THE OXFORD HISTORY OF THE PRISON

The Practice of Punishment in Western Society

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**Introduction**

For many readers, the most novel contribution of *The Oxford History of the Prison* may well be its demonstration that prisons do have a history. In the popular imagination, institutions of incarceration appear so monumental in design and so intrinsic to the criminal justice system that it is tempting to think of them as permanent and fixed features of Western societies. The massive quality of the buildings, with their walls and turrets jutting out of the landscape and visible over great distances, conveys immutability. Meting out punishment by a calculus of time to be served seems so commonsensical today, that it becomes difficult to conceive of a moment when prisons were not at the core of criminal justice.

In fact, the history of incarceration is marked by extraordinary changes. As the table of contents to this book indicates, before the eighteenth century the prison was only one part, and by no means the most essential part, of the system of punishment. Moreover, once invented and implemented, the prison underwent fundamental alterations in appearance and organization. In the 1830s prisons were organized around the principles of order and regularity and hence isolated each prisoner in a cell and enforced rules of total silence. By the early 1900s the institutions modeled themselves on the outside community, affording inmates the opportunity to mix in the yard and work in groups; the prison thus became a testing ground for judging readiness for release. All the while, over the course of the nineteenth century prisons began to specialize, so that juveniles entered one type of institution, women another, the mentally ill still another. The process continued into the twentieth century, with inmates eventually confined to minimum-, medium-, maximum-, or lately, maximum-maximum-security prisons according to the severity of their offense and the extent of their criminal record. Thus, the English prison of 1790 or the American prison of 1830 had little in common with the prisons of 1900 or 1990, regardless of whether the yardstick is the daily routine, the amount of time served, the methods of release, or as we shall see, the public’s understanding of the purposes of confinement. In brief, prisons not only have a history, but a rich history.

*Uncovering the History of the Prison*

It is a tribute to recent scholarship that the contours of these developments are so well mapped. To create this book as recently as twenty-five years ago would have been impossible. Practically all of the contributors to this volume are pioneers in the field, and the results of their research began to appear only in the 1970s. Indeed, the historians’ attention to the prison is so new that one has to ask why they were inspired to take up this subject in the first place.
Part of the answer rests in the emergence of a keen interest in social history and a determination to understand the organization of a society in terms not only of the activities of the elite (the leaders of government, diplomacy, and business) but also of the role of ordinary people, including workers, women, minorities, and even those who ended up in jails, prisons, and reformatories. Some of the inspiration for this analysis came from one of the founders of modern sociology, Emile Durkheim. Durkheim first demonstrated that to expose the fundamental norms of a society, often so fundamental as to remain hidden and unarticulated, it was useful to investigate the fate of those who openly violated the norms. The history of the deviant became a way to understand the history of the normal, or in our terms, the history of the prison serves to illuminate the history of all social institutions.

Theory aside, it was almost inevitable that once historians began to follow people to work and church, they would also follow them to public festivals and outings—which, as contributor Pieter Spierenburg discovered, in the seventeenth century included the public execution. At first, the execution spectacle was scary and intimidating, and the monarch and his subordinates zealously used the occasion to bolster the authority of royal government. But in time, executions became the occasion for rowdiness and disgust—both because the crowd had begun to identify with the victim, not the executioner, and because the spectacle had become revolting, offending a new sensibility about pain and bodily integrity. Thus, it became desirable to mete out punishment away from the public gaze and to find alternatives to the gallows. So the historian who opened an inquiry into public gatherings ended up writing a critical chapter in the history of the prison.

The historians' engagement with the prison also builds on the fact that social history has joined with political history to explore how societies and governments maintain social order. To this end, punishment becomes not a detour on the historical landscape but a critical element in evaluating the exercise of authority. Thus in the American case, it is no accident that in the 1820s and 1830s, when democratic principles were receiving their most positive support and ordinary citizens were participating in politics to an unprecedented degree, incarceration became the core feature of criminal justice. In effect, those who want to understand the special features of Jacksonian America must grapple with the origins and development of the prison.

Perhaps no one better demonstrated the value of this approach than the French moral philosopher Michel Foucault. Not by training or temperament a historian, Foucault used history as a text on which to ground a discussion of power and authority in Western civilization. As exemplified by his book *Discipline and Punish*, he eschewed archival research and had little appreciation for the nuances of time and place. He wrote as though phenomena separated by decades were one and as though all the universe were France. Most important, he frequently conflated official rhetoric and daily realities; let public officials announce a program for the surveillance or the reform of criminals, and he presumed its realization. But however serious these flaws, Foucault endowed the history of incarceration with a special meaning. The prison became the representative institution of industrial society, the perfect realization of the modern state. Study the prison and understand bourgeois society: this enticing formulation inspired a number of historians.
That prisons captured the attention of historians is the result, too, of the declining legitimacy of the institutions both in Europe and in the United States throughout the 1960s and 1970s. Once established organizations become suspect, the curiosity of historians is immediately stimulated. In the United States, for example, prison riots, particularly the one at Attica State Prison in New York, highlighted the wretchedness of institutional conditions. At the same time, the prisoners’ rights movement equated confinement with cruel and unusual punishment, and litigation on behalf of prisoners successfully persuaded federal judges to intervene directly in the administration of the institutions and to abandon a hands-off policy that had given deference to wardens’ expertise. These developments prompted historians to question the heretofore accepted explanation of the rise of the prison, an explanation stating that the prison, in comparison with the gallows and the whipping post, represented a burgeoning spirit of benevolence and humanitarianism. If the prison had turned into so grim a place, historians asked, why was it invented in the first place? As Randall McGowen and Séan McConville explain in chapters three and five, reformers such as John Howard in England did play an important role in provoking changes in the system of punishment. Nevertheless, the history of the prison must be framed in the context of developments in the larger society, which made social, administrative, and political concerns even more determinative than benign philanthropy.

**Why the Prison?**

Even while studying the prison in a variety of places and periods, historians of the institution have asked many of the same questions. What are prisons for? What purposes do they serve? What purposes should they serve? In what conditions should the prisoners be held? What are prisoners obliged to do, and to forfeit? These themes resonate throughout the history of the prison and, thus, throughout this volume.

To read this book is to discover that whatever the current realities of the prison and however the prison has been used, each of these questions generated a full and elaborate debate. Over the years these topics attracted the leading philosophers and political scientists of their generations—Kant, Bentham, Mill, Hart, and many others. The serious search for a justification of the prison and for the definition of its purposes has continued through the centuries.

Applying the American distinction between prison and jail helps to launch the inquiry into the purposes of the prison. Oversimplifying, jails hold mainly those awaiting trial and awaiting punishment; prisons hold convicted offenders as a punishment. Of course, some alleged criminals have to be held secure until brought to trial and, if convicted, until punishment. In this sense the system of trials presupposes the existence of the jail. If the cage exists, and if we do not know what else to do with a convicted offender who does not need to be killed or whipped or exiled yet who cannot be allowed to escape adverse consequences for his crime, why not continue the caging? So, we are suggesting, the original justification for the prison may well have been incapacitation. Whatever else, incarceration serves to remove a potential offender from the community.

The conventional contemporary answer to “Why the prison?” includes the desire to deter crime, to express society’s urge for retribution, and to reform the deviant, but adds as well
the desire to incapacitate dangerous criminals. We will not canvass the libraries of studies on the extent to which the prison manages to fulfill these four purposes, but some comment on the broad state of current knowledge about the efficacy of each of them is useful.

Incapacitation: At least for the period during which a prisoner is in prison, he is unlikely to inflict criminal harm on those outside the walls. To this extent, the prison clearly helps to reduce crime. But this effect may not be very great; it all depends on the natural history of criminal careers. Most serious crime fluctuates with the life cycle: a tendency toward violence flourishes in males aged fifteen or sixteen, stays high in their twenties, wanes in their thirties, and virtually disappears at about thirty-five. The question, then, is whether the prison sentence simply occupies some of this time or whether it merely defers the experiential processes of maturing away from criminal behavior.

Deterrence: The criminal justice system as a whole appears to have a deterrent and reductive effect on criminal behavior, but it is not at all clear whether marginal changes in any one element of that system has any effect at all. So far, at least, it has proved impossible causally to relate changes in the quality of conditions of imprisonment or in the length of imprisonment to changes in its crime rates—and, similarly, impossible causally to relate changes over time between the two. Likely, the prison deters some citizens and some prisoners from crime, but equally likely, it confirms other prisoners in their criminality.

Retribution or Expiation: The talionic law originated as a restraint on punishment. It is best understood not as an eye for an eye, a life for a life, but as only an eye for an eye, only a life (not torture and then death) for a life. But the quantum of punishment deserved is not easy to assess. Much depends on whose measure of appropriate vengeance governs the equation. Indeed, the victim's sense of what constitutes appropriate suffering for the criminal may change between the time of the loss and a few months later. And, is it the victim's sentiment of vengeance that should control the assessment? The social justification for retribution as an appropriate purpose of imprisonment states that otherwise, individuals who had been wronged would take the law into their own hands and exact retribution. Historically, punishment under the aegis of the law, and not that of the victim, prevents lasting and socially debilitating blood feuds. But in modern society this understanding does not help very much in deciding who should go to prison and for how long and under what conditions of incarceration. All one can say about public sentiment on these issues is that whatever practices are followed in a society at any time, the majority of citizens perceive these practices as too lenient toward the criminal.

Reformation: It is entirely sensible that, so far as is practicable, the prisoner's time in prison should be devoted to fitting him to live a law-abiding life on release. To this extent, reformation is an unexceptional purpose of incarceration. But it does not justify the prison. Indeed, the prison turns out to be an ineffective and undesirable venue for reformative efforts—be they educative, psychological, social adaptive, or whatever. It is hard to train for freedom in a cage.

These four conventional justifications of the prison are so routinely put forward to justify punishment under the aegis of the criminal law—any punishment, all punishments—that they provide little insight at all into the "why" of the particular punishment of the prison. If one feels that suffering should be imposed on whoever has inflicted suffering on another (he
made another suffer, let him suffer too) then the prison is only one possible means among many. If one’s guiding belief is that an offender must be banished, either permanently or temporarily (because of what he has done he is no longer allowed to be a member of our group) such a banishment may be achieved by capital punishment, by exile or transportation, or by imprisonment for life or for a period of time. So why opt for the prison? Why invest in cells and walls?

Without simplifying or condensing the answers, it is apparent that Western societies typically carry expectations of the prison that are unreal and contradictory. It is rare for prison administrators to seek to define their purposes, but sometimes they try. Consider one recent effort. Her Majesty’s Prison Service is responsible for providing prison services in England and Wales. It is a substantial organization, consisting on March 1, 1993, of 38,233 staff, 128 prisons, and 42,870 prisoners. Its “Statement of Purpose” declares that it “serves the public by keeping in custody those committed by the courts.” Its duty is to “look after them with humanity and help them lead law-abiding and useful lives in custody and after release.” These purposes are then broken down into a series of principal goals, namely, to:

- keep prisoners in custody
- maintain order, control, discipline and a safe environment
- provide decent conditions for prisoners and meet their needs, including health care
- provide positive regimes which help prisoners address their offending behavior and allow them as full and responsible a life as possible
- help prisoners prepare for their return to the community.

These are clear and modest goals, but it is not surprising that such expectations are not often met. The rhetoric of imprisonment and the reality of the cage are often in stark contrast. Nowhere is this more obvious than in the issue of prison labor, an issue that also resonates throughout this book. The expectation is that prisoners will do hard and punitive labor, be productive, and help to meet the costs of their incarceration but, at the same time, will not compete unfairly with free labor or with entrepreneurship. The tensions here are obvious and troublesome, and they have generated sometimes brutal and generally uneven results. There is a grim history of prisoners being intentionally worked to death—in the salt mines and quarries of the ancient world, in the galleys of the Mediterranean, and in the Soviet Gulag. But nowhere was this brutal purpose more clearly realized than in the Nazi concentration camps, with their cruelly cynical and mendacious motto Arbeit Macht Frei (Work Makes You Free).

But one must confront the contrast. If temporary banishment from the community were the leading purpose of the prison, there would seem to be no reason that the community, the prisoner, and those who are dependent on him should be denied the product of the prisoner’s labor. Hence one model of imprisonment, developed most adequately in the Scandinavian countries, is a full-wage prison—a “factory with a fence,” as described with approval by a chief justice of the U.S. Supreme Court. The prisoner earns roughly as much as he would were he free and from his earnings meets the cost of his board and keep in prison, compensates the victims of his crime, supports his dependents, and saves for his release. However, these sensible purposes are rarely realized, and there is frequently abuse in the
exploitation of prison labor—far less than in the brutal lethality of the Gulag and the concentration camp, but abuse enough. There is a history of the exploitation of prison labor in the fields and chain gangs of the pre–Civil War South and in the labor camps and factories of contemporary China.

Today, in more advanced countries, there is little productive work for prisoners to do, so that deadening idleness deepens the pangs and inefficiencies of prison life. This lack springs, of course, from the opposition of organized labor and of organized business to having to compete with prison labor. The most common resolution, or amelioration, of this problem has been to confine prison production to “state use,” thereby at least concealing if not eliminating the continuing and obvious conflict with free labor and enterprise. But the paradox remains: the prisoner should work and yet he is denied work. The essays in this volume describe the many different arrangements that have been made for prison labor; not one seems to have reached a satisfactory compromise to make the prison a place of useful and profitable production.

The Expectations of the Prison, Past and Present

This brief survey of the difficulty of defining the proper role of labor in the prison provides a clue to the basic dysfunction of the prison itself. Most students of the prison have increasingly come to the conclusion that imprisonment should be used as the sanction of last resort, to be imposed only when other measures of controlling the criminal have been tried and have failed or in situations in which those other measures are clearly inadequate. The usual public response to such a proposition is that it could be made only by someone who cared not at all, or certainly too little, for citizens’ safety. This reaction is not surprising; as this book shows, the public has always overwhelmingly supported whatever punishments were inflicted as a means of either reducing or preventing an increase in crime. However, research into the use of imprisonment over time and in different countries has failed to demonstrate any positive correlation between increasing the rate of imprisonment and reducing the rate of crime.

It is also true that countries with very similar crime rates have startlingly different rates of imprisonment. How can this be? Certainly, while prisoners are in prison they cannot (with very few exceptions) commit crimes in the community; there must be some incapacitative effect of their caging. So why don’t crime rates decline as imprisonment rates increase? This question is made more pointed by the observable fact that some prisoners do indeed use their time in prison (or that time uses them) so that they do not offend again. The answer may be found in the criminogenic force of imprisonment itself, or the idea that prison serves as, in nineteenth-century language, “a school for criminals.” Possibly the self-image that the prison generates for its inhabitants outweighs the crime-reducing influence of deterrence, efforts at rehabilitation, and biological influences of the passage of time on human behavior. Admittedly, this idea is speculative, but so is the opposing view that incapacitation and deterrence truly do lower the crime rate.

Another line of argument insists that the duty of the prison is to reform the criminal, to change him from a social danger and an economic liability into a peaceful and useful citizen. The small group of prisoners who, by their past behavior and recent crimes, have demonstrated their dangerousness should receive all the forces of reform, coercively if necessary,
and not be released until they have demonstrated their fitness to live in society without committing criminal acts. For them, at least, prison should be an indeterminate sentence to be served until their fitness for complete release is confirmed. To this end, release itself should be a gradual and closely controlled process, with expanding degrees of freedom in which the fitness of the inmate for complete freedom can be tested. If the prisoners fail the tests, they should remain confined.

These are the seductive ideas that underlay the movement toward the indeterminate sentence, parole release decision, conditional release and supervision, and habitual criminal laws. In their literary incarnation, the ideas are excellently presented as the “Ludovici Technique” in Anthony Burgess’s A Clockwork Orange and in other less-compelling science fiction. Their defect is that they grossly exaggerate the present capacity of the social sciences both to predict and to change human behavior. But, as we shall see time and again in the chapters that follow, modesty in rhetoric is not a standard feature in the prison literature.

What of the Prisoners?

So much, then, for what the community and the prison staff can properly expect of the prison. What of the prisoners? Who are they, and what can they reasonably expect of the institution?

The inmates are the best and the worst among us. They include Mahatma Gandhi, Martin Luther King, Nelson Mandela, Thomas More, Oscar Wilde, Bertrand Russell—a very mixed group but not lacking in virtue—and a long list of highly principled dissenters. There is no point in cataloguing the worst. Prisoners are ourselves writ large or small. And, as such, they should not be subjected to suffering exceeding fair expiation for the crimes for which they have been convicted. Below that admittedly vague ceiling of suffering, they are entitled to a reasonably safe, clean environment. They must be spared cruelty, cruelty being defined as violations of their bodily and psychological integrities beyond the legitimate necessities of their punishment. There is one theme, however, that has complicated this whole analysis of appropriate prison conditions—the alleged principle of “less eligibility.” It is the idea, which dates back at least to the nineteenth century, that the prisoner’s conditions must not in any particular be preferable, more comfortable, or more adequate than those of the worst-off members of the community who have not been convicted of a crime. Otherwise, it is suggested, a positive incentive is created for those worst-off citizens to commit crime so as to improve their conditions. This is a daft idea, but it captures men’s minds. Happily, it is not taken seriously by prison administrators who know that if they are not to operate death camps, their prisons must be run by consent. The administrators hold the ultimate power at the periphery, but within the walls power lies with the prisoners. In the end, the prison embodies the largest power the state exercises over its citizens in time of peace. If the balance between authority and autonomy is struck fairly here, it is not likely to go far wrong elsewhere.

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One last word on the scope and limits of this book: the history of the prison is so extensive and diverse that inevitably, as editors, we have had to make hard choices. Thus, for example, we did not include a chapter on the concentration camps because in their design and horror
they are outside the history of the prison. The genocidal practices that went on within the camps did not take their inspiration from the conduct of criminal punishment; however gross the violations to dignity and decency within the prison, they do not match up to the Nazi experience.

Moreover, to keep the book to manageable proportions, we limited ourselves to Western countries, and even there we focused our attention on the Anglo-American story. Had we dared to venture more fully outside it, excepting the chapters on the European continent and Australia, we would have had to create a second volume. Our hope is that what we have sacrificed in coverage we have compensated for in depth. And we do anticipate that others will explore the history of the prison in still other places, and, in so doing, take the story in new directions.

—Norval Morris and David J. Rothman
PART I

Prisons in History

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Chapter One

Prison before the Prison
The Ancient and Medieval Worlds

Edward M. Peters

The prisons of the ancient world have disappeared. Those of late antiquity and medieval Europe have fallen into ruin, have been recycled into other uses, or have been preserved as museums, their varied history usually explained only in terms of modern concepts of penology. Like the buildings that once housed them, the sources for the early history of prisons are also lost, diverse, fragmentary, or otherwise difficult to interpret. The collaborative work of archaeologists, philologists, and historians has been required to illuminate the character of the Babylonian bit asiri and the "Great Prison" of the Egyptian Middle Kingdom. For the prisons of ancient Athens, we must turn to the Greek oratorical literature and the writings of Plato. For the prisons of the ancient Hebrews, we must consult the central Jewish religious text, the Bible. And if we want properly to understand these and other ancient and medieval prisons, we must approach them from a broad cultural perspective.

Imprisonment of any sort and for whatever purpose is in essence the public imposition of involuntary physical confinement. In the Western tradition the practice occurs as early as the Greek myths and the Book of Genesis, and it is usually classified as part of the wider category of physical punishments that restrict an individual’s freedom of movement. In the broadest sense, this category includes practices foreign to modern ideas of imprisonment, such as public sale into slavery or publicly imposed forced labor, the exhibition of offenders to public shame—like the stocks that are often seen in reconstructed American colonial villages—and exile and deportation (banishment to a remote place). Imprisonment included temporary custodial detention pending trial or the infliction of some other punishment. The abandonment of an offender, confined and left to starve to death, shaded into another category of physical punishment: the punishment of the body by death, mutilation, or beating. An examination of these ancient practices will assist our understanding of the past functions of imprisonment.

This chapter will describe the role of prisons and related ideas of crime and punishment in early Greece, ancient Egypt, Persia and Israel, Rome, and medieval Europe (the latter
including both the law and practices of the Latin Christian Church and the learned law and practices of England and the Continent. Each of these cultures is introduced by a brief overview of its social and legal history, a description and analysis of its ideas and practices of crime and punishment, its specific use of prisons, and a discussion of its single important—or most striking—source of information about prisons. Each section concludes with a discussion of the uses of prison imagery in religious, philosophical, and literary works produced by each of the cultures; that is, prisons and imprisonment are considered as part of the imagination as well as the penal practices of past cultures.

The chapter as a whole deals with prisons as part of a broader spectrum of modes of physical punishment, including confinement, well before the large-scale period of prison building and imprisonment that began in seventeenth-century Europe. Our subject is prisons in the ages before the prison.

**Criminal Law in Ancient Athens**

Writing around 700 B.C., the Greek poet Hesiod made an eloquent claim that the capacity for living according to law and justice was what made humans uniquely human:

Here is the law, as Zeus established it
for human beings;
as for fish, and wild animals, and the flying birds,
they feed on each other, since there is no idea
of justice among them;
but to men he gave justice, and she in the end
is proved the best thing
they have.

For Hesiod, justice meant a set of dispute-settling procedures that reduced the inequalities of wealth, power, or status between contestants and allowed for a decision based solely on the issue in dispute between them.

In the century after Hesiod, the polis, the autonomous Greek city-state, created a collective, public authority that controlled the settlement of private disputes, issued written laws, and created the category of crime. From the law on homicide attributed to Drakon around 620 B.C. through the more extensive laws of Solon around 594 B.C. and additions and revisions in the later sixth and fifth centuries, the polis claimed a monopoly over written laws, the regulation of dispute settlement, and the punishment of criminals. At the end of the great age of independent city-states, in the middle of the fourth century B.C., the philosopher Aristotle offered yet another definition of human nature: man is an animal differentiated from all other animals by living in the society of the polis—the original meaning of the often misunderstood phrase, “man is a political animal.” Greek city-states provide the earliest evidence for public punishment in the Western tradition—and for its roots in ideas of law and justice.

Of all the Greek city-states, Athens is the best documented. Athenian documentation ranges from the writings of orators and philosophers to the tragedies of the Greek dramatists. The identification, first, of law with justice and, second, of law and justice with the city-state is expressed dramatically in the plays of Aeschylus (525–456 B.C.). In one of these, the issue of involuntary confinement is central. Hesiod had told the story of the anger of Zeus at the
titan Prometheus because Prometheus had stolen fire from heaven and given it as a gift to humans. Zeus had Prometheus chained to a great mountain and subjected to insufferable torments. Aeschylus took up the theme of Zeus's anger and power—and the epic confinement of Prometheus—in the drama *Prometheus Bound*. There, as in his other dramas, Aeschylus explored the relationship between power and justice, ostensibly at the mythical level of gods and titans but to his audience in the language of their own understanding and experience. Even the Greek title of the play, *Prometheus desmotes*, reflects a term and a practice contemporary with Aeschylus and his audiences: *desmotes* meant, literally, "chained," and one of the names of the prison in Athens was the *desmoterion*—"the place of chains."

The most concise statement concerning a rationale for the punishment of criminals in Greece is found not in the legal literature but in a remark of the philosopher Plato. In the dialogue *Gorgias* (525A-B), Plato has Socrates observe:

Now the proper office of all punishment is twofold: he who is rightly punished ought either to become better and profit by it, or he ought to be made an example to his fellows, that they may see what he suffers, and fear to suffer the like, and become better. Those who are improved when they are punished by gods and men, are those whose sins are curable; and they are improved, as in this world so also in another, by pain and suffering; for there is no other way in which they can be delivered from their evil. But they who have been guilty of the worst crimes, and are incurable by reason of their crimes, are made examples; as they are incurable, they get no good themselves, but others get good when they behold them enduring forever the most terrible and painful and fearful sufferings as the penalty of their sins—there they are, hanging up in the prison-house of the world below just as examples, a spectacle and warning to all unrighteous men who come thither.

Socrates' sharp analogy between punishments inflicted by civil authorities in this life and those administered by the gods after death is echoed elsewhere in Plato's writings, notably in *Laws* (881B): "Hence we must make the punishments for such [terrible] crimes here in this present life, if we can, no less stern than those of the life to come."

Plato's argument on behalf of exemplary deterrence became a commonplace in ancient and medieval thought. But his argument for correction, based on his ideas that evil acts are the result of ignorance and that punishment should consist of instruction and correction of those offenders who are capable of being reformed (Protagoras 324B-D, and below), remained largely unheeded until the European Middle Ages—and then was viewed in a very different cultural context. Although Plato rejected the idea of retribution, or vengeance, his own Greek language in dealing with terrible crimes and incurable criminals is extremely violent, and there is evidence that a considerable aspect of Athenian criminal justice did focus on retribution as well as deterrence.

Athenian legal procedure also determined the forms of punishment that could be inflicted: stoning to death (lapidation); throwing the offender from a cliff (precipitation); binding him to a stake so that he suffered a slow death and public abuse while dying (apotympanismos, an early form of crucifixion); or the formal dedication of the offender to the gods, by a ritual cursing him or forbidding all from any social communication with him. Dedication to the gods reflects the religious sanction that homicide and other crimes were thought to invoke. In other instances, the dishonored dead might be forbidden burial, and their houses might be destroyed.
Besides these physical punishments, Athens and a number of other ancient societies recognized and used “patrimonial” punishments—confiscation of property, fines, and the destruction of the condemned offenders’ houses. The free citizen, Demosthenes the orator once observed, was usually punished in his property, the slave in his body. But the distinction was not categorical; the range of punishments described here could be applied to slaves, foreigners, and citizens alike. Athens and other ancient societies also used “moral” punishments: the public exposition of the offender, the infliction of posthumous punishments, the publicly imposed status of shamefulness (attimia, "with severe civil disabilities"), and public denunciation.

The well-known case of Socrates illustrates a number of aspects of the Athenian system of punishment. Charged in 399 B.C. with the offense of impiety—in Socrates’ case, of corrupting youthful minds and of believing in “new” gods instead of the gods recognized by the city—Socrates was tried before a jury of five hundred members in a trial that, by Athenian law, lasted only a single day. Socrates’ defense was the long speech attributed to him in Plato’s dialogue Apology. Found guilty of impiety by a slim majority of thirty jurors, Socrates had the right to propose his penalty—as did the prosecution. Socrates’ prosecutors proposed the death penalty, and Socrates himself considered, but rejected, imprisonment (Apology 37C):

Shall I [propose] imprisonment? And why should I spend my days in prison, and be the slave of the magistrates [elected for just one] year—a slave of the Eleven? Or shall the penalty be a fine, and imprisonment until the fine is paid? There is the same objection. I should have to lie in prison, for money I have none, and cannot pay. And if I say exile (and this may possibly be the penalty which you will affix), I must indeed be blinded by the love of life, if I am so irrational as to expect that when you, who are my own [fellow] citizens, cannot endure my discourses and arguments, and have found them so grievous and odious that you will have no more of them, [that] others are likely to endure them.

Probably because Socrates himself rejected the alternatives, the jury condemned him to death. Because of a delay imposed by the Athenian religious calendar (Plato, Phaedo 58B), Socrates was confined in prison—from which his friends urged him to escape—until he drank poison in a form of execution that was also an Athenian penalty: compulsory suicide. The case of Socrates offers a spectrum of early-fourth-century Athenian criminal law and modes of punishment—not only the death penalty but also the possibility of a fine with prison until it was paid and of exile.

Sixth-century Athens instituted a number of different bodies to enforce its criminal law. Among these was The Eleven, a board of public officials charged with dealing with those described as kakourgoi (literally, “evildoers”). These were the annually elected magistrates whom Socrates brusquely dismissed as tyrants ruling over slaves. The Eleven assumed custody of all arrested people, maintained several prisons, and supervised the application and removal of chains to some classes of prisoners (Plato, Phaedo 59E). Among the magistrates’ duties were opening and closing the prison for visiting hours (Plato, Phaedo 59D, Crito 43A) and announcing to the condemned the day of their execution (Plato, Phaedo 59E). Prisons were also, as in the case of Socrates, often the scenes of executions, as well as the torture of slaves and of citizens accused of certain serious crimes. The general term for prison was
phyllake, although the word for the place of chaining, *desmosteron*, was sometimes generically used for the prison itself in Athens and elsewhere in Greece.

Socrates’ speech in his own defense also suggests some of the range of functions that Athenian prisons served. Plato’s *Apology* implies that punitive imprisonment was at least a legitimate possibility in 399, as was imprisonment in cases of debt to the state (in Socrates’ case, an unpaid and perhaps unpayable fine) and in the case of the detention of those condemned to death until the sentence was carried out. Other sources indicate that The Eleven were responsible for receiving and securing all those accused of certain kinds of flagrant crime, especially those who initially denied guilt and always in the cases of foreigners and slaves, whose legal status in Athens, as in much of the rest of the ancient world, was considerably inferior to that of free citizens.

Besides these uses of imprisonment illustrated in the case of Socrates, other offenses also entailed short or long terms in prison. All foreigners accused of a public or private offense were jailed if they could provide no sureties, in order to prevent their flight. Imprisonment was also used to coerce a debtor to meet his obligations, especially obligations to the state. Some evidence indicates that prisoners were temporarily paroled during certain civic festivals, although they remained under the supervision of The Eleven. Within the prison *desmosteron* itself, prisoners might have freedom of movement, or again as in the case of Socrates, they might be chained, fettered, or put into the stocks, head or neck braces, or wooden beams or blocks restricting leg or arm movement. For example, a passage in a speech by Lysias in the late fourth century B.C. refers back to one of Solon’s laws: “He shall have his foot confined in the stocks for five days, if the court shall make such addition to the sentence.” Lysias says that in his own day, this was called “confinement in the wood.”

Plato devoted considerable thought to the reform of such punishment, particularly in *Laws*, in which he describes the utopian commonwealth of Magnesia. *Laws* considers various
offenses against piety and morals and proposes three distinct kinds of prison depending on the reformability or incorrigibility of the offender. The first, a public building near the marketplace, was for general offenders and was expected to hold a large number of these, although none for longer than two years. The second class of prison, called a reform center, was for those who had committed more serious offenses but had done so because they were foolish, rather than intrinsically bad. They were to be confined for no less than five years, with no contact with other citizens except for visits from the Nocturnal Council, a kind of moral and civil police, near whose meeting place the prison was located. These visits were intended to improve their moral character. The third kind of prison was for incorrigibles and was to be located far from the city in the wildest part of the commonwealth. No visitors were allowed, and the inmates, who were to be imprisoned for life, were guarded and fed by slaves. When a prisoner died, his body was to be cast out beyond the frontiers of the state and left unburied.

These notions of prisons reflect much of Plato’s distinctive view of crime as error and of punishment as instruction, but they also tell us about some of the functions of actual Athenian (and perhaps other Greek) prisons. Prisons as places of temporary custody for those about to be tried or those sentenced to punishment, as structures for coercive detention for certain kinds of debtors, as sites of torture and execution, and as institutions for long-term, perhaps even lifelong, punishment all find echoes in Laws. Prisons did not play the largest punitive role in Athenian penology, since capital punishment, fines, and exile were more frequently used. But they were regularly used in a variety of instances, and their existence and conditions were well-known.

Prisons and images of confinement exercised the Athenian imagination, not only in Aeschylus’s depiction of the torment of Prometheus but also in Plato’s account of Socrates and of his own idealized Magnesia. They also supplied metaphors for philosophical discussions of significant aspects of the human condition. In Plato’s Cratylus (400C), Socrates observed that some philosophers regard the body as a prison in which the spirit is incarcerated. Other thinkers argued that the kosmos (the orderly universe) itself is a kind of prison (desmoteron) for human beings. As institution and as familiar metaphor, the prison occupied a significant place in Athenian civilization. The later influence of Athenian prisons lay less in their continuous history than in their use in literary imagery and philosophical literature, as in the case of Socrates. As such, they created images and scenes that have influenced the Western imagination ever since.

**Ancient Egypt, Mesopotamia, and Assyria**

The earliest records of prisons in Egypt date from the period of the Middle Kingdom (2050–1786 B.C.). The pharaohs of the Middle Kingdom acknowledged a sacred duty to preserve public order. Every injury inflicted on (or by) an Egyptian troubled the sacred order, which the pharaohs were bound to reestablish through their judiciary, legal procedures, and punishments. On these principles, expressed in the concept of maat ("justice" or "order"), depended the equilibrium of the universe. Pharaohs and their servants could be neither arbitrary nor cruel, and Middle Kingdom pharaohs appear to have preferred public beatings and imprisonment to the death penalty.
One of the most useful accounts of prisons in ancient Egypt is the passage in the Book of Genesis (39:20–40:5) describing the confinement of the Hebrew slave Joseph by the Egyptian royal official Potiphar. Pharaoh's prison in Genesis appears to have been a granary that housed foreign offenders, who performed forced labor while in confinement. Imprisonment of this kind could be lengthy. One rabbinic tradition says that Joseph remained in prison for as long as twelve years. Genesis states that he rose to the position of supervisor of other prisoners and was finally freed only because Pharaoh heard that he had a knack for interpreting dreams.

Joseph's fellow inmates included royal servants temporarily confined for dereliction of duty and frequently foreigners captured in war or thought to be spies. Joseph's own brothers were arrested and confined in prison for three days because they were suspected of being spies. All of these instances appear to be consistent with what else is known of the practice of imprisonment in the Egypt of the Middle Kingdom.

Joseph's prison was the "Great Prison," the hnr wr at Thebes, present-day Luxor, whose existence is unrecorded before the period of the Middle Kingdom. The Egyptian word hnr derives from the verb hr, "to restrain," hence hr, "prisoner" or "one who is restrained." The prisons of Egypt (the prisons of places other than Thebes were generally designated ith, a generic term for any place of confinement) might have resembled fortresses with cells and dungeons or institutions like a workhouse or labor camp, since Egyptian prisoners appear to have been expected to work during their time of confinement. This practice was not unique to Egypt. When Samson was captured by the Philistines (Judges 16:22) he too was put to prison work grinding corn.

There seems to have been no classification of prisoners according to their offenses. Prisoners who were awaiting the disposition of their cases, those who were being held for
execution after conviction, and those who—like Joseph—had been confined indefinitely at the order of a royal official were all confined together with deserters from state labor forces, suspected spies like Joseph's brothers, and disgraced officials of the state. Escape from prison was an additional—and very serious—crime. The prisons were directed by an overseer with a staff of scribes and guards. Prison records were meticulously kept, and prisons themselves seem to have housed the criminal courts. Such institutions appear to have survived in Egypt long after the age of the pharaohs and were still in existence, together with forced labor by prisoners, at the beginning of the Common Era.

In another area, the series of civilizations that arose between 3000 and 400 B.C. between the Tigris and Euphrates rivers produced codes of law very early, the best known being that of Hammurabi (1792–1750). Hammurabi stated that his law was intended to maintain justice and destroy evil so that the strong did not oppress the weak. These early Babylonian codes provided for several kinds of punishment, including various forms of capital punishment and such lesser punishments as mutilation. The early laws speak little of prisons, but sources in other literature indicate their use in cases of debt, theft, and bribery, as well as for rebellious slaves and, as in Middle Kingdom Egypt, for foreign captives.

The Assyrian empire (746–539 B.C.) imprisoned smugglers, thieves, deserters from royal service, tax evaders, and like its predecessors in the ancient Near East, foreign captives, often on a very large scale and often involving forced labor. The Old Babylonian term bit asiri seems to refer specifically to the forced labor of foreign captives. Like Samson among the Philistines (and Hebrews and others among the Egyptians), foreign prisoners among the Assyrians largely labored at grinding flour, and their prisons were close to or inside granaries. Some prisoners were confined in dry cisterns that were otherwise used for the storage of grain. Bit kili, another Babylonian term for prison, appears to have had a somewhat broader meaning, indicating any location used to confine criminals, hostages, rebels, or those detained for any other reason.

These practices extended from Hammurabi through the period of Assyrian domination down to the Persian empire that succeeded Assyria in 539 B.C. We know of them both from internal Mesopotamian sources and from the observations and narratives of those people who experienced firsthand the penal practices of Middle Kingdom Egypt, Assyria, and Persia: the Hebrews.

**Ancient Israel**

Between the floodplain civilizations of Egypt and Mesopotamia, small, largely nomadic, clan-based societies of shepherds and traders, led by patriarchal chieftains, arose. These Semitic-speaking peoples drew on the cultures of neighboring civilizations, but they rejected both the great cities and the gods of the Egyptians and Babylonians. One of these groups, identifying itself as the descendants of Abraham, fled Egypt around the thirteenth century B.C. under the leadership of Moses and moved east into Palestine and Syria.

The memory of the exodus from Egypt and the experience of establishing themselves in Palestine shaped the refugees into a new people possessed of a powerful new religion. That
religion was based on a covenant between God and the Hebrew people and was spelled out in the law attributed to Moses.

The chief source of ancient Hebrew history is the Bible, but the Bible is also far more than a lawbook. It consists of literary works belonging to different literary genres, written at different times and for different purposes. Its components are not always accurately datable, and for purposes of historical description they are not always clear. The core of ancient Hebrew law (as well as modern Jewish law) is Torah (in Hebrew, meaning “law,” “wisdom,” “teaching”; in Greek, Pentateuch, the “five books” of Genesis, Exodus, Leviticus, Numbers, and Deuteronomy). At the heart of Torah is the covenant between God and Moses on behalf of the entire Hebrew people (Exodus 19–34, Deuteronomy 4–10), expressed in the Ten Commandments (Exodus 20:1–17, Deuteronomy 5:6–21) and subsequent legal commands. The rest of the Bible originally consisted of two other kinds of text, “the prophets” and “the writings,” both of which are also of considerable historical and legal importance.

The Bible describes the law and civilization of the Hebrew people and many aspects of other civilizations in the ancient Near East, including criminal law and penology. It is worth noting, for example, that of the seventeen instances of imprisonment in the narrative parts of the Bible, twelve are described as taking place outside Hebrew society proper, and they show various types and functions of imprisonment in societies as different as Egypt and Assyria.

The first recorded offense in Jewish history, Adam and Eve’s disobedience to God, was punished by exile. So was the second, Cain’s killing of Abel. Both offenses were punished by God himself, in Cain’s case with the addition of a protective or shaming “mark” placed on Cain. Jewish law itself can be traced only from the thirteenth century B.C.

During the period of the judges (thirteenth to eleventh centuries), local councils of elders appear to have administered the law of each village (Ruth 4:2), law that was customary and unwritten. The inhabitants witnessed the deliberations and participated in the execution of sentences. Besides the elders, exceptional individuals might also give judgment (1 Samuel 2:18–21). In the period of the early monarchy (David [1000–961] and Solomon [961–922]), kings began to assert authority throughout the kingdom, accepting appeals from village courts. During the period of divided kingship (Judah in the south, Israel in the north, 871–609; the term “Jew” derives from the descendants of the kingdom of Judah), royal rule in Judah grew more assertive: royal judges were appointed for each village; and a high court at Jerusalem heard appeals and formulated jurisprudence. In addition, during the reign of Josiah (640–609) a lawbook was discovered during the restoration of the Temple (2 Chronicles 34:14–33), a book now recognized as the original form of the Book of Deuteronomy. Josiah’s acceptance of the book and his declaration of a new covenant provided the kingdom of Judah with a written law for the first time.

The last years of the Judean monarchy were marked by the growing threat from Assyria in the east, the destruction of the kingdom of Israel in 722, and the conquest of Judah in 586. The conquest led to the period of Jewish exile in Babylon and the slow restoration of a Jewish protectorate kingdom under later Persian, Egyptian, and Syrian domination during the post-Exilic period (537–142), until the resurgence of the monarchy under the Maccabees and the later dependence on the Roman Empire. In the post-Exilic period, judicial authority among
the Jews was held by the priestly class and was centered at the seventy-one-member court of the Sanhedrin, presided over by the high priest in Jerusalem.

The history of criminal law in the Bible is colored by the precepts of Deuteronomy. Crime was regarded as a violation of the covenant with God, as deliberate disobedience to categorical commandments. Because the covenant created the Hebrews as a people, the principal early punishments were death and exile, both forms of removal from the community. The earliest references to confinement (Leviticus 24:10–23, Numbers 15:32–36) indicate simply that offenders were placed in temporary custody until capital sentences could be carried out.

Like exile, the death penalty was used to remove those whose offenses disrupted public order and purity and threatened to bring down the wrath of God on the whole community (Deuteronomy 17:12, which also suggests a theory of deterrence, and Joshua 7). The argument in favor of using punishment as a deterrent is made in Deuteronomy 19:16–21, which also states that exact reprisal, "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot," should be taken on a false witness precisely as the witness had intended his opponent to suffer.

The principal forms of the death penalty were lapidation (dramatic instances are Numbers 15:32–36 and Joshua 7:25–26, which echo the earlier form of community participation in village trials), burning (which consisted of forcing the mouth open and pouring molten lead into the stomach), decapitation (Deuteronomy 13:13–17), and strangulation. Corporal punishments included beating and mutilation. Compensation, fines, and compulsory sacrifices could also be ordered. There is an interesting tendency in post-Exilic Judaism to mitigate the harsher punishments, including the death penalty, in favor of other forms of punishment, several of which appear to have originated outside Israel.

The Deuteronomic laws say nothing of prisons, and the few early instances of confinement mentioned above are obviously custodial, although Hebrew writers certainly noted the practice among other peoples, as in the story of Joseph in Egypt. Prisons first appeared among the Hebrews during the monarchy, when King Ahab ordered the imprisonment of the prophet Michiah on a diet of bread and water until the king returned from battle (1 Kings 22:26–28, 2 Chronicles 18:25–27). In another incident, King Asa put the "seer" Hanani in stocks (2 Chronicles 16:10). Neither king had any religious warrant for such an action, but imprisonment, like other forms of bodily punishment, appears to have been introduced by the early kings, perhaps in imitation of the practices of neighboring states, Egypt to the west or the great empires of the east.

In terms of legal and religious history, one of the most influential books of the Bible has been the Book of Ezra. The work was composed around 400 and recorded the reestablishment of the Jewish community in Palestine after the Babylonian captivity. The Persian king Artaxerxes II retained political control of the territory, and it was Artaxerxes' permission, which Ezra recorded, that laid down the enforceability of religious regulations and procedures of criminal law: "Whoever will not obey the law of your God and the law of the king, let judgment be rigorously executed upon him, be it death, banishment, confiscation of property, or imprisonment" (Ezra 7:26). These forms, two of which—imprisonment and the con-
fiscation of property—had not before existed in Jewish law, were adopted by later Jewish law enforcement officials and were retained until well into the Common Era. The power of Assyria was long remembered in post-Exilic Jewish society—for both ordinary Jews and Jewish kings had endured the hardships of Assyrian imprisonment, including five kings of Judah (2 Chronicles 35:11, 2 Chronicles 36:6, 2 Kings 17:4, 2 Kings 25:7, 2 Kings 25:27).

The most informative instance of imprisonment in Jewish society is the case of the prophet Jeremiah. The prophets, claiming divine inspiration and command, proved particularly irritating to both kings and priests, and Jeremiah was one of the greatest irritants. His prophecy of divine vengeance on Judah so irritated Pashur, son of Immer the priest, that Pashur had Jeremiah flogged and then confined overnight in stocks, “in the prison in the Upper Gate of Benjamin” (Jeremiah 20:1–2). Shemaiah the Nehelamite complained that all prophets should be jailed (Jeremiah 29:24–29) and that this was the duty of the priests. King Zedekiah (himself later imprisoned in Assyria: 2 Kings 25:27) also imprisoned Jeremiah “in the court of the guardhouse attached to the royal palace” (Jeremiah 32:2–5). Later, Jeremiah was arrested by a royal officer who had him flogged “and imprisoned him in the house of Jonathan the Scribe, which they had converted into a prison; for Jeremiah had been put into a vaulted pit beneath the house, and here he remained for a long time” (Jeremiah 37:13–16). Interrogated by Zedekiah, Jeremiah was transferred to the court of the guardhouse, where he again remained for some time (Jeremiah 37:21). But the soldiers, infuriated by his prophecies, received the king’s permission, took Jeremiah, and let him down with ropes into a water cistern that still had mud and slime at its bottom (Jeremiah 37:6–13). Rescued by a friend’s petition, Jeremiah returned to the court of the guardhouse until the fall of Jerusalem.

The conventions of biblical translation require that the text of the Bible be rendered in such a way that it is understandable to contemporary readers. But in the case of imprisonment, such translation rules prove to be misleading. The description of the places and uses of imprisonment in the case of Jeremiah alone suggests a far greater variety of types of confinement than what the simple modern terms “prison” and “stocks” can adequately convey. In fact, the trials of Jeremiah illustrate a collection of practices that are consistent with—and probably derivative from—others in non-Jewish societies in the ancient world.

The functions of imprisonment that had been adopted by Jewish society by the time of the writing of the Book of Jeremiah survived through the Maccabean monarchy and the juridical importance of the Sanhedrin down to the Roman world. Some echoes of them can be found in the Christian Bible. The overnight detention of Peter and John by the Sanhedrin (Acts of the Apostles 4:3) and of the apostles by the high priest, from which they were freed by an angel (Acts 5:18–19), Saul’s imprisonment of Christians (Acts 8:3, 9:2), and the now-converted Paul’s reminder to fellow Christians that some of them had been imprisoned and had had their possessions confiscated (Hebrews 10:34) are all early Christian testimonies to the continuing practice of imprisonment in Jewish penology.

Like the case of Socrates and the Greek uses of images of imprisonment as literary metaphors, the Jewish legacy was also one of images. The Jewish philosopher Philo, around the turn of the Common Era, interpreted the imprisonment of Joseph in Egypt in terms of the Platonist image of the soul’s imprisonment in the body. But the greatest influence of Jewish
images of imprisonment was religious rather than philosophical. The influence of the Jewish Bible reached a far wider audience than Plato or the Greek orators, and that audience paid particular attention to its vivid expressions of human helplessness and terror, particularly in its language of confinement and release, of captives ransomed by God, of refuge and sanctuary, and of exile and return.

Psalms 40, 69, and 107 use the imagery of God's drawing a prisoner "up out of the muddy pit, out of the mire and clay," echoing the next-to-last imprisonment of Jeremiah. Psalm 102 states that the Lord will hear the groaning of prisoners; Psalm 105 retells the story of Joseph as prisoner; Psalm 142 requests, "Set me free from prison that I may praise thy name." Psalm 146 says that the Lord will set the prisoner free, and the Book of Isaiah (61:1) states that the Lord has commanded the prophet "to proclaim liberty to the captives and release those in prison." The Books of Job, Psalms, Isaiah, Lamentations, and Zechariah also abound in prison images. The eloquence of the religious imagery of the Jewish Bible joined the philosophical imagery of the Athenians as part of the historical and intellectual legacy of Mediterranean antiquity. But neither of these traditions focused on scientific jurisprudence or law. The third legacy, that of Rome, addressed both.

**The Law of Rome**

The city-state of Rome was built in the farmsteaded countryside of central Italy on a series of hills close to convenient crossing-points of the Tiber River. The legendary date of its founding was 753 B.C., and from that date until 509 B.C. it was ruled by kings. In 509 a republic was established, at whose head were two magistrates, called consuls, as well as various subordinate magistrates, some of whom, the praetors, performed the chief legal functions of the magistracy. The Republic directed the expansion of Roman military power, and eventually Roman government, throughout Italy and the Mediterranean and Near Eastern worlds and into Southern and Central Europe. The expansion of Roman authority created social and economic strains, flooded Rome with enormous wealth, and made political power the object of a number of civil wars. By the last quarter of the first century B.C., the Republic was replaced by the rule of a single man, the emperor, and by a large imperial bureaucracy and army. From the reign of Constantine on (A.D. 312–37), the emperors, with one exception, were all Christians. The Roman Empire is conventionally said to have lasted in the West until A.D. 476 and in the East until A.D. 1453. Its influence, particularly its legal influence, lasted much longer.

In 451 B.C. the Twelve Tables, the first written laws of Rome, were issued. These dealt chiefly with private disputes between individuals, and even the few instances of offenses against the Roman state—receiving bribes and aiding an enemy of Rome—had to be prosecuted privately before the assembly of the people. Such offenses as physical assault, theft, insult, the theft or destruction of crops, and perjury were all considered offenses against private persons (delict) to be prosecuted by the offended individual in the presence of the appropriate magistrates and before the assembly of citizens.

Conviction for some offenses required the payment of compensation, but the most frequent penalty was death. Among the forms of capital punishment in effect were burning (for
conviction of arson), precipitation from the Tarpeian Cliff (for perjury), clubbing to death (for composers of scurrilous songs about a citizen), hanging (for theft of the crops of others, apparently a form of punitive human sacrifice to the goddess Cebe), and decapitation. Although not mentioned in the Twelve Tables, several other forms of capital punishment were also used in early Rome. The culleus, the practice of confining the offender in a sack with an ape, a dog, and a serpent and throwing the sack into the sea, was used for those who had killed close relatives. Vestal virgins who violated their oaths of chastity were buried alive. The powerful features of the laws of delict suggest that these punishments emerged originally as a substitute for private revenge. In addition, although it was not a formal punishment, exile might be chosen by a convicted offender as an alternative to execution. Those who chose to go into exile in these circumstances lost their citizenship, freedom, and immovable property and could be killed by any citizen if they returned to Rome.

The only instance of imprisonment in the Twelve Tables occurs in the laws concerning debt. Debtors who could not or would not pay were to be held in private confinement by their creditors for sixty days and were to have their debts publicly announced on three successive market days, on the last of which they might be executed or sold into slavery outside the city. Narrative sources add one further category of imprisonment. The limitless powers of the male heads of Roman households included the right to maintain a domestic prison cell to discipline members of the household. This cell, the ergastulum, could be a work cell for recalcitrant or rebellious slaves or a place of confinement at the pleasure of the father for any family member for any infraction of household discipline.

The Twelve Tables were never officially abolished as Roman law, but changes in the administration and application of law from the fifth to the second century B.C. greatly widened the range and expanded the procedures used. To give legal advice was both an obligation and one of the few acceptable public roles for members of the ruling class (the others were military command, holding public office—including judicial office—and managing one’s own estates). Although technically amateurs, legal experts achieved considerable fame, and their advice was offered and accepted at all stages of a litigation procedure. Cicero (106–43 B.C.), who made his own reputation as an orator in the law courts, noted the intense interest in discussing even minor points of law on the part of those who held the highest offices in the Roman state. When legal experts held the office of praetor they were able to influence the law by their right to control its application. By the end of the second century B.C. some jurists had begun to write specialized treatises on particular questions of law. Other amateurs, Cicero among them, specialized in speaking against or on behalf of defendants in court—further developing the Greek genre of forensic oratory.

From the mid-second century B.C. the Roman state began to establish specific courts, the quaestiones perpetuae, to try particular offenses. These courts were presided over by a praetor, although accusation and prosecution were still conducted by private individuals. The penalties inflicted by these courts were statutory—there was no discretion on the part of the court—and there was no appeal from their verdicts. The quaestiones perpetuae represented the next stage in the formation of Roman criminal law.

Several other aspects of Roman culture also contributed to this process. For the bottom strata of Roman society there appears to have been a summary police procedure exercised by
the lower magistrates, notably by the tresviri capitales. Only the highest Roman magistrates—the consuls, the assembly of citizens, occasional dictators, and the highest military command ranks—held what the Romans called imperium, the power of life and death over Roman citizens. But even magistrates like the tresviri capitales possessed the right of coercitio, the authority to punish violations of their commands and instances of public disorder by a number of means short of capital punishment. References in Roman literature, including the comic drama, indicate that the tresviri capitales could imprison offenders temporarily, although of these prisons little is known. In the provinces of the empire local governors and their staffs had great latitude in the administration of the law, including criminal law. Military courts too had considerable power over those who came before them. It is possible that the summary police procedure used by lesser magistrates in the city of Rome, by governors in the provinces, and by military courts constituted something closer to a true criminal legal system than the quaestiones perpetuae.

At the end of the first century B.C. a series of revolutions placed Augustus at the head of the Roman state. The period between Augustus and the death of the jurist Ulpian (A.D. 222/224) is termed the classical period of Roman law. Although the emperor himself became the chief source of law, Augustus and most of his successors relied on the advice of legal specialists, not only in their legal administration but in the composition of the very laws they issued. Besides the increasingly prominent role of jurists and imperial officials in the administration of the law, particularly the criminal law, the other distinguishing feature of the classical period is the flowering of a technical literature of jurisprudence produced by the imperial jurists, a body of legal literature that has no counterpart in the ancient world. During the last century of the Republic, the social upheavals and internal violence that characterized the period had led to the expansion of the sphere of public law (including constitutional and criminal law), law that dealt with the endangering of the order or authority of the state itself. The emperors, with the advice of the jurists, greatly expanded the sphere of criminal law.

Emperors and their legal advisers added new offenses to the competence of the quaestiones perpetuae, and they created still other new offenses by imperial edict. In some instances imperially delegated officials assumed the functions of the older quaestiones perpetuae, trying cases on the basis either of charges brought by private citizens or of charges generated by their own investigation—inquisitio. In both instances the central role of the state indicates that the older conception of many offenses as private injuries—delicts—was giving way to a conception of some of these, at least, as crimes, to be treated under public law by public authorities.

Under the new imperial system, a number of hitherto infrequent practices became more common, notably the use of torture. Torture had always been required in the testimony of slaves, since they were assumed to have no honor and no reason to tell the truth except when compelled. The application of torture to others gradually expanded to defendants of low social status and even to witnesses in some cases, particularly treason, a category that itself greatly expanded under the emperors.

The increasingly public character of offenses that had once been prosecuted privately made social status more important, especially while it still served to determine the way an
offense might be tried and punished. Older Roman social distinctions had by the early Empire given way to the social distinction between strata called honestiores and humiliores. One sign of the difference between these two levels was the nature of punishments that were normally inflicted on members of each. This difference became more important during the imperial period, when punishments themselves became more and more severe.

Under the emperors, exile—formerly a choice enabling one to avoid capital punishment—became an inflicted punishment, either as relegatio (exile from Rome) or as deportatio (banishment to a particular place, often remote and harsh). Emperors also condemned some offenders to forced labor at public works for a specific period of time, to the mines, or to gladiatorial combat. The last two of these, usually inflicted on humiliores, were really death sentences, as was, of course, the other new punishment of being thrown to the beasts in public games, another punishment chiefly inflicted on humiliores but under some emperors used on anyone who displeased or offended them.

Being thrown to the beasts, being publicly burned to death, or suffering the Roman form of apotympanismos (crucifixion) belonged to a class of spectacular punishments known as the summa supplicia, "the highest punishments." These were reserved for horrendous offenses (or offenses that were thought to be horrendous), and they were aspects of the increasing pursuit of exemplary deterrence through spectacular and aggravated executions, which demonstrated the limitless power of the emperors. These punishments began under the early emperors and reached a peak during the third and early fourth centuries, when they reached a level of ferocity that had rarely, if ever, been equaled in the ancient world. During this period the literature describing Christian martyrs (see below) offers graphic depictions of large numbers of examples of such forms of execution.

The later fourth- and fifth-century emperors, however, began to reduce both the variety and the severity of capital punishment. This process occurred in the context of the last major stage in Roman legal history, the compilation of extensive collections of legal literature under imperial patronage. In 438 the emperor Theodosius II issued the Theodosian Code, containing imperial edicts from the fourth and early fifth centuries. A century later, Justinian issued the Institutes (533), the first introductory book for beginning law students, the Code (534), a new compilation of imperial legislation from the second century through the early sixth, and the Digest (533), a rich collection of legal science written by the great jurists of the imperial period. These texts, known since the thirteenth century as Corpus Iuris Civilis ("Body of Civil Law"), influenced the law of Europe and the Americas until the end of the eighteenth century and are still the basis for learned law in countries with civil law systems. The treatment of Roman criminals in Book 9 of Justinian's Code and in Books 47 and 48 of the Digest, even though Justinian himself termed them "the terrifying books," was considerably closer to the forms of execution in the late Republic and early Empire than to those of more recent Roman history.

Aside from the references in the Twelve Tables to imprisonment for debt and for the practice of the domestic ergastulum, sources for the history of the early use of prisons in Rome are largely the narratives of historians. The first-century historian Livy described an episode that had taken place in 385 B.C., suggesting an early use of prison other than for debt or the domestic ergastulum. After an attempt to free a number of imprisoned debtors, the military
hero Marcus Manlius was hauled before the dictator of Rome (dictators were occasionally appointed during political crises in the Roman Republic) and put into prison in chains, "to draw his breath in darkness, at the mercy of the executioner."

Livy's Latin uses two terms for the action against Manlius: *vinculum* (chaining) and *carcer* (prison). These correspond exactly to the Greek terms *desmoterion* and *phylake*, and when Latin writers translated the Greek terms they used the Latin *vinculum* and *carcer*. The cases of Manlius and several others from the fourth to the second centuries B.C. suggest something of the instances of imprisonment but little of the character of prisons in the early Republic. The Roman writer Aulus Gellius mentions Naevius the satirist: "He wrote two plays in prison, *The Soothsayer* and *The Lion*, when by reason of his constant abuse and insults aimed at the leading men of the city, after the manner of the Greek poets, he had been imprisoned at Rome by the triumvirs." The triumvirs in Gellius's story of Naevius are the *tresviri capitales*, the lower-ranking magistrates possessing the power of *coercitus*. Naevius's imprisonment was coercive: he was released when he promised to stop insulting important people. The otherwise unknown C. Cornelius was convicted of sexually corrupting a young boy. One of the *tresviri capitales* placed him in prison, where he either remained until he died or was executed.

One of the earliest references to the prison at Rome occurs in another passage by Livy. After the successful suppression of a revolt by Carthaginian prisoners of war in 198 B.C., the consuls ordered the lower magistrates to double their prison precautions. "So at Rome watchmen patroled the streets, the minor magistrates were ordered to make inspections, and the three officials in charge of the quarry-prisons to increase their vigilance, and the praetors sent letters around to the Latin confederacy, that the hostages kept should be placed in close custody, with no opportunity to come out into public places, the prisoners loaded with chains of not less than ten pounds' weight, and guarded only in a public prison."
The quarry-prisons and their three officials were the tresviri capitales and the prisons known as latumiae. The latumiae were part of a prison complex located on the southern slope of the Capitoline Hill, where rock had once been quarried. They were adjacent to the underground chamber called the Tullianum, later called the carcer Mamertinus, the Mamertine prison. This stood at the northwest corner of the Roman forum, in an area known as the Comitium, the seat of the magistrates and the site of much of their judicial business. The prison that survives today is below the present-day church of San Giuseppe dei Falegnami. The Tullianum was built in the third century B.C., probably as a convenient place of confinement close to the courts. In the late second century B.C. a room was added above the Tullianum proper, and the latumiae stood close by. The lower chamber appears to have been used indifferently as both a place of confinement and an execution chamber. The second-century A.D. historian Sallust described the chamber: "In the prison... there is a place called the Tullianum, about twelve feet below the surface of the ground. It is enclosed on all sides by walls, and above it is a chamber with a vaulted roof of stone. Neglect, darkness, and stench make it hideous and fearsome to behold. Into this place Lentulus was let down, and the executioners then carried out their orders and strangled him."

Sallust wrote around the middle of the first century B.C., when the tresviri capitales, with a relatively small number of subordinates, still seem to have constituted the effective police force in Rome. The rapid growth of the city, however, and the needs of the emperors at the end of that century began the development of other forms of policing and probably the building of other prisons. Juvenal, the second-century A.D. Roman satirist, complained that he longed for the days when only a single prison had met the needs of the city of Rome. Under the Empire too, provincial governors certainly built prisons, so that by the end of the second century, if not considerably earlier, the number of prisons within the city and the Empire had increased considerably.

Even under the Republic there were prisons outside Rome. In the early second century B.C., Perseus, king of Macedonia, was captured by a Roman army and placed by the praetor of Rome with his family in a prison at Alba Fucens in central Italy. The first-century B.C. historian Diodorus Siculus described the prison:

The prison is a deep underground dungeon, no larger than [a dining-room that could hold nine people], dark and noisome from the large numbers [of people] committed to the place, who were men under condemnation on capital charges, for most in this category were incarcerated there at this period. With so many shut up in such close quarters, the poor wretches were reduced to the appearance of brutes, and since their food and everything pertaining to their other needs was all so foully commingled, a stench so terrible assailed anyone who drew near it that it could scarcely be endured.

Many of Perseus's fellow inmates were awaiting execution, but it is not clear that Perseus was. Nevertheless, his jailers threw down a sword and a noose to him, urging him to commit suicide, which he refused to do. He had nearly died from mistreatment when he was removed to a more comfortable place of confinement. Perseus lasted there for two years, until his guards undertook to kill him by depriving him of sleep.

As a prisoner of war, Perseus was in a special category. Elsewhere Livy wrote of the confinement and chaining of prisoners of war (some of them in the latumiae in Rome) and of
hostages, a custom seen elsewhere in the ancient world. The details the account of Perseus preserves about the prison at Alba Fucens are important. The cell below ground level—with its stench and filth, the invitation to suicide, and the possibility of the chamber as a place of execution—indicates a variety of functions. Perseus's prison at Alba Fucens too was below ground, and it echoes the water cistern into which Jeremiah was thrown, as well as the Tullianum in Rome.

It is difficult to see the Tullianum, at least, as a prison intended for long-term punitive imprisonment, since its physical conditions were so terrible and dangerous. But it is possible to see the chamber above it and the latumiae as places of more than temporary custodial confinement, not only in the indefinite detention of prisoners of war but also in the detention of others who might have been imprisoned for long terms or for life. Such cases, however, were rare, and although we know considerably more about the prison at Rome than, for example, that at Athens, punitive imprisonment for any length of time seems to have been infrequent.

By the early fourth century, imperial edicts indicated a general concern for at least the minimal physical well-being of inmates. An edict of Constantine in the Theodosian Code dated 320 referred to anyone held in custody awaiting the appearance of his accuser: "[He] shall not be put in manacles of iron that cleave to the bones, but in looser chains, so that there may be no torture and yet the custody may remain secure. When incarcerated he must not suffer the darkness of an inner prison, but he must be kept in good health by the enjoyment of light, and when night doubles the necessity for his guard, he shall be taken back to the vestibules of the prison and into healthful places. When day returns, at early sunrise, he shall be forthwith let out into the common light of day so that he may not perish from the torments of prison."

Constantine's edict and other sources, notably those concerning the imprisonment of Christians, reveal other important features of Roman prisons. They appear to have had different sections, for example. One was an inner (or deeper), more obscure chamber in which the accused might be shut up in darkness, locked into stocks or tightly chained, unattended to, unfed, suffering from heat or cold and filth, abused by jailers, or otherwise tortured while in prison. Such sections are referred to in another passage of the Theodosian Code in reference to crimes "that deserve prison barriers and squalid custody." A century after Constantine's edict, St. Augustine, in a passage in one of his Tractates on the Gospel of John, also mentioned the different parts of a Roman prison: "And it makes a difference for each one who is later to be brought before the judge with what kind of guard he is taken. For, in fact, detentions under guard are exercised in accordance with the merits of the cases. Lictors are ordered to guard some, a humane and mild duty and appropriate to a citizen; others are handed over to jailers. Others are sent into prison; and in the prison itself not all, but in accordance with the merits of more serious cases, [some] are thrust into the lowest parts of the prison." The Theodosian Code also directed judges to inspect prisons every Sunday to see that the guards had not accepted bribes from prisoners, that the prisoners were provided with a ration of food at public expense, and that the prisoners were conducted to the baths under guard. The prison registrar was responsible for any escapes and for any excessive brutality toward the prisoners.
Emperors sometimes performed gratuitous acts of mercy. In one such case we can see the distinction between two different kinds of crime and the treatment of criminals. An edict of 367 announced the emptying of the prisons in honor of Easter, except for those prisoners guilty of treason, crimes against the dead, sorcery, adultery, rape, and homicide. These crimes, which merited the summa supplicia as punishment, were generally termed crimina excepta—crimes so awful that ordinary criminal procedures were suspended in their prosecution.

The category of crimine exceptum also explains some of the erosion of the status distinctions that had earlier marked Roman forms of punishment. In the Republic and during the first century of the Empire, those who came to be termed honestiores either were quickly executed—usually by decapitation—or were allowed to flee into exile. But from the third century on, if not earlier, honestiores and humiliores alike underwent torture and suffered the summa supplicia in the case of the excepted crimes.

The actual policing practices of the Empire and the increase in the size of the imperial administration, including the administration of justice, appear to have outrun the doctrines of the jurists. The jurists of the classical period preserved the older categories of offenses tried by the Republican quaestiones perpetuae, even though these had long since fallen into disuse with the rise of the imperial civil service and criminal legal procedures. During the third and early fourth centuries, the combination of the limitless power of the emperors and their servants and their arbitrary use of it made the formulation of a doctrine of criminal justice very difficult, if not irrelevant.

Justinian’s Code and Digest nonetheless offer a number of ideas concerning imprisonment, all from the classical period and one of which became extremely influential. The Code, for example, contained an edict from the second-century emperor Antoninus, who stated his position on life imprisonment: “Your statement that a free man has been condemned to imprisonment in chains for life is incredible, for this penalty can scarcely be imposed [even] upon a person of servile condition.” The later jurist Callistratus indicated that an even earlier second-century emperor, Hadrian, had issued an edict specifically forbidding life imprisonment by provincial governors.

Among the jurists whose work on criminal law does survive, the most influential of all was Ulpian, whose death in 222/224 conventionally marks the end of the classical period of Roman law. In the matter of prison, Ulpian left one phrase that resonated through many centuries and came to be understood (erroneously) as the sole doctrine of imprisonment in Roman law: “Governors are in the habit of condemning men to be kept in prison or in chains, but they ought not to do this, for punishments of this type are forbidden. Prison indeed ought to be employed for confining men, not for punishing them.”

In matters of criminal law, the Code and the Digest of Justinian represent an attempt by the later Roman emperors to mitigate the arbitrary harshness of the third-century Empire by recovering the laws of such moderate second-century emperors as Hadrian and Antoninus and the opinions of the classical jurists. The laws of the Christian emperors after Constantine also reflected a mitigating of the most ferocious aspects of Roman criminal procedure.

The largest single group of Roman prisoners whose sources provide extensive detail for life in Roman prisons are the Christians, not only from accounts in the gospels, the epistles, and the Acts of the Apostles, all parts of the Christian New Testament, but also from a group
of texts known generally as the "Acts of the Christian Martyrs." Although the exact legal basis for the Roman prosecution of Christians is still a matter of scholarly debate, accounts from different parts of the Empire are in considerable agreement concerning the prisons in which the Christians were held.

Like other accused criminals, Christians were remanded to prison for custodial purposes, to await the arrival of a competent judicial official or the attention of the local magistrate or to await the execution of a capital sentence (Acts of the Apostles 22–26), sometimes for years. In at least one case, that of Ptolemaeus, the account states that when Ptolemaeus admitted to being a Christian, an officer "put him in chains and punished him for a long time in prison (desmoterion)." The text is not clear whether the imprisonment was for the purposes of aggravated physical punishment such as torture or for punitive confinement, since Ptolemaeus was later executed. In general, however, Christians do not seem to have been imprisoned as a punishment. In spite of formidable gates, walls, security measures, overcrowding, and filthy, prisons were certainly not the harshest punishments known to imperial whim, as the summa supplicia testify.

The "Acts of the Christian Martyrs" corroborate the point that prisons had several sections. One was the inner chamber, cited above by both Constantine and Augustine. Other parts of the prison were less terrible. Some had windows. There were policies, at least, concerning minimal food rations, although one martyr preferred to fast and share his small ration among the other prisoners. The more desirable parts of the prison could sometimes be obtained by purchasing them from the jailers, as did the friends of St. Perpetua in Carthage in 202. Christians may have been routinely placed at first in the inner part of the prison because of their jailers' fear that they might escape by means of magic.

From the third-century account of the martyrdom of Pionius, it is clear that many jailers could expect to extort a percentage of the gifts given to prisoners in their charge, since the jailers became angry at Pionius for refusing to accept gifts from friends outside the prison. Visitors were sometimes permitted, but they could also be arbitrarily refused access to the prisoners. Among Christians, the duty of visiting prisoners was recognized as soon as the persecutions began in earnest in the second century. It was inspired by Jesus' prediction that at the Last Judgment, those who had visited prisons would be counted among the righteous (Matthew 25:36), and by other scriptural texts (Hebrews 13:3), as would those who suffered imprisonment during the persecutions (Hebrews 10:34). For a brief time, St. Perpetua was permitted to have her newborn baby with her in prison. She noted, "And my prison suddenly became a palace to me, and I would rather have been there than anywhere else."

The contribution of Rome to the history of criminal law and prisons was the jurisprudence of the Code and the Digest and the moving narratives of the Christian martyrs. The acts of the martyrs were read by later Christians, along with the books of Job, Psalms, Lamentations, Isaiah, and Zechariah, and these shaped later Christian attitudes toward both the use of prisons and the needs of prisoners. The earliest Christian literature urged charity and forbearance toward offending fellow Christians (Romans 2:1), or fraternal admonishment (Matthew 18:15), but the expansion of Christianity and the Christianization of the entire Roman Empire by the end of the fourth century made such attitudes ethically compelling but very difficult to adopt as criminal policy. Although Christianity did mitigate some of the savage
turned out to be St. Hospitius, who chose to live in this fashion as an act of penance, the Lombards' assumption that chained confinement was a punishment for murder suggests that prisons served other purposes among the Lombards besides punishing theft.

The use of prisons for private purposes is also reflected in the narrative sources for Frankish Gaul. Of these, Gregory of Tours's History of the Franks and the narratives of a large number of saints' lives are the most important. Gregory also tells the story of how the invading Lombards mistook St. Hospitius for a condemned murderer (VI.6), but for the most part narrative sources suggest that imprisonment for ransom was far more prevalent among the Franks than was any form of judicial imprisonment. Kings sometimes used monasteries as prisons for captured rebels, as Chilperic used St. Calais in the diocese of le Mans in 576 for the imprisonment of his rebellious son Merovech. The monasteries of St. Denis and Fulda were used as prisons by later kings of the Franks. But for the most part, prisons were used infrequently. Like the Lombards, the Franks used fines, enslavement, mutilation, and capital punishment far more often than they used prisons.

There are two exceptions to this general statement. The laws of Visigothic Spain distinguished sharply between private injury and crime, although royal judges supervised the adjudication of both. Visigothic judges used a number of legal practices, including torture and other procedural rules, in such a way as to indicate a strong influence from Roman criminal law. Visigothic laws indicate certainly the use of custodial confinement, including private custodial confinement and imprisonment pending the execution of a capital sentence, since these laws discuss the crimes of escaping from prison and aiding in the escape of prisoners. There is also mention of the amount of money that jailers could accept from prisoners. But there is little more in either the laws or the narrative sources indicating the extent or character of imprisonment.

A second exception is the case of Ostrogothic Italy before it fell to Justinian's armies in 554. The Ostrogothic king Theodoric (491–526) attempted to rule his Ostrogothic and Roman subjects separately, as king of the Ostrogoths and as military leader of Italy. But Theodoric's rule was never secure, and in 524 Theodoric imprisoned his Roman servant, the scholar, diplomat, and theologian Boethius, on a charge of treason. While in prison in Pavia, Boethius wrote his moving work in prose and verse, The Consolation of Philosophy, a dialogue between the imprisoned author and Lady Philosophy on the nature of human fortune and misfortune. The work, smuggled out of prison by members of Boethius's family, became one of the most widely read works of Latin Christian literature, and it has remained immensely popular down to the present. Among its translators into English have been King Alfred the Great, Geoffrey Chaucer, and Queen Elizabeth I. Boethius's imprisonment, torture, and execution became for later readers the last Christian martyrdom of the ancient world.

The strong Roman tinge to Ostrogothic and Visigothic legal practice did not characterize the rest of European society until the ninth century. For many prisoners, the only hope was not in human justice but in divine. Boethius was tortured and executed in prison, but others were freed by saintly intervention.

An important role of churchmen in early medieval Europe, regardless of the folk to which they belonged, was that of peacemaker between enemies, both private and public. Churchmen often had few resources or material powers in these affairs, but they had one advantage
that violent layfolk did not: they could invoke supernatural powers. Among those to whom both churchmen and laypeople turned were those saints known for their miraculous ability to liberate prisoners.

Few early Christian martyrs were released from prison by divine or saintly intervention, although the apocryphal literature did depict a few miraculous escapes. But in Gaul the liberator-saint had appeared by the sixth century and remained popular for centuries afterward. In his History of the Franks (V.8), Gregory of Tours recounts the story of how the body of the recently deceased St. Germanus (the St. Germanus of Saint-Germain-des-Prés, now part of Paris) became heavier to its pallbearers as his funeral procession passed a prison and then became miraculously lighter to carry after the prisoners were freed. We know little else about the people liberated from prison by Frankish saints, but it seems that many were the powerless, those who had run afoul not of public law and public authority but of private holders of public authority who used imprisonment as a means of coercing the weak, of obtaining ransoms, and of punishing personal enemies. Besides the relics of St. Germanus, Gregory also notes the liberating function of St. Eparchius (VI.8) and states that direct divine intervention freed Bishop Aetherius of Lisieux (VI.36). The narrative life of St. Eligius notes that when the saint approached the prison in Bourges, the gates opened miraculously and the prisoners' chains fell off. All the miracles attributed to St. Gaugericus of Cambrai concern the freeing of prisoners, often against the will of officials. Of all the liberating saints, the most popular was probably St. Leonard, whose cult began among the weak but appealed more to
the knightly and aristocratic social strata in the later Middle Ages, indicating that the weak and powerless were not the only people who had reason to fear imprisonment and who had the need to seek saintly assistance.

Other kinds of liberators were less saintly. Medieval kings often performed gratuitous acts of mercy in pardoning prisoners, often at the urging of churchmen, but royal mercy was not to be routinely expected. Other moral obligations, however, were more regularly practiced. The early Christian conviction that aiding prisoners with alms and other services, as well as praying for them, was a proper work of Christian charity led pious individuals and groups to contribute to the aid and occasionally the ransom of prisoners throughout the Middle Ages.

From the eleventh century on, significant numbers of hospitals, religious orders, and religious associations called confraternities began to devote themselves to aiding the poor, the sick, the lepers, the pilgrims, and the abandoned children and the old people of medieval Europe. By the twelfth century, prisoners came to be included in this category—generally termed "the poor of Christ"—and donations in private wills in the form of bequests and endowments to aid the poor became a standard part of the general obligation of charity. Occasionally entire religious orders devoted themselves to the ransom of prisoners—including prisoners captured in wars or in conflicts across the religious divide between Christendom and the Islamic world. One of the most active of these was the Order of St. Mary of Merced in Barcelona.

If churchmen and acts of charity on the part of ordinary Christians could only slightly ease the lot of prisoners, the charitable component of behavior toward prisoners on the part of clergy and laity should not be neglected. It inspired not only individuals and groups but also the legal system that grew up alongside the secular laws of the Germanic and later kingdoms: the canon law of the Latin Christian Church.

**THE DISCIPLINE AND LAW OF THE LATIN CHURCH, 550–1550**

**Ecclesiastical Discipline and Canon Law**

Scriptural references to relations among Christians in the earliest communities were shaped by the charismatic and fraternal character of those communities. Christians were admonished not to pass judgment on fellow Christians (Luke 6:37), to act with forbearance (Romans 2:1), and to exercise fraternal admonition (Matthew 18:15) and forgiveness of personal offenses (Matthew 18:21–35). In some cases, however, scriptural texts allow for a more severe response to sinful conduct: 1 Corinthians 5:1–13 permits exclusion from the community in a case of incest. Authority had been given by God to the Christian community to "bind and loose" (Matthew 18:18) in matters among themselves. That authority was assumed particularly by the community's leaders, the bishops.

The legalization of Christianity in the Roman Empire and the legal privileges given to Christian communities and their leaders beginning in the fourth century helped to create a hierarchy of authority among Christians. Emperors recognized the spiritual authority of bishops in matters of maintaining discipline and establishing dogma in the communities
ruled by the bishops, and in many instances they also recognized the bishops’ authority in civil affairs.

Bishops assumed judicial responsibility for all matters concerning Christian clergy and church property and for immoral behavior within their communities. Assemblies of bishops—the church councils—increasingly legislated for all of Christianity. The writings of individual churchmen and respected individual bishops, particularly those of the city of Rome, also contained advisory and legislative acts that were accepted throughout most of the Christian world. From the sixth century on, local ecclesiastical assemblies, the rulings of Germanic kings, private handbooks of penance, liturgical books, and other texts produced still more legal materials. Many scholars attempted to collect and rationalize this vast body of material between the eighth and the twelfth centuries, but not until the collection of Gratian of Bologna around 1140—*The Concordance of Discordant Canons, or Decretum*—did a single collection come to be widely accepted as the starting point for all study of ecclesiastical, or canon, law. Gratian’s collection was the basis for later laws and legal collections issued by popes and councils and for the *Liber Extra* of Pope Gregory IX in 1234, the *Liber Sextus* of Pope Boniface VIII in 1298, and the *Extravagantes* of Pope John XXII in 1317. Canon law was also recognized in all of the territorial monarchies, principalities, and independent city-republics of medieval Europe at least until the Reformations of the sixteenth century.

The disciplinary aspects of canon law were based on the bishop’s responsibility for the salvation of those he ruled by the proper application of “discipline” and “correction.” In the name of God, bishops were expected to determine the nature of spiritual offenses and to apply the appropriate penances so that a sinner might be corrected and led to salvation by a combination of discipline, correction, and mercy.

Early Christian writers had used some of the terminology of Roman criminal law to describe spiritual offenses. These offenses were considered sins—acts against God and duly constituted spiritual superiors who acted in God’s name. Church courts rejected any penitential punishment that resulted in death, mutilation, or the shedding of blood or any form of discipline that might lead the offender to despair, thus preventing the penance that would lead to salvation and restoration to the Christian community. Here, in a very different form, was an echo of one of Plato’s justifications for punishment in the *Gorgias*—the correction and improvement of wrongdoers.

The development of canon law in the cases of monks, secular clergy, and laypeople was the earliest articulation of an institutionalized disciplinary system, one that based itself on the idea of sin and its correction, penitential expiation. In this process the prison emerged with an entirely new function.

**Monastic Prisons**

Of all Christian clergy, only members of monastic orders lived lives of continual prayer and penitence. Monks were considered to have withdrawn from this world to a life of penitence in preparation for the next. Those who entered monastic orders took special vows that included the vow of obedience to the ruler of the monastery, the abbot. Different monastic orders were governed not only by canon law but also by constitutions designed specifically
for each order. By the twelfth century the most influential monastic rule was that of St. Benedict of Nursia (d.547), a rule supplemented by later constitutions issued by church councils, popes, and the orders themselves.

In matters of discipline, the Rule of Benedict spoke only of the isolation of serious offenders, banning them from the common table and the collective liturgical services that constituted the center of monastic life and forbidding them both the company and the speech of other monks. The isolated monk was made to labor, "persisting in the struggle of penitence; knowing that terrible sentence of the Apostle [Paul, 1 Corinthians 5:5] who said that such a man was given over to the destruction of the flesh in order that his soul might be saved at the day of the Lord" (c.25). The Rule of Benedict continued: "The refection of food, moreover, shall he take alone, in the measure and at the time the abbot shall appoint as suitable for him. Nor shall he be blessed by anyone who passes by, nor shall any food be given to him."

The Benedictine Rule does not mention a term for prison, but an earlier canon law source, a letter of Pope Siricius (384–98) to Himerius, bishop of Tarragona, stated that delinquent monks and nuns should be separated from their fellows and confined in an ergastulum, a disciplinary cell within the monastery in which forced labor took place, thus moving the old Roman punitive domestic work cell for slaves and household dependents into the institutional setting of the monastery. The letter of Siricius was reissued in 895 at the Synod of Trabur, and it made its way into Gratian's Decretum in 1140. Not all monastic constitutions became part of canon law, but from the sixth century on, a number of them used the Latin term carcer as a designation of penitential confinement, and most of them agreed that such confinement might continue solely at the discretion of the abbot, in the most severe cases entailing confinement for life.

The systematization of canon law tended to homogenize Latin monasteries, and by the late twelfth century each monastery was expected to contain a prison of one sort or another. By the thirteenth century some instances of monastic penitential imprisonment were designated by the formal term "punishment," and later legal writers pointed out that imprisonment for life for a monastic offender was comparable to the death penalty in secular justice.

In monastic usage the term murus ("a wall") came to be used as a designation for the room "appropriate for imprisonment" that the Benedictine Rule called for. Some historians
have suggested that the term indicates that monastic offenders were “walled up,” but murus simply seems to have been a common term for monastic imprisonment of any kind. The related terms (used in other clerical and in lay instances) murus strictus and murus largus (“close confinement” and “more liberal confinement”) suggest two distinct aspects of confinement depending on the nature of the offense.

Monastic imprisonment was used in conjunction with other disciplinary measures, including restricted diet and beating with rods. In general, no form of monastic discipline differed qualitatively from individual penances that monks might voluntarily undertake for spiritual benefit. But excessive punishment was occasionally inflicted in cases of monastic imprisonment, although most of the sources that record it usually criticized excessiveness. Peter the Venerable of Cluny, one of the most influential abbots of the twelfth century, told disapprovingly of a prior who confined an offending monk in a subterranean chamber for life. Other abbots imposed chains and fetters on imprisoned monks. In fourteenth-century Toulouse, monks lodged a protest against a monastic prison called Vade in pace (“Go in peace”), which seems to have been far more severe than the usual place of monastic confinement. Monastic prisons and their severities survived into early modern times, and the great Benedictine monk and scholar Jean Mabillon criticized them in a short tract written around 1690, “Reflections on the Prisons of the Monastic Orders.”

The most severe examples of monastic imprisonment, however, cannot be taken for the norm. The horror stories of monastic prisons that circulated during the eighteenth and nineteenth centuries must not be read back and assumed to be an accurate generalized portrait of monastic confinement everywhere.

Nor were monks the only religious subject to confinement. The twelfth-century Cistercian writer Ailred of Rievaulx told the story of the nun of Watton, who, around 1160, became pregnant by another religious, was discovered, and was chained by fetters on each leg and placed in a cell with only bread and water to live on. After her lover had been castrated, the nun remained in prison, but through divine intervention all traces of pregnancy miraculously disappeared and her chains and fetters fell off. The stories of Peter the Venerable, the prison called Vade in pace, and the nun of Watton seem to be memorable precisely because they were considered unusual, not because they illustrated a common practice. They do represent, however, a distinctive monastic contribution to the history of prisons: the first instances of confinement for specific periods and occasionally for life for the purpose of moral correction.

Monastic prisons also served for the confinement of secular clergy under discipline by their bishops. The process was known as detrusio in monasterium (“confinement in a monastery”), and it might entail either living as a monk under normal monastic discipline or being held in a monastic prison. During the twelfth century, bishops were expected to have their own diocesan prisons for the punishment of criminal clergy. The episcopal use of imprisonment as punishment was regularized in an executive order entitled “Quamvis” and issued by Pope Boniface VIII in his lawbook, the Liber Sextus, in 1298. Addressing the Roman law doctrine that prisons should serve as places of confinement, not punishment, Boniface nevertheless permitted abbots and bishops to punish offenders by the poena carceris (“punishment of prison”) either for periods of time or for life. Boniface VIII is the first sovereign authority
in the Western tradition to determine that imprisonment as punishment was a legitimate instrument of a universal legal system.

Clerical Discipline of the Laity

The disciplinary obligations of bishops, councils, and popes were not restricted to clerical personnel. Laypeople too sinned and required penance to expiate sin. The key to clerical jurisdiction over laypeople—including, in theory and often in practice, nobles and kings—was the necessity of penance on the part of all sinners. In all cases, the clergy’s duty was to impose penance. Lesser and secret sins might be privately confessed, and in most cases private penance was imposed, since, as canon lawyers said, “The Church does not judge hidden things.”

But in the case of sins that were publicly known or of such enormity that they required public penance, the “internal forum” of conscience and private confession and penance gave way to the “external forum” of ecclesiastical judgment. Such sins might be intrinsically serious, or they might be serious offenses that were notorious and caused scandalum, public knowledge that injured the Christian community and therefore had to be dealt with publicly. “Criminal sins,” as the most severe sins were called, required public exclusion from the church and the sacraments, and they required public penance of various kinds, including penitential confinement, the same detrusio in monasterium that applied to secular clergy. For some particularly offensive criminal sins—incest, magic, divination—several eighth- and ninth-century councils insisted on actual punitive incarceration, and the Latin sources specifically use the term career.

The extensive development of canon law after the work of Gratian in the mid-twelfth century tended to regularize ecclesiastical criminal procedure and formally extended the competence of ecclesiastical courts, especially after the decretal Novit of Pope Innocent III (1198–1216) in 1204, which asserted ecclesiastical jurisdiction in any case involving sin. At the same time, Innocent III established a new legal procedure for ecclesiastical courts. The traditional procedure had been accusatorial: a case required a private accuser in order to begin a legal process. This procedure also operated in secular courts. Innocent revived an older method of procedure, the inquisitorial procedure, which had been developed in Roman imperial courts, had occasionally been used in the early Christian communities, but since then had only rarely been used, chiefly by bishops who were required to visit the religious institutions in their dioceses and inquire into the moral conduct of those in the institutions. The new inquisitorial procedure introduced by Innocent III applied to both clerics and laypeople, particularly in serious and publicly known matters.

The Prisons of the Inquisitors

Perhaps the best-known instances of the clerical discipline of the laity are found in the work of a number of inquisitorial tribunals established in the early thirteenth century chiefly to deal with cases of heterodoxy, that is, active dissent from ecclesiastical doctrine. The revival of inquisitorial trial procedure by Innocent III appears to have been used initially in the cases of criminal clergy. But with the perception by churchmen and lay rulers of widespread dissent in religious matters in the twelfth and thirteenth centuries, the older doctrines of
forbearance, pastoral admonition, and the accusatorial procedure appeared insufficient to protect Christian society against a new and formidable enemy. From the late twelfth century, both churchmen and lay rulers issued stiffer laws regarding the discovery and punishment of people who were considered enemies of both God and Christian society. These laws also contributed to the simultaneous development of secular criminal law, considered in the next section of this chapter. In the early thirteenth century the popes created the special office of "inquisitor of heretical depravity," an instance of papally delegated jurisdiction to a specific individual to investigate the presence of heterodoxy in a particular place for a specified period of time.

Inquisitorial investigations required time—to notify people of the inquisitors' arrival and the purpose of their visit, to establish contact with local ecclesiastical and secular authorities, and to investigate matters that were generally concealed and difficult to establish with clarity. Because the investigations often took a long time, inquisitors used prisons to hold those accused until the investigation was complete. Although inquisitors could not inflict the death penalty, they were permitted to establish the orthodoxy or lack of it on the part of the accused and then "relax" the heretic to "the secular arm," the secular court that could execute a convicted heretic once heterodoxy had been established by the appropriate theological jurisdiction, in this case, that of the inquisitor.

Only in extreme cases, however, were convicted heretics executed. If there was hope of changing the views of heretics or of inducing heretics to repent, they were often imprisoned, some for life. The new work of the inquisitors at first greatly overloaded the capacity of existing prisons, and from the mid-thirteenth century on, both the confiscated property of convicted heretics and grants from the royal treasury, especially in France and Sicily, led to the construction of special inquisitorial prisons. These were expensive to maintain, however, and thus proved to be a continuous source of dispute among the different authorities responsible for them. The inquisitors and their secular counterparts were the first to discover the financial impact that even a modest system of prisons could have. The inquisitors' frequent use of imprisonment also increased officials' awareness of prison conditions. Early in the fourteenth century, Pope Clement V sent a commission of inspectors into the inquisitorial prisons of southern France; finding these prisons to be in great disrepair, the inspectors issued strict and apparently successful orders for improvement. From the fourteenth century on, inquisitorial prisons were probably the best-maintained prisons in Europe.

The authority of ecclesiastical courts, including inquisitorial courts, over monks, secular clergy, and laypeople was not substantially challenged in most of Europe until the various Reformations of the sixteenth century and the movements for the secularization of ecclesiastical property and the elimination of clerical privilege in the eighteenth and nineteenth centuries. As part of the associated polemic, a largely mythical image of the ominous and terrible "Inquisition" was used effectively against any manifestation of clerical authority over laypeople. One of the most popular images was the case of Joan of Arc. Fighting on behalf of the king of France against the English and their Burgundian allies in 1430, Joan was captured by the Burgundians, sold by them to the English, and tried as a heretic in 1431 by an inquisitorial court that the English established with French clerical collaboration. Promised leniency by the court, Joan pleaded guilty to a reduced charge. But when she was sentenced to life
imprisonment because her judges believed that she had recanted only out of fear of death (a common reason for sentences of life imprisonment in inquisitorial courts), Joan revoked her confession and was burned at the stake. Another inquisitorial tribunal posthumously rehabilitated her in 1456.

For the most part, the inquisitorial tribunals were far more regularized than the ad hoc tribunal that tried Joan. In their extension of clerical authority to discipline the laity, inquisitorial tribunals brought a new kind of imprisonment, hitherto restricted to the world of monks and secular clergy, into the world of lay criminal justice. They also brought Boniface VIII’s rule that prisons could indeed be used for temporary or perpetual punishment, regardless of what Roman law said about the matter. The influence of ecclesiastical courts in general from the twelfth century on coincided with the revived study of Roman law and the reform of criminal law in virtually all the states of Europe.

**Learned Law and Punishment in Europe, 1150–1550**

*The Revival of Roman Law and Local Law*

The *Institutes* and *Code* of Justinian were known in Europe from 554 on. But the *Digest*, the key to late Roman jurisprudence, was not. Late in the eleventh century a single manuscript of the *Digest* surfaced in northern Italy, and from then on, Roman law was taught at a number of schools, especially at the great law university of Bologna. From the twelfth century on, learned law became the most popular subject of study in Europe, partly because it also served the needs of rulers.

The formal study of learned law gave considerable impetus to efforts by secular rulers to expand and legitimate their authority, especially their authority over wrongdoing. On a number of fronts—academic study, the design of lawmakers, the practical activity of lay courts throughout Europe—learned law became a prominent part of a general transformation of European society and culture in the twelfth century and after. Although Roman law was the formal subject of most study, it was the learned and scientific character of that law that most strongly influenced contemporary societies. Learned law did not necessarily become identical with Roman law in France, Italy, the Iberian peninsula, and England, but these places too increasingly invoked the principles of learned law. A mixture of Roman law and local learned law shaped what legal historians call the *ius commune*, the “common learned law,” of early modern Europe, with the term used in Latin only so as not to confuse it with the English common law, the other major legal system of medieval and early modern Europe. A number of elements in the learned law influenced public law, particularly its criminal law component. Prominent among these was the general shift from the accusatorial to the inquisitorial legal procedure, the institution of written evidence, and the use of specialized professional personnel, including judges with wide discretion in admitting evidence and sentencing. The social, political, economic, and intellectual changes of the twelfth century have long been regarded by historians as a turning point in European history. The growth and development of cities, many of them asserting virtual independence of any superior authority, especially in northern Italy, the increasingly public character of kingship, and the familiarity and attractiveness of canon law transformed early medieval Europe into the civilization.
of proto-modern Europe. Legal study occupied a prominent place in the dynamics of the twelfth-century renaissance.

But European societies did not change everywhere at once, nor did they all change at the same pace or in the same ways. A survey of the doctrines that governed crime and punishment in the two systems of the English common law and the continental *ius commune* reflects the variances among different regions and the survival of older ideas and methods alongside the new. The universal claims of learned Roman law and canon law often made little impression on areas not prepared to receive or use them.

**Prisons and the Common Law of England**

The Germanic law codes of Anglo-Saxon England record the use of imprisonment for theft and witchcraft, but the most common forms of punishment were those used in the rest of Europe—mutilation, death, exile, or compensation. In the violent century following the Norman conquest of England in 1066, William I (1066–87) and his successors attempted to impose their authority throughout the kingdom, but a strong public law and administration did not emerge until the second half of the twelfth century under Henry II (1154–89). Among the steps toward a strengthened public law was the construction of the Tower of London by William I as the first royal prison in England, built to hold the king's enemies. Other early
royal prisons were the Fleet in London, used chiefly for the custody of those confined by London justices as well as for occasional prisoners of war and hostages, and the “baulk house” at Winchester, whose functions were similar. Instances of using prisons to hold private enemies, particularly in the civil wars of 1135–54, abound in narrative histories. When Henry II issued the Assizes of Clarendon in 1166, he ordered that sheriffs should build jails in each county to hold those accused of felonies until they could be tried by itinerant royal justices.

During the later twelfth and thirteenth centuries, coercive imprisonment in the Fleet or the Tower for debtors of the crown became more common, as did the imprisonment of contumacious excommunicates, those who interfered with the working of the law, failed appellantants, attainted jurors, perjurers, frauds, and those who misinformed the courts. These reasons for confinement fall generally within the conventional categories of custodial and coercive imprisonment. In the early thirteenth century the great English jurist Ralegh-Bratton could comfortably quote the Roman jurist Ulpian to the effect that prisons were for custody only, not for punishment. Ulpian’s Roman rule certainly seemed to apply in Ralegh-Bratton’s England.

But from the 1270s on, the number of prisons in England and of imprisonable offenses increased rapidly. By 1520 there were 180 imprisonable offenses in the common law. A significant number of these new offenses dealt with vagrancy, breaking the peace, infamy, illegal bearing of arms, morals offenses, and other similar acts. Besides the proliferation of imprisonable offenses, there also occurred in the thirteenth century a restriction of those devices that permitted an offender to stay out of prison—bail, frankpledge, and property attachment. There was a corresponding increase in offenses for which no bail could be obtained—treason, arson, jailbreaking, and arrest by the direct order of the king or the king’s chief justice.
The prison-building program begun by Henry II placed royal prisons throughout the kingdom. Nobles who had more limited rights of justice also kept prisons, ranging from suites of rooms in the gatehouses of monasteries to castles, mills, and parts of houses, the “makeshift prisons” that are evident in German lands as well as parts of England. Some English prisons were franchial—that is, the right to arrest and hold a free man was given (or sold) by the king to a person who derived an income from the difference between money spent maintaining the prison and the prisoners and money received for their upkeep.

Towns too were compelled by the king to build and maintain jails as part of their corporate responsibility for keeping the peace. London, for example, held not only the Tower and the Fleet but also the following, from the late twelfth century: Newgate, largely for debtors and state prisoners; Ludgate, for freemen of the city confined for debt, trespass, contempt, and other lesser offenses; the Marshalsea (prisons of the royal Marshall); the Counters (prisons for the sheriffs of London and Middlesex County), and the Tun, chiefly for moral delinquents. Other towns also had prisons, and the Bristol Tun is depicted in one of the earliest English drawings of a prison.

Punishment in English criminal law was intended to be quick and public to serve as a deterrent to other crime. Thus, forms of punishment ranged from shaming display—the pillory, mutilation, branding, public stocks, and ducking stools—to severe and aggravated capital punishments—hanging, drowning, burning, burial alive, or decapitation—and any of these could be preceded by the infliction of torments before the execution itself. Besides the prisons of London, there was also the official place of execution, Tyburn Hill, which was used for several centuries.

The increase in criminal legal business strained the capacity of the jails, and during the thirteenth century, the crown appointed special commissions to clear, or “deliver,” the jails. These commissions of “gaol delivery” greatly speeded up the process of criminal justice and emptied the prisons—by convictions as well as releases—so that the next group of prisoners could be assembled. When the system worked efficiently, gaol delivery could clear jails two or three times a year.

In royal prisons the types of accommodations varied from foul to comfortable, the latter usually reserved for high-ranking prisoners. Jailers charged fees for what they termed suavitas (“gentle keeping”), and these fees were regulated by a London ordinance of 1346. Food, fuel, bedding, and other items of comfort were sold to prisoners, and debts to jailers had to be cleared before a prisoner could be freed. Irons were used inside prisons to confine dangerous prisoners, although a number of laws stated that these were not to be used for aggravating confinement but rather for security. “Iron fees” might be paid to alleviate the prisoner's condition. The prisoners thus bore much of the cost of their own confinement because of the low fees allowed by the crown and because of the expenses and narrow profit margins of the franchial prisons. The practice of private charity greatly aided prisoners, especially the poorest, some of whom depended on it for their very survival.

At their worst, English prisons resembled those on the Continent and earlier Roman prisons as well. Below the comfortable rooms were common chambers for groups of prisoners, and below these were the cells of harshest confinement: “Juliansbourne” in Newgate, “Bolton's Ward” in the Fleet, and other notoriously named cells in other prisons.
Jailers were subject to severe penalties for escapes. In the later Middle Ages, convicted felons who had escaped and been recaptured were treated as traitors. Boredom and despair still drove many prisoners to escape. In 1244 the prisoner Gryffud ap Llewellyn fell to his death while attempting to escape from the Tower of London, an attempt commemorated in contemporary chronicle accounts and in a striking manuscript illustration.

England was a compact kingdom, efficiently ruled by a series of kings who based many of their claims to legitimacy on the strength of the common law. England also had courts of canon law, and the two laws in England produced a remarkable homogeneity throughout the kingdom in law and punishment, as well as in the use of prisons. The English legal system and its doctrines of criminal law spread throughout the later English colonies and the British Empire, constituting one of the major legal systems of the modern world.

**Prisons on the Continent and the Ius Commune**

One of the chief differences between the common law of England and the evolving *ius commune* of the Continent was the degree to which the latter was strongly influenced by Roman law. The greatest centers of this influence were the kingdom of Sicily and the city-republics of northern Italy, much of southern France, and the kingdoms of France and Castile in general, especially from the thirteenth century. But not all of continental Europe was equally
influenced by Roman and other learned law, and it is advisable to begin with those areas influenced least and latest.

Germany was the most regionalized and fragmented of European kingdoms. Princes, ecclesiastical rulers, and cities wielded virtually unchecked local power, and the scope of royal authority—including royal justice—was limited. The older personal law codes of earlier Germanic peoples and the laws of later kings and emperors developed after the tenth century into diffuse local usages. Regional accounts of legal custom appeared in the thirteenth century in Saxony and Swabia, although these accounts were privately made and not legally binding. Canon law too operated in the German lands, but it remained strictly in the ecclesiastical courts and had little impact on legal change outside these courts. Learned Roman law did not enter German courts until the end of the fifteenth century. And not until 1532 did there emerge a full-fledged criminal code, the Carolina of Emperor Charles V.

Crime and punishment in the German lands rested on local custom, often followed archaic legal procedures, and operated largely at the discretion of the local ruler. Much of what became criminal law elsewhere in Europe remained in the realm of private injury; cases were tried by tribunals of lay jurors who were merely the prominent men in the local community and were directed by a judge appointed by the lord who controlled the court. Procedure was oral, and law lay in the conscience and local knowledge of jurors. Public law was limited, and its resources were few.

Custom dictated both procedure and punishment. Nobles were beheaded, and serious offenders of lower social status were broken on the wheel, burned, or hanged. These forms of shameful execution, often accompanied by mutilation, were inflicted by the executioner in the service of the local holder of the rights of “high justice.” The division of judicial competence into the spheres of “high,” “middle,” and “low” justice occurred throughout Europe from the eleventh century on, originally by delegation from the king but later appropriated by any lord strong enough to do so. These rights were as much financial as judicial—the higher the justice one’s court wielded, the greater the ruler’s income in fines and confiscations.

On the rare occasions when prisons are mentioned, they serve either as a mitigation of capital punishment or as an alternative to a fine if the offender was insolvent. Except for mitigated death sentences, prison terms were usually short, although by the fifteenth century, particularly in the courts of cities, terms of imprisonment varied more widely. In some territories a visit by the king customarily entailed the freeing of prisoners. The German kings-emperors themselves often used the castle at Trifels to hold enemies and those charged with crimes against them.

For the most part, prisons in German lands consisted of rooms and holes in the foundations of local fortifications, in the cellars of town halls, and in subterranean chambers known as Löcher: the Bornheimer Loch was a prison in Frankfurt under the Bornheim gate, and the Brückenloch was located under the bridge tower in Mainz. Such ad hoc prisons were regulated only by the local authorities who administered them. Imprisonment in the German lands remained local and unreformed until well into the early modern period.

The Scandinavian countries, like Germany, favored punishments that entailed property loss, death, or mutilation and, occasionally in Iceland, penal servitude. Although imprison-
ment was used in canon law courts in Northern Europe, and in Iceland and probably elsewhere as temporary confinement in the sheriff’s house pending trial and execution, there appears to have been no wider use of imprisonment in any Scandinavian law until the sixteenth century, when confinement at forced labor was gradually introduced. In the Low Countries too, canon law courts used prisons, but secular courts generally did not, except for preventive detention—as in Iceland and elsewhere—until the growth of a widespread use of prisons throughout Europe in the late sixteenth and seventeenth centuries.

Like Germany, tenth-, eleventh-, and twelfth-century France consisted of territorial principalities created by warlords in the wake of the fall of the Carolingian monarchy and the invasions of the later ninth and tenth centuries. The kings of “France” made extensive claims to superiority over the territorial princes, but for much of the period between 987 and 1180 they effectively ruled only in the middle Seine Valley in the territory known as the Ile-de-France. The emergence of strong kings in the late twelfth century, particularly Philip II (Philip Augustus, 1180–1223), and the extension of royal authority over many of the territorial principalities through inheritance, marriage, and conquest led to the creation of a strong and centralized monarchy that ruled a country of distinctive regions in the thirteenth century, a monarchy best exemplified by the kings Louis IX (1226–70) and Philip IV (Philip the Fair, 1285–1314). The French monarchy survived the disasters of the long war with England during the fourteenth and early fifteenth centuries and emerged at the end of the fifteenth century with its authority restored and its powers and governing institutions increased.

The royal centralization of law and justice that characterized England by the second half of the twelfth century did not occur in France until the mid-thirteenth century. In fact, until Napoleon, civil and criminal law in France remained largely regionally based, although royally supervised. During the twelfth and thirteenth centuries royal, lordly, municipal, and ecclesiastical courts and courtholders with differing levels of judicial competence and very different levels of legal science existed side by side. By the thirteenth century the right to administer justice itself had become categorized—as it was in German lands and England—as “high,” “middle,” and “low” depending on the sphere of competence of the courtholder. Part of the centralizing of royal power in the thirteenth century was the monopolizing of high justice by royal officials and courts directly responsible to the kings of France.

By the thirteenth century the local customs and practices in the different regions of France were written down in volumes called coutumiers, or customaries. In these, offenses and punishments were generally fixed, the accusatory process operated in both private and public matters, and the rules of evidence were vague. In royal courts, however, judges adopted the inquisitorial procedure, generally termed Romano-canonical, as well as written evidence and stricter rules of evidence generally, enjoyed broad judicial discretion, and became legal specialists in the new learned law.

In Old French the Latin term prisio, derived from a Latin term meaning “to arrest” or “to take custody of,” acquired a variety of distinct meanings. It might mean the act of arrest, the right to try someone arrested, the right to arrest a free person, the state of privation of liberty, or the actual place of detention itself. In French, Italian, and English it displaced the older and more formal Latin term carcer and the medieval Latin term geola, which became, in English, “jail.”
Custodial imprisonment existed in France, as it did elsewhere, for those accused of certain kinds of crimes, for those whose flight was considered likely, for those who were considered infamous, and for those without status or privilege. Imprisonment as a punishment also developed in thirteenth-century France, not only in royal justice but in collections of regional customary law as well. The customary law written in thirteenth-century Normandy (1248–70) allowed for punitive imprisonment, and the fourteenth-century Ancient Customary of Brittany included punitive imprisonment for offenders of low estate when their offenses insulted those of higher estate. The greatest of the customaries, that written by Philippe de Beaumanoir (1247–96) for the county of Clermont and the region around Beauvais, was a private collection but was extremely wide-ranging and virtually encyclopedic. Beaumanoir routinely stated that punishment should consist of death, punitive imprisonment, or loss of property. Beaumanoir echoed the Brittany customs regarding the insulting of a superior by an inferior—and he added an argument for deterrence. He allowed imprisonment for debt, as well as for perjury and conspiracy.

Throughout thirteenth-century France, blasphemy was punishable by imprisonment, in close confinement at the judge’s discretion; imprisonment was also used for the misuse of the right to imprison, in some instances of theft, and occasionally as an alternative to the execution of capital punishment. In 1312 Perceval d’Aunay, convicted of breaking into a house at night for the purpose of robbery and kidnapping, was sentenced to two years of close confinement on bread and water, to be followed by exile from the kingdom of France. In 1317 Simon Braielez, implicated in the assassination of an advocate of the Parlement of Paris, was sentenced to imprisonment for life in the Châtelet in Paris.

The Châtelet is the best known of the early French prisons. A fortress on the right bank of the Seine, it came around 1200 to house the court and prison of the provost (royal governor) of the city. The prison itself was a tower in the northeast corner of the fortress. The comfortable highest rooms were maintained for nobles who paid their own expenses of fourpence a night for a bed and twopence a night for a room. On a lower level was a single room shared by prisoners of lower social status, and below this, as in English prisons, was the fosse or oubliette, into which prisoners were lowered from the floor above, although even there prisoners had to pay one penny per night for their room.

The jurisdiction of the provost of Paris extended widely beyond the city proper and eventually came to include most of northern France. The procedures of the provost's court were compiled into the Custom of Paris, ultimately the most influential of French regional collections of customary law. The records of the Châtelet are far from complete, but a number of scholars have successfully used them in studies of criminality and punishment. Although the Châtelet served most frequently as a custodial prison, the sentences of Perceval d’Aunay and Simon Braielez indicate that punitive imprisonment was not unknown, although it was infrequent.

In principle, royal prisons were to be regularly inspected—for physical conditions as well as for the supervision of jailers—and they were to be reasonable and airy, as royal instructions stated, so that the punishment of prison did not cause death or injury. The sexes were routinely separated, and if possible, female prisoners were to have female jailers. One of Joan of Arc’s complaints was that she had not been given female guards while in prison.
With the addition of towers and dungeons, the fortress of Loches near Tours was transformed into a royal prison during the reign of Louis XI (1461-83).

Hardened criminals were to be separated from offenders who were not thought to be dangerous. Jailers were also responsible for preventing escapes and for providing their charges with food, at least bread and water, although in some cases prisoners were permitted to pay for better food or to have relatives and friends bring food. On occasion some fraternal, professional, or charitable associations donated food and wine to prisoners at the Châtelet, as did the goldsmiths' guild, which gave an Easter dinner to all the prisoners in the city of Paris. In royal prisons, prisoners were deprived of their own clothing and forced to wear a simple garment that was easily identifiable and helped to mark escapees and to identify prisoners mingling with visitors either in the prisons or on those occasions when prisoners were permitted briefly to be outside prisons.

Outside Paris, there was little systematization of prisons, except in the royal castles, where provosts kept prisoners until they were transferred to the Châtelet. Royal prisons began to increase in number during the reign of Louis XI (1461-83), who expanded the fortress at Loches, near Tours, with towers and dungeons and transformed the chateau at Vincennes into an elaborately secure fortress and prison. The most famous royal prison, the Bastille, was originally a gate in the fortifications constructed for the military defense of Paris. From 1370 until the early fifteenth century the Bastille was enlarged; it had dungeons, eight towers with places of confinement inside thick stone walls, and physically debilitating living conditions.

The system of prisons that emerged from French customary regional and royal law lasted until the French Revolution in 1789. In the late seventeenth and eighteenth centuries, penal reformers, under the influence of Ulpian's old maxim that prisons should be used only for confinement and not for punishment, insisted that prison conditions be improved and prison practices reformed. By the eighteenth century, however, new forms of punishment had been introduced—including the galleys and the workhouses. All of Europe stood on the eve of a
vast program of political and legal reform, one of the most symbolic acts of which was the storming of the Bastille—by then an insignificant prison that held few prisoners. But as a symbol of the power of the Old Regime, the Bastille illuminates the position that prisons had come to occupy in French society and in the revolutionary imagination.

In the Christian kingdoms of the Iberian peninsula in the tenth and eleventh centuries, most law was local and customary. Its legitimacy usually depended on the existence of a local charter of settlement issued, by a ruler, to Christian settlers of reconquered Muslim lands (cartas de población) or on more detailed fueros, charters given by a ruler to the inhabitants of a district and used by them to administer their own affairs. Some fueros were so detailed that they circulated widely within large regions, thus making legal practice uniform, at least within areas influenced by a single fuero. Legal procedures were similar to those of other European societies: privately initiated, supervised by royally appointed judges, largely oral, and unlearned. In criminal cases the kings and royal officials could impose fines, confiscation, exile, mutilation, and hanging. The only traces of imprisonment in the eleventh and early twelfth centuries were its infliction for failure to appear in court and the practice of imprisoning those defendants who could not post bonds to the plaintiff.

As rulers began to legislate more actively in the eleventh century, a number of larger and more inclusive legal works appeared. Particularly important were the Usatges of Barcelona and the legislation of Alfonso IX of Léon-Castila at the end of the twelfth century. Royal legislation and royally appointed, specialized judges considerably expanded criminal law, affirming the king's right to inflict capital punishment (hanging, drowning, boiling alive) as well as mutilation (punitive amputation of hands and feet, and noses, lips, ears, and breasts in the case of women), blinding, and fines and imprisonment. Iberian scholars and rulers also drew on the renewed study of Roman law after the mid-twelfth century and attempted to create uniform legal systems within the kingdoms of Aragon, Castile, and Portugal. Although their attempts often encountered stiff local resistance, much of their work was successful.

The most impressive and wide-ranging legislative work in medieval Iberia was the collection called Las Siete Partidas ("The Collection in Seven Parts"), issued by King Alfonso X shortly after 1265. Although the applicability of the Siete Partidas varied within Castile, the work contains the most extensive discussion of the uses of prison of any royal legislation in medieval Europe.

Title XXIX of the seventh part of the Siete Partidas contains fifteen laws pertaining to prisons and prisoners, ranging from the process of prison commitment to penalties for escape and for erecting new prisons without royal permission. Prison security is emphasized, as is the insistence that female prisoners be segregated from males for fear of scandal, either by placing them in a convent or putting them in the custody of good women. The regulations for guarding prisoners are detailed: the chief jailer must report regularly to the judges about the condition of the prisons and prisoners, and undue severity—branding and mutilation of prisoners—was forbidden. The penalty for permitting or aiding prison breaks was severe.

We do not know the extent to which the laws of the Siete Partidas applied to actual prisons in Castile—or elsewhere in the peninsula—nor do we know about the prison buildings themselves. But the breadth of Alfonso X's concerns with prisons suggests more than a mere imitation of Roman and French royal law.
France and Castile illustrate the difficulties faced by royal authorities in the thirteenth and fourteenth centuries when they tried to impose systematic criminal law on large territorial monarchies. The numerous societies in Italy, however, display a very different pattern. Nowhere else in Western Europe is the broad spectrum of legal innovations in the twelfth and thirteenth centuries as evident as in Italy. The Kingdom of Sicily, the papal states, and the powerful city-republics of the north—Venice, Florence, Milan, and Genoa—offer an astonishingly ambitious address to the problems of crime and criminal law. This approach, at its most developed, comes closest to later developments in criminal law and modes of punishment.

Italy was the home not only of the first major center of learned legal study—Bologna—but also of the first university created to serve the interests of a single state, that of Naples. From the universities, legal specialists, rapidly creating a new profession, moved on to careers in the church, royal and princely chanceries and courts, and the legal judgments and advocacies of the cities. They effected the reform of the older Lombard law into a general territorial law for much of Italy. They contributed to the making and administration of canon law, not only in the papal states (which had a separate system of secular law as well) but also in the cities. They also shaped and administered the new urban legal codes. Results of their work included the first learned written law code of the kingdom of Sicily, the *Constitutions of Melfi* of 1231, the written versions of regional and urban customs (at Milan in 1216, followed quickly by Brescia, Como, and Piacenza), and the formal promulgation of urban statutes. In criminal law the legal specialists produced the first handbooks of criminal procedure, notably Albertus Gandinus’s *Treatise on Crimes* of 1270 and, in the fourteenth century, the first treatise specifically devoted to penal law, the *Treatise on Prisons*, attributed to the great jurist Bartolus of Sassoferrato.

In spite of the diversity of jurisdictions across the Italian peninsula, a common result of the influence of learned law on local custom and practice here, as in the royal courts of France, was its impact on the area of legal procedure and the rules of evidence. Most jurisdictions adopted the inquisitorial procedure of Roman law and canon law, the rules of evidence in learned law, the specialization of a legal profession, and the institutions of punishment for criminal offenses. One feature of the new learned law that did not derive from Roman precedents or doctrine, however, was the use of punitive imprisonment.

Among the variety of state-inflicted punishments, prison was not originally conspicuous. Fines, capital punishments by various means, exile, and public shaming were far more frequent. In the *Constitutions of Melfi*, for example, a period of imprisonment, usually for one year, was prescribed only for those who falsely claimed to be physicians. In this instance imprisonment was a supplementary punishment to the confiscation of the offender’s property. Like other tribunals that received convicted heretics from church courts, the Sicilian kingdom also prescribed life imprisonment for heretics who had recanted out of fear of death.

In Sicily, as elsewhere in Italy, public authorities used as prisons whatever suitable space was available for the purpose. One of the best-known instances of imprisonment in the kingdom of Sicily was that of Pietro della Vigna, chancellor of the king-emperor Frederick II and author of the *Constitutions of Melfi*. In 1249 the chancellor fell into the king’s disfavor and was blinded and put into prison, where, in despair, he committed suicide. He makes an eloquent
and moving appearance in Dante's *Inferno* (Canto XIII), composed around 1310 and itself a rich source of imagery touching on criminal justice, tortures, and imprisonment.

In Rome the famous Castel San Angelo, originally the tomb of the second-century Roman emperor Hadrian, seems to have been referred to as early as the seventh century as "The Prison of Theoderic," although there is no evidence that the early-sixth-century Ostrogothic king ever used it as such. The Castel was used frequently as a fortified residence for Roman aristocrats and popes, however, and as a place of confinement for local criminals. The *prigione storiche* ("historical prisons") within it are still shown to visitors. In Florence, before the construction of the official city prison, Le Stinche (1297–1304), the city government leased private buildings, although these were used only to hold those awaiting trial for certain offenses and those awaiting the execution of capital sentences.

In the Roman law that guided much of the law learning and lawmaking in thirteenth-century Italy, Ulpian's statement that prisons should be used for confinement, not for punishment, was generally understood to be the formal doctrine on the subject. In other learned law, however, notably canon law, prisons were certainly used for both punishment and correction. This conflict was more apparent than real. Roman law by itself did not hold in very many places in Italy or the rest of Europe. Moreover, Roman law gave considerable discretion to the presiding judge in criminal cases, and the statutory authority of many city-republics not only permitted them to establish their own statutory punishments but also allowed judges to create new punishments when the occasion seemed to call for them and to punish by analogy—that is, to apply known punishments to offenses not specifically defined by statute. Especially in cases in which the harshest of punishments seemed inappropriate, for one reason or another, imprisonment offered an appealing alternative. Judges also knew that a prison sentence was reversible if new evidence was forthcoming and that a capital sentence was not.

In preambles to collections of statute law, treatises on crime and punishment, lectures of the legal scholars, oaths of public office, instructions to magistrates, and opinions of practicing jurists, criminal law was regarded as both a punishment for wickedness and a means of reforming the offender—in modern terms, both retribution and reform. The growth of the northern Italian cities was accompanied by increased crime and increased official attention paid to crime and criminals. During the fourteenth and fifteenth centuries the lawmakers of the cities became willing and able to fit punishments to crimes with considerable rational precision, including, in Italy and elsewhere, a reduction in the physical severity of many punishments.

Some historians have identified a sequence in styles of public punishment from the twelfth to the sixteenth centuries, according to which initially harsh physical punishments were succeeded by fines, and fines often were combined with imprisonment during the fourteenth and fifteenth centuries. In both Venice and Florence the increased use of punitive imprisonment suggests that imprisonment represented a major aspect of the legal revolution that had begun in the twelfth and thirteenth centuries.

In 1297 the city of Florence began the construction of its public prison, Le Stinche. The construction of the prison shortly followed the publication of the *Ordinances of Justice* in 1293. Florence revised its criminal statutes twice more in the fourteenth century, in 1322–23.
and in 1355, and again in the fifteenth century, in 1415. The statutes of criminal justice and the prison both represented a considerable investment of communal energy and resources, and both reflected a new interest in making imprisonment a regular part of criminal punishment.

Le Stinche was sometimes used to incarcerate children for their correction and improvement. It segregated its inmates according to age, gender, degree of sanity, and the seriousness of the offense. So well-known did it become that the prisons that later appeared in other cities—Siena and Pistoia among them—although formally known as carceri di Comune ("prisons of the Comune"), were also informally called Le Stinche. In 1559 the architect Antonio da Ponte was commissioned to construct a large public prison in Venice, containing four hundred individual cells in which would be incarcerated prisoners whose capital sentences had been commuted to life in prison, suggesting that the increasing visibility and the novelty of the use of prisons did not constitute an isolated Florentine and Venetian phenomenon.

The legal learning and innovative character of the northern Italian city-republics in the thirteenth and fourteenth centuries overcame the objections of Roman law to the use of punitive imprisonment, possibly on the model of contemporary canon law and certainly out of the experience of lawmaking and law administering in the new societies the cities created. The lessons about punitive imprisonment learned in these cities and in canon law courts were not lost on the royal courts of France and Castile or, eventually, on most other Western European societies.

In the age of the "birth of the prison" in the eighteenth and early nineteenth centuries, criminal law reformers, artists, novelists, and polemicists looked back on what they thought they knew of medieval European prisons with a mixed attitude of fascination, horror, and contempt. In terms of the new purposes of punishment and the immense scale of prisons, nothing in the ancient or medieval worlds seemed to resemble the institutions that followed from Pentonville, Eastern State, or Auburn. Compared with the new, large-scale, scientifically managed and organized prisons of the modern world, those of the ancient and medieval worlds looked like ghastly dungeons of the sort that eighteenth- and nineteenth-century Romantic artists like Giambattista Piranesi and the illustrators of fantastic novels about the Spanish Inquisition loved to draw. But long before the new penal institutions and the modern age of penology heralded by these institutions, the small-scale societies of medieval Europe, working with what they could of Roman law and driven by the conviction that in some cases, however few, punitive confinement was preferable to capital punishment, exile, or the confiscation of property, created punitive imprisonment in both ecclesiastical and secular courts.

Thirteenth-century Europeans knew little about the prisons of Mediterranean antiquity except for their treatment in Roman law and their echoes in scripture. But just as these Europeans carved out a new legal science and a new legal system for themselves, so they created a new system of punishment. At worst, the new criminal punishments indeed appeared to be what Richard van Dulmen has called "a theater of horror." Especially in the frequency of and the mechanical use of torture and in aggravated executions, these punishments came close to the summa supplicia of third-century Rome. The body of the condemned became the map of the offense and the sole subject of legal vengeance.
But there is another side to the penal practices of the thirteenth century and later, one that is especially evident in the history of prisons. In some instances, at least, those who held the power of life and death chose the confined life of prison. Some, like Boniface VIII, instituted punitive imprisonment statutorily, sweeping aside the conventional Roman objections. Others—the independent city-republics of northern Italy and the kings of Sicily, England, France, and Castile—introduced imprisonment into traditional systems of criminal punishment. After 1200, the criminal law practices of Europe resembled less and less those of Mediterranean antiquity and the earlier Middle Ages and more and more those of later centuries.

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Bibliographic Note

A much fuller bibliography is available from the author. The references here follow the sequence of topics treated in the chapter.


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