CHAPTER 10
Monastic confinement and imperial justice

During the reign of Justinian, the penalty of confinement in a monastery was introduced into public law in a number of the emperor's so-called Novels, issued between 542 and 556. These laws dealt with a wide range of issues. In 546, the emperor introduced lifelong monastic confinement, to be spent in a monastery outside his former diocese, for any bishop who had been deposed and exiled but was unwilling to give up his see or to remain at his place of banishment. In the same year and the same legal promulgation, Novel 123, Justinian prescribed monastic confinement for a number of offences of subordinate clergy. Among these were any clerics' attendance of public games and gambling, clerics' perjury in civil disputes (although not in criminal processes) and the abduction of deaconesses, a clerical office open to women. In accordance with the time-honoured principle that abducted women were complicit in the crime, a deaconess was to be punished with permanent retirement to a monastery, while the former two offences by male clerics merited only a three-year-long residence. In the previous year, Justinian had ordered that clerical stewards who had sold church property to heretics, Jews or Samaritans be excommunicated and sent to a monastery for a year.

While the emperor legislated on the penalty of monastic confinement to address problems of church unity and church discipline, he also, in addition, introduced it in the context of marital offences. In 542, Justinian ordered a wife who had sent notice of divorce to her husband without sufficient reason (henceforth called 'unilateral divorce') to a monastery for the rest of her life. The monastery was also to receive part of her property. Six years later, he extended the same penalty to husbands and eventually, in 556, also to couples who had divorced by mutual consent, unless they decided to reunite. In the same law of 556, Justinian also stipulated that a woman convicted of adultery receive 'customary punishment', perhaps referring to a fine to the equivalent of a third of the dowry paid to the husband, and in addition be sent to a monastery. Yet, the adulteress' stay in the monastery could be temporary as her husband could take her back after two years, if he so wished. If he did not, the monastery was to receive part of the woman's property according to the same ratios established in the law on unilateral divorce. In the case of adultery, Justinian explicitly stated that the details on the punishment in his law followed those laid down by Constantine, which had been a form of exile, deportatio with loss of citizenship, or at least Justinian interpreted it in this way. It is reasonable to assume that Justinian also followed Constantine's statutory penalty (relegatio with loss of property) in his divorce law. Both laws, hence, extended a traditional penalty of exile to forced residence in a monastery.

Justinian's legislation established a legal penalty of educative confinement for the first time in Roman law, both in the spiritual sense, for individual moral improvement, and in the social sense, in the case of temporary stays in the monastery that included release back into society. At that point, the traditional concept of non-lethal, neutralising and reformative punishment in Roman legal thought described in the first part of this study, entertained in imperial paternalistic discourse since classical times and enhanced by the concept of the Christian emperor as a guarantor of salvation, met with an institution that at least in theory offered an infrastructure to realise such expectations also for elite offenders and in the case of serious crime. Yet, the penalty was only introduced for a small number of crimes and criminals, whose variety at first sight is bewildering for the historian in search for a coherent strategy behind

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1 The following chapter partly draws on Hillner (2007), although it considerably develops the argument advanced in this article through a study of the social contexts of the public penalty of monastic confinement.

2 NJust 123.11.2.
3 NJust 121.10.1; NJust 123.10 (offering to bishops, priests and deacons); NJust 123.30 and 123.40. On the late antique office of deaconesses see Elin (1994) 137–185. On abduction (naprota) as a legal crime see Evans Grubbs (1995) 184–185; Evans Grubbs (2000). Roman law did not make a distinction between abduction against the woman's will (with, possibly, rape) and abduction with the woman's consent.

4 NJust 11.11.4. The stewards in question were the so-called dekamnoses, which the council of Chalcedon in 451 had prescribed each bishop's church to employ. The akonemos was to be selected from the clergy of the bishop's church: Chalcedon (451) can. 16 (ACO 2.2.2140).

5 NJust 127.4; NJust 127.6 (548); NJust 127.11. On Justinian's divorce law see Noonan (1968) 41–96.

6 NJust 124.10. The law ordered simply peinaste: Goria (1974) 74 suspects it prescribed corporal punishment, but it is more reasonable to conclude that the fine also mentioned in NJust 127.8 as punishment for adultery was meant.

7 See above Chapter 7.

8 Noonan (1994) 341 also note Mommsen (1899) 973–975 on this particular law and its connection with exile.
Justinian’s actions. What we have to bear in mind, however, is that, as we have alluded to in the Introduction, Justinian’s laws on monastic exile, just as in most late Roman laws, were prompted by real-life scenarios and expectations brought to the emperor’s attention on a piecemeal basis, even though he responded with a characteristically programmatic attitude exceeding that of previous emperors. As we shall see in this chapter, Justinian did not create the penalty of monastic confinement but drew on previous uses of this type of punishment, including ecclesiastical uses as described in the previous chapter, which explains the diversity of situations in which it was introduced, from doctrinal conflict at the top of the Church to conflicts in the domestic sphere. At the same time, however, it can be argued that Justinian’s choice to turn monastic confinement into a statutory penalty was inspired by his belief that ecclesiastical jurisdiction, penance and the monastic institution had a role to play in ordering the Christian empire.

Monastic confinement of banished clerics

Justinian legislated on monastic confinement of banished bishops, who were perceived as troublesome, because, in effect, monasteries had been used for this purpose for decades during the religious controversies of the fifth and early sixth centuries. The very origins of this government measure can be connected to the increase in stable monastic communities over the course of the fifth century and the monastic background particularly of many Eastern bishops involved in theological dispute. Many depose and banished bishops in fact sought out friendly monasteries as places to reside in, not only because they allowed a life of religious orthodoxy, but also because they provided a social network, material sustenance and safety from state interference. For example, Timothy of Alexandria (nicknamed ‘Salophakius’) retreated to his former monastery of Canopus near Alexandria, which shared his loyalties to the teachings of the Council of Chalcedon, after the usurper Basiliscus had re-installed his Miaphysite rival Timothy Aelurus in 476. On occasion, such monastic retreats happened to escape imperial arrest. After his deposition in 518 and subsequent banishment by Justinian’s uncle and predecessor Justin, the Miaphysite leader Severus of Antioch fled to the monastery of Enat

outside Alexandria, a city that, as we have seen in Chapter 7, became a focal point for Miaphysite refugees during this time, causing local state authorities much headache. As we have also observed in Chapter 8, monasteries came to be seen as sacred spaces over the course of the fifth and early sixth centuries, strictly divided from the outside world by inviolable boundaries, which may have significantly aided their perceptions as places of refuge from public justice, even though, unlike churches, this was not yet acknowledged by law.

Often, however, monastic retreats of banished church leaders were endorsed by the emperor as a gesture of magnanimity. In 431 Theodosius II explicitly allowed Nestorius of Constantinople to live in his former monastery outside Antioch after his deposition at the Council of Ephesus. He did the same to the archimandrite Eutyches, condemned as a heretic at Chalcedon, but permitted (at first) to retire to his own monastery, and to Theodoret of Cyrus who seems to have returned by his own request to his old monastery near Apamea after having been deposed at the Council of Ephesus in 449. Allowing such men to pass the time of their banishment at their former monasteries or in a friendly community was perceived as similar to house arrest, to ensure a life in relative comfort of the banished, which also, conveniently, relieved the emperor from providing for their sustenance. It also simultaneously upheld an image of imperial clemency and the heretic’s removal from society. At times, emperors may have come to subsequently ratify a case of sanctuary as a penalty of exile, remotely guarding, as it were, a refugee to a monastery. For example, Peter the Fuller, the Miaphysite bishop of Antioch, whom Leo had banished to Oasis in 471 for having forcibly expelled his predecessor Martyrius, seems to have obtained subsequent permission from the emperor to instead reside at the Monastery of the Acoemetae (‘Sleepless Monks’, so called for their incessant prayer), whose motherhouse was on

*On Severus’ stay at Enatmon, where he also met other equally banished bishops see Wisse (2006) 247-248. For an incident concerning a lay aristocrat fleeing to a monastery see Procopius, Secret History 1.29 (Loeb 40).
*See above Chapter 8 and on monasteries’ late antique beginnings as places of immunity see Rosenwein (1999) 41. On hospitality as a principle of Christian monasticism see Hilbremer, Genoa, Wehr (1972) 115. A fundamental text was Life of Antony 17 (PG 16:869B); see also Rule of Benedict 5 (SC 18:680-687), which claimed that hospitality was an original part of monasticism, and served for the perfection of monks. On church asylum and its connection with exile in late antiquity see above Chapter 7.
*Eutyches: Evagrius, Ecclesiastical History 1.7 (SC 542:14-146); Leo, ep. 84 (ACO 2:444); Theodoret: Theodoret, ep. 199 (SC 21:80), which articulates the request and ep. 146 (SC 11:72-200), which presents him in the monastery in 431.
the southern side of the Bosporus outside Constantinople. In another version of this story, however, reported by the early ninth-century chronicler Theophanes, Peter 'hid' in the monastery to avoid his unpleasant place of banishment. The Acoemene may have been Peter’s original community, which could explain why the monks, renowned for their fierce endorsement of Chalcedon, welcomed him, a doctrinal rival. They also had a strong commitment to aid refugees from public justice. Lay people took advantage of this opportunity as well. In 476, Leontia, the wife of the usurper Marcian, hid in the monastery of the Acoemene, which induced the emperor Zeno to treat her like an exile and confiscate her property. It is therefore possible that some incidents, which for the sake of dramatisation of an exile’s story later on became described as ‘banishment’ to a monastery, began as sanctuary offered by a monastic community, similar to the incidents of forced clerical ordination described in Chapter 7.

Alongside such retrospective regulations of individual exiles’ behaviour, however, monasteries were also explicitly chosen by state authorities, with encouragement and collaboration by sympathetic bishops and monastic leaders, as institutions that could assist in monitoring and manipulating deposed clerics and unruly ascetics seen as in need of control. We have already observed such motivations in the preceding chapter in the case of Pelagius of Rome, who sought to rally state authorities behind his attempts to confine a schismatic bishop in a monastery, conveniently located on an island. Such lobbying had a long tradition and at times met with more success. For instance, in the wake of the Council of Chalcedon and emperor Marcian’s quest to submit the Eastern Church to unanimous acceptance of its decisions, Theodosius of Jerusalem, who sternly resisted submission to the council, was arrested at Antioch and sent to the Chalcidian monastery of Dios in Constantinople. According to his biographer, John Rufus (a Miaphysite bishop of Maiouma in Palestine in the early sixth century), this happened on request by the monastic abbot who promised to win Theodosius over to his faith. John Rufus’ story is an idealising account of Theodosius’ suffering, but this does not exclude the possibility that he described the emperor’s and the abbot’s motivations accurately. In 555, in a similar vein, Marcian removed two influential monks, Carousus and Dorotheus, supporters of the condemned archimandrite Eutyches, from their monasteries at Constantinople to monasteries in support of Chalcedon, to terminate their unremitting lobbying for Eutyches in the capital, as noted with satisfaction by Leo of Rome. Leo may in fact have petitioned the emperor to this effect.

Under Justinian, episodes of the infliction of monastic confinement to coerce correct religious behaviour intensified and also became more proactively pursued by the emperor himself. Among the prominent individuals who suffered such treatment were the senior clerics who refused to subscribe to the condemnation of the Three Chapters, which they saw as undermining the principles of Chalcedon. These included Pelagius, at this point still a Roman deacon, held ‘in exile’ at various monasteries at Constantinople after the Council of Constantinople in 555, who eventually gave in, which paved his way to becoming bishop of Rome in 556. Remarkably, this experience did not deter Pelagius from suggesting monastic confinement for a religious opponent when Bishop himself, which attests to the general consensus among ecclesiastical and public authorities about the social and spiritual benefits of such measures in the sixth century. Another monastic exile at Constantinople in the early 550s, Primus of Hadrumentum also recanted his opposition to Justinian’s policies and returned not only to his see, but to the primacy of Byzacena. For this volte-de-face and promotion he was heavily rebuked by his fellow African exile Victor of Tunnuna, who had already spent a period of banishment in 554 at, among other places, the monastery of Mandracium in Carthage, probably pronounced by the Praetorian Prefect of Africa or the governor of Africa proconsularis, after rejecting Justinian’s edict condemning the Three Chapters. In 555, Victor was to start, together with Theodore of Cebarsus, another exile odyssey, which took them first to Alexandria. Initially they were held at the career of the Praetorium in Alexandria and then at the castellum Diocletiani, but were eventually allowed to reside (like Timothy Salophakiolus a few decades earlier) at the monastery called Metanoia at Canopus. This was a community famous for its support of...
Chalcedon and hence likely to be sympathetic to Victor’s views. In any case, stay at their monastery was certainly more comfortable and dignified than Victor and Theodore’s previous places of confinement. It may hence be possible that the African bishops’ transfer to the monastery was the result of negotiations between the monks and the civil authorities (or military authorities if the castellum Diocletianu refers to a military fort). At Canopus, the monastery had probably inherited, at least in cultural perception, the privilege to grant asylum from the ancient pagan sanctuary, on which territory it had been erected in 392. Nonetheless, this did not prevent Victor and Theodore from being moved eventually, in 565, to a series of monasteries in Constantinople.55 Further African bishops were interned in the city’s monasteries during this time, and some, who had previously been banished to Egypt were also transferred closer to Constantinople, and possibly to monasteries. The frequency at which this happened suggests that the emperor strategically hoped to be able to influence their views in this way.56

While Justinian hence had prohibited the confinement of troublesome exiles in 529 in any kind of φυλάκη, as we have seen in Chapter 7, he not only afterwards ordered such confinement himself on a grand scale, but also officially prescribed it in 546 in the form of monastic exile. While it is unclear whether the emperor himself drew a connection between prohibited forms of confinement, which had included fortress banishment, and confinement in a monastery, affected exiles certainly may have done as we shall see. For the emperor, however, the benefits of monastic confinement were unambiguous. It provided scope for control of movement and religious coercion, but also helped to maintain an imperial image of clemency and Christian virtue. The banishment of the patriarch of Constantinople Eutychius, who refused to accept the ageing Justinian’s sphartaraocs or imperial edict in 565 (supporting the view of Julian of Halicarnassus that Jesus’ body had been incorruptible from conception), tells a tale of such alternating expressions of coercion and clemency through the medium of monastic exile. Eutychius was first sent to the (otherwise unknown) monastery of Choracudis in Constantinople, where he seems to have suffered some abuse. Later he was moved to the more lenient monastery of Osias near Chalcedon. As a result, he was able to refuse Justinian’s summons to court, which suggests that the emperor respected the monastery’s power of protection.

Once he was formally deposed, Eutychius was banished to the island of Principus, where he was held under military guard, possibly at the local copper quarries, and finally was allowed to reside in his original monastery at Anasia in Pontus.57 This was a classic carrot-and-stick strategy employed by the emperor to make Eutychius toe the line, which characteristically ended in a magnanimous order to, essentially, retire home to monastic penance, conveniently located at the margins of the empire.58

The appeal religious dissidents’ monastic exile had for Justinian is shown most succinctly by the events ensuing after the synod held at Constantinople in 536. On instigation of Agapitus of Rome, who was visiting the imperial city, the synod had deposed the bishop Anthimus of Constantinople, of Miaphysite leanings, who was duly banished by Justinian, together with other Miaphysite leaders, including Severus of Antioch and Peter of Apamea (who once again returned to Egypt). Yet, rather than being expelled from the city, Anthimus was subsequently hosted by the imperial court in the so-called palace of Hormisdas, which adjoined the Great Palace.59 In the following years, the palace was turned into a monastery for up to 500 Miaphysite clerics and monks, many of whom came to escape public prosecution. Theodosius of Alexandria and John of Hephastopolis, who at first had been sent to a fortress in Thrace as we have seen in Chapter 7, later were also transferred to the palace of Hormisdas, and eventually were allowed to live in the suburb of Sykai, which housed a number of Miaphysite monasteries founded in this period on imperial land.60 John of Ephesus, who came to reside at the palace of Hormisdas himself for a period of time after 542, described the situation squarely as a result of Theodora’s patronage and her Miaphysite sympathies. Yet, John also made it clear that Justinian supported the initiative, curiously offering asylum from his own jurisdiction. At the same time, the installation of a community of Miaphysite clerics or monks in the imperial palace was not only meant for protection, but, since the banished were held on the emperor’s own territory, was an ingenious method to control movement and curtail the Miaphysite leaders’ activities.61

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54 On the monastery’s Chalcedonian credentials, perhaps not as strong in the sixth century as before, and its rights of immunity (mentioned in ACO 2.1217) see Gasco (1995) 1608–1612.
55 Victor of Tunnana, Chronica 555.1, 556.2, 565 (MGH AA II.2:204, 205).
56 See above Chapter 7 and Appendix III.
57 Life of the Patriarch Eutychian 58, 40 (PG 86:2317–2320, 2321); Theophanes, AM 6057 (de Boor 1940).
58 On Choracudis see Justin (1969) 541.
59 Eutychius was later recalled under Justinian’s successor, Justin II.
61 John of Ephesus, Life of Zaur (PO 17:27); Life of John of Hephastopolis (PO 18:337); Victor of Tunnana, Chronica 540 (MGH AA II.2:2199). On both the monastery in the palace of Hormisdas and the monasteries at Sykai see Huttel (2007) 144–145.
62 See Ashbrook Harvey (1990) 82: she calls it a ‘house prison’; for analysis of the emperor’s motivations see also Evans (2002) xlii–xliii 74.
Prison and penance

Public law, monastic confinement, and the social benefits of penance

While Justinian’s law on monastic exile of banished bishops can be directly connected to the emperor’s and his predecessors’ pursuit of Christian unity in doctrine, his laws that introduced monastic confinement for cases of inappropriate clerical conduct and marital offences, in turn, reflect the emperor’s keen interest in two issues integral, to his mind, to Christian order on earth, the daily moral integrity of the clergy and the chastity of lay marriage. The emperor here, again, may have been responding to and capitalising on already existing judicial practices, particularly in the case of misbehaving clerics, but he gave the practice a distinctively universalising aspect that connected it to a contemporary understanding of both the spiritual and the social benefits of penance.

Judging from the introduction of monastic confinement for a rather random selection of clerical misconduct, Justinian’s transformation of wayward clerics’ monastic confinement into a public penalty may have partly arisen in order to address concrete cases of confusion about public and ecclesiastical competences in the case of church order. Some of these offences were of a type for which a charge at a public court could be brought and on which previous emperors had already legislated. For example, both Leo in 470, and Anastasius in 511, had prohibited the sale of church lands to heretics and imposed fines on any stewards undertakings such negotiations.40 Also clerics committing perjury in civil disputes were to be submitted to public prosecution in earlier imperial law.41 Other offences for which Justinian prescribed monastic confinement had traditionally been strictly seen as church business, such as the issue of clerics gambling or attending the public games, which was a topic dear to church council legislation but before Justinian had not been addressed in public law.42 The customary separation prior to Justinian of church affairs and public affairs can best be exemplified by the regulation of the issue of the abduction or seduction of consecrated women, including deaconesses, in previous public law. While earlier imperial laws had ordered harsh punishment for the abductor, a penalty for the woman herself had never been specified, other than loss of her property to either the monastery, in the case of nuns, or the church, in the case of deaconesses.43 Church councils, in turn, frequently prescribed excommunication of lapses consecrated women, to be followed by periods of penance of varying length, including lifelong penance.44 Justinian now also officially equipped public judges to deal with such issues and enforce penance.

This understanding of church business as a state affair concisely reflects Justinian’s wider sense of duty to keep the Church in shape, as part of his care for the empire. As he explained elsewhere, it was the greatest matter of concern to the emperor that clerics’ dignity be preserved, in order to ensure the purity of their prayers to God.45 Public law had to be made fit to shoulder this task. At the same time, however, Justinian also incorporated into public law a penalty customary for clerics tried in ecclesiastical courts, monastic confinement, which anticipated a public judge to involve a bishop in the penal process. What the emperor envisaged, therefore, was cooperation between bishops and public judges when it came to clerical misconduct by aligning penal procedures. Significantly, many of Justinian’s prescriptions of monastic confinement were contained in his Novel 23, a long local promulgation that sought, as the emperor said in its grand opening, to give a comprehensive take on imperial legislation on church business, and in the process endorsed an overlap of public and ecclesiastical criminal procedure, as we have discussed at length in Chapter 3.46

Justinian’s laws that introduced monastic confinement for divorce and adultery, in turn, needs to be seen in the context of the emperor’s and the imperial couple’s support for the institution of Christian marriage, a concern whose intensity was also a subject of contemporary comment, especially by the emperor’s most vocal critic, Procopius.47 In both laws, we can observe a complete reversal of previous legislation on these marital offences, including in Justinian’s own earlier legal promulgations on the issues. In his law on adultery, monastic confinement replaced the death penalty for adultery, which the emperor himself had still referenced as the

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33 CJ 1.3.14 (470); CJ 1.3.15 (511). 42 CT 11.11.10 (586/586); CJ 4.2.12 (586).
44 Council of Elwina (506), c. 79 (Vives 35); Council of Adiabene (456-164) c. 54 (NPNF 2:443-479; Apanate Logomena 41 = Archm. Constitutions 8,479; Funk 776-779); Council of Hippo (399), cc. 2-4 (CC 1.45-172); on sons of clerics. On clerics gambling, Justinian had already legislated in 534, but at this time had ordered only a period of suspension without specifying where it was to be spent. CJ 1.4.34-7 (354).

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40 Laws on abduction of consecrated women before Justinian: CT 1.5.1 (534); C 11.5 (440) = Stran. in, Numa 6.4 (458). Justinian’s earlier laws on raptus of consecrated women: CJ 1.3.11 (538); CJ 1.3.14; CJ 1.5.5 (359); see also Arrian (1996) 99.
41 Councils of Elwina (506) c. 19 (Vives 4); Apanate Logomena 41 = Archm. Constitutions 8,479; Funk 776-779; Council of Hippo (399), cc. 2-4 (CC 1.45-172); on sons of clerics. On clerics gambling, Justinian had already legislated in 534, but at this time had ordered only a period of suspension without specifying where it was to be spent. CJ 1.4.34-7 (354).
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48 Councils of Elwina (506) c. 19 (Vives 4); Apanate Logomena 41 = Archm. Constitutions 8,479; Funk 776-779; Council of Hippo (399), cc. 2-4 (CC 1.45-172); on sons of clerics. On clerics gambling, Justinian had already legislated in 534, but at this time had ordered only a period of suspension without specifying where it was to be spent. CJ 1.4.34-7 (354).
statutory penalty a few years earlier. In the case of divorce, Justinian's introduction of monastic confinement precluded the right of the 'guilty' divorcee to remarry, which, despite the criminalization of unilateral divorce under Constantine, had a long tradition in Eastern Roman divorce law, also during Justinian’s earlier reign. Furthermore, the laws also factored in the reconciliation of husband and wife. In the case of adultery, this was a striking innovation, since hitherto Roman law had stipulated that dissolution of marriage had to follow a conviction for adultery. A husband who did not divorce his wife could have faced a charge of procuring (lenocinium). Now, Justinian explained, husband and wife could get back together 'without fear' of such an accusation and without damage to the marriage, if the husband so wished.

It is in particular in this last provision that we can observe the social context of Justinian’s marriage law. Reconciliation after adultery responded to the Christian rejection of the death penalty and notions of the indissolubility of marriage. Yet, it may also have often been in the interest of a woman's family, either of blood or marriage. Novel 134 was explicitly concerned with ordering provincial administration, including criminal jurisdiction of provincial governors. Already since the time of Constantine the right to bring an accusation for adultery had been restricted to husbands in the first instance and a woman'sagnate relatives (her paterfamilias and his other descendants). This allowed a woman's family, in practice, to settle a case of sexual misbehaviour at home or through mediation, which often, in a provincial context, may have been performed by the local bishop, as we have discussed in Chapter 3. Constantine's legislation probably responded to the long-standing resistance of families to bring their most intimate affairs to court, and the same may apply to Justinian’s. Justinian’s interest in strengthening the role of families, and in particular husbands, in the redress of female deviance is also reflected elsewhere in his legislation. For example, contrary to earlier legislation, he permitted an aggrieved husband to kill his wife's lover (but not his wife) even on suspicion if he found the two in incriminating circumstances and had given warning three times to the alleged adulterer.

In Novel 134, Justinian even integrated the husband into public punitive processes, should he wish to bring a public accusation. He conferred on him the power to either take his wife back after a period of two years, which also may have been designed to allow for an eventual pregnancy and the baby's weaning, or to consign her to the monastery permanently. In either case, his family honour and his Christian conduct were safeguarded through this spiritually enhanced domestic seclusion. In the previous chapter we have seen a bishop, Pelagius of Rome, suggesting a similar course of action in a case of adultery brought to his attention. While this case postdates Justinian’s adultery law by two years, it nonetheless provides an example of the kind of collaboration between bishops and husbands that may have prompted the emperor’s legislation.

Even where reconciliation between husband and wife did not happen, monastic confinement of adulteresses and divorcées provided a further social benefit beyond the preservation of family honour. According to Justinian’s law, if a husband did not take an adulterous wife back, her monastic confinement opened up the possibility for him to divorce her, to keep the dowry and pre-nuptial donation and to remarry, for in 131 and in 136 Justinian had already established monastic conversion of one spouse as a legitimate reason for divorce. This, of course, also meant that unilateral divorce, to be punished equally with monastic confinement, allowed the 'innocent' spouse to keep the dowry and remarry. Justinian, hence, in a traditional Roman way, did not adhere to an absolute notion of indisso-lubility of marriage. For the emperor, continuity of marriage did not necessarily mean one lifelong marriage, but continuance of the married status, which would ensure the production of heirs, the transfer of property within the family and an outlet for sexual desire. Procopius again provides us with a commentary on these views when he maliciously reported on Theodora’s campaigns for the institution of marriage among the aristocratic families of Constantinople, obliging everybody around her to get married or remarried, even widows who she accused of living 'unchaste lives'. The law on monastic confinement came to play a role in this campaign for marriage, criminalising unilateral divorce, but at the same time freeing one spouse to resume married status elsewhere. While this was certainly in the interest of the latter, for some Church authorities, divorce,

On the development of late Roman divorce legislation, and the differences between East and West see Kazer (1977) 174–190; Evans Grubbs (1995) 202–203; Arjomand (1966) 177–189; and see also above Chapter 6. See C. 17.7.10 and 17.7.11 (258); NJust 22.6 and 22.12 (196); 53.8 (197); 74.3 (198) on Justinian’s earlier divorce legislation.


On Christian attitudes to divorce after adultery, which were however often ambiguous, see Arjomand (1995) 181–184.

and hence remarriage, even after one spouse had entered the monastic life, was controversial, for it violated the sacredness of Christian marriage. A few decades after Justinian’s death, Gregory the Great, called in to adjudicate the case of a woman whose husband had entered a monastery in Sicily against her will, explained that either she also had to adopt the monastic state or her husband should return to her, but certainly the marriage had not been dissolved, even if public law said so.60 Justinian, however, did not perceive a conflict between his divorce legislation and the views of Church authorities.61 On the contrary, he entrusted the local bishop with transferring a woman ‘guilty’ of unilateral divorce to monasteries under his jurisdiction.62 Bishops were to be part of the emperor’s scheme to restore marital order by withdrawing those who did not comply from civil life. Perhaps this reflects that, in practice, bishops were in fact often instrumental in encouraging such withdrawals. As we have seen in the previous chapter, there were certain bishops, such as Pelagius, who valued the potential that monastic retreats, in particular of women, had for the maintenance of domestic peace.

Yet, it would be wrong to see the emperor’s adoption of monastic confinement into public law only as a pragmatic move, to integrate ecclesiastical justice into public government or to underline a bishop’s or husband’s authority in the described circumstances. Its promulgation was also, and perhaps more importantly, a way to advance Justinian’s vision of his rule. It is probably no coincidence that Justinian’s laws on monastic confinement nearly all date from the time after the year 542, a watershed in his reign.63 Due to his own illness during the plague that hit Constantinople in this year and almost took Justinian’s own life, the deterioration of the war in Italy and a series of further natural disasters around the Eastern Mediterranean during the 540s, the emperor became ever more focussed on ordering Christian society and ensuring his subjects’ spiritual worth. The latter half of his reign was, of course, dominated by Justinian’s attempt to heal the doctrinal conflicts within the Christian church, a plan that spectacularly failed during the Three-Chapter Controversy. Yet, it also saw a high degree of attempts to improve day-to-day clerical and lay Christian morality, which surpassed the activity of any other emperor before.64 The more proactive incorporation of monastic space into the administration of punishment in this period was part of this new direction of imperial rule. Where the laws on monastic confinement spoke of ‘penance’ (μετάνοια) of those submitted to it, and as a chance to ‘correct’ (ευθηνοῦσαν), this was no empty lip service or simple repetition of ecclesiastical norms.65

Justinian’s laws on monastic confinement, in fact, reflected an urgent understanding of the monastery as penitential space that, as we have already seen in previous chapters, was widespread in sixth-century monastic discourse. In the East, the Christian ascetics’ acceptance of perpetual human sinfulness led to the endorsement of a system of mutual control and assistance between monks to ensure the penitential performance of each individual member. For example, Basil of Caesarea suggested closely watching and caring for those monks who had sinned or were in danger of sinning.66 Basil’s defence of the coenobitic lifestyle, as opposed to a solitary or less regimented life, in his Long Rule was based on the advantage that monks could educate each other when needed.67 In fact, it has been argued that for Basil the very function of the ascetic community was its programme of consultation, encouragement, advice and correction, which worked vertically, flowing from a spiritual father, and horizontally, among monks.68

Between 535 and 539 Justinian issued two laws that tried to regulate the life of monks (and in 539 also nuns) along these lines. Both laws were addressed to the patriarch of Constantinople, and hence perhaps inspired by him, and made specific references to monastic life in the city, so it can be assumed that their primary aim was to bring order to the institutions of the emperor’s capital.69 The two laws pre-date his legislation on monastic exile. We should certainly not assume that Justinian sought to create, through these laws, monasteries as government institutions purely for the administration of the public penalty of monastic confinement. Yet, we could assume that for the execution of the penalty of monastic confinement the emperor had a monastery in mind that would comply with the standards he set out in these laws. In many ways, they were an imperial endorsement

60 Gregory the Great, ep. 6.49 (CC 1470.4123); ep. 11.10 (CC 1470.4108-109). On a similar perspective see Basili, Moralia, Rule 73.1 (PG 31:849). 61 A point also noted by Noonan (1968) 76-77. 62 NJust 117.13 (542). 63 On the role of the year 542 and the latter part of Justinian’s reign see Meier (2002) 277-299; Leppin (2001) 351-379.
of the monastic principles promulgated at the Council of Chalcedon in 451 AD. As is well known, the Council of Chalcedon was also an attempt by the attending bishops to restrain the power of the often violent ascetic partisans that had dominated the Christological controversies of the earlier fifth century by preferring monks resident in stable communities over wandering holy men and putting monasteries under the control of the local bishop. Yet, Justinian developed these principles further by delineating the role he wished monasteries to play for the state. As he explained in the law issued in 539, he expected monks and nuns to pray for the well-being of the empire, which made their life choice not only useful for themselves, but for society as a whole.

For Justinian, monks were able to provide intercessory prayer for human sinners, because, as he explained in his laudatory preface to the law issued in 535, monastic life, if properly conducted, cleansed from human sin. Life in common in particular, he continued, ensured that monks would assist with the penance of each other. They were to ‘witness one another’s honour and chastity, … and may only reflect upon what is good.’ Accordingly, Justinian set out to create the framework to facilitate such mutual control and to protect it from being disturbed by pollution from the outside world. Justinian tried to establish monasteries as robust institutions by granting them ownership over the property of people who entered the monastery (NJJust 5.4–5.7). Furthermore, he stressed the authority of the bishop in monastic activities, such as foundation, building, alienation of property, confirmation of abbot election and most importantly relationships with the outside world. The bishop was to appoint an ecclesiastical agent for each monastery (NJJust 5.1, 9; 133.4). Finally, the emperor regulated the minutiae details of daily monastic life. He strongly adhered to the ideology of a coenobitic lifestyle, which should be reflected in monastic architecture and the patriarch was to demolish all monastic edifices that did not comply with these standards. All ascetics were to live in buildings with only one or two guarded gates and surrounded by walls (NJJust 133.1). Leaving the monastery was allowed for church visit only, and exchange even with family members was restricted (NJJust 133.2–133.3). Within the walls, however, there should not be any private rooms, except for the most spiritually advanced members of the community. Everyone should study, work, eat and sleep together (NJJust 5.3.133.1). Monastic space was hence to have clear boundaries to the outside sinful world, but at the same time make transparent and visible all sinful behaviour within these boundaries. The similarity between Justinian’s regulations and contemporary sixth-century Western rules is striking and reflects a rising cross-Mediterranean understanding of entire monastic communities as both penitential and thereby holy. While individual holy men had been traditionally seen as mediators between God and man the concept of monastic communities’ collective intercessory prayer, which would characterise religious life throughout the Middle Ages, was beginning to emerge in the sixth century. The difference between Eastern and Western developments in this period was, however, that in the East it was a lay monarch dictating the rules and as such partly driving the change.

A previous sinful life and monastic membership, therefore, did not exclude each other, but, on the contrary, embracing the ascetic lifestyle was the most visible expression of repenting one’s sins for Justinian. When, in 535, the emperor dealt with the apparently frequent occurrence of slaves who had stolen from their master and subsequently entered a monastery, he ordered that these should not be returned to their masters after having completed a three-year noviciate. Still, the Council of Chalcedon had ruled that all slaves were to be returned to their master. Yet, as Justinian now explained, ‘even though [the slave] committed some offence in his previous life — for human nature is commonly prone towards offences — the three years’ witness of his faith shall suffice for a proper purging of sins and for becoming more virtuous.’ Justinian’s idea of the monastery as a community of purified sinners, protected against further sin through collective prayer and strict enclosure, also becomes apparent in a remarkable enterprise of the emperor and his wife Theodore that is closely related to his introduction of monastic confinement as a public penalty. According

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61 NJJust 133.1 (339); on Justinian’s understanding of the purpose of monasteries see also Mouchard (1994) 118–119; Humphreys (2003) 179.
62 NJJust 131.1 NJJust 5.3 (553); διὰ αὐτοῦ μάρτυρος τῆς ἀλήθειας γνώσεως κοσμητορία τι καὶ σωφροσύνη, καὶ μὴ τοῦ ἄνθρωπον οὐκέτ’ ἔχον, αλλ’ ἐξαιτίας τῆς γνώσεως διὰ τὴν τῶν δεόντων ἐνεργείας.
63 See also NJJust 67 (388), ordering that all monasteries must first receive episcopal permission to be built, and in addition it stipulated that the bishop must be assured that they have sufficient endowment for their upkeep.
64 On contemporary western provisions see above Chapter 8 regarding walls, and, regarding intermonastic space see e.g. Rule of the Master 11, 108–121 (SC 64630–321); Rule of Benedict 23 (SC 182–184); Rule of Aurelius to the Monks 11; Rule of Aurelius to the Nuns 6 (PL 68/350); Rule of Pecorius 58, 59 (PL 68/569), 577); see also De Vogt (1963) 69–70; Gradowics-Pancz (1999) 188–186. On the similarity between Justinian’s provisions and the Rule of Benedict see Jensch (1993) 823–830. On the Western development of monasteries’ intercessory prayer see De Jong (1995) 217–241.
65 Council of Chalcedon (451), c. 4 (ACO 2.1135).
66 NJJust 3.2 (553): ἄλλων ἁμαρτὸς μὴ τίνα καθώς τῶν ἁμαρτημάτων καὶ τοῦ δεόντος ἐνεργείας ἢ τοῦ τρισκελοῦς μαντικῆς.
to Procopius, the imperial couple set out to rescue the prostitutes of Constantinople by sending them into a purpose-built monastery to undergo penance. In his panegyric on the building programme of Justinian, written around the year 555, Procopius related:

The Emperor Justinian and the Empress Theodora ... cleansed the state of the pollution of the brothels, banishing the very name of brothel-keepers, and they set free from a licentiousness fit only for slaves the women who were struggling with extreme poverty, providing them with independent maintenance, and setting virtue free. This they accomplished as follows. Near that shore of the strait which is on the right as one sails toward the Sea called Euxine, they made what had formerly been a palace into an imposing convent designed to serve as a refuge for women who repented of their past lives, so that there through the occupation which their minds would have with the worship of God and with piety they might be able to cleanse away the sins of their lives in the brothel. Therefore they call this domicile of such women 'Penance' (M绦δεωνον) in keeping with its purpose.

The foundation of this monastery in an imperial palace at the Dardanelles cannot be precisely dated, but may be connected to Justinian’s expulsion of procurers from Constantinople and closure of the city’s brothels in 532. It was certainly inspired by the strong tradition of the repentant prostitute in Eastern hagiography. Stories such as the Life of Pelagia or the Life of Mary of Egypt, prostitutes who embarked on a life of ascetic self-mortification, circulated in sixth-century Constantinople and may have been particularly dear to Theodora, a former actress who thrived on the image of being a purified sinner. Procopius’ account succinctly captures the imperial couple’s understanding of monastic space’s potential to both protect the sexual morals of society and reform even the most depraved sinner (in addition to, pragmatically, providing material maintenance).

Monastic confinement of adulteresses was part of the same imperial concern, and it equally tapped into more traditional and Christian cultures of stigmatisation. It subverted the age-old Roman association of the adulteress with the sexual impurity of the prostitute, which in previous centuries could even have led to her assignment to a brothel, by enclosing her within a community trained in moral correction and hence capable of aiding her return to a state of chastity. As such, once again, monastic confinement of the adulteress reflected the image of the repentant harlot. 70 In one of the most powerful developments of this hagiographical motif, the Life of Theodora of Alexandria, dating from the fifth or sixth century, the heroine was an adulteress who, dressed as a man, sought out a male monastery to atone for her sin. 71 While we cannot be sure, also due to uncertainties of dating, whether Justinian knew this Life, it succinctly reflects the resilient link between female sexuality, sinfulness and monastic penance made in contemporary imagination. Significantly, however, it was only for adulteresses (and divorcees) that forced penance in a monastery became legally prescribed, while penance of prostitutes only made it into imperial practice. The lack of legal interaction for the latter was perhaps due to the principle of Roman law that a prostitute, while being sexually promiscuous, nonetheless did not commit a public crime. 72

In the Life of Theodora, the wife-monk refused to return to her husband, even on the promise of forgiveness. When they met, he did not recognise her due to her male disguise. The couple were only united after her death, when a divine vision brought the husband to the monastery and he decided to also enter the ascetic life. 73 This turn of the story corresponds to its monastic and devotional agenda, representing the prospect of reconciliation (which would also have meant re-acceptance of her female body) as just another temptation for the saint to endure. Yet, the literary strength of the temptation lies in the fact that the wish for reconciliation after adultery often must have been real for late antique couples. This is what Justinian’s law acknowledged, which, as we have seen above, allowed the adulterous woman to return to her husband and to resume her marital duty. Tellingly, however, this was only allowed after the adulteress — any adulteress, not just pregnant ones — had passed a period of penance in the monastery. What this means is firstly that the emperor viewed adultery not only as a public crime and a threat to family continuity, but also as Christian sin warranting penance, and secondly that he believed the period of penance, and particularly penance spent in a monastery, paved the way for social re-integration. This was not entirely in accordance with ecclesiastical norms.
norms, which, as we have seen in Chapter 3, often prescribed ex-penitents’ sexual abstinence for life.74

We witness a similar perspective on monastic confinement as equipping a penitent to return to the world in Justinian’s laws on clerics who had violated church discipline. Both for clerics committing perjury in civil disputes and for clerics gambling, Justinian ordered a short-term suspension to be spent in a monastery and a subsequent return to the ministry. For the latter offence, which was considered of a less serious nature, the bishop was to closely monitor the penitential performance, and if it was ‘in proportion to his sins’ he could restore the cleric in question to his office before the prescribed period of time had elapsed.75 Similar to adulteresses, Justinian hence hoped that monastic confinement and its opportunity to perform a superior form of penance enabled a cleric to resume their duty with honour. Again the emperor’s understanding of the consequences of clerical penance differed significantly from ecclesiastical law, particularly in the case of perjury. As we have seen, a series of Gallic church councils held between 506 and 538 had declared that a bishop, deacon or priest deposed for adultery, fraud or perjury had to retire permanently to a monastery to perform penance.76 It is not unreasonable to assume that Justinian was familiar with this legislation. The 540s were, in fact, due to Justinian’s visions of re-conquest a time when the Mediterranean regions were drawn together in an unprecedented fashion. Justinian’s legislation on monastic confinement for clerics fell exactly in the years when contacts between Gaul and the imperial court in Constantinople intensified over the question of the Italian war. These diplomatic discourses used ecclesiastical routes of communication, which may well have transmitted knowledge about ecclesiastical norms.77

Yet, even if Justinian took into account such intelligence, he gave it a less rigid reading. As we have already seen in Chapter 4, Justinian was not only interested in the purpose of penance as preparation for final judgement, but also in its possibility to engineer Christian society. Penance spent in a monastery, aided by the public penalty of monastic confinement, ensured continuity of two important social institutions, the clergy, and the family.

75 Nf 133.10.1 (546): si est et si malo habuisset femina effossa tunc cosseus propter metu non.
76 Councils of Agde (506) c. 60 (C. C. 168.255); Ulpiano (577) c. 22 (SC 573512); Orleans III (538) c. 8 (SC 5735238). See above Chapter 9.

Monastic confinement and imperial justice

The period of penance, in these cases, provided offenders with an opportunity to show their worth in front of God, but also to regain their honour in front of society. This view corresponded accurately to the more general cultural acceptance in the sixth century, described in the previous chapter, of the spiritual and social benefits that came with the canonical, yet highly respected, short-term format of monastic penance. In the East, such cultural acceptance may have been supported by what Claudia Rapp has called the concept of vicarious penance, a strong understanding of monks’ ability to shoulder sins of the less spiritually advanced, and to act as a guarantor and intercessor at final judgement.78 The integration of not only monasteries but also husbands and bishops into the public penalty of monastic confinement, as brokers of monastic penance, clearly shows that Justinian was operating within a context of cultural consensus. The emperor may have been in defiance of ecclesiastical norms, but he clearly was in tune with ecclesiastical and social practice.

From monastery to prison: realities and images of monastic confinement

As with all legal evidence of the late Roman world, it is difficult to say how frequently Justinian’s laws on monastic confinement were applied by public judges and, if they were applied, how such confinement was organised. With the exception of the story of repentant prostitutes reported by Procopius, our most detailed evidence on actual cases of monastic confinement of lay individuals and subordinate clergy derives from bishops’ jurisdiction, discussed in the previous chapter, which is further confirmation that this was the primary context inspiring Justinian’s laws.79 These laws, both those on monastic confinement and those regulating monastic life, envisaged a strong hierarchical link between bishops and monasteries. In reality, as we have seen in the previous chapter, this was not always accomplished, but it must have been common enough to warrant the emperor’s confidence that if bishops had a role in the administration of the penalty it could be successfully implemented. Similarly to what we have observed regarding Gregory the Great’s administration of monastic confinement, the emperor also sought to strengthen

78 Rapp (2007) 136–143. As Rapp shows, the term was originally coined in German (‘Büßernahme’) by the early twelfth-century theologian J. Härnsch.
79 In Constantinople, monasteries were frequently used as places of banishment for members of the imperial family in the mid-Byzantine period (eighth to tenth centuries), but it is unclear whether this happened on the basis of Justinian’s legislation, see Goria (1974) 73; Talbot (1985) 109–117.
monasteries' commitment to house divorcees and adulteresses by stipulating that institutions were to receive up to two thirds of such convict's property (or one third if they had any children).\(^6\) Again, the parameters of property confiscation were a remarkable development from previous imperial law. Under earlier exile legislation, such property would have been assigned to the imperial treasury or a city council.\(^6\) The provision relieved the imperial treasury of the moral obligation to support convicts, often expressed in the reward of a stipend, thereby also conveniently isolating them from any other outside patronage, but also as a way to integrate monasteries into the administration of public justice. Yet, despite such benefits and the fundamental principle of hospitality and charity for the oppressed that underpinned late antique monasticism, it cannot be excluded that some monasteries may have felt that enforced hospitality represented a burden and an undue interference with monastic life, particularly when it came to hosting lay sinners.\(^6\) The fact that Justinian and Theodora installed the community of repentant prostitutes mentioned above in one of their palaces may suggest that at times they felt a purpose-built monastery served their aims better and more comprehensively than a pre-existing institution. The monastery that housed the prostitutes also subsequently remained under tight imperial control, for it was probably here that the fiancée and the mother of the usurper Heraclius were confined by Phocas in 610.\(^6\)

Loss of property may of course also have been designed to tie convicted monks to monasteries. The same can be said for taking monastic vows, which those convicted of sexual crimes or offences against church discipline seem to have been obliged to undergo unless their stay in a monastery was temporary (perhaps after a period of excommunication and penance, as suggested by the two-year penance of the adulterous woman).\(^4\) In addition, the walls of a monastery quite literally provided enclosure. Although we know little of the physical lay-out of monasteries Justinian found in Constantinople or elsewhere, both archaeological remains and textual references show that the emperor's vision of strong-walled buildings, which allowed high control of access, were at times adhered to. Justinian's most famous foundation outside Constantinople, the monastery on Mount Sinai, later dedicated to St. Catherine, turned a loose congregation of hermits into a spatially ordered and heavily fortified community.\(^4\) According to Procopius, the monastery of Mandracaion that the emperor built at Carthage and which, incidentally, later housed the exiled Victor of Tunus, resembled a fortress.\(^4\) Yet, it should be noted that while the walls of a monastery, vows and the loss of property to the institution may have prevented escape or communication with the outside world, the focus of the laws was equally on segregation from the world and spiritual improvement as it was on security. The aim was integration into the community and enforcing a penitential lifestyle onto these offenders, ensured by the rigid monastic regime of work, vigil, fasting, prayers and the mutual control facilitated by the panoptic architecture Justinian envisaged and perhaps realised in those monasteries he supported.

In the so-called palace of Hormisdas at Constantinople, at least, internal transparency seems to have been as important as external walls. The imperial couple turned a large hall into the dormitory for the Miaphysite exiles according to the principle of visibility of behaviour also detailed in Justinian's rules, while only the old and honoured received their own cells.\(^6\) We therefore do not have to assume that convicts to monastic confinement were supposed to be held in a special environment within the monastery.\(^6\)

To best understand real circumstances of monastic confinement ordered by imperial authorities we must return to the evidence involving dissident clerics recorded in the context of religious conflicts. It should be noted, however, that they are not representative of the public penalty of monastic confinement in general. While after 546 banishing a deposed bishop to a monastery, particularly one who was deemed to be troublesome, may well have happened with reference to Justinian's legislation, it is not always clear, as we have seen, whether banished clerics ending up in monasteries were sent there by government order, let alone a formal sentence, or whether monasteries had offered them hospitality. Furthermore, the aim of a government order for a banished cleric to reside at a particular monastery was often to persuade him to subscribe to a particular doctrinal view or to curb his influence. While this could be framed as penance (and...
in Justinian's law on exiled bishops it indeed was), the conditions under which a dissident cleric had to live in a monastery were arguably organised differently in order to facilitate a change of mind or to control movement than those of adulteresses and divorcees would have been, particularly where the latter were expected to join the monastic community permanently. Such conditions of monastic confinement, finally, were often described from the perspective of those who had suffered them, or those sympathetic with their views, so we need to assume a certain degree of amplification of experiences. As we shall see, such elaborations, once again, included the comparison between monastic confinement and imprisonment, even where authorities were keen to minimize the connection.

The significant rise of dissident clerics' monastic confinement under Justinian may be explained by the fact that the emperor could rely on a range of monastic institutions to be used for such purposes, particularly in Constantinople. On ideological grounds, monasteries of Chalcedonian leanings, the majority of institutions in Constantinople, may well have relished the opportunity of hosting Miaphysite opponents (as argued vividly by John of Ephesus regarding events under Justinian's successor, Justin II, to which we will return below), while they may also have happily welcomed or even solicited the stay of ultra-orthodox clerics, such as Victor of Tunnuna, the deacon Pelagius of Rome, and Primasius of Hadrumetum (held at the monastery of the Acoemetae). Yet, Justinian's policies of monastic patronage may have created a landscape fertile for the imposition of his will in any case, even where previous emperors may have faced opposition. Peter Hatle has shown succinctly how over the course of his reign Justinian developed a complex network of imperial patronage for the monasteries of the city that created tight dependencies of many of the city's institutions on the imperial court. To start with, the emperor was an avid renovator of monasteries. A famous example is that of the female monastery in the southern porticus of the Hagia Sophia, founded by John Chrysostom's patron Olympias, which Justinian restored after it had burnt down during the Nika revolt of 532. The emperor also encouraged monastic foundations by donating land, such as for the Miaphysite monasteries at Sykai, or by making endowments, such as for the monastery of Chora, founded by one Theodora, later believed to have been Theodora's uncle, which soon became one of the most important monastic establishments of

the city. As a consequence of Justinian spreading his patronage equally to Miaphysite and Chalcedonian communities, the intense political activities of Constantinople's monks that had characterised the aftermath of the Council of Chalcedon right up to the reign of Justinian's uncle Justin markedly slowed down under this emperor. Justinian's monastic laws, and particularly their strengthening of the office of the prior of the city's monasteries, a sort of monastic inspector, might also have aided the emperor with gaining a unique opportunity to interfere with monastic affairs (NJust 133.4). While it is unclear how the prior came to be appointed, it is unlikely that this happened without the emperor's consent.

Outside Constantinople, Justinian's ability to enlist monastic obedience is far more doubtful. To be sure, more than bishops, public magistrates imposing monastic confinement had recourse to military help to prevent a penitent from leaving the monastery. Yet, also in the provinces monasteries loyal to the emperor of course existed, such as the afore-mentioned monastery of Mandractum, where Victor of Tunnuna had been forced to reside in 544. Hosting a deposed bishop was no doubt a favour the emperor, or his provincial delegate, could ask of this community, as an obligation not dissimilar to that imposed on imperial officials hosting defendants under the custodia militaris, or trade corporations enlisting convicts into their workforce. In fact, in a different context, Justinian drew on monasteries to provide a form of preventive custody when he ordered a woman defendant to be held in female monasteries rather than in public prisons, 'by whom she may be guarded chastely.'

This last provision shows that, from the imperial perspective, forced residence in a monastery, whether in preventive custody or following a sentence, was not only considered secure, practical or spiritually becoming, but also honourable. However, if we are to believe their hagiographers, some of those who suffered monastic confinement in the context of religious conflict were not only detained by the walls of a monastery itself,

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99 On the office see Hatle (2007) 173–174. Under Justinian it was held continuously by the abbot of the monastery of Dalmato.
100 We do not hear about military guard in the context of monastic confinement imposed by an emperor, but in the case of Sagittarius of Embrun and Sulpitius of Gap mentioned in the previous chapter Guntram had the monastery watched by soldiers. Gregory of Tours. Historia 5.40 (MGH. SRM 1.248).
101 On the monastery and its possible location at the port of Carthage see Leone (2007) 174.
102 CTh 9.3.1.pr. and (120) = CJ 9.4.1.pr. and 1; CTh 9.3.3 (572); CTh 9.2.6 (582) = CJ 9.4.5; CTh 9.1.7 (499) Sim. 19 (459); CJ 1.4.22 (529); women in the prison: CTh 9.3.3 (140); NJust 134.2 (156).
but also further incarcerated, and stay in a monastery could be a disastrous experience. John of Ephesus is our most sure-footed guide to living conditions under such circumstances. His most colourful reports concerned the events following Justin II's so-called second Henotikon of 571, another imperial attempt to conciliate opponents and supporters of the Council of Chalcedon by brushing over the council's decision. In collaboration with the patriarch of Constantinople John Scholastikos, the rejection of this edict by leading Miaphysite clerics marked the end of the relative peace between Miaphysites and Chalcedonians that had prevailed under Justinian and the beginning of a persecution that would last until 577. In its course some Miaphysite bishops, and their clerical, lay and monastic supporters in Constantinople, were interned in monasteries loyal to the emperor or the patriarch at a frequency that may have been fuelled by Justinian's recent legislation on the practice. Himself a victim of this persecution, John of Ephesus' stories are a firework of abuse and maltreatment. Some clerics were put into cells without any ventilation or made to drink acid wine. They were tortured with lances, spied on constantly and prevented from writing and receiving visitors. The results were disease and malnourishment. Elesius of Sardis, who fell seriously ill at the monastery of the Abrahaimites, was at least allowed to go to the baths, but only under strict guard. Two noble ladies swept up in the persecution were dealt with slightly differently: they were tonsured and dressed in black habits and then put to work in a monastery's kitchen and latrines (they duly recanted and were restored to their former rank). The fate of the latter may be an index to the life of women sent to monasteries to atone for their sexual crimes. Yet, even John had to concede that not everyone was treated badly. The priest Scrgius, sent to the monastery of Raboula with its Miaphysite sympathies, was welcomed with kindness and respect. We do not know the reason for this hospitality or whether it was administered in defiance of official orders. It seems, then, that the quality of life in monastic confinement, unsurprisingly, often depended on the doctrinal perspectives of the hosting community.

John of Ephesus was neither the first nor the only writer to point the finger at the dark side of monastic confinement. According to his biographer, Eutychius of Constantinople, whom Justinian deposed in 565, was led 'naked' and stripped of his property to the monastery of Chronacidis, where he had to endure further insult by the monks. John Rufus, narrating in the early sixth century the fate of Theodosius of Jerusalem after the Council of Chalcedon, explained how the abbot of the monastery of Dios, after having fruitlessly tried all sorts of persuasion, had put the bishop into a narrow cell, which was not only unheated, but also full of quicklime, causing him to develop severe illness, exacerbated by beating and malnourishment. Another commentator of this event, Zacharias Rhétor (later possibly bishop of Mytilene, writing in the sixth century), while also reporting the presence of quicklime in his cell, pointed out, however, that Theodosius had been able to stage doctrinal debates with many people during his time at the monastery. The historian pondering the different accounts is left with the conclusion that, while Theodosius may have been held in confinement at the monastery, both writers followed a particular agenda in their representation of this event. Zacharias was keen to stress Theodosius' continued influence and intellectual superiority, John Rufus his likeness to a persecuted martyr, his rightful status as a Christian bishop and his ascetic rigour. Especially for the latter argument, as we have seen in detail in Chapter 8, drawing a comparison between the hero's experiences and the customary features of the public prison (hunger, frost, torture, isolation, illness, darkness, foulness of air) was the surest way of making the point.

John of Ephesus understood this as well. The protagonists of his stories were endlessly dragged from one form of imprisonment (clearly labelled as such) to another, from the patriarch's palace, to hospices, to watch-towers, to prisons, to praetoria, to monasteries, to islands and back again, and little distinction was made between these with regard to living conditions, treatment and purpose of confinement. For John, monastic confinement, at least in the form demanded by his doctrinal opponents, did not stand out as more charitable than confinement in any of the other places. On the contrary, with reference to the Syrian holy man Sergius, who had been held and allegedly maltreated at a Chalcedonian monastery in Armenia in 518 for stirring up anti-Chalcedonian resistance, John
complained bitterly that for ‘a Christian’ (meaning ‘orthodox Christian’) even being in ‘the lowest dungeon in a prison’ would have been far better than in this monastery for anyone who was sent there was thenceforth reduced to utter despair, on account of the boundless severity of sufferings which they used to inflict on the man who was sent to them; since they were very zealous for the tenets of the heresy, and they used to reckon it as an act of justice to torture believers and accordingly they would stand over them like executioners not just one or two or a hundred, but each of them would pull him from his side and torture him (for they were about three hundred); and accordingly those who used to send to that place were confident that their purpose would be accomplished.\[105\]

Nonetheless, Sergius managed to flee from a third-floor window of the monastery, so the extent to which his movements were restricted in the way John described is doubtful. John’s stories hence capitalised on the image of prison that we have traced in the preceding chapters in the same way as earlier exiles in confinement had done. The surroundings and conditions of confinement were different, but, despite its monastic character, the arguments on their unlawfulness remained the same.

Crucially, the comparison between monastic confinement and imprisonment was not only made in the context of Christian conflict and religious coercion, but also in circumstances where the official line openly stressed the aims of imperial clemency, Christian charity, penance and salvation. Procopius of Caesarea, to whom we owe the information about Justinian and Theodora’s foundation of a monastery for prostitutes mentioned above, also narrated the same story in his counter-tale of the Justinianic Age, the Secret History, written with the agenda to turn almost everything that could be said in praise of the imperial couple in the historian’s official works on its head:

Theodora also devoted considerable attention to the punishment of women caught in carnal sin. She picked up more than five hundred harlots in the forum, who earned a miserable living by selling themselves there for three obols, and sent them to the opposite mainland, where they were locked up (σαβτεῖσι) in the monastery called Penance (M废弃ς) to force them to change their way of life. Some of them, however, threw themselves from the parapets at night and thus freed themselves from an undesired salvation.\[106\]

\[104\] On Procopius’ denouncement of Justinian’s and Theodora’s private prisons see above Chapters 6 and 7.

\[105\] John of Ephesus, Lives of Simeon and Sergius 1.81 (PO 17:104–105).
\[106\] Procopius, Secret History 17.5.6 (Loeb 1916: slightly modified).
Conclusions

Over the two-hundred years of late antiquity, Christian institutions gave shape to a form of penal organisation that had been subject of theoretical thinking since the times of Plato. Monastic confinement was strikingly similar to Plato’s second kind of prison described in his Laws, with which we began this study, a curative institution in proximity to society and where criminals were to benefit from the company of ‘virtuous’ citizens acting as instructors. The question remains, of course, whether this similarity is purely coincidental. Late antique authorities who ordered or practised monastic confinement certainly did not consciously adopt Platonic ideas, and it is ironic that monastic confinement actually became a statutory penalty under Justinian, the emperor who closed the academy in Athens at the beginning of his reign. Nonetheless, monastic confinement shows that late antique Christianity and the institutions it developed helped to provide new answers to questions around the educative aims of punishment that, as this book has shown, had been discussed, and this with reference to Plato, since at least the early empire. When, as the ancient terminology of emendatio invites us, we connect these questions to the deep current of the concept of fatherhood that ran through justifications of power by the public, private, imperial, ecclesiastical and monastic elites of the Roman empire, they may appear less ‘shallow’ than previously thought. It is worth summarising in closing how monastic confinement engaged with these questions before briefly returning to its relationship with the ancient and modern institutions we call ‘prison’.

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Fifth- and sixth-century monastic confinement could be adapted to a variety of purposes. To illustrate this versatility, it is useful to revisit the conclusions drawn by Walther Laske in his study of monastic confinement during the early medieval period. In 1978 the German historian wrote that we need to distinguish between three forms of monastic confinement: forced entry into a monastery that included taking vows (‘Mönchung’ or ‘Nunnung’), temporary monastic confinement for the performance of penance with a view to ‘reconciliation’ and hence social re-integration (‘Zwang zur Buße’) and confinement in a monastery without a change of status or the expectation to perform penance as a more lenient, honourable or more secure form of punishment (‘Einsperrung ins Kloster’). For the late antique period, we can make similar distinctions. Broadly speaking, monastic confinement was firstly imposed on a social group that can be described as non-conforming domestic ‘dependents’ (wives, slaves, young people), at times in connection with the coerced taking of vows, at times envisaging reintegration into society. Secondly, we can observe it as a method to address clerical misbehaviour and a way to allow clerics to parade of the benefits of penance and sometimes to return to office. Finally, monastic confinement emerged as a special form of banishment and segregation of religious dissidents during the years of religious conflict of the fifth and sixth centuries.

The identification of such patterns is constructive as they help to demonstrate that monastic confinement was practised in different social and legal contexts, whose relationships with each other are not immediately obvious. Yet, the distinction between these patterns is also to some extent artificial when observed from the perspective of normative discourses. Drawing too rigid distinctions between individual forms of monastic confinement may in fact risk obscuring more comprehensive motivations behind the penalty and, crucially, the incorporation of this penalty into written law. At least based on the usual phrasing of these motivations in the late antique period, all forms of monastic confinement were held together by the importance afforded to performing penance, and an understanding of the monastery as the quintessentially penitential and ordered space.

In this respect, it is important to pause and consider the question of the ‘authenticity’ of penitential or ascetic discourses, that is, whether monastic confinement, in reality, was meant to benefit an offender, or whether it was applied as a method of social control, the satisfaction of victims, the protection of society, or of broadcasting imperial clemency. Due to the normative nature and rhetorical tone of many of our sources, the answer may have to remain largely inconclusive, but it should be noted that within the framework of monastic confinement a number of practices developed

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1 Leplin (2011) 100-101.

that can be described as fulfilling these more traditional purposes of punishment. As this book has shown, some of these, such as the removal of misbehaving domestic dependents (women, slaves, young people and, in late antiquity, subordinate clerics) from the public gaze, reflect a culture of social hierarchy that pre-dated the appearance of Christianity. Within these traditional circumstances, confinement had often already been a method of choice to restore social order (and we should note that Plato’s first type of imprisonment was also destined for offenders of this type). The emergence of the coenobitic monastery and the development of episcopal control over it may have given an additional outlet to achieve such aims. The ‘discovery’ of monasteries as suitable places of detention of religious dissenters provides testimony of a perceived need for greater control of opponents in the context of religious conflict than ‘simple’ banishment could deliver. In turn, it may often have been a convenient way to turn the embarrassment of monastic asylum or episcopal intercession for criminals into a success story for public judges. At the same time, monastic confinement gave their actions a Christian patina that perhaps made the practice of confinement less contentious. Furthermore, it is also clear, however, that the rhetoric surrounding the penalty of monastic confinement was, that it could become a means to spare elite offenders or indeed victims and their families the shame of visible punishment, which, in late antiquity as before, was always a pressing concern for judges, quite beyond any expectations for salvation. Monastic confinement hence fulfilled a number of purposes that may need to be disconnected from purely ‘penitential’ aims, in the spiritual sense, although it also shows that the performing of penance was a social act for the benefit of the community as well.

In addition, by law monastic confinement was only proposed for a small number of crimes and criminals. The death penalty, corporal punishment, forced labour and ‘simple’ banishment all continued to exist, and many of these penalties particularly affected lower-status offenders. Yet, we should always remember that Roman and also ecclesiastical law-making was reactive, responding to whatever cases were brought to the authorities’ attention, which may have prevented monastic confinement from becoming more comprehensively prescribed. In late antiquity, neither the state nor the Church had the power to wield a totalising juridical authority to cover all aspects of social life, and pronouncements of monastic confinement as a legal penalty were therefore by necessity patchy. This means that it would be wrong to assume that those who promoted monastic confinement did not think of it as a punishment that could potentially benefit anyone with moral failings.

Conclusions

This was certainly the case for the emperor Justinian on the one hand and Gregory the Great on the other, whose legal decisions provide us with the richest evidence for the institution of monastic confinement in the sixth century. Even where other authorities ordering or imposing monastic confinement may have valued its purely social benefits, these two men powerfully made the connection between monastic confinement and the spiritual side of penance, understood as a requirement for all humankind to mend the relationship with God. It is certainly no coincidence that both were also monastic thinkers with a special insight into the role that monasteries should play in the relationship between humankind and God.

Justinian valued monastic communities for what they were able to contribute to the welfare of the Christian empire. Monasteries were seen as subordinate and bound up in the responsibility of the emperor to ensure the spiritual well-being of his people. This included, most importantly, their ability to intercede for humanity through the purity of their prayer. Yet, as we have seen in the first part of this book, the emperor also saw the infliction of punishment as part of his duty as a Christian leader and subscribed to the maxims that, on the one hand, the public process should leave room for the opportunity to perform penance, and on the other, that the virtuous majority, the ‘good’ Christian community had to be protected. In the Foucauldian sense, the labelling of disruptive members of society as ‘diseased’ justified their confinement and allowed shifting the public spectacle of legal violence to a more comprehensive, but perhaps not less violent manipulation of behaviour out of the public gaze. In this sense, monasteries provided a controlled and superior penitential space, a space set apart for the activity of specialists in moral correction, whose availability aided the integration of penance into public jurisdiction.

For Gregory, the monk turned bishop, the importance of the monastery did not lie in its ability to foster a communal way of life apart from the world. Rather, he appreciated the monastery for its ability to underpin the duty of church leaders to prepare the faithful during the wait for the end and, more concretely in the context of monastic confinement, for its ability to provide a space for education within the Christian hierarchy defined as

1 See Hase-Úngher (2002) for a lucid analysis of Justinian’s view of monasticism as subordinate to imperial will, which divorced monasticism of its independent political power.

* See Foucault (1975) in which he traced the large-scale confinement of unwanted members of society in hospitals for the ‘mad’ in seventeenth-century Europe. In a process he called ‘le grand réformateur’ and which he saw as a precursor to the modern prison penalty. The categories of people Foucault identified (single mothers, delinquent priests, heretics, prostitutes and the unemployed) are strikingly similar to those submitted to monastic confinement at the time of Justinian.
Prison and penance

culminating in episcopal power. It is here that the monastery finds its place in Gregory’s pastoral framework. At the same time, monastic confinement also allowed protecting vulnerable Christian society outside the monastery by segregating sinners or making them ‘disappear’, expressed in the terms *detrucio* or *retrusion*, widely used, although not coined, by Gregory.

As leaders of Christian institutions in this world, concerned not only about endings but about continuities as well, both Justinian and Gregory, however, also endorsed monastic penance as a basis for social reintegration. Again, this should not be seen as disingenuous, but as a reflection of the enormous potency monastic penance possessed in this period. Embracing the ascetic lifestyle, even if only for a short time, conferred a vast degree of integrity on the penitent as it was the most visible expression of a disposition to mend the relationship with God. For Justinian, it was so compelling that it induced him to give up the time-honoured prerogative of imperial pardon described in the first part of this book. Pardon from the penalty of monastic confinement could be dispensed by bishops, or, most strikingly in the case of adulterous women, by their husbands.

Justinian and Gregory’s regulation of monastic confinement, in addition to other evidence of its use since the fifth century, shows that the institution appeared around the same time in geographically and politically diverse contexts. This was not accidental even though on the basis of the extant sources it is difficult to reconstruct potential channels of influence of individual legal texts and practices. Given the high level of communication during the religious disputes and military conflicts of the fifth and sixth centuries the exchange of knowledge of legal detail certainly cannot be excluded. In addition, emperors also responded to ecclesiastical practices, particularly where they interfered with the activity of imperial judges, and to the lobbying of bishops, their intercession for individual criminals and incidents of monastic asylum. Mutual influences between norms or practices cannot, however, entirely explain why monastic confinement was taken up in different social and regional scenarios. The attractiveness of this form of punishment to authorities of varying background also implies a cross-Mediterranean understanding of contemporary monastic culture and its social usefulness, aided by the Chalcedonian request for *stabilitas loci* of monks and the subordination of the monastery to the local bishop. Wherever we encounter monastic confinement, and in particularly in Gaul, Italy and in Constantinople, we can also detect a parallel shift in monastic discourses from an emphasis on the inner, lifelong struggle of the individual monk against sin to an emphasis on the need to harness the entire monastic community against the temptation of sin. The latter was expressed in the concepts of strict separation of the monastery from the outside world, as well as of internal visibility of behaviour. This shift is most perceptibly reflected by the emergence of monastic rules, managing, sometimes in exhaustive detail, all aspects of monastic space and time, which were increasingly composed by external authorities, keen on developing monastic institutions that fit into their world view, such as bishops and lay rulers, including Justinian. Monastic confinement hence developed at the same time as the concept of ascetic exile became focussed on enclosure in space and time, a momentous change in the monastic movement. In short, it was, somewhat paradoxically, monasteries’ otherworldliness, their role as ‘magnetically attractive others’, that made them interesting for the late Roman state and for church leaders, in the first place because they provided a source of pure intercessory prayer, but also because they provided a space in which to segregate people with social and spiritual benefits.

Both late antique bishops and emperors hence saw the potential of the monastery as a civic resource to aid the purpose of Christian punishment in this world. This is not to say that their aims and procedures of monastic confinement should be seen as entirely identical. Most importantly, from bishops’ perspectives, uses of monastic confinement served to underline the differences between public and ecclesiastical justice, in both intention and forms. Monastic confinement was represented as protection from public law and as more adept to match the requirements of temporal Christian punishment than a public penalty. In fact, public law, including laws issued by Justinian, retained the death penalty and penalties of a visibly deterrent nature and a more rhetorically pronounced status-based distinction of penalties, where also monastic confinement at times was explicitly reserved for those of higher rank only and opposed to corporal punishment. While ecclesiastical penal practice came to incorporate flogging over the course of the fifth and sixth centuries, the justifications surrounding this punishment were generally educative rather than status-

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5 See Leyser (2000) 150–159 for Gregory’s attitude to monastic life, and for his focus on its integration into the Church, rather than monasticism *per se*.

6 For an excellent analysis of this development see Diem (2001) 175–228.


8 See Njus (2001) 246 which ordered monastic confinement only for bishops, deacons and priests, while lower-ranking clerics were to be flogged for the crime of perjury.
based even though, of course, the latter often may have played a role in its actual imposition.9

We witness discourses on the superiority of ecclesiastical law and its use of monastic confinement particularly in areas where bishops were substantial figures of civic authority, such as post-Roman Gaul and late-sixth-century Italy. While they may attest to competition between bishops and lay magistrates in the judicial sphere—as prison release miracles from late antique Gaul suggest—it should also be noted that arguments about the correct use of monastic confinement equally served to define inter-ecclesiastical hierarchies of authority. This was certainly the case for Gregory the Great, whose preoccupations with monastic confinement were mainly directed at fellow bishops. Overall, there may have been more collaboration between bishops, public judges, monastic authorities and victims of wrongdoing regarding the imposition and administration of monastic confinement than the sources allow us to see. As the rise of forced ordinations during the fifth and sixth centuries show, interference by bishops or monastic communities may well have often suited lay rulers’ goals. Perhaps the starkest difference between monastic confinement ordered by a public magistrate and an ecclesiastical penalty lay in the possibilities of enforcement. We hear much less about problems of implementation in incidents of monastic confinement involving state authorities, most notably in the context of religious conflict in sixth-century Constantinople. Critically, these are also the incidents where parallels to imprisonment were drawn. The ecclesiastical evidence, in turn, suggests that bishops had to rely on the good will of many more agents, including, crucially, those on whom the penalty was imposed, unless they were direct church dependents.

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Sixth-century monastic confinement demonstrates that not only an idea but also the practice of educative punishment—punishment that aimed not only at the body but also the ‘soul’, through segregation, surveillance and discipline of behaviour—existed in Western society over a thousand years prior to the introduction of the modern prison penalty. Already Michel Foucault ingeniously noted that the modern era did not invent the techniques of discipline he saw at play in the modern prison. In his study of these techniques he saw their origin in the ordering of time, space and activities in the medieval monastery, which first fed into the organisation of schools, and subsequently hospitals, military barracks, factories and eventually the prison. However, he also claimed there were differences: in the monastery, he explained, inmates submitted to discipline voluntarily and for individual benefit, as well as for renunciation of society, and not because their retirement from the world was socially useful.10 Yet, Foucault overlooked the late antique phenomenon of monastic confinement which subverts a notion of monasteries as homogeneous bodies of spiritually enlightened volunteers.11 Even though monastic confinement was not the most dominant penalty in this period, and may even have been marginal in practice, the fact that such punishment was discussed, ordered and also at least partially implemented hence invites us to rethink a model of progressive, irreversible development in the history of punishment, which distinguishes between ’modern’ and ‘pre-modern’ as near-monolithic blocks and postulates a near chronological tradition from public execution to prison, or from retribution and deterrence to ‘reform’. Incidentally, this is also true for contemporary punishment in Britain and the United States, where in the early twenty-first century a ‘startling reversal of the settled historical pattern’ has been observed, with renewed vilifications of criminals and the re-emergence of calls for their segregation and even public vengeance as justifications of punishment and the prison penalty, at the expense of or at least alongside ‘reform’, that seemingly unshakeable twentieth century ideal. In the same political contexts, governments are also not averse to ‘out-sourcing’ the maintenance of prisons, to keep down costs in the face of increased demands for punitive imprisonment, making the involvement of the state in the administration of punishment, once again, a more circuitous one.12

This book has sketched only the beginnings of the penalty of monastic confinement in the Roman empire, in response to ancient and early Christian ideas of ‘reform’. The penalty was, however, to have a remarkable career in the ever closer affinity of public punishment and Christian penance over the early medieval period. Lay rulers and ecclesiastical authorities, particularly during the Carolingian empire, continuously rediscovered the potential of the monastic institution to fulfil their social

9 On the justifications of, but also controversies around, the imposition of flogging on higher-ranking clerics in late antiquity see Dossey (2001).

10 Foucault (1979) 176–177. Foucault here drew on the concept of ‘total institution’ as developed in the work of Goffman (1966).

11 As argued perspicaciously in Gelner (1998) 108. A similar argument can be made about the practice of child oblation to monasteries, on which see De Jong (1999).

12 Garthard, D. (2001), 3, 8–9; and for a more polemical, but not less intriguing view on prisons see Wacquant (2009) at 173.
and spiritual duties. Monastic penance truly spoke to the heart of early medieval Christian society, where atonement had become one of the standard responses to adversity, disaster and endemic conflict. While the influence and interpretation of ecclesiastical norms and traditions on these developments is undisputed, the early medieval impact of Roman imperial regulations of monastic confinement in Justiniac law still requires closer inspection. This is particularly true where we find evidence for its use in public legal norms in the West, such as in the Visigothic laws.

In turn, the role of an emperor in the termination of the penalty should also be noted. At the beginning of the nineteenth century, it was Napoléon of France who gave penal confinement a new direction, after the French revolution had left many of the ancient monasteries of the country (used for monastic confinement also during the Ancien Régime) dissolved. While the use of dissolved monasteries as state prisons already began in the 1790s, it was France's new monarch, often and in particular in his legislative work styling himself as a new Justinian, who took this enterprise on in a systematic fashion. Nine of the twelve prisons that had been founded in former monasteries before 1862 were established during Napoléon's reign. Notorious examples include Fontevraud Abbey in the Loire Valley, transformed into a state ‘penitentiary’ in 1804, and Clairvaux Abbey, which became a prison in 1808 and still remains one today. At that point, then, all that remained of monastic discipline was its compelling reflection in ordered physical space, which, stripped of its spiritual connotations, came to be subsumed into the penal power of the state and submitted to strictly social purposes. It was this process of appropriating an already existing architecture of surveillance that particularly impressed Michel Foucault.

Conclusions

As the great French social theorist pinpoints the ‘birth’ of the modern prison at that moment in time, it is worth returning to the relationship between monastic confinement and imprisonment. While, as we have argued above, Plato’s second type of prison was similar to monastic confinement, it differed in one important respect: the Greek philosopher envisaged this prison as an autonomous, publicly run institution. Yet, such an institution was not realised in late antiquity, nor at any time before in the ancient world. Monasteries may have been used for state or church punishment, and perhaps in surprisingly ‘modern’ ways, but they were not public or ecclesiastical institutions. Furthermore, as had been the case with the wide range of spaces used for the administration of punishment in the Roman world, such as quarries, mines, brothels or factories, or in the ecclesiastical sphere, hospices, the primary function of monasteries was not the holding of criminal convicts, even from a state or church perspective. They were also not impenetrable ‘total’ institutions, even though idealistic contemporary descriptions of monastic architecture and daily life might imply this. What this means is that sixth-century monastic confinement as an enforced form of penance did not create an institution identical to the modern prison, or an institution that can be easily called ‘prison’ at all, even where we might want to accept that it provided the nucleus for a later prison penalty. The success of monastic confinement in individual cases relied in large parts on the acceptance of integrating strangers by the communities in question, and on the ever-changing quality of patronage, networks and personal charisma of the judge or legislator, which sheds an important light on the continuously improvised relationship between private, public and religious spaces in the administration of justice in late antiquity.

Yet, from a historical perspective we may not have to wait for the modern period to observe an appearance of purpose-built prisons as penal institutions. As Jean Dunbabin has argued, it was during the religious conflicts of the thirteenth and fourteenth centuries that the Catholic Church officially endorsed the coercive and penitential qualities of the prison, expressed most directly in a decreal by Boniface VIII, issued in 1298, that quoted the famous Digest passage on Roman prohibitions of punitive imprisonment discussed in Chapter 5, but strikingly subverted its meaning:

Although it is evident that the use of prison is authorised for the prisoner’s custody and not for punishment, we have no objection if you send members

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For critique of the description of later medieval monasteries as ’total institutions’ see also Leclercq (1970) 407—410.
of the clergy who are under your discipline, after a confession of crime or a conviction to prison, for the performance of penance.¹⁹

At this point penance in confinement did not have to take the digression via monastic enclosure — although monastic confinement also continued to exist. Prison as a penal institution had lost its terror for legislators and was put to wide use during the inquisition in Southern France to both coerce and segregate heretics. The Later Middle Ages, then, developed an infrastructure of imprisonment that the late Roman empire lacked, despite similar concerns about the purity of religious society, which ultimately reveals much about the conservative, traditionally-minded and minimalist attitude of late Roman government.²⁰

This book has shown, however, that the sixth century was a moment in time where this enshrined conservatism was already being questioned. With his monastery entirely designed for the penance of prostitutes swept up from the streets of Constantinople, Justinian created an enclosed and regulated space submitted to the purpose of the debauched women's salvation and the purification of society. In addition, the emperor ensured that monasteries were financially equipped for hosting public convicts, which was mirrored by Gregory the Great, although not in the same systematic, legal fashion. The state provision of space and resources left less to chance and had the potential of turning monastic confinement into a more robust and sustainable institution. Such innovations were seen with suspicion by Justinian's contemporaries, accustomed to the rhetoric that any public use of confinement other than for preventive custody was illegal. This rhetoric was fuelled by a string of late antique legislation, not the least by the very same Justinian. The emperor would not have wished to draw a parallel between his enterprises and the forms of imprisonment he prohibited, private and public, but observers of his practices and laws did. Nonetheless, within the sixth-century monastery, the boundaries between custodial, coercive, punitive and penitential confinement began to be blurred, and the gap between the pure and the defiled narrowed in the very figure of the ascetic, encouraged to emulate the filthy criminal to pledge the truthfulness of penance. This process is reflected succinctly in the use of the term detrusio for monastic confinement, which, after Gregory the Great, was to become the standard term to denote forced penance in a monastery throughout the European Middle Ages.²¹ While the term recalled notions of underground concealment of convicted criminals, the space that received them was considered holy and pure — but also populated by sinners.

²⁰ A current research project on Anglo-Saxon royal prisons undertaken by Richard Sowerby (Cambridge) may show in the future that the appearance of purpose-built penal prisons has to be dated even earlier, to a public context and the British Isles. On these institutions see Hudson (2012) 195.
²¹ Gellner (2008a).