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Excerpt

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## *Introduction*

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

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

<sup>2</sup> For an overview of twentieth-century sociological assessment of the ‘birth of the prison’ see Garland, D. (1990), in particular Chapters 2 and 6. On Mommsen see Rebenich (2002).

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

### Approaches to prison and punishment

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

<sup>3</sup> See e.g. Brasiello (1937) 367; Garnsey (1970) 148–149; Robinson (1995), 6, 13, 103; Bauman (1996) 30, 170 fn. 39.

<sup>4</sup> Lovato (1994); Krause (1996). On Lovato’s position see also below Chapter 5 and Rivière (1994) 579–652, who again rejects the notion of the punitive prison sentence.

<sup>5</sup> Eisenhut (1972) 268–282.

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

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

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

<sup>6</sup> See in particular Neri (1998); Pavón Torrejón (2003); and two conference proceedings Bertrand-Dagenbach (1999a) and Bertrand-Dagenbach (2004a).

<sup>7</sup> Zaibert (2006) 29–31. <sup>8</sup> De Robertis (1948) 169–196; De Robertis (1954).

<sup>9</sup> Sitizia (1990) 211; Bonini (1993) 401; also see Humbert (1991) 137.

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

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

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

<sup>12</sup> Garnsey (1968) 141–162; Robinson (2007) 130–157.

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

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

<sup>15</sup> Gaddis (2005) 133–149.

**Approaches to punishment and penance: monastic confinement**

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

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

<sup>16</sup> Stini (2011); on forced labour see Millar (1984) 128–147; Gustafson (1994) 421–433.

<sup>17</sup> Washburn (2007), now published as Washburn (2012). References to Washburn's study throughout this book usually relate to Washburn (2007).

<sup>18</sup> Sprigade (1964); Laske (1973); Laske (1978) 321–330.

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

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

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

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

<sup>20</sup> As noted by Noethlichs (1994) 18–40, who first collected the corresponding evidence.

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

<sup>22</sup> NJust 98.2.2 (539): κοινὸς ἅπασιν πατήρ. <sup>23</sup> Pazdernik (2005) 186.

<sup>24</sup> On the ‘modern’ aspects of Justinian’s vision of government see Leppin (2011) 171.

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

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

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

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

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

<sup>27</sup> For this development see Diem (2005). <sup>28</sup> Millar (1984); Cooper (2011) 328–329.

<sup>29</sup> Frazee (1982) 263–279.

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

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

<sup>30</sup> Millar (1984) 144–145.

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

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

<sup>33</sup> The quote is from Uhalde (2007) 106.



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

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

### **Prison, imprisonment, confinement and reform: concepts and definitions**

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

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

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

<sup>35</sup> Geltner (2008a) 89–108. <sup>36</sup> Markus (1990) 197; Cameron (1995) 147–161.

<sup>37</sup> Rapp (2007) 121–148.

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

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

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

<sup>38</sup> Sometimes I have also seen it as appropriate to translate the terms *vincula* and δεσμοί as ‘prison’; for discussion see further Chapters 5 and 6.

<sup>39</sup> Ley (2001). <sup>40</sup> See e.g. Guillou (1983) 79–86; Wood (1994) 195.

<sup>41</sup> De Jong (2001) 292–293.