state that had the power to address wrongdoing. Since his reasoning was included in Justinian's Digest we must assume that it still mattered in the sixth century.

Non-state institutions with the power to punish concerned originally and predominantly the *paterfamilias*' legal control over children, slaves and freedmen, which ruled real social relations even in the Roman provinces as evidence from late antique Egypt shows.³ A new category of people that came under the authority of elite Roman property owners in late antiquity were the tenant farmers who worked their estates, alongside slaves and wage labourers, which our sources call *coloni*. The origin of this dependency, its nature and its extent are quite obscure, a point to which I will return below. During the course of the late antique period, further non-state punitive authorities started to be recognised, such as, as we have seen in Chapter 3, that of the Christian bishop, but also that of monastic leaders. I subsume these under a label 'private' that, following Kate Cooper, defines institutions, practices and spaces that were not funded by public resources (but which were not, as the modern usage of the term would suggest, shielded from the public gaze or indeed out of the public interest).⁴

¹ D 50.16.224 (Venuleius Saturninus). ² See e.g. CTh 9.12.1 (319). ³ Arjava (1998) 147–165.

⁴ On Roman definitions of 'public' and 'private' see Cooper (2007a) 17–24.