

Incarceration and the Law

Documentary sources show that carceral facilities were used under public and private regimes for a variety of purposes: sometimes prisons were used to hold defendants prior to their trial, and again briefly after trial before they could receive another form of punishment; sometimes prisons were employed to coerce repayment of publicly or privately held debts, or in hopes of deterring deviant behavior in a wider civic population; sometimes prisons were used to neutralize political enemies, or as forms of torture and execution in and of themselves, where people were sent to waste away before their bodies were discarded. And sometimes people were placed into carceral facilities as a form of punishment, even for a limited-term sentence. From a purely legal perspective, some of these uses of the prison were clearly permissible, and some were contested. Some were abuses, and some were unquestionably sanctioned. All, however, were carceral practices, whose stunning variety we investigate as they appear on a continuum from limited-term incarceration in public prisons to sentences of carceral convict labor.

Because we intend the voices of the incarcerated to have the final word, it seems fair to let the lawyers and judges have the opening statement. If the notion of an ancient world in which prisons were marginal were not so widespread, we might have begun our analysis elsewhere; however, our study will prove more effective if we first demonstrate that surviving legal materials do permit punitive incarceration as part of legal procedure, and that varieties of incarceration were a widely available legal sanction, at least within the Roman legal tradition of the imperial period. So, we begin there, with an overview of previous work where legal historians have argued for the widespread use of prison facilities and for the possibility of legal, penal incarceration, before we turn in chapter 2 to discussing spaces where

incarceration took place and, in the remainder of the book, to investigating lived experiences and social perceptions of the prison.

Compared to documentary and literary sources, legal sources on incarceration are somewhat scant. Nevertheless, a number do remain, mostly as collected in late antique compilations of Roman law—compilations that are useful because, for the majority of our period, Roman law was operative across the Mediterranean basin as one of many legal frameworks and eventually as the dominant framework for nearly all inhabitants of the region. It is, of course, a flawed historiography to reduce the history of incarceration to theoretical debates and expressions of law. Much of the carceral apparatus existed beyond the realm of courts, judges, advocates, and laws. Even so, as Robert Gordon (1984) argued in a classic treatment of the relationship between elite sources of legal disputation and law as practiced, the writing of judges and jurists “are among the richest artifacts of a society’s legal consciousness. Because they are the most rationalized and elaborated legal products, you’ll find in them an exceptionally refined and concentrated version of legal consciousness” (120). At the same time, influence flows both ways: sometimes elite prescriptions trickle down in “vulgarized forms” as popular practices, and sometimes juristic sources “represent simply an elaborated, purified, and formalized version of a consciousness whose primary producers are to be found all over the society” (121). So, what do squarely legal sources say about how incarceration *ought* to function in an ideal world?

Roman legal materials are dynamic and diverse. Juristic sources from the likes of Paul, Ulpian, and Modestinus are rather uncontroversially idealized texts, while laws preserved in the late Roman codes are more akin to statute law—idealizing still, but differently so. At base, legal sources of all stripes present a spectrum of carceral practices, including limited-term or perpetual sentences in public prisons, condemnation to hard labor in or adjacent to carceral facilities meant to house convict laborers, imprisonment in public or private facilities intended to coerce debt collection, and temporary incarceration en route to other forms of punishment—sometimes temporary incarceration before execution within a civic prison, and sometimes transfer to another prison to await punishment of a different sort. All these practices are carceral. Above all, legal sources dispute and disagree about the precise ideal shape of this carceral constellation, and there are possible readings of some sources that may imply penal incarceration in particular was outlawed in the Roman Empire. Other elite normative sources claim that penal incarceration is not only acceptable but in fact preferable. As a purely legal matter, we find a diversity of idealized practices, but we join a growing number of scholars to advocate that they trend in one direction: the notion that penal incarceration was materially common and legally acceptable at several points in the various, evolving Roman legal systems. We wait until chapters 3 and 4 to discuss how the prison was often experienced as punishment and how such ideologies proliferated through society; here we argue that jurists and emperors often intended and used carceral facilities as such.

We make this distinction because it is one thing to argue that incarcerated people understood their imprisonment as punishment, another thing to suggest that some administrators misused incarceration as punishment, and yet another to determine that lawyers, legal theorists, and administrators intended incarceration as punishment. In the following section, we deal primarily with legal sources, intending to isolate the contours of a Roman theoretical discourse on the relationship between incarceration and law. We hope to demonstrate that when Constantine legislated “The prison is for punishment. The prison is for guilty people,” he meant what he said, while also tapping into a long tradition of officials who legislated and implemented penal incarceration, even while some jurists disagreed and reformers protested the practice (*CTh* 11.7.3, L35 [320 CE]).

JURISTS, JUDGES, AND EMPERORS ON PUNITIVE INCARCERATION

The role of jurists is difficult to delineate in contemporary terms: they were legal scholars, commentators, and advisors to the imperial apparatus. While jurists and emperors were both interested in law, their relationship with it was fundamentally different. Roman emperors were a source of law, while (before the late antique period) jurists were interpreters of it. Members of a third category—enforcers of the law, in the person of governors, judges, and court officials—in some cases show keen awareness of the pronouncements of emperors and opinions of jurists, but in many instances they were either not up to date on the legal theory or did not feel beholden to it in their own practices.

The contention that incarceration was at times intended as a legal punishment is at odds with trends in understanding Roman law since at least the late nineteenth century. As discussed in the introduction, Yann Rivière (2021) is only the most recent in a long line of scholars to reiterate the now traditional view, so we will engage his account and his conclusion: “incarceration never had the function of penal confinement, defined for a limited-term or in perpetuity, and it was solely through the negligence of judges or procedural delays that detainees awaiting trial could be held within the walls of a cell” (409). Words like *never* and *solely* paint an idealized picture in broad strokes. In Rivière’s estimation, the conclusion constitutes an essential historical fact, though after dismissing the need to provide evidence supporting such a widely repeated claim, he relents, offering the same two pieces of evidence mustered most everywhere else: Ulpian’s comment that governors ought not to use prisons for punishment, and the jurist’s discussion of doubled sentences for people who escape from condemnation to public works.

The problem, here and elsewhere, is that none of this evidence says what it has been often interpreted to mean. Before Ulpian prescribed his ideal state, in which incarceration is not used for punishment, he described the world as he knew it in practice: “Governors are in the habit of condemning people to be kept in prison

or that they might be kept in chains, but they ought not do this, for punishments of this type are forbidden . . . [*Solent praesides in carcere continendos damnare aut ut in vinculis contineantur: sed id eos facere non oportet. Nam huiusmodi poenae interdictae sunt . . .*]” (D 48.19.8.9, L120 [early third century CE]).

Now, jurists use normative language like “but they ought not do this” (*sed id eos facere non oportet*) in a number of different ways that occasionally conflict. Sometimes *oportet* means “the legal rule ought to be X,” while other times it means “as an ethical matter, we ought to do X,” “the legal rule should properly be X,” “it is illegal for the judge to do X,” and, in some cases, “X is not suitably effective.” Given the number of legal sources that prescribe penal incarceration in some variety, and given its apparent widespread use—both according to the documentary record, literary sources, and according to Ulpian himself in this very passage—we find it most compelling to translate Ulpian’s Latin with either of two possibilities, rendering it as follows: “Governors are in the habit of condemning people to be kept in prison or that they might be kept in chains, but [as an ethical matter/ the law should normatively declare that] *they ought not to do this, for punishments of this type are forbidden*; the prison should be used to confine men, and not for their punishment” (D 48.19.8.9, L120 [early third century CE]). Not all texts can or should be read against the grain, but this opinion invites such an interpretation.

There has even been a *recherché* grammatical discussion in the literature suggesting various emendations to Ulpian’s text, on the theory that the Latin manuscript must be corrupt and that some words (*aut*) should be deleted, while others (*perpetuis*) ought to be supplied. What Ulpian *actually* wrote, it has been proposed, speaks to his distaste for governors keeping prisoners permanently in chains, and does not indicate a prohibition on penal incarceration tout court (Lovato 1994, 133–39; Rivière 1999, 58–59; Hillner 2015, 136). The arguments are complex and contested, and they would warrant detailed analysis if Ulpian’s passage were the only legal source that speaks to the ubiquity or acceptability of penal incarceration. As we show below, however, scholars have been in the habit of taking Ulpian’s distaste for the common use of penal incarceration as the locus classicus for the discussion about penal incarceration in Roman law, but they ought not do so. Penal incarceration appears regularly in legal sources, and while the specific reading of Ulpian’s legal opinion is contested, its effect is not; whatever the particular aim of Ulpian’s displeasure was, he speaks squarely to the fact that legal ideals had frustratingly little impact on penal practices in the Severan era, or that his opinion was in the great minority. If we wanted strictly to understand the internal ideal world of Roman law, then a long digression would be warranted (cf. Rodríguez Martín 2003, 175–92; Zamora Manzano 2015, 72–94). But our aims are different, so we must press on.

Rivière’s other piece of evidence is this: Ulpian claims that in cases where people escape from condemnation to public works, their sentence is doubled. He clarifies, however, that the entire sentence is not doubled “from the time when

[the convict] was arrested and imprisoned,” but rather that only the time remaining on their sentence should be doubled upon escape (*duplicato tempore damnari solet: sed duplicare eum id temporis oportet*) (D 48.19.8.7, L120 [early third century CE]). In this case, Ulpian distinguishes between people who are condemned to public works and people who are condemned to civic prisons, speaking only to the former category. It is crucial to remember, however, that a variety of legal punishments were available to Roman judges. Just as Ulpian claims that it is customary to use prisons as punishment, though he saw the practice as distasteful, he claims that it is customary to double sentences for escapees. The availability of condemnation to public works does not preclude condemnation to civic prisons, and in reality both were explicitly conceived of as carceral facilities within a larger punitive system.

Dozens of legal sources speak to the widespread use of prisons for punishment, while other literary materials help to contextualize Ulpian’s concerns. In the late first century BCE, Cicero employed common knowledge and language for uses of prisons, and the types of people inside them, in service of a larger principle: “For in this connection we do not need to discuss cut-throats, poisoners, forgers of wills, thieves, and embezzlers of public money, who should be worn out not by lectures and discussions of philosophers, but by chains and prison walls” (*On Duties* 3.18; L225 [46–43 BCE]). Centuries later from the court of Constantine, Eusebius complained that Christians had been condemned to the entire gamut of acceptable legal penalties: some fought gladiators and beasts, some were castrated and sent to the mines, and others were submitted to tortures and then “cast into prison” (*Martyrs of Palestine* 7.4, L54 [early fourth century CE]; cf. Tertullian, *Apology* 44–45, L262 [197 CE]; Eusebius, *Theophania* 5.28, L154 [ca. 324 CE]).

Ulpian did not rule out the use of public incarceration as a form of public reprove, either—in his treatise *On the Edict* he approves of it (or at least in his gloss of the edict he reports that the pretor reserves the option to use the prison) as an *animadversio*—a chastisement for deviance, in this case for a man who brings a knife to a dice fight and may be punished with either a fine, a term in the stone quarries, or one in the public prison (*in vincula publica*) (D 11.5.1.4, L116 [early third century CE]). Even if one wants to avoid translating *vincula publica* as “public/municipal prison,” it remains unavoidable that Ulpian viewed some kind of public incarceration as a formal legal punishment. For us, the exact location need not be the civic prison alone; as we discuss at length in chapter 2, attempting to delineate neatly between penal incarceration in a civic prison and penal incarceration in a facility for convict laborers seems to miss the forest for the trees. What matters for our discussion here is the use of incarceration as one of the formal penalties available to judges.

If Ulpian’s criticisms are the best evidence that can be mustered from the legal corpus against the legal use of penal incarceration (and they are), we must at least countenance the conclusion that penal incarceration was simply legal, prevalent,

and commonly accepted throughout parts of the Roman world. This argument, while controversial, is hardly novel—Peter Garnsey made it already at length in 1970, concluding “Ulpian disapproved, but nevertheless *vincula* or *vincula publica* appears as a punishment alongside *relegatio*, *exilium*, *deportatio*, *opus publicum*, and the money fine. The governors, in employing imprisonment as a penalty, could be said to have shown a fuller understanding of the direction in which the penal system was evolving” (149–50). Or, elsewhere: “The Severan jurist Ulpian complained of the ‘custom’ of governors of sentencing condemned men to prison . . . But judges evidently took a less purist stance, and [in the imperial period] imprisonment became a regular alternative to penalties such as exile, the fine, and public labor” (Garnsey 1968, 152). In other words, prisons were one of the tools in the evolving Roman legal toolbox.

It is important to note that penal incarceration was not invented by Romans of the high and late empire. Already in 353 BCE, Demosthenes discussed incarceration as a formal “bodily” punishment (as opposed to a financial punishment) that the law courts could impose as a sentence to someone convicted of crimes—one with the effect of blocking the wealthy elite from avoiding carceral punishment by paying a fine while the poor endured prison (*Against Timocrates* 24.146 and 151, L27 [353 BCE]; Allen 1997, 124–25, 132; Folch 2021b, 508). It appears in republican Rome, as well: in a classic article comparing various accounts of the Catilinarian conspiracy of the mid-first century CE, Werner Eisenhut (1972) argues, “the facts allow for no other conclusion: during the period of Cicero’s consulship, incarceration was a viable punishment so common that Caesar could propose it as a legal alternative to execution. The senators . . . and the writers who report on the Senate session evidently agreed with this view” (1972, 272).

Two Greek inscriptions of a Roman edict dated to 68 CE from Tiberius Julius Alexander (prefect of Egypt from 66–69 CE) on debt imprisonment specified the legal use of prisons for holding debtors and indicate that the only person who should be detained in a public prison is someone who is a “criminal.” (This law perhaps overturns a provision of the Twelve Tables, which likely permitted debt imprisonment in public facilities.) In it, the governor declares that debtors to the state ought to be kept in the local treasury prison (*praktoreion*) “so that the extraction of debt may be from the property, rather than from the bodies”—apparently the *praktoreion* was less onerous than the civic prison. By way of explanation what ‘extracting a debt from the bodies’ would entail, the prefect elucidates that only criminals (*kakourgoi*) should be held in the civic prison (*eis fulakēn*) (Temple of Hibis 2.4, D177 [68 CE]; OGIS 669, D185 [68 CE]). These carceral facilities retained their Ptolemaic titles even under Roman administration, and their use remained intact as places of bodily punishment. And, importantly, debt incarceration itself had a punitive function, even when sentences were served in prisons reserved for financial offenders.

Disarticulating debt incarceration from incarceration for perceived criminality is quintessentially modern and reductive, as is a clean distinction between coercive, custodial, and penal control. A generation ago Richard Ireland (1987) showed that the tripartite theoretical division between custodial, punitive, and coercive imprisonment that is near-axiomatic in modern penology does not hold in medieval English legal ideology *or* practice, where defaulting on debt constituted a social offense itself deserving of punishment, and where penal incarceration was intended as a deterrent against breach of contract; to understand debt imprisonment as strictly coercive is to dramatically misunderstand the social world of medieval England. The same approach and potential problems extends also to the ancient Mediterranean. Hillner employs this now-standard taxonomy, with the added caveat that “the penal landscape of the Roman world was more complex than these previous models allow.” More than questioning the utility of applying modern models to the ancient world, Hillner suggests that “forms of imprisonment understood as ‘reformatory’ had their place in this landscape” (2015, 1–2, cf. 14–15, 113–16).

Nevertheless, when applying modern penal theories to antiquity, it is often hard to square the circle. Such categories can mislead as much as they reveal; for instance, we agree with Zamora Manzano (2015, 22), Garnsey (1970, 149–50), and others that even custodial and coercive control was a *de facto* penal sanction in the Roman legal imaginary. Ulpian himself admits as much in book 7 of *On the Duty of the Proconsul*, commending the imperially sanctioned practice of placing insane individuals in the prison in order to constrain their behavior, noting the double-effect of even “purely custodial” incarceration in cases where murderers falsely claim insanity as a defense. Anyone claiming insanity should be incarcerated, “such that if he was faking, he is punished, and if he is insane, he is confined in the prison” (*ut si simulasset, plecteretur, si fueret, in carcere contineretur*) (D 1.18.13.1; L287 [early third century CE]; Pavón Torrejón 2000: 202).

In a series of studies beginning in 1994, Andrea Lovato has published what is still the most sophisticated analysis of the prison’s place in Roman penal ideology, making his analysis worth briefly discussing here. Lovato (1999) shows convincingly that at least by the period of the late Roman republic, the oft-cited delineation between a judge’s jurisdictional power and his coercive power had collapsed, and that even the coercive use of civic prisons had punitive aims and functions (50–51; Zamora Manzano 2015, 29). He also showed how the advent of a new legal regime under the *cognitio* process changed the legal framework under which carceral sentences were imposed and allowed for greater judicial discretion in sentencing, even though neither changed the Roman punitive regime in its broad outlines (Lovato 1994, 88–89). Our point of departure is indebted to Lovato, who showed that it constitutes a historical failure to extract a general rule about the nonexistence of a prison sentence from Ulpian’s famous comment, and further

that according to Roman law, the civic prison was only one part of a multifaceted punitive regime which included prisons of other types (2).

Instead of letting Ulpian's ideals dictate our analysis, we too have decided to take a different tack: letting pronouncements of rulers before and after Ulpian's time guide our understanding of Roman law. Throughout this evidence, from Julius Caesar to Constantine and beyond, we find clear evidence of carceral control as a *poena*—a punishment meted out to avenge a legal or social violation. The vast corpus of Roman legal materials has a number of distinct throughlines on this topic. First, jurists discuss incarceration regularly, and emperors legislate about it; its use was a staple of successive Roman legal systems. Second, while some jurists found penal incarceration distasteful, others express no compunction about imprisoning people as punishment after conviction. While not unanimously agreed on as an ideal practice, it is undeniable that the prison was a tool used by some administrators for maintaining civil order and sanctioning people for perceived deviance. Third, both in the older formulary and imperial *cognitio* procedures, a wide range of sentences were available to judges, including permanent or time-bound banishments, permanent or time-bound condemnation to prison, public works, and mines, and death by starvation, strangulation, sword, or spectacle.

Condemnation to the mines in particular was a topic of perennial interest to jurists, but we should be careful not to assume that the level of juristic interest in the status and plight of imprisoned workers reflects the proportion of people punished in this way. (Roman jurists were also intrigued by the legal liability of dogs and their owners; it is an interesting juristic conundrum, but we should not assume that interest on the part of legal professionals reflects ancient legal dockets heavy with canine torts. Justinian's compilers apparently needed more information on mines than on other punishments, and thus excerpted that material more heavily.) Fourth, people serving sentences of convict labor were still caught up in the larger punitive carceral system—they were often considered as a type of prisoner: for instance, when Seneca the Younger calls the mines at Sicily a “natural prison” (*nativus carcer*) (*On Consolation* 17.4, L94 [37–41 CE]). Archaeological sources like the incarcerated workers quarters at Simitthus, too, suggest that these spaces functioned as permanent and purpose-built prisons with intentional design elements allowing for separation of prisoners of different types (Simitthus Workers' Prison, A13). Documentary evidence further demonstrates that, in some cases, a majority of convicts condemned to the mines were in fact not laboring underground but were restrained inside a carceral facility for long stretches of time during their sentence—they were in prison, awaiting their turn to work. We return to each of these points below (p. 125–127).

Jurists and emperors at times even prescribed sentences of incarceration for a limited term, mainly for lower social status offenders: a practice that is hard to make sense of apart from the intention of incarceration as punishment for deviance. Writing in the late second century, Papinian discussed a rescript of Marcus

Aurelius and Lucius Verus some forty years earlier on the topic of limited-term, penal incarceration. The law immediately concerns slaves who had been sentenced to limited-term imprisonment by a judge, and addresses the question of whether they could receive an inheritance after their sentence was served. “The imperial brothers wrote in a rescript that slaves condemned to temporary imprisonment [*servos in temporaria vincula damnatos*] may obtain their freedom and an inheritance or legacy when they have served their time [*postquam tempus expleverint*], given the fact that the period of restraint which results from a legal sentence satisfies the punishment [*consequi quia temporaria coercitio, quae descendit ex sententia, poenae est abolitio*]” (D 48.19.33, L41 [161–69 CE]). It is important to remember that the subjects of this rescript were *already* slaves; the text speaks to their limited-term incarceration as a punishment for deviant behavior, not to restraint in chains related particularly to their enslaved status. Most importantly, the logic of the passage relies on a broader theory of carceral practice: the reason that a slave’s capacity to inherit is returned to him after his period in chains is that “the period of restraint satisfies the punishment.” Not only was limited-term penal incarceration under discussion in this imperial pronouncement from the mid-second century CE, but it invokes a broader legal principle that time incarcerated can be calibrated to deviance and act to satisfy the need for punishment. We return to this point in chapter three.

A rescript of Hadrian discussed by Callistratus in the third century CE speaks both to limited-term penal incarceration and to sentencing enhancements reminiscent of more recent American carceral practice, in which subsequent misconduct can render one punishment into another, harsher option. In the early second century CE, Hadrian ordered that in cases where convicts escape or otherwise fail to fulfill the terms of their punishment, “a certain gradation should be observed with reference to prisoners—namely, that those who were sentenced for a certain period of time [*in tempus damnati*] should be sentenced for life [*in perpetuum damnati erant*]” (D 48.19.28.14, L122 [117–38 CE]). Some have attempted to explain away the limited-term, penal aspect of this rescript by restricting its application solely to free men condemned to public works, and not, as it says, people under carceral control (*ita . . . in custodiis*). Such harmonization is possible, and Hervé Huntzinger (2005) offers precisely such a solution on analogy with Ulpian’s opinion on doubling of public slave sentences from a century later, likely before Callistratus wrote (24). It is hardly the only solution, however, and suffers from two defects: (1) It is not what the text says, which instead refers to people condemned to hard labor simply as prisoners; and (2) Ulpian himself attests both disagreement between jurists and, famously, between legal ideals and practiced realities.

In the second book of his *On the Duty of the Proconsul*, Ulpian laid out his ideal procedure for someone facing an accusation. There are four options: they are “to be admitted to the prison” (*in carcerem recipienda*), “delivered to a soldier”

(*an militi tradenda*), or “committed to the care of their sureties, or to that of themselves” (*fideiussoribus committenda vel etiam sibi*) (D 48.3.1, L105 [early third century CE]). What Ulpian intends, then, is a system of pretrial custodial incarceration with allowances for bail—either cash bail or bail on the recognizance of the accused, both of which are amply attested in the documentary record. Some laws, like *CTh* 9.1.7 and 9.1.18, from the middle and latter parts of the fourth century respectively, record imperial pronouncements that incarcerated people should be tried within a month (*CTh* 9.1.7, L89 [338CE]; *CTh* 9.1.18, L290 [396 CE]). A law of 423 CE further explicates the bail system, though it claims to simply restate “the rules long ago made for criminal cases.” These timeworn rules indicate that accused people should generally not be incarcerated simply by virtue of accusation, but that certain serious crimes require both accuser and accused to be incarcerated, with the conditions of their custody “taking into account their rank” (*dignitatis*)—which is to say that high-ranking people are not to be incarcerated in public prisons, an invocation of the Roman class-based caste system long since instituted by the fifth century (*CI* 9.2.17.0, L5 [423 CE]; cf. D 48.19.9.11; Harries 1999, 139–42).

Earlier jurists like Venuleius Saturninus, working in a somewhat different legal system, likewise prescribe that people should be incarcerated after they confess until they are sentenced (D 48.3.5, L107 [early third century CE]). Importantly, none of the laws say that the sentence cannot be further incarceration, only that they should be sentenced in a reasonable time, and Saturninus similarly speaks only to preconviction detention without indicating the range of possible punishments. A set of opinions forged in the name of the famous jurist Paul, probably sometime in the late third century, details available punishments for crimes of varying severity: people convicted of the most serious crimes may incur beheading, crucifixion, and immolation as punishment; deportation, condemnation to the mines, or gladiatorial combat for less severe crimes; and for the lowest level of infractions options include banishment, condemnation to public works, and incarceration (*vincula*) (*Sententia Pauli* 5.17.2, *FIRA*², 405 [late third century CE]).

Labeling it as a “less purist stance,” Garnsey (1968) notes that for some jurists “imprisonment became a regular alternative to penalties such as exile, the fine, and public labor” (152). Already in the mid-second century CE, the emperor Antoninus Pius had written to the people of Antioch that someone accused of a serious crime should not be released on bail, “but should suffer this same penalty of imprisonment before his punishment [*verum hanc ipsam carceris poenam ante supplicium sustinere*]” (D 48.3.3, L106). So linked were the prison and punishment that Roman legal theory provided for both pre- and postconviction penal incarceration, and one punishment was not exclusive of another—one could be “punished” with incarceration before undergoing another form of punishment. But

again, the fact that another form of punishment was possible does not negate the penal aspect of incarceration itself—or, indeed, its use as a sanction in and of itself.

The emperor Constantine says as much in a number of reformatory laws promulgated in 320 and the years following. In *Theodosian Code* 11.7.3 he legislated that tax debtors should not be incarcerated or suffer any other type of bodily harm by the legal apparatus. Constantine's justification for the law offers another glimpse into a carceral logic of the early fourth century, in the context of a dramatic reorganization of Roman legal bureaucracy. He specifies that prisons are not intended for tax debtors, but for a different type of persons: convicts. "The prison is for punishment; the prison is for guilty people [*carcer poenaliū, carcer hominum noxiōrum est*]" (*CTh* 11.7.3, L35 [320 CE]). If we were to frame our understanding of Constantine's legislation as bound by Ulpian's distaste for punitive uses of incarceration nearly a century prior, or the notion that prisons are ideally custodial and not part of the punitive apparatus, then we could find a way to explain away Constantine's rather clear invocation of prisons as a place for the punishment of convicts. Still, we argue that the two men's status is relevant: Constantine was an emperor, Ulpian was a jurist. If we add to this the fact that Ulpian explicitly says that prisons were regularly used as punishment in his own day, it becomes hard to read Constantine's statement to say anything other than its plain meaning. If, as Lovato argues, laws such as these reflect a desire for stricter sentencing guidelines that were previously lacking in the *cognitio* procedure, the point is doubly made—punitive sentencing to prison was perhaps previously one possible outcome, only later to become a standardized regime (1994). Another set of reforms appear in a Constantinian law from the same year. At issue is the plight of defendants awaiting trial of any kind and the danger inherent in prolonged carceral detention. Such defendants as these ought to be kept in salubrious conditions, in loose-fitting chains, and with access to light (at least during the day). The law offers its own justification, as well: "The idea is that he does not perish from the punishments of prison [*ne poenis carceris perimatur*], which is regarded as pitiable for the innocent, but not sufficiently severe for the guilty" (*CTh* 9.3.1, L133 [320/1 CE]).

Constantine's legislation on the subject is something of a thorn in the side of Lovato's analysis. In his commentary on the law, Lovato (1994) admits that "the term *poenae carceris* [punishment by imprisonment] appears in the law: we have already noted that this is an expression used inappropriately" (183). The phrase does appear several times, so on what grounds does Lovato accuse the emperor of using the expression "punishment of imprisonment" inappropriately? Lovato agrees that Ulpian's distaste for penal incarceration is not the proper context in which to understand Constantine's discussion of penal incarceration, and he offers instead a novel reading of Constantine's reformatory justification that death on account of the squalid conditions is "a fate which is considered pitiable for the innocent but not severe enough for the guilty." In Lovato's estimation,

the “punishment of imprisonment” is poor wording because the prison is intended here with a “preventative function”—that is, to hold prisoners until trial, given that “the establishment of the accused’s innocence is a point of arrival, not departure” (182). Thus, the law indicates that imprisonment *itself* is not severe enough for the guilty—that “a punishment of this kind would have been insufficient”—and thus the prison cannot have been used as punishment at all (183–84). This is a possible reading of Constantine’s law, but it is hardly the most compelling one. In addition to providing a subtle interpretive sleight of hand, Lovato’s comment fails to acknowledge the awful torture of imprisonment—tortures that the law in question explicitly aims to mitigate. Even so, if the concern is about people dying in prison, the law does not necessarily speak for or against the use of penal incarceration.

In Lovato’s estimation, Constantine was prone to legislative mistakes. Six years later, when promulgating yet another law discussing the use of penal incarceration, the emperor was responsible for “another improper use of the term *punishment*” (185). The law reads,

If any person should be apprehended in that kind of infraction or crime that appears to deserve the confinement of prison and the squalor of custody, and if after a hearing before the public records the commission of the crime should be established, he shall sustain the penalty of imprisonment, and thus somewhat later he shall be led forth and heard before the public records. For thus a reminder of the crime committed shall be made under public attestation, so to speak, so that when judges rage excessively, it may appear that certain restraints and moderation have been employed. (*CTh* 9.3.2, L172 [326 CE])

The law indicates the order of operations for a person suspected of a “infraction or crime [*culpa vel crimine*]” that appears to warrant incarceration after their guilt has been established in the public record. Interestingly, the emperor indicates precisely that there are a variety of infractions that deserve incarceration (while pointedly refusing to distinguish between “infractions” and “crimes”), and after conviction people guilty of such deviance “shall bear the penalty of imprisonment [*poenam carceris sustineat*].” In the broader context of the law it is clear that Constantine intends the prison to be used only in criminal cases, sparing debtors to the state from a variety of physical and social sanctions by implementing a looser military custody while limiting the use of carceral punishment to convicted criminals (Rivière 2004b, 209–10). His son Constantius prescribed a somewhat more expansive policy, legislating in 349 CE that public prisons should be used both for non-punitive custody before trial, and for postconviction punishment. “Prisons shall hold the scoundrels when they are convicted [*sceleratos convictosque carceres teneant*], tortures shall tear them apart, the avenging sword shall do away with them. Thus, in this way, the freedom of the habitually lawless will be prevented” (*CTh* 2.1.1, L34 [349 CE]). Lest we think that the listed punishments—prison, tortures, and death—are intended to be sequential rather than prison as a punishment in

and of itself, an early sixth-century jurist in the West added an interpretation, noting that even people working on imperial estates are subject to whichever punishment is demanded by their guilt, including prison, torture, and death. “Should any of the Emperor’s own slaves or tenant farmers be involved in any criminality, [judges should] arrest and punish them, just as their guilt demands—the same as if they were private persons” (*CTh* 2.1.1.Int). Both this fourth-century law and its sixth-century gloss present prison as one penal option out of many available to judges, no matter the identity of the defendant. This is the way that the emperors Gratian, Valentinian II, and Theodosius I understood the status quo, as well; fifty years after Constantine’s legislation, they reiterated that: “Before he is convicted, no one should be chained in prison” (*CTh* 9.2.3 L90 [380 CE]). Confinement *after* conviction, it seems—and even confinement in life-threatening chains—was both acceptable and normal. Were these people still in custodial custody, on the way to punishment, or was custody part of their punishment itself? Commentators disagree, as we have shown. What is clear, though, is that prolonged postconviction incarceration was nevertheless common, and deadly in itself.

In fact, in the early fifth century the emperors Honorius and Theodosius II spoke to the possibility that people who had been sentenced to some form of exile were instead punished with serving that time in a prison, either by accident or as a result of judicial abuse. In such cases, they decree that the prisoner should be

absolved from further punishment, released from their chains, freed from custody [*solutos poena vinculisque laxatos custodia liberari*], and have no fear of the miseries of exile afterwards. Let it suffice that they have atoned once for all through the sufferings of immeasurable tortures, so that those persons who have been long deprived of the breath of our common air and the sight of light and who, confined within a narrow space, have been burdened with the weight of chains shall not be compelled to sustain also the punishment of exile [*exilii poenam sustinere*]. (*CTh* 9.40.22, L96 [414 CE])

Importantly, time spent “in chains” (*vinculis*), and “custody” (*custodia*) are forms of incarceration, a codified legal penalty that the law places alongside exile. As a penalty, however, incarceration was so much more severe that someone who was sentenced to exile and instead served that time in prison was to be immediately absolved of further penalties. Here we see both location of bondage and extent of time carefully calibrated as related forms of punishment that respond both to the nature of the crime and the status of its perpetrator.

Across six centuries, then, Roman legal sources regularly prescribed incarceration as a sanctioned form of punishment, including incarceration for a limited term. Reflection on Ulpian’s distaste for incarceration, as well as on the distinction between incarceration and sentencing on the part of jurists like Venuleius Saturninus and emperors like Antoninus Pius, has led modern historians to understand that Roman incarceration was purely custodial, that custody was

kept until punishment was rendered, and that the punishment rendered was never further incarceration.

Such an assumption, however, involves three fundamental errors. First, it is to assume that jurists like Ulpian speak descriptively rather than prescriptively, an assumption that is undercut by scores of documentary and literary sources, and by the fuller context of Ulpian's own comment. Roman jurists often presented a vision of an idealized judicial system, not a reflection of the system as practiced. However, when they speak explicitly of the system as practiced, they point to penal incarceration as a norm; Ulpian admits that "governors are in the habit of condemning people to be kept in prison or that they might be kept in chains" (D 48.19.8.9, L120 [early third century CE]). As Hillner (2015) points out, "even a positivist reading of Ulpian's passage as a prohibition of the prison penalty would suggest that provincial governors applied it in their sentencing practice. The nearly proverbial status in literary texts ranging from the late republic to late antiquity seems to confirm the widespread use of punitive imprisonment during the empire" (136). While "no true Roman" ought to do so, apparently lots of Romans did exactly this. Second, it is an error to assume that jurists like Ulpian were speaking authoritatively rather than offering opinions about what the law means and how it should work. Jurists' opinions could be influential, but they were not socially powerful in the way that we understand a law to be today, or in the way that an imperial constitution was in Ulpian's day. The third historical error is to read a text like that of Venuleius Saturninus, who says that people who confess should be incarcerated "until sentence is passed on him," to mean that incarceration itself was not an available sentence (D 48.3.5, L107 [early third century CE]). This source speaks to the use of custodial incarceration in antiquity but it does not suggest that custody was the only reason for relegating someone to prison. Saturninus wrote about the topic of pretrial bail, not about whether penal incarceration was an available form of sentencing. We show below that prisoners regularly described and experienced their incarceration as a punishment, and documentary sources attest to prisoners released from incarceration and other forms of punishment after serving a time-limited sentence.

Legal sources also stress that penal sentences were often intended to be limited in term. Callistratus wrote in the early third century CE, "In the mandates given by the emperors to provincial governors it is provided that no one is to be condemned to permanent chains/imprisonment [*perpetuis vinculis damnetur*], and the deified Hadrian also wrote a rescript to this effect" (D 48.19.35, L42). The rescript, and Callistratus's description of the various mandates that he has seen, implies precisely that further limited-term imprisonment is at least theoretically acceptable, and that only *permanent* incarceration was outlawed—though even Hadrian's rescripts are inconsistent on the permissibility of permanent sentences, as discussed below (D 48.19.28.14, L122 [117–38 CE]). Of course, documentary and literary sources show that permanent—or at least indefinite and prolonged—incarceration

was commonly practiced, again pointing to the fissure between legal theory and social practice (cf. Quintus Curtius, *History of Alexander* 7.1–10, L188 [41–54 CE]). We return for the moment, however, to legal theory.

VARIETIES OF PUNITIVE INCARCERATION: CONDEMNATION TO HARD LABOR

Condemnation to unpaid convict labor is prevalent in Roman legal sources and was predominantly categorized as an aspect of the larger system of penal incarceration, a framing that documentary and literary sources largely corroborate (Huntzinger 2005). Penal mine service existed in two interlocking but formally distinct categories: those condemned to the mines with heavy chains (*ad metallum*) and those condemned to a lesser service of mine labor with lighter chains (*ad opus metalli*) (D 48.19.8.6, L120 [early third century CE]). Mine service was a peculiar aspect of the Roman carceral system, and jurists were most interested in the intellectual problems that these statuses presented. While Hillner (2015) categorizes condemnation to hard labor as a “special form of exile,” legal sources characterize penal labor as a form of carceral control, reserved for low status offenders and related to but legally distinct from enslavement (199–211; Larsen 2019). For Millar (1984), a clear bifurcation between imprisonment and condemnation to the mines is merited: “Imprisonment therefore was not (in principle) a recognised long-term penalty . . . *Opus publicum*, however, clearly was a regular custodial penalty, frequently referred to in legal sources” (132–33). It is worth pausing to question the utility of such a clean distinction and ask if it is more useful to frame the discussion differently. In our view, a “custodial penalty” is, if nothing else, a carceral practice; mines and mining complexes were functional prisons even though they were not identical to imprisonment in a municipal facility. Jurists and emperors were creative in their sentences of condemnation to hard labor, including one of Constantine’s political rivals who was condemned to work, fettered, in an imperial weaving establishment in Carthage (*CTh* 4.6.3, L135 [336 CE]), while a law of the mid-fourth century condemns people convicted of lesser crimes to work in the bakeries of Rome (*CTh* 9.40.5, L95 [364 CE]). In discussing not just the prison but also the broader legal ideologies carceral practices, we incorporate sentencing to hard labor into our analysis of incarceration, including sentences sending convicts to mines, quarries, bakeries, brothels, and other public works—places where people were sent as prisoners to perform unpaid labor on behalf of the state or its contracted partners.

Convict labor was employed beyond resource extraction, especially in the condemnation of prisoners to serve a punitive limited-term carceral sentences in public works, a fate typically reserved for lower-status individuals (Pavón Torrejón 2003b, 188–92). A rescript of Antoninus Pius on the topic of people who steal goods from sinking ships is illustrative of a widely implemented practice of

differential punishments, varying in the Roman Republic according to citizenship status, and by the high empire and throughout late antiquity, rigidly according to social class (Cardascia 1950). The emperor prescribes that, after being convicted, higher-status free people should be “beaten with clubs and banished for three years, or if they are of the lower classes, condemn them to public works (*opus publicum*) for the same period [that is, for a three-year sentence]” (D 47.9.4.1, L170 [mid-second century CE]). Enslaved people convicted of this crime, the emperor clarifies, should be flogged and then sent to the mines. Here the time and location are clearly specified, with both unapologetically calibrated to the social status of the convicted. Ulpian proposed that people who had been condemned to public works (*opus publicum*), only to escape, should have the times of their sentences doubled as further punishment (D 48.19.8.7, L120 [early third century CE]). Likewise, if the escapee had originally been condemned to ten years of labor, his sentence should be extended to life, or alternatively changed to a different, harsher sentence: condemnation to the mines.

For sake of scope we keep our focus on incarceration, yet recent works like Douglas Blackmon’s *Slavery by Another Name* (2008) and Michelle Alexander’s *The New Jim Crow* (2010) challenge the desire and the utility of drawing clean lines between the categories of enslavement and incarceration. It is worth clarifying that legal sources disambiguate enslaved people from those who are legally incarcerated. Writing in the late third century, the Roman jurist Hermogenian clarified the idealized legal status of even free people condemned to mine service. He claims that “Those condemned to the mines [*damnati . . . in metallum*], as also to the service of the mineworkers, are made into slaves, that is, ‘penal slaves’” (D 48.19.36, L161). Hermogenian’s syntax makes clear that both men (mineworkers) and women (who were condemned “to the service of mineworkers [*in ministerium metallicorum*]”) were made similar to slaves by virtue of their type of service, but that their status is different—they are *servi poenae*, or “slaves because of punishment” owned directly by the Roman state (D 48.19.8.8, L120; Hirt 2010, 97–98). Importantly, their status differs from enslaved people on three counts: they do not have a master as such, their enslavement is potentially limited in term, and it resulted from conviction for deviance.

As a slight aside, commentators have often read this passage to mean that “women serving mine workers almost certainly were expected to provide sexual services” (Hillner 2020, 20; citing Robinson 2007, 125). There is some evidence that jurists were at least concerned with the possibility that women condemned to the mines might give birth (D 40.5.24.5), but if the implication that women were sex slaves is present in any of the discussions of mineworkers, it is rather subtle. There is, additionally, evidence for paid prostitution within the garrison guarding the mines at Mons Claudianus in the first through third centuries, rather than condemned or enslaved sex workers (Bülow-Jacobsen 2022). Similarly,

Hélène Cuvigny (2010) has shown that soldiers from the Roman garrison at Berenice paid for the services of a prostitute by the month; it would be surprising if male inmates were provided with sexual services while soldiers paid out of pocket for the same. To further underscore the folly of reading legal prescriptions as if they were descriptions of universal practices, we note that even women working in mines overseen by the military did not *solely* work “in the service of mineworkers”—in the second century, for example, women worked in the emerald mines themselves, as documentary evidence proves (O. Did. 376 [early second century CE]).

The distinction between a “slave” and a “slave of punishment” was of continual interest to jurists and legislators. In his *On the Duty of the Proconsul*, Ulpian addresses a potential legal problem in which an enslaved person (*servus*) is condemned to work as a “punishment slave” (*servus poenae*) on account of deviance. If that person is subsequently released from his sentence, what is his new legal status? Does he revert to being a slave? The question is only intelligible if one understands that a *servus poenae* is not a subset of *servus*, but a different category altogether. Ulpian commends a rescript of Antoninus Pius as “most correct” (*rectissime*) in its judgment that, in the event of release of a “punishment slave,” the person should not be returned to their former enslaver because they ceased to be their master’s property when their legal status changed to *servus poenae*. To underscore the point further, Ulpian continues, “If, however, a slave is condemned to fetters [*in vincula*]*—whether permanently or temporarily [sive in perpetua . . . sive in temporalia]*—he remains the property of him who was his master before he was condemned” (D 48.19.8.12–13, L120 [early third century CE]). That is, a slave who is *not* sentenced to service as a *servus poenae* does not change legal status; as a result, he remains under the authority of his enslaver, to whom he is returned after his sentence is complete. Similarly, according to Ulpian, women who are condemned to forced labor in the mines become *servae poenae* only if they are condemned to permanent labor; if they are condemned only to a temporary sentence in the mines, their legal status remains intact and they remain citizens (D 48.19.8.8).

In some cases, jurists devise hypotheticals to test the limits and implications of a legal doctrine, with little real-world interest or application; the question of an incarcerated slave was not merely a hypothetical. Ulpian cites an imperial rescript that adjudicates this problem, presumably in response to at least one relevant case, and the distinction between enslaved people and imprisoned people appears in the papyrological record, as well. P. Oxy. 12.1423 is a letter from Flavius Ammonas, an attendant on the staff of the prefect of Egypt, charging another man to locate his runaway slave and “to bind him as a prisoner and return him” (*diadēsas* [amended *diadēsanti*] *desmion agagein*) (D132 [mid-third century CE]). The man was already liable to be chained simply by virtue

of his enslaved status. This papyrus from an imperial official makes clear that it was his deviant behavior that changed the slave's status to "prisoner," leading him to be bound on account of his actions. Roman materials are not unique in referring to convict laborers as prisoners and in discussing convict labor among broader carceral practices. Documentary sources from the Ptolemaic period also refer to people laboring in mines as "prisoners" (*desmôtai*), and to mines as a "prison" (*desmôterion*) (PSI 4.423, D58 [263–29 BCE]; P. Cair. Zen. 2.59296; D33 [250 BCE]).

It is often assumed that Romans considered labor in the mines to be effectively a death sentence, but the breadth of evidence suggests that death was only one possible outcome, the likelihood of which depended on what form of condemnation the convict underwent—whether they were condemned *in metallum* or *ad opus metalli*. The jurist Callistratus points out that at least condemnation to mine service (*ad opus metalli*) was not a death sentence *de iure* by prescribing that, in certain circumstances, the penalty could be enhanced to become a death penalty (D 48.19.28.14, L122 [early third century CE]). Similarly, a rescript of the emperor Antoninus Pius stipulates that in some cases, people condemned to mine service (*in metallum damnati*) can be released owing to sickness or infirmity, provided that they "have served not less than ten years of their sentence" (D 48.19.22–23, L131 [138–61 CE]). Citing this rescript, the jurist Modestinus adds that sentences to mine labor should be understood as limited to ten years unless specifically indicated otherwise by the sentencing judge. He writes as follows: "If someone is sent to the mines without a predetermined time limit [*sine praefinito tempore in metallum dato*] on account of the inexperience of the person sentencing, it seems that his sentence is limited to ten years" (D 48.19.23, L131 [ca. 250 CE]). Perpetual condemnation to the mines existed as one option for judges, but the only sense in which a sentence of service in the mines (*ad opus metalli*) could *not* be time-bound, according to Modestinus, was when the judge made a mistake.

Documentary sources like SB 20.14631 provide corroborating evidence for limited-term sentences in the mines. This short and fragmentary letter from the prefect of Egypt to a mining official orders the release of a man sentenced by the previous prefect to labor in the mines for a period of five years. "I order that Petesuchos son of Petesuchos, condemned by the distinguished man Petronius Mamertinus to five years in the alabaster mines, be released because the time of his sentence is complete" (D106 [139 CE]; Bastianini 1988). Similarly, a papyrus written at the direction of the prefect of Egypt on December 27, 209 CE documents the release of a prisoner who had been sentenced to work in the mines and been incarcerated there for a period of five years. The document is similar to others of its type, recording conviction of a crime, length of incarceration, and completion of a sentence. It reads:

From Subatianus Aquila to Theon the governor of the Arsinoite district. Greetings. Nigeras, son of Papirios, whom the most honorable Claudius Julianus condemned to the alabaster mine for a period of five years, and who has completed the time of his sentence, I released. (SB 1.4639, D109)

It is important to remember that mining camps that employed convict labor, like alabaster mines in the Nile Valley and marble mines in Egypt's eastern desert, are carceral facilities. *PSI* 4.423, discussed above, contains a report from a mine overseer in Ptolemaic Egypt, detailing the labor of ten prisoners (*desmōtai*) who worked the mine over the course of sixty-eight days. (p. 125–126; D58 [263–229 BCE]). The overseer specifically notes, moreover, that 130 further prisoners were being held in the camp, waiting for their turn to work. As we demonstrate in chapter 2 with investigation of the incarcerated miner's quarters at Simitthus (Chemtou, Tunisia), and the mines at Phaino (Wadi Feynan, Jordan), condemnation to labor was not an exemption from incarceration—it was a form of incarceration.

Limited-term sentencing and release was rather common, it seems. In fact, a similar papyrus from only a few months later mentions the same prefect of Egypt as employing a limited-term sentence.

Anubion the governor [writes] . . . Since the most illustrious prefect Subatianus Aquila sent me a letter concerning Isidorus, who is also called Chaireos, who has completed the time of his sentence and has been released, this copy was sent to you all, so that you might know and act accordingly. (SB 14.11999, D105 [210 CE]; Schwartz 1971)

Again we find bureaucracy at the center of the Roman carceral system, with the colonial Roman administrator pronouncing the completion of a carceral sentence. Some commentators, like Arnaldo Marcone (1999), express reservations about the ubiquity of such releases for time served, but he nevertheless admits that “even if such releases didn’t take place every day, they absolutely correspond to a regular practice which, on balance, speaks in favor of the smooth functioning of the administration of Roman Egypt”—an administration that had condemnation and release as part of its regular procedure (97). What this document fails to mention, however, is perhaps just as illuminating as the information it presents: first, it does not indicate how long the person had been incarcerated, only that he had completed the time of his sentence. Second, it does not clarify where he had been incarcerated. While the mines are a possible location, and perhaps the probable location, it is worth noting that the language of the document allows the possibility that he had been detained in a public prison.

In the late first century BCE, Diodorus Siculus noted that mine service is dangerous to health and to life, and that few are able to survive it indefinitely (*Library of History* 5.38, L168). Practically speaking, toxic air filled with heavy metals rendered it less likely that prisoners would survive their sentence of penal labor in the

mines, and some late ancient laws prescribe perpetual condemnation to the mines as a criminal sanction, as in cases of fraudulent notices of ownership, or if an estate overseer allows heretics to congregate on his land (*CTh* 2.14.1 [400 CE]; *CTh* 16.5.40 [407 CE]). Just as penal incarceration was one option available to Roman judges, so too were limited-term or perpetual sentences of labor in the mines.

PRISON REFORMS

As we have argued, carceral ideology was hardly static through the period covered by our juristic sources; nor can a singular set of practices be distilled from a corpus punctuated by dissenting voices and intermittent efforts at reform. Nevertheless, the sources do reflect a couple periods of what might be described as prison reform, with a cluster of laws promulgated under Constantine, and again under Honorius and Theodosius II, that attempt to constrain some of the worst excesses of the carceral system. Since the period of the *Theodosian Code*, in which these laws are attested, spans almost precisely the space between the two periods of “reform,” we cannot say that these emperors were unique in their concern over the plight of the incarcerated; other attempts at reform are almost certainly lost to history. Nevertheless, legal sources rarely discuss the material conditions of prisons, and we do well to pay attention to the few laws that place incarcerated individuals as subjects rather than objects.

Constantine’s reforms were dispatched from Serdica (Sofia, Bulgaria) in 320/21 CE, and aimed to address some of the dangers of prison for people locked inside, first of all by limiting the time that accused people were jailed, as discussed above. The idea is that the accused “not perish from the punishments of prison” (*CTh* 9.3.1, L133). Accused persons in both private and public suits shall be kept in loose fitting chains rather than “iron fetters which fit close to the bone.” The law addresses access to light, as well, stipulating that accused people should be allowed access to light during the day and moved to darker, inner areas of the prison only “when night doubles the need for detention.” Even then, accused prisoners are intended only to be kept in the part of the prison closer to the entrance (*vestibulum*), rather than the dark inner prison reserved for convicts. At sunrise, “[the prisoner] ought to be immediately led back to the sunlight.” Here we see Constantine speaking directly to the distinction between custodial and penal incarceration, and prescribing that both ought to happen in public prisons. It is not precisely a distinction between a prison and a jail in modern sense—another two hundred years passed before we have secure evidence of a separate pretrial jail facility specifically for the accused and not yet convicted—but it is certainly an explicit attestation of an operative legal distinction between custodial and punitive incarceration (p. 87).

The emperor was concerned, however, that prisons were fundamentally dangerous and unhealthy places, and that custodial incarceration could constitute an

injustice for someone acquitted of charges for which they were jailed. He orders that “neither those who perform the duties of the prison-warden [*qui stratorum funguntur officio*] nor his assistants shall not be permitted to sell their cruelty to the accusers, nor to deliver innocent people to death in the confines of prisons or to allow them to waste away for chronic disease after they are denied a hearing.” This is the context in which Constantine clarifies that death in prison “is regarded as pitiable for the innocent, though it is not sufficiently severe for the guilty.” Constantine indicates that in many instances death in prison would not be enough for guilty people—they ought to be executed, as argued by Lovato (1994)—and also that conditions in public prisons were so dire that they constituted punishment in themselves (183–84). Squalid prison conditions could—and apparently did—kill people, and it was precisely this aspect that aborted justice for the innocent and guilty alike: a punishment that should not be visited on people awaiting trial, even though they are acceptable for those who have been convicted, and perhaps overly humane for convicts.

Nearly two centuries later the Ostrogothic king Theodoric restated Constantine’s concern about the tortures of prison, adding a new facet of carceral ideology that doesn’t appear in earlier Roman legal sources: reformatory incarceration. The king demanded that penal incarceration be dispensed selectively, “lest the innocent seem to endure harm to life on account of a zeal for punishment . . . let the guilty alone fall for the correction of many, since it is even a kind of piety to imprison the crime in its infancy, lest it should increase with maturity” (Cassiodorus, *Variae* 5.39.1–4, L7 [523–26 CE]). The prison was a social instrument in the hands of the Ostrogothic state, an integrated facet of the penal apparatus aimed at producing salubrious effects on its victims. Theodoric’s ideal transparently reflects a much earlier precedent: Plato’s suggestion that an ideal city would have three prisons, one called “the Reformatory” where penal control can instill moderation in offenders without ejecting them from society for good (*Laws* 908a–909c, L18 [mid-fourth century BCE], p. 94–95). In this instance we see Plato’s ideal put into civic action—it is part of the long-term genesis of reformatory incarceration that Hillner details in her 2015 monograph, which traces the phenomenon from ideals of the Greek classical period into the practice of fifth- and sixth-century forced monastic confinement.

The widespread implementation of reformatory incarceration is one of the trends that Hillner advocates for in late Roman sources and society; we note four more trends here, each of which is discussed by Bernhard Raspels (1991) and expanded upon by Hillner. First, legal materials witness a desire to limit the number of prisons—as seen, for instance, in legislation addressing prison personnel. Citing three laws spanning the fourth century, Hillner (2015) writes “Secret agents [*agentes in rebus*] and soldiers acting as a police force in rural areas [*stationarii*] were urged not to put people in prison [*carcer*], but to refer their matter and the offenders themselves to a magistrate with judicial powers” (121). The

point is correct in broad strokes, but its implications are muddled; the first two laws cited (*CTh* 8.4.2, 315 CE; 6.29.1, L87 [355 CE]) simply shift responsibility for imprisonment from the *agentes in rebus* to judges, prohibiting them from keeping their own prison facilities and sending people to them without proper trial. The laws attempt to limit who can oversee prison facilities, yes, but not to limit the use of prisons either pre- or posttrial; judges were still free to do so. The third law simply restates that these secret agents should not be casting anyone into prison, but instead should devote themselves to their other duties (*CTh* 6.29.8, 395 CE). As Hillner writes, these laws envision that “[secret agents’] official duties were purely supervisory and not judicial, but the laws show that these competences were sometimes exceeded” (121).

But abuses of the prison are still uses of the prison. The fact that laws spanning the fourth century reiterate the commonality of such abuses suggests that they were likely widespread and difficult to reign in. Such abuses are historical phenomena and instances of carceral practice—and, indeed, local carceral *policy* in some places. They deserve to be part of our analysis as much as the ideals of the legislators trying to limit them.

This late ancient attempt to place carceral control largely under the authority of judges leads Hillner to conclude that “prisons therefore were to be located only in the provincial capitals, although at this level there was no limit on the number of prisons, as different judges based in provincial capitals could maintain their own prisons” (122). Again, the point is technically true but muddled; as we demonstrate below, both archaeological and documentary data show that prison facilities appeared across the landscape, far beyond provincial capitals, even in the fourth-century horizon about which Hillner writes. If *true* prisons only occurred in provincial capitals, then the Mediterranean basin was littered with perhaps thousands of untrue prisons, which are still part of the story of incarceration in this period.

Three more broad-scale reforms are worth noting, as well: As Hillner notes, sources point to a desire that only people involved in criminal procedures are placed in prisons, that such people are brought to prompt trials, and that people in pretrial detention are protected from abuses by staff in the facilities where they waited (121–25). Although Hillner relies on Rivière’s reading of Constantine’s legislation that we have disputed above, late Roman legal sources certainly aim to limit the use of prisons in fiscal and civil matters, reserving incarceration for criminal cases. In attempting to secure prompt trials of the accused, legal sources are in harmony with literary and documentary sources that we discuss below, seeming to speak to a real problem: that the judges’ dockets were perpetually backlogged, leaving countless hordes in prison awaiting trial, and often dying before their appearance (p. 99–101). The late fourth through mid-fifth century present another burst of legal reforms addressing a new reality in which Christians were both part of a religious community whose history was bound up in unjust incarceration and, in their position as governing officials, incarcerators themselves. In the late

360s CE, the emperors Valentinian II, Valens, and Gratian jointly pronounced a general amnesty on Easter, while another law of 385 CE exempted people guilty of certain crimes from any amnesty on account of their capacity to affect society negatively (*CTh* 9.38.3, L45 [367–69 CE]; *CTh* 9.38.8, L29 [385 CE]). Hillner (2015) is right to point to Easter amnesty laws as a salve to the issue of trial delays and prison guard abuses, noting especially the import of clerical visits to and oversight of carceral facilities (104–5, 123–24). The latter law presents perhaps the first Roman evidence of incarceration described explicitly as a communal good because of the prison's ability to incapacitate certain classes of offenders. In the early fifth century, the emperors Honorius and Theodosius II commanded stiff penalties for judges and their staffs who fail to follow certain “health-giving regulations” (*saluberrime statuta*) for people jailed as a result of an accusation against them. Custodial prisoners are ordered to receive a portion of food on Sunday, along with a guarded visit to the public bath (*CTh* 9.3.7, L44 [409 CE]). While these reforms are explicitly described as extending from a Christian concern for the poor, they appear to be intended solely for the benefit of accused persons and not for those suffering penal incarceration. The same emperors granted sanctuary to people who fled to churches to avoid incarceration and demanded that bishops be able to enter both churches and prisons to speak with people accused of crimes, in order that they might appeal to judges on behalf of the accused and on behalf of those “very many persons [who] are frequently thrust into prison in order that that may be deprived of the freedom to approach a judge” (*Sirmondian* 13, L100 [419 CE]). Late ancient Christians also occasionally promoted punitive incarceration for less serious crimes—a policy motivated by a squeamish desire to avoid bloodshed and executions, as Hillner (2015) points out (140–42; cf. esp. Cassiodorus, *Variae* 7.1.3; Ambrose, *Letter* 50).

BETWEEN LEGAL IDEALS AND CARCERAL PRACTICES

It was necessary to take a close, albeit brief, look at ideologies of incarceration prescribed by and reflected in juristic sources. Nevertheless, there are three fundamental flaws with a focus on legal sources when trying to understand incarceration in antiquity. First, juristic sources' claims about what the law is are often prescriptive. While we are on *somewhat* firmer ground in presuming that imperial pronouncements were carried out, we must conclude that the idealized world of the jurists has no obvious or necessary connection to facts on the ground—especially in the case of Ulpian's distaste for penal incarceration, which he couches in the admission that the practice was in fact widespread. Juristic opinions and even imperial pronouncements do not reflect practices in any one-to-one manner; in fact, we have seen that they are at times explicitly at odds. In other words, any scholar reading jurists and imperial pronouncements for clear insight into “everyday” carceral practices commits a category error.

There is some relationship between legal ideals and the practices that they undergird, but it is neither static nor predictable, and as we have shown, legal sources in particular attest to the impotence of jurists and emperors to reign in the prison's use. As Hubert Dreyfus and Paul Rabinow explain, in instances where we want to understand the diffuse connections between individual, empowered actors and broad systems that they influence, looking to practices is often the most obvious solution.

This is the problem. How to talk about intentionality without a subject, a strategy without a strategist. The answer must lie in the practices themselves . . . There is a logic to the practices. There is a push towards a strategic objective, but no one is pushing. The objective emerged historically, taking particular forms and encountering specific obstacles, conditions and resistances. Will and calculation were involved. The overall effect, however, escaped the actors' intentions, as well as those of anybody else. As Foucault phrased it, "People know what they do; they frequently know why they do what they do; but what they don't know is what what they do does." (1982, 187)

What is surprising is that even scholars deeply knowledgeable about the range of documentary evidence and its dissimilarity with juristic prescriptions nevertheless let their own analysis of the normative materials speak before and in summation of countervailing evidence. For instance, a scholar no less than Jens-Uwe Krause (1996), who published a marvelous book detailing much of the documentary evidence for incarceration, nevertheless followed Mommsen in his conclusion that "incarceration in the Roman empire essentially comprised custodial and pre-execution detention . . . Nothing changed from this situation during the imperial period" (64). The Mommsenian and Foucauldian frames for the prison prove hard to escape.

Legal historians have recently sought to underline the disconnect between ideals preserved in ancient laws and practices preserved in documentary sources; there may be no larger gap than the one between the modern scholarly understanding of ancient incarceration based on legal sources and the reality of incarceration as seen through archaeological, documentary, and visual material. Still, as many have argued, Roman legal sources are replete with indications that limited-term penal incarceration was acceptable and operative from at least the period of the late republic and continuing through late antiquity (Eisenhut 1972; Lovato 1994, 85–89).

Nevertheless, legal sources are not univocal, and at times even jurists working under successive emperors fundamentally disagree with each other. For instance, Callistratus prescribed that prisoners should be stripped after their conviction, while his contemporary Ulpian advised that even convicted prisoners should be allowed to keep a modest amount of clothing and money so that they can purchase food while in prison (Callistratus, D 48.20.2, L33 [ca. 193–211 CE]; Ulpian, D 48.20.6, L124 [211–22 CE]). For his part, two centuries later, the

orator, professor, and advocate for prisoners Libanius complained directly to the emperor that central legislation had little impact on civic practice, at least in his late fourth-century context; he knew it to be typical practice for wardens to allow prisoners their clothes only after extracting a bribe (*Oration* 33.30 [386 CE]). Nevertheless, legal sources also regularly prescribe practices that other evidence flatly contradicts, as we discuss at length in later chapters. Rather than being pictures of the final product, legal materials are selected snapshots from a constantly evolving recipe book.

To be fair, many contemporary scholars of Roman law are interested purely in the idealized world of the law—what the law *says* rather than how it was carried out. This is a fine and legitimate research agenda, though it is not ours. Even so, we have argued here that as a matter of legal theory—what the law *says*—penal incarceration is regularly attested as a legitimate, “legal” practice. Problems are compounded when social historians who do attend to practices take legal theories as if they reflect realities on the ground. Starting with Mommsen, historians who have written on the topic of Roman prisons constantly reduce the phenomenon to overzealous and exploitative bureaucrats who abuse and dishonor the “real law.” Even if limited-term and penal incarceration were illegal under the system of Roman law, we have to deal with the apparent fact, exclaimed by scores of documentary and literary sources, that it was practiced constantly across the ancient Mediterranean. Some of the men behind our legal sources would prefer if incarceration were little used and little discussed. Historians, by and large, have obliged.

The second issue with a purely legal frame for understanding incarceration is this: In the ancient Mediterranean basin, incarceration was not merely—or even primarily—a function of law. As we argue below at length, carceral systems were central to the economic and social life of many ancient cities; even emperors had a hard time reining in their use. In 355 CE, the emperor Constantius complained from Milan that imperial secret agents in Rome had a “wicked custom by which they have been sending any men to prison” (*CTh* 6.29.1, L87 [355 CE]). The emperor’s order that such customs cease was apparently either disregarded, rescinded, or otherwise in need of reiteration, because forty years later another law prescribed the same thing on the basis of the same complaint about secret agents (*agentes in rebus*) abusing their power (*CTh* 6.29.8, L214 [395 CE]). Examples could be multiplied of bureaucrats complaining about the widespread use of prisons for unjust and illegal purposes, and of scholars dismissing the issue of penal incarceration as a problem of “a few bad apples”—forgetting, it seems, the rest of that famous bon mot: “A few bad apples spoil the barrel.”

Literary sources, too, attest to the impotence of legal prohibitions. In a different oration before the emperor, this one exclusively taking up the plight of Antioch’s civic prisoners, Libanius laments the ubiquity of prisoners dying even awaiting trial *despite* legal prohibitions that aim at holding governors liable in such cases (*Oration* 45.14, L52 [386 CE]). Eusebius of Vercelli even accused his Christian

theological rivals of abusing the civic prison (*carcer publicus*) of Scythopolis in order to persecute coreligionists, shutting some of them up for long stints and arresting those visiting to bring them food, using the courts to exile others, and threatening the local destitute population with prison in order to keep them in line: “the Ariomaniacs terrify the rich, because they threaten them with proscription, and they terrify the poor, since they have the power to shut them up in prison” (*Letter* 2.5–8, L38 [355–59 CE]; cf. Hillner 2015: 223–224). Sources like these paint abuses as rampant. In what follows we will see a variety of prison spaces and a myriad of uses of those spaces, including custodial, penal, and coercive implementations, alongside a number of uses that are clearly abuses of prisons for personal, political, or religious aims. The point that we want to stress is that even abuses are *uses* of the prison. They are not “just” abuses, a locution that we have heard often, whose aim is to remove evidence from the discussion and whose effect is to marginalize experiences because they are deemed anomalous. If penal incarceration was an abuse, then it was a common one. And if abuse itself is common, as literary sources attest from the entire span of the period under discussion, then attending to abuses of the prison is to attend to the history of the prison itself.

There is one final issue with centering legal sources in our understanding of carceral practices: it is to forget the lives and bodies of people after their cage was secured. In the words of Keramet Reiter (2016), it is to allow the prison to become “the backdrop of a story whose center stage is occupied by bureaucrats and their politics” (7). And so, we turn to the core of our work: foregrounding archaeological and documentary evidence in the hope that we can glimpse the lives of people suffering incarceration and not merely the goals and scruples of their captors. Our aim in engaging these sources is almost never to enlighten *why* someone is in prison. What their captors intended is perhaps useful as a question of intellectual, institutional, or legal history, but it is not our primary aim here. We will ask, instead, “what was the prison to the person inside of it?”