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Criminal Justice in Italy between the End of the Liberal State and Fascism: Transnational Perspectives between the USA and Italy (1919-1945)

Luigi Lacchè

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1 In recent decades the study of the transnational exchange of criminal law thought between the United States and Italy has focused on the one hand on the origins and development of American criminal jurisprudence and on the other on the significant influence in the United States of Cesare Lombroso's ideas together with the contribution of the other two most famous representatives of Italian criminal positivism, Raffaele Garofalo and above all Enrico Ferri. In my article I take into account this indispensable background but my specific focus will mostly concern the period between the "Ferri project" (1919-1923) and the legislative policy of Fascism on law and criminal justice. In particular I propose to analyze how Fascist criminal reforms have been received, interpreted and assessed by the American (and to a lesser extent English and Australian) doctrine, in the light also of a number of articles published in American Journals.

2 For anyone subscribing to the comparative legal history approach[1] it would seem useful to close the current gap. In fact, while the political and social dimension of Fascism, the

Duce and his personality, Fascist economic policy and corporatism have traditionally attracted the attention of American historiography, the same cannot be said for the juridical phenomenon. The present study is only a first step in this direction.

I. Pragmatic American experimentalism and Italian doctrinal criminology

3 Italian positivist criminology has always emphasized (and indeed exaggerated) the successful "export" of its "dogmas". It is true that the United States was, for about three decades, one of the most receptive "markets", although this Italian doctrine was probably most enthusiastically received in Latin American countries[2]. In reality the "showcase" of the American movement – the indeterminate sentence principle – is specifically rooted in American history and was experimented upon and then formulated by the superintendent Zebulon Brockway at the Cincinnati penitentiary congress of 1870. Following this address, the first nucleus of a system of individualized justice was established in the Elmira Reformatory in 1877. These instances thus reflect the autochthonous imprinting of the American way but they also help to explain why the works of the Italian 'trinity'[3], Lombroso, Ferri and Garofalo, attracted a great deal of attention in the U.S.

4 The development of criminal anthropology there opened a fertile ground in the context of an extensive international movement[4]. Between the nineteenth and the twentieth century a degree of mutual interest made possible a fruitful exchange. From the American side the pragmatic approach to criminology prompted scholars and jurists to look to the Italian (and European) positivists for a sound scientific and academic foundational background. From the Italian side, it was possible to look at the American experience as a sort of empirical validation of positivist ideas. Individualization, indeterminate sentencing, parole, and social defense opened the new horizons of punishment. The works of the Italian positivists, Lombroso, and in particular Ferri and Garofalo, by virtue of their doctrinal foundations, could serve to "integrate" and support the American pragmatic approach to criminal jurisprudence. The impressive array of translations and reviews regarding Italian positivist criminology may serve to illustrate the *Zeitgeist* of these transnational connections[5]. From the end of the nineteenth century, international conferences, lectures, journals and editorial series helped to spread the ideas of Italian criminological positivism throughout the U.S. The contribution of John Henry Wigmore in founding in Chicago the *American Institute of Criminal Law and Criminology* (1909), its *Journal* (1910) and then the *Modern Criminal Science Series* illustrates the maturation of American criminology and the "canonization" of Lombroso, Ferri and Garofalo among the classics of European criminological studies[6].

II. Enrico Ferri presents his Project in the U.S.

5 In 1920 the Journal of the American Institute published an article by Enrico Ferri which informed its American readers of the formation – since September 1919 – of a commission for the "positivist reform of the Italian Penal Code"[7]. Ferri was the president of this royal commission, appointed to this post by the Minister of Justice

Lodovico Mortara. According to Ferri this was "an event of great scientific importance and satisfaction to all who struggled and worked for the affirmation of criminological positivism"[8]. It was a sort of reward for a long battle, declaring finally the complete success of positivist conceptions of social defense.

> Thus it completes its historical cycle quite rapidly in comparison with the Classic School, which had to wait more than fifty years [for] its proposed reforms to be legally sanctioned, obtaining the official recognition of the Italian state after being proposed and carried [in] triumph in many congresses and foreign countries, and entering [the] decisive phase of the realization of its practical conclusions[9].

6 The Italian lawyer was exaggerating the significance of this event but it is perfectly true that the initial purpose of the Minister of J.tice had been to change Italian criminal law in harmony with certain findings of positivist criminology. The composition of the ministerial commission, with Ferri as its President and Garofalo as vice-president and with a majority of positivist jurists, confirmed this discourse. The royal decree was clear: the commission had been "appointed to suggest the necessary reforms in the system of penal legislation [so as] to obtain, in harmony with the principles and rational methods for the defense of society against crime in general, a more efficacious and sure defense against habitual delinquency"[10]. This legislative initiative must be seen in the context of the difficult circumstances in the aftermath of the First World War. The impact of the conflict on social and economic conditions and the alleged increase in habitual crime and recidivism led to a call for a reformism founded on the notion of social defense.

7 The overrepresentation of the positivist movement within the commission probably depended more on the personal inclinations of Lodovico Mortara[11] than on the real dominance of the positive school after 1919[12]. The radical nature of the so-called Ferri Code (its first book composed of 131 articles) covered all the major cornerstones: social defense seen as the exclusive aim of criminal justice, the overcoming of the legal responsibility principle, criminal dangerousness as the basis for sentencing, the rigid taxonomy of criminal types, some kinds of indeterminate punishment setting only a minimum sentence. In-depth analysis of the Ferri draft belies traditional interpretations. The resignation from the commission of "two moderate social defenders"[13] like law professors Alessandro Stoppato and Emanuele Carnevale, the scathing criticisms of Catholic intellectuals and jurists and above all of the leaders of the technical-juridical approach (*tecnicismo giuridico*), Arturo Rocco and Vincenzo Manzini, and then the failure of the project show that the Ferri Code can be seen as the "swansong" of criminological positivism rather than its apogee[14].

8 Instead, Ferri's articles published in 1920 and 1921 in the *Journal of the American Institute of Criminal Law and Criminology* were designed to communicate the *triumph* of Italian positivist criminology. They did confirm American interest in the ideas of the Italian celebrity[15] but in 1924 – after the Ferri project had already failed – the same Journal published the English translation[16] of an article elaborated by the Social Service Faculty of the Catholic University of the Sacred Heart in Milan (*Università Cattolica del Sacro Cuore*). This article, probably written or inspired by Father Agostino Gemelli, a doctor and the rector of the only very recently established Catholic University (1921), a sworn enemy of criminological positivism, and by professor Giulio Battaglini, harshly criticized Ferri's extreme social-defense ideology. In this article the authors sought to show that the *Lombrosian* Ferri Code had gone far beyond the minister's instructions. In their view the just instances of the royal decree would be best realised by updating the

traditional approach of criminal law and not by following Ferri's extremist proposals. The American experience of indeterminate sentencing was evoked to point out that

> According to current American law the indeterminateness of punishment is not unlimited, i.e., penal sentences are not absolutely indeterminate. In fact, in every state in the Union a maximum sentence is fixed, and in some a minimum also. The law itself does not always fix this maximum and minimum, for sometimes the matter is left to the discretion of the judge[17].

III. Sheldon Glueck on Ferri's Project

9 It is relevant to note that when Sheldon Glueck, a criminologist of Polish origin, invited by Roscoe Pound to teach at Harvard from 1925, published in 1928 his *Principles of a Rational Penal Code*[18], he looked carefully and with deep knowledge at the Ferri Code. Glueck's starting point was the wide-ranging debate in the U.S on the "alleged collapse of the administration of criminal justice in the American city"[19]. Glueck thought that American criminal jurisprudence had to be reviewed in-depth.

> One need hardly defend the thesis that what is required in this field is a fundamental reexamination of the foundations of criminal law and procedure in the light of what is known today of psychiatry, psychology, and social case work – that rapidly growing trinity of the yet to be developed master-discipline, the "science of human nature"[20].

10 Following the principle that "*Society should utilize every scientific instrumentality for self-protection against destructive elements in its midst, with as little interference with the free life of its members as is consistent with such social self-protection*"[21], the criminologist reviewed the main theories of punishment that presupposed the implementation of a rational approach. Analyzing the limits of the American system of individualization of punishment and indeterminate sentencing, Glueck acknowledged, at least in general, the innovative character of the Ferri Code but nevertheless he criticized some fundamental aspects. It is true that the choice fell on "a new and autonomous systematization of legislative norms in accord with the advance of scientific doctrines" but the adoption of a legislative schedule of "conditions of dangerousness" and "conditions of less dangerousness" as the guidance of judges in individualizing punishment was in his view too radical. Stressing "the principle of the dangerousness of the offender"" involved some exaggeration and in this "Ferri unduly underemphasizes the rehabilitative possibilities of the offender"[22].

> The second point of criticism of Ferri's system – Glueck argued – is more serious. It is doubtful whether any scheme of individualization based on a schedule of minute rules set down by the legislature to govern judges in future cases can be successful. This can no more be done by the legislature as to a person's character than it can (as at present attempted) as to single acts. The legislature cannot possibly conceive in advance the subtle nuances that distinguish different offenders from each other, nor the types or lengths of treatment required by various individuals. What the legislature can do is to set down certain broad penological standards and leave to trained judges, psychiatrists, and psychologists, forming a quasi-judicial treatment body, the application of those standards in the individual case. An examination of the details of Ferri's scheme will indicate that this criticism is sound[23].

11 For Ferri the legislator should have prescribed to the judge a narrowly-defined schedule of conditions of different degrees of dangerousness in order to provide for "necessary guarantees" but this was a contradictory choice and it had created a confusing system. Ferri's scheme sought to achieve a change of perspective but finally –

Glueck observed – fell into the same problem: "the substitution of minute rules, mechanically to be applied by judges, the difference being that now, instead of the legislature measuring the exact gravity of the offense in advance, it is provided that it measure the exact dangerousness of every type of offender in advance"[24].

12 The solution proposed by Ferri's commission could not be followed "but this does not mean that to provide for true individualization the treatment of the offender must be left to judges or other officials wholly without guidance and without control as to the length or nature of that treatment"[25]. To overcome Ferri's impasse Glueck proposed to follow a set of four major principles[26]:

> (1) The treatment (sentence-imposing) feature of the proceedings must be sharply differentiated from the guilt-finding phase. (2) The decision as to treatment must be made by a board or tribunal specially qualified in the interpretation and evaluation of psychiatric, psychological, and sociologic data. (3) The treatment must be modifiable in the light of scientific reports of progress. (4) The rights of the individual must be safeguarded against possible arbitrariness or other unlawful action on the part of the treatment tribunal.

IV. Fascist criminal justice in the international network

13 Here it is interesting to point out that in this important article from 1928 Glueck also alluded to the 1927 draft (*Progetto preliminare di un nuovo codice penale*) of the fascist penal code prepared largely by *Signor Rocco*, Minister of Justice. According to Glueck, the project sought to retain – as opposed to the radical, failed, Ferri code – the principle of responsibility "which has rested for centuries on the basis of the individual capacity of understanding and will, and of consciousness and volition in human action"[27].

14 Fascism gave great importance to the reform of the Criminal Law System. The Minister of Justice Alfredo Rocco (1875-1935) undoubtedly played a leading role. He was appointed Minister of Justice on January 5, 1925[28], a mere two days after Mussolini had assumed full political and moral responsibility for the socialist leader Giacomo Matteotti's murder. In the same month Rocco requested that the Chamber of deputies grant a legislative delegation to revise Italy's penal legislation. Minister of Justice between 1925 and 1932, he was probably the most influential jurist and politician during the phase of the so-called Fascist revolution[29]. Alfredo Rocco made justice one of the main pillars of the new political regime. Rather than being under the spell of Fascism, as was the case with many other important jurists[30], Rocco was himself a real and ambitious builder of systems[31]. His role was decisive from the laws of 1925-26 to the new penal codes of 1930-31. During these years Fascism devised its main strategies, policies and tools in order to protect and to build the Fascist state. Criminal law was a strong medium through which Fascist core ideologies were expressed.

15 The weight of Fascist ideology on penal reforms cannot be underestimated but we need to broaden our viewpoint. Recent studies have analyzed the Rocco Code projects and the final text, going beyond the Fascist political setting. In particular they have situated them in a wider context, namely that of the transnational debate on criminal reforms[32]. The scientific solidity and systematic approach of Fascist legislative work attracted the attention of international experts. The regime easily resumed the *topos* of Italian genius intent on refining the penal system. After all Italy was the country of Cesare Beccaria and of a great movement involved in the "criminal Enlightenment", the nation in which the positive school had put down its roots. Without necessarily having to agree

with Lombroso or Ferri, their international echo was indisputable. Regardless of the relationship with this past, Fascist propaganda played its part and carefully considered the international scene when making known the *new* Fascist path to criminal law reform and asserting it as a model[33]. If Fascism – as Mussolini claimed – was a universalistic model, there was all the more reason for Fascist criminal justice to express to a great extent its ideological foundations[34].

16 An important means to spread abroad this legislative work was the official translation of the preliminary project elaborated by the Rocco brothers, the minister Alfredo and the penal law professor Arturo. The latter was in fact one of the main theorists of the technical-juridical method, an approach very much at odds with the Ferri project. The blueprint was published in French, German and English, publications that did much to promote it[35]. These translations were a fundamental step in the regime's overall strategy[36]. Probably the translations are to be connected also to the International Congresses and especially the discussion on the eve of the Conference for the Unification of Penal Law held in Rome in 1928. Among the members of the Italian delegation were the stalwarts of criminal positivism, Ferri and Garofalo, but above all the real protagonists of Fascist penal reforms: Arturo Rocco, Vincenzo Manzini, Edoardo Massari and Mariano d'Amelio[37].

17 If the Ferri Code, despite its positivistic foundations, had been considered from the American side to not be in tune with the ongoing debate on the forms of individualization of punishment, Rocco's draft and then the final version sanctioned a departure from that perspective. Seen from this point of view the roots of the Fascist Rocco code have to be understood in the context of the wider European debate. Subsequently the Rocco code became one of the most important paradigms of the European approach to a dual-track system, one based on the traditional punishments imposed by the judge with ordinary sentences and on the possibility of applying indefinite measures of security to specific categories of dangerous offenders. Security measures could be alternatives or complementary to ordinary penalties. On this ground the American and European sides parted company. The Fascist penal code systematized and adapted to the Italian context a set of technical solutions already tried and tested by a number of other nations (Norway 1902; United Kingdom 1908; projects in Germany, Austria and Switzerland 1908-09; Sweden 1927; Belgium 1930 etc.) and certain ideas widely discussed at international congresses and in journals[38].

18 The European perspective on Rocco's code depended first of all on the possibility of considering it an integral part of an international movement with site-specific solutions but also with a shared common core. The dual-track system became the showcase of this new phase of European penology. This solution made it possible to maintain the punishment and the measure of security within the limits of the principle of legality[39]. Retribution and social defense could coexist, while moving away from the indeterminate sentence experience. In Fascist Italy positivists, and above all Enrico Ferri[40] after his project had foundered, could argue that the dual-track system was nonetheless a *victory* for their criminological theory. Conversely Alfredo Rocco and the majority of those within the penal law academic establishment could say that the solution largely developed by the 1930 code was syncretistic[41], a sort of upgrade/adaptation to the transformed Fascist State of some principles embedded in the Liberal State tradition. Paradoxically, this choice – safeguarding formally the *nullum crimen nulla poena sine lege* principle – could also reassure those jurists more sensitive to the

Liberal State guarantees. In the *doppio binario* reform the ambiguity regarding the nature of security measures permitted the building up of a formally judicial but concretely administrative system of individualisation. The new system consolidated and reoriented the dual levels of legality[42] of the Liberal State tradition. Individualized treatment based on indefinite preventative measures of detention and control could be applied to the dangerous classes and to some dangerous typologies of offenders. The strengthening of the State control policy did in fact extend administrative power and was entirely consistent with the *Stato forte* of Fascism.

V. The view of American scholars on the fascist penal reforms

19 The aim of this paper is not to examine the penal codification system built during Fascism in and for itself but rather to wonder if and how U.S. scholars looked at Fascist criminal law and justice. We have seen that European and American legal experts shared, from the last part of the nineteenth century, a set of concerns about the rising threat of dangerous habitual and recidivist offenders. The classical approach, one based on "simple" retributive sentences, seemed inadequate. A social defense approach by contrast called for more individualised punishments tailored to suit the offender's personality. But the solutions adopted were different: from the beginning of the twentieth century the paths followed by the U.S. and European penal orders started to diverge where indefinite sentencing and the dual-track system based on diverse rules of law enforcement were concerned[43]. The important transnational exchanges based on translations and editorial series, congresses and journals did not in fact bring the two sides of the Atlantic Ocean closer together.

20 It is known that the political Fascist movement, the role and personality of Mussolini, the establishment of the new regime and then the development of Fascist corporatism[44] were the aspects which attracted most of the attention of American observers: politicians, journalists and scholars. Was it the same for the penal system? As we have seen Fascist investment in the reform of the criminal justice system was unprecedented. The emphasis placed on it was designed to reaffirm a sort of primacy of the "Italian model".

21 If we look at the American reaction to this, we can say that it was not entirely indifferent. From the beginning of the twentieth century American criminal jurisprudence started to change its main orientations, being increasingly concerned with social security, the control of dangerousness and the prevention of deviance. It was necessary to find – as Roscoe Pound wrote in 1929 – a new "workable balance between the general security and the individual life"[45]. This was not only an American problem, indeed it was an international preoccupation. From this point of view the Fascist orientation could have been in line with the general mood for fostering a social defense discourse that made it possible to limit and weaken individual guarantees and the *nulla poena sine lege*. The American glance towards Fascist criminal justice reforms has to be viewed also from this perspective.

22 H. Arthur Steiner[46] considered the Fascist conception of law in terms of his own interpretation of Fascism[47]. Minister of Justice Alfredo Rocco was seen as one of the members of the legal-philosophical *Quadrumvirate* of Fascism, together with Benito

Mussolini, Giovanni Gentile and Sergio Panunzio. According to the philosophical concept of the *Stato etico* (Ethical State), Rocco's penal code was one of the pillars of "the absolute State [that] cannot tolerate any form of political opposition or dissent"[48]. "The reaction against democracy is also at the bottom of the new Fascist Penal Code"[49]. The Fascist State, Steiner argued, confused State and government[50] and repudiated the democratic-liberal conception. For this reason the Penal Code introduced a range of new forms of offense against the personality and integrity of the State, covering questions to do with the family and morality, and crimes against the public economy. So

> Law becomes the instrument of State power, fashioned at the convenience of the State to serve its own interests, and hence is subject to no human limitation. But law, as a positive tool of State interest, becomes more than a simple, negative device for reconciling social antagonisms. Law cannot be separated from the State any more than the State can be separated from law[51].

23 Julius Stone likewise considered Alfredo Rocco – "one of the most intelligent men in high office in fascist Italy"[52] – to be one of the theorists of Fascist ideology. Once again his codes were a mirror reflecting the authoritarian spirit and ideal of personal hierarchy, in particular the Code of Criminal Procedure which came into effect on the first of July, 1931.

> Typical of the changes wrought by this Code are the merging of the powers and functions of the *juge d'instruction* and the prosecuting official, the conditioning of liability of the police for illegal acts upon the will of the Minister of Justice, the power of the executive to pick the judges to sit in the grave cases tried in the Court of Appeals for criminal matters, and serious limitations upon the facilities of accused persons to make their defence[53].

24 Nathaniel Cantor[54] valued the consistency of the Ferri Project, observing that it had been the first such code to systematically and logically elaborate the chief ideas of the positivists. It was "the first unequivocal, uncompromising Positivist penal code", "the first *definite* absolute break with the classical doctrines"[55]. According to Cantor, the Ferri Project influenced the Rocco Code but the *doppio binario* system – the first in continental Europe to systematize the measures of security for social defense – was the paradigm of "the irreconcilable contradictions of the new Italian penal code"[56]. Indeed "The endeavor to combine within the same criminal code individualization of treatment and punishment for offense was bound to lead to inevitable conflict in legislation and administration"[57].

VI. Voices from Europe in the American debate

25 At the beginning of the thirties American scholars were in a position to know something about the Fascist criminal law system, thanks above all to articles published in several different Journals. One contribution to the debate took the form of an essay published in an authoritative British Journal: a series of articles by the English barrister William Stallybrass[58], who however compared from the technical point of view the Rocco draft code with the general principles of criminal law in England. This comparison was for many reasons problematic but it appeared to the author to be useful[59]. Stallybrass's judgment on Rocco's *Progetto definitivo* was flattering[60]. It was – he noted – "probably the most important of all the new projected codes", preceded as it was by Rocco's masterly *Relazione.* In Stallybrass's view, the *Relazione* enabled us the

better to understand the draft code, detaching it from the context that after 1925-26 showed clearly the totalitarian vocation of Fascism. The English barrister admitted the limits of his own contribution, deferring in turn to Giulio Battaglini's study of the principles underlying the new legislation[61]. We have seen that Battaglini (1885-1961) was an opponent of positivist criminology who, together with Agostino Gemelli, had criticized Ferri's draft. He was professor at the University of Pavia, at the Catholic University of Milan and subsequently in Bologna; also the editor of the *Rivista italiana di diritto penale,* following the technical-juridical method. He was not among the top-ranking protagonists of Italian penal science but starting from the time of Rocco's codification period he became a jurist increasingly central to the Fascist regime. He spoke very well the main modern languages, including Russian, and he was engaged in extensive propaganda activity to promote Fascist criminal legislation abroad, contributing also to the circulation of German criminal science in Italy[62]. His close ties with a number of prominent American scholars[63] allowed him to reach the American audience in a manner that no other Italian criminal lawyer could match in this period.

26 Battaglini's article *The Fascist Reform of the Penal Law in Italy*, published in 1933, can be considered a sort of *manifesto*-synthesis of the Rocco reform. Following the *Relazione* of the Minister of Justice, he emphasized the ideological dimension[64]: the code defended first of all the personality of the State but it was also the "moral code" of the Italian nation. The problem of legal responsibility, declared Battaglini, had been at the center of the "rivalry between the Classical and the Positive schools in Italy"[65]. The new penal code had provided a solution to this long debate and "mark[ed] a stage of capital historical importance in the world-wide legislative movement"[66]. Rocco's choice had been to retain the tradition that had the principle of responsibility as its foundation but "developed and adapted to the new needs of State and society"[67]. Conversely Ferri's Draft Code of 1921 "met very active opposition because it eliminated the principle of moral responsibility for human actions"[68]. The failure of Ferri had demonstrated the impossibility of composing a code on any principle other than that of the moral (or voluntary) causation of the offender. Battaglini insisted on Ferri's proposals not only on account of his personal opposition to them but also because of the reputation Ferri enjoyed in the U.S. He did however invoke Ferri's authority when it suited him, noting that he had approved Rocco's first draft in 1927.

27 For Battaglini the new Code was based on the principle of individual responsibility. However,

> In most cases, the responsible person is also the dangerous one. But then dangerousness is absorbed by responsibility; that is to say, the fulfilment of the penalty serves also the purpose of repressing the dangerousness. The principle of dangerousness assumes a value in itself whenever dangerousness cannot be absorbed by responsibility, i.e., where responsibility does not exist (e.g., insanity) or where circumstances require an additional and specific repression of dangerousness (e.g., habitual crime)[69].

28 Among the most important features of Rocco's code compared with the liberal legislation were, Battaglini argues, the increase in penalties, the consolidation of the death penalty but also the faith in the moral regeneration of the criminal. The supervisory Judge, a new judicial functionary, had responsibility for the administrative supervision of prison penalties. At the same time, "A salient feature of the new Penal Code is to render more flexible and therefore more efficient the repression of crime, *increasing the discretion powers of the trial judge*"[70].

> The so-called “measure of safety” forms one of the most prominent features of the new code; it may be termed the question of the period in our affairs. Rocco’s Code devotes to it all of title VIII of Book I. The “measure of safety” is based on the principle of “dangerousness”, in the sense above explained. It is applicable in those cases where the principle assumes an intrinsic value, distinct from that of responsibility[71].

29 For Battaglini security measures were administrative ones, serving first of all as a defense of society against habitual delinquents and recidivists. The *doppio binario* was the solution and “This system of "measures of safety" may be regarded as the one useful remnant taken over from the positivist school’s Code”[72]. The Italian scholar thus sought to connect safety measures to the positivist background but the scope of the penal or criminal law remained what it had always been, that is, a system based on the principle of responsibility, absolutely homogeneous and without any intrusion whatsoever of any foreign method. “Eclecticism, in the method followed by Minister Rocco, is excluded”[73].

30 If Giulio Battaglini tended to minimize the impact of the security measures, Giovanni Novelli, Director-General, Penal and Preventive Institutions, of the Ministry of Justice, in a propagandistic way presented to the American audience the effects of the Fascist legislation on the penitentiary system, showing how the dual-track approach worked in practice. He underlined in particular the role of the new surveillance judge in safeguarding the individual rights of prisoners.

> Wishing to summarize in this short article the fundamental characteristics of the system, we can say that its basic concept is that to the surveillance judge is entrusted the protection of what may be called civil personal rights of the prisoners during penal treatment. That is to say, this member of the judiciary, invested with administrative functions, assures the execution of punishment within the limits of and with the procedures contemplated in the penal code and in the regulations[74].

VII. Distant echoes

31 To briefly summarize the views of some American legal thinkers regarding the Fascist criminal reforms we can say that, despite the popularity of positivism in the U.S. at the turn of the nineteenth century, several aspects of the *radical* Ferri Code were criticized. Hence, we need to distinguish between the significant presence of the Italian criminological movement up until the Ferri Project, which can be considered a turning point, and its effective “influence” on American criminal and penitentiary institutions. In the early 1930s American responses were still focused on questions of criminal science, rather than on the nature of the regime itself. The *isolationist* policy of the U.S. did not prevent some scholars from assessing specific aspects of Fascist codes and criminal reforms, pointing out in the process various problems and contradictions. The analysis of these aspects did much to promote a better understanding of the real nature of the Fascist regime.

32 The Rocco codes and the solid Fascist criminal system could attract attention but it could never conceivably have become a paradigm. The problems were similar but the solutions were not. The individualization of punishment was a common cornerstone but in the U.S. the debate was about the indeterminate sentence and the single-track method, whereas in Italy, and in many other European countries, the measures of security represented the specific route to find a compromise. Fascism

constitutionalized this path by means of the Rocco codes but accentuated the authoritarian dimension while formally maintaining the principle of legality. The ambiguity of the rule by law marked the Fascist penal system. Fascist propaganda presented Italian legislation as a penal model at international conferences and in publications. Some European nations, Spain and Portugal for instance, mentioned the Italian Fascist influence but the United States, despite some generic references[75], stayed well away.

VIII. About the Fascist *Stato di diritto*

33 For an author like William Stallybrass – read in the U.S. – the Rocco project continued to focus on the principle of legality[76]: it "opens with a clear pronouncement against arbitrary power on the part of the government and arbitrary punishment"[77]. This assessment is correct. As we have remarked above, Rocco's penal legislation was extraordinarily effective in exploiting the *nullum crimen nulla poena sine lege* principle as a relevant strategy. The principle of legality was a sort of *patina* useful for not breaking with the liberal legacy. For this reason in the criminal law and justice systems the difference between the Fascist and the Nazi regimes was evident. The Nazi overcoming of the principle *nullum crimen sine lege* – replaced as it was by that of *nullum crimen sine poena* – and of the prohibitions of non-retroactivity of the law and analogy revealed a radical break with the liberal rule of law tradition within the new *Führerstaat* framework[78].

34 If the dual-track system in Europe over the first decades of the twentieth century identified, albeit in various different ways, a common path serving to combine the traditional retributive culture and the new social defense tools, the Italian case with the rise and consolidation of Fascism cannot be considered only as one of the possible variants. There is also something very specific about it. So a further remark is necessary.

35 The penal codification process (1927-1931) followed the phase of the so-called *leggi fascistissime* (ultrafascist laws) of 1925-26. The Fascist regime first created a strong and efficient repressive apparatus based on a complex of actions: from the beginning the use of violence by the *squadristi*; an unprecedented police apparatus (Political police, OVRA); a new Law of public safety (n. 1848, 6 November 1926), which reorganized policing, with a view to eradicating all forms of opposition and subversion; the establishment in 1926 of a Special Tribunal for the Defence of the State (Law n. 2008); the reintroduction of the death penalty; the forced expatriation of political dissidents (*Fuorusciti*); "confinement by the police" (*confino di polizia*), the "silent weapon" of the regime, an administrative measure subtracted from the penal law regulations (over 12,000 people were subjected to it)[79].

36 Fascist penal legislation cannot be separate from this radical *ante factum*. They both belong to the same ideological framework. So one needs to go beyond the notion of "moderate social defense"[80] when referring to the Fascist period. This is to say that the principle of legality of the Fascist regime underlying Rocco's code is hopelessly far removed from rule of law principles. Jerome Hall in 1937 thought that in Fascist Italy the setting up of a special tribunal against political opponents and the very broad definition of political crimes allowed the regime to keep the *nulla poena sine lege* principle in ordinary offences"[81].

> Yet, when one finds that Denmark introduced analogy a few years ago, that Italy in her 1930 Code reaffirmed *nulla poena* including non-retroactivity, and when we note that Poland did likewise, that Germany has departed from the rule, and that Russia discarded it entirely in 1926, we must conclude that no facile identification of *nulla poena* with a particular type of government will suffice. It would, however, be much more fallacious to assume that political forces are not involved[82].

37 The comparaison with Soviet and Nazi criminal law helped a great deal to detach – for a non-secondary aspect – the Fascist experiment by virtue of its formally conserving the principle of legality and the prohibition of analogy from the group of totalitarian States. Likewise in the analysis of Leon Yankvich this comparison ended up relativizing the Fascist departure from the principle of legality. Although anti-democratic and authoritarian, the 1930 Penal Code could be seen within the framework of legality and legal certainty[83].

38 Other American scholars did not seem to share this attitude towards the Rocco Code and the reference to the rule of law. During the Thirties, and especially after the conquest of Abyssinia and above all the rapprochement with the German Nazi State, attitudes towards the Fascist regime changed, and criminal justice and issues regarding the rights of individuals became the object of critical analysis. This was the case with, for example, Steiner and Stone, who in 1936-37 underlined the fraught issue of legality in Fascist law and the need to contextualize Fascist criminal policy. Lawless violence, fighting against opponents, the idea of a strong state deliberately far removed from democratic foundations represent the frame within which to take into consideration the limitations on individual rights and procedural safeguards, and the emphasis on retribution and prevention. Nathaniel Cantor reported on Fascist policy directed against the regime's opponents, showing how confinement by the police and Special Tribunal judgments had little to do with liberal guarantees and *moderate* ideas[84]. The brutal treatment of political prisoners showed clearly the connections with the Fascist policy on political crimes based on the 1926 Act for the Defence of the State, the activities of the Special Tribunal from 1927 onwards and subsequently the consolidation of the Rocco Code.

39 It therefore cannot be forgotten that the Fascist claim to have formal legality must be defined as *rule by law* rather than *rule of law*. The concept of law – connected with the ideology of the strong state – was the expression of dictator will departing from the idea of law as limit on power and guarantee of the individual. The *rule by law* was "one of the most solid foundations of the authoritarian regime"[85]. The forms of duality or hybridity made it possible to falsify or misuse the rule of law tenets. Positive formal law did in fact prove unable to resist a range of authoritarian measures. On the contrary, the substantive principle of legality was used to legitimate - on the basis of a mass consensus[86] - violence[87], political repression and the abominable promulgation and implementation of racial laws.

40 In 1945 Morris Ploscowe[88] denounced the true nature of the Fascist reforms of criminal justice: they were not limited to political cases in which the Fascist regime was directly interested or involved.

> Fascism made possible imprisonment by administrative action without reference to courts for both ordinary as well as political offenders. Fascism's completely partisan extraordinary tribunal for political crimes was matched in the prosecution of ordinary crimes by regulations which made it impossible for any but good Fascists to sit as judges in the ordinary courts. Even the summary courts-martial procedure for political cases had its counterpart in the procedures used for

> ordinary cases, which were so heavily weighted against the accused as to leave him almost completely at the mercy of the police and the prosecuting authorities[89].

41 However, the ambiguity[90] of Fascist criminal enforcement would prove to be, thanks to Rocco's codes, a powerful argument. After the fall of Fascism some criminal law scholars elaborated the so-called "brake theory", arguing that they had been able, thanks to the adoption of the technical-legal approach, to limit the Fascist orientation and to safeguard the liberal core of Italian penal doctrine and hence the rule of law[91]. For this reason it was sufficient, they argued, to remove the Fascist patina in order to recover the liberal background and its legislation. However, the brake theory seems unconvincing, as does the aim of many legal scholars who were active during the time of Fascism to entrench themselves in a supposed position of neutrality by adhering to the technical-legal approach. Such arguments referred to a kind of legal formalism adopted by Rocco's codes, which can be considered a sort of shelter behind which they could hide, in order not to be tainted by the guilts of the regime.

42 In Italy the notion did in the end prevail that it was possible – as the same Ploscowe argued – to *purge* Italian criminal justice. A democratic purge was initiated but it was bland and highly problematic: the Fascist Rocco codes and the regime's justice system legacy left very deep traces in the new Italian constitutional State, destined to last, substantially and symbolically, a very long time[92].

NOTES

1. See L. Lacchè, "Sulla Comparative Legal History e dintorni", *Diritto: storia e comparazione. Nuovi propositi per un binomio antico*, ed. A. Somma and M. Brutti, Frankfurt am Main, Max Planck Institute for European Legal History, Global Perspectives on Legal History, 2018, p. 245-265; *Idem*, "Crossing boundaries. Comparative constitutional history as a space of communication", *Glossae. European Journal of Legal History*, 15, 2018, p. 126-139. For some methodological insights see "The Transnationalisation of Criminal Law in the Nineteenth and Twentieth Century. Political Crime, Police Cooperation, Security Regimes and Normative Orders", ed. K. Härter, T. Hannappel and J. C. Tyrichter, Frankfurt am Main, Vittorio Klostermann, 2019; K. Härter and V. Vegh Weis, "Transnational Criminal Law in Transatlantic Perspective (1870-1945): Introductory Notes, Initial Results and Concepts", *Rechtsgeschichte/Legal History*, 30, 2022, p. 84-94.

2. As has recently been shown by L. Sansone, *La galassia Lombroso*, Rome-Bari, Laterza, 2023.

3. A. Walsh, "The Holy Trinity and the Legacy of the Italian School of Criminal Anthropology", *Human Nature Review*, 3, 2003, p. 1-11.

4. See N. H. Rafter, "Criminal Anthropology in the United States", *Criminology*, 30, 4, 1992, p. 525-546; *id.*, *Creating born criminals*, Urbana, University of Illinois, 1997, p. 110-128; *id.*, "Criminal Anthropology. Its Reception in the United States and the Nature of Its Appeal", *Criminals and their Scientists. The History of Criminology in International Perspective*, ed. P. Becker and R. H. Wetzell, Cambridge, Cambridge University Press, 2006, p. 159-181; *id.*, "Gli Stati Uniti", *Cesare Lombroso cento anni dopo*, ed. S. Montaldo and P. Tappero Turin, Utet, 2009, p. 277-287; M. Gibson, *Born to crime. Cesare Lombroso and the origins of biological criminology*, Westport, Praeger, 2002; C. Petit, "Lombroso in Chicago. Presencias europeas en la *Modern Criminal Science*

americana", *Quaderni Fiorentini per la storia del pensiero giuridico moderno*, 36, 2007, *Principio di legalità e diritto penale (Per Mario Sbriccoli)*, t. II, p. 801-900; *id*., "Lombroso et l'Amérique", *Revue de science criminelle et de droit pénal comparé*, 1, 2010, p. 17-29; M. Pifferi, "L'influenza della Scuola Positiva negli Stati Uniti. Luci e ombre di un successo culturale", *Diritto penale XXI secolo*, *Scuola Positiva e Codice Rocco*, X, 2, 2011, p. 537-559; *id*., "Il giudice penale e le trasformazioni della *criminal jurisprudence* negli Stati Uniti ad inizio Novecento", *Quaderni Fiorentini per la storia del pensiero giuridico moderno*, 40, 2011, II, p. 687-719; *id*., *L'individualizzazione della pena. Difesa sociale e crisi della legalità penale tra Otto e Novecento*, Milan, Giuffrè, 2013; *id*., *Reinventing Punishment. A Comparative History of Criminology and Penology in the Nineteenth and Twentieth Centuries*, Oxford, Oxford University Press, 2016. C. Fijnaut, *Criminology and the Criminal Justice System. A Historical and Transatlantic Introduction*, Cambridge, Intersentia, 2017; S. Montaldo, "Lombroso: The Myth, The History", *Crime, Histoire & Sociétés / Crime, History & Societies*, 22, 2, 2018, p. 1-33.

5. M. Pifferi, L'influenza della Scuola Positiva» *op. cit*., p. 538-539.

6. C. Petit, "Lombroso in Chicago", *op. cit*., p. 842 ff.

7. E. Ferri, "The Nomination of a Commission for the Positivist Reform of the Italian Penal Code", *Journal of the American Institute of Criminal Law and Criminology*, 11, 1, May 1920, p. 67-76.

8. *Ibidem*, p. 67.

9. *Ibid*.

10. Royal Decree 14 September 1919, n. 1743, art. I.

11. But the Minister declared that he had no wish to prejudge the issue: "The commission has not been called to proclaim the downfall of free arbitration, or, vice versa, to ratify the bankruptcy of science confronted by a victorious insurrection of spiritualism. The work of the legislator is never done by a priori method, and even when he is the victim of error he acts and insists on acting with the positive method in legislation. The positive method and scientific positivism are neither synonymous nor identical" (E. Ferri, "The Nomination of a Commission", *op. cit*., p. 73).

12. "The Ferri Commission came into being not because positivist criminology had conquered the "classical school" of Jurisprudence: it was because it had conquered the commission's founder, Justice Minister Lodovico Mortara" (P. Garfinkel, *Criminal Law in Liberal and Fascist Italy*, Cambridge, Cambridge University Press, 2016, p. 355).

13. *Ibid*., p. 350.

14. Regarding the historiographical interpretations and for the most thorough reconstruction of the Italian debate surrounding the Ferri Code see P. Garfinkel, *Criminal Law in Liberal and Fascist Italy*, *op. cit*., p. 344-383.

15. In the article "The Reform of Penal Law in Italy", *Journal of the American Institute of Criminal Law and Criminology*, 12, 2, Aug. 1921, p. 178-198, Ferri summarizes his ideas and recalls that the recent edition of his book "Criminal Sociology" was adopted by some universities in the United States. His philosophical background was not always followed but these "same universities approve "todo corde" and unreservedly, the practical proposals of penal justice which that book contains" (p. 182).

16. "On the Reform of the Italian Penal Code", *Journal of the American Institute of Criminal Law and Criminology*, 14, 4, February 1924, p. 524-543 (*Sulla riforma del codice penale italiano. A proposito del progetto Ferri*, Milan, Vita e Pensiero, 1923). The text was translated by Arthur J. Todd, Professor of Sociology, Northwestern University, Director of Industrial Relations.

17. *Ibid*., p. 530.

18. S. Glueck, "Principles of a Rational Penal Code", *Harvard Law Review*, 41, 4, February 1928, p. 453-482. "Although he was essentially a behavioral scientist, Glueck possessed a law degree and, by virtue of Pound's sponsorship, was soon to join the Harvard Law faculty. Glueck both brought the behavioral science perspective into the legal academy and attempted to achieve the media via to which Pound appealed in his "Summary" to the Cleveland study" (Th. A. Green,

"Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice", *Michigan Law Review*, 93, 7, Jun. 1995, p. 2019).

19. S. Glueck, "Principles of a Rational Penal Code", *op. cit*., p. 453.

20. *Ibid*., p. 453-454.

21. *Ibid*., p. 455, italics in the text.

22. *Ibid*., p. 469.

23. *Ibid*., p. 470. "3. Professor Ferri's scheme of judicial individualization on the basis of a detailed legislative schedule of "conditions of dangerousness" and "conditions of less dangerousness" and a penal calculus is unsatisfactory. Individualization should be effected by a scientifically qualified treatment board, to begin to function after the individual offender has been found (or has pleaded) guilty in the existing criminal court. In addition to the original disposition of cases, the treatment tribunal should periodically review the progress of offenders under treatment, modifying the original prescription ("sentence") if found necessary. The board should utilize existing scientific facilities (psychiatry, psychology, social work) in individualization" (p. 481). See M. Pifferi, *Reinventing Punishment*, *op. cit*., p. 212-215.

24. S. Glueck, "Principles of a Rational Penal Code", *op. cit*., p. 474. Glueck publishes the circumstances which, according to the Italian Project, indicate a greater dangerousness in the offender, *ibid*., p. 471-472.

25. *Ibid*., p. 475.

26. *Ibid*.

27. *Ibid*., p. 454. Glueck quotes the article of E. Ferri, "II Progetto Rocco di Codice Penale", *La Scuola Positiva. Rivista di Diritto e Procedura Penale*, n.s., VII, 1927, VIII, 1928, n°. II.

28. Rocco had held various positions in the government since 1922. He was president of the Chamber of Deputies at the time that he was appointed minister of Justice. P. Costa, "Rocco, Alfredo", *Dizionario biografico dei giuristi italiani (XII-XX secolo)*, Bononia, Il Mulino, 2013, p. 1703.

See G. Vassalli, "Passione politica di un uomo di legge", foreward to A. Rocco, *Discorsi parlamentari*, Bononia, Il Mulino, 2005, p. 49; G. Simone, *Il Guardasigilli del regime. L'itinerario politico e culturale di Alfredo Rocco*, Milan, F. Angeli, 2012, p. 181.

29. G. Vassalli, "Passione politica di un uomo di legge", *op. cit*., p. 41 ff. "As Minister of Justice Rocco was the protagonist – although I would venture to say the author – of the radical authoritarian transformation of the institutions of the Kingdom and the construction of a strong legal system to sustain and defend the dictatorship" (M. Sbriccoli, "Rocco, Alfredo", *Dizionario del fascismo. II. L-Z*, ed. V. De Grazia and S. Luzzatto, Turin, Einaudi, 2005, p. 535-536).

30. See "I giuristi e il fascino del regime (1918-1925)", ed. I. Birocchi and L. Loschiavo, Rome, RomaTre Press, 2015.

31. "From 1925 to 1932 the political biography of Rocco coincides with the history of fascism and the period that signaled the end of the liberal State and the formation of the fascist regime" (E. Gentile, *Il mito dello Stato nuovo. Dal radicalismo nazionale al fascismo*, Rome-Bari, Laterza, 2002 (1982), p. 201). See P. Ungari, *Alfredo Rocco e l'ideologia giuridica del fascismo*, Brescia, Morcelliana, 1963, p. 9; G. Chiodi, "Alfredo Rocco e il fascino dello Stato sociale", *I giuristi e il fascino del regime*, *op. cit*., p. 103-127, gives a convincing account of the relevance of Rocco's nationalist programme for his future endeavours.

32. T. Pires Marques, "La riforma penale fascista italiana: un modello internazionale", *Studi sulla questione criminale*, 3, 2008, p. 73-105; *id*., *Crime and the Fascist State, 1850-1940*, London, Pickering & Chatto, 2013, p. 48 ff.; now Pifferi, "Individualization of Punishment and the Rule of Law", *op. cit*.; *id*., «Global Criminology and National Tradition: The Impact of Reform Movements on Criminal Systems at the Beginning of the 20th Century», *Entanglements in Legal History: conceptual approaches*, ed. Th. Duve, Frankfurt am Main, Max Planck Institute for European Legal History, 2014, p. 543-564; *id*., *Reinventing Punishment*, *op. cit*.; P. Garfinkel, *Criminal Law in Liberal and Fascist Italy*, *op. cit*., p. 399 ff.

33. T. Pires Marques, *La riforma penale fascista italiana*, *op. cit*., p. 22-23.

34. On a wide range of international commentaries on Fascist criminal law and justice by contemporary scholars in the United Kingdom, the United States and (pre-Vichy) France, according to a convincing periodization, see the fundamental contribution by S. Skinner, "Fascist by Name, Fascist by Nature? The 1930 Italian Penal Code in Academic Commentary 1928-46", *Fascism and Criminal Law: History, Theory, Continuity*, ed. S. Skinner, Oxford and Portland, Hart Publishing, 2015, p. 59-84.

35. *Preliminary Scheme of the Italian Penal Code Compiled by the Italian Minister of Justice in Rome*, London, Baldesio Art Printing, 1929. Cf. P. Garfinkel, *Criminal Law in Liberal and Fascist Italy*, *op. cit*., p. 414.

36. Some examples are given in T. Pires Marques, "La riforma penale fascista italiana", *op. cit*., p. 24.

37. *Conférence Internationale d'Unification du Droit Pénal (Rome 21-25 Mai 1928). Actes de la Conférence publiés par les soins du Comité d'Organisation de la Conférence*, Rome, Istituto Poligrafico dello Stato, 1931, p. 11. On the composition of Italian delegations at international congresses see T. Pires Marques, "La riforma penale fascista italiana", *op. cit.*

38. M. Pifferi, "Individualization of Punishment and the Rule of Law: Reshaping Legality in the United States and Europe between the 19th and the 20th Century», *The American Journal of Legal History*, 52, 3, July 2012, p. 325-376; *id*., *Reinventing Punishment*, *op. cit*.; P. Garfinkel, *Criminal Law in Liberal and Fascist Italy*, *op. cit*., p. 399-400.

39. On this aspect and the comparison between U.S. and Europe see M. Pifferi, "Individualization of Punishment and the Rule of Law", *op. cit*.; *id*., "Global Criminology and National Tradition", *op. cit*., p. 543-564; *id*., *Reinventing Punishment op. cit*.

40. T. Pires Marques, "La riforma penale fascista italiana", *op. cit*., p. 13-14; *id*., *Crime and the Fascist State*, *op. cit*., p. 62-63, on Ferri participation to International Congresses (London 1925, Rome 1928); M. Pifferi, *Reinventing Punishment*, *op. cit*., p. 238. On Ferri's clumsy attempt to affirm the positivistic background of the Rocco code project, see the memories of the young Leon Radzinowicz, *Adventures in Criminology*, London, Routledge, 1999, p. 19-25. On the positivists' reaction to the Rocco Code see E. Dezza, "Le reazioni del positivismo penale al codice Rocco", *Diritto penale XXI secolo*, X, 2, 2011, p. 421-440; E. Musumeci, "The Positivist School of Criminology and The Italian Fascist Criminal Law. A Squandered Legacy?", *Fascism and Criminal Law*, *op. cit*., p. 50 ff.

41. M. Pifferi, "Criminology and the Rise of Authoritarian Criminal Law, 1930s-1940s", *Ideology and Criminal Law. Fascist, National Socialist and Authoritarian Regimes*, ed. S. Skinner, London, Hart Publishing, 2019, p. 111.

42. On the concept of the dual level of legality see M. Sbriccoli, "La penalistica civile. Teorie e ideologie del diritto penale nell'Italia unita", *Storia del diritto penale e della giustizia. Scritti editi e inediti (1972-2007)*, Milan, Giuffrè, 2009, t. I, p. 524. "The dual level of legality distinguishes the "gentlemen" from the "scoundrels" destining them to two different punitive *filières*, has the political opportunity prevail over juridical rule, the aim over the law. It allows the achievement of politically desirable objectives by way of the compression of rights, prerogatives and guarantees, covering those who are juridically and politically responsible for such compression" (M. Sbriccoli, "Caratteri originari e tratti permanenti del sistema penale italiano (1860-1990)", *ibid*., p. 596-597, also 647, 654-655). See also L. Lacchè and M. Stronati, *Beyond the statute law: the "grey" government of criminal justice systems. History and Theory in the moderne age*, Macerata, Edizioni Università di Macerata, 2011; L. Lacchè, "The Shadow of the Law: the Special Tribunal for the Defence of the State between Justice and Politics in the Italian Fascist Period", *Fascism and Criminal Law: History, Theory, Continuity*, *op. cit*., p. 15-33; *id*., ""Alzate l'architrave, carpentieri". I livelli della legalità penale e le "crisi" tra Otto e Novecento", *Le legalità e le crisi della legalità*, ed. C. Storti, Turin, Giappichelli, 2016, p. 183-205; *id*., ""Uno sguardo fugace". Le misure di

prevenzione in Italia tra Ottocento e Novecento", *Rivista italiana di diritto e procedura penale*, 2, 2017, p. 413-438.

43. M. Pifferi, "Global Criminology and National Tradition", *op. cit*., p. 327 ff. On historical roots see. J. Q. Whitman, *Harsh Justice. Criminal Punishment and the Widening Divide Between America and Europe*, New York-Oxford, Oxford University Press, 2003.

44. For the historiographical debate see in particular J. P. Diggins, "Filtration with Fascism: American Pragmatic Liberal and Mussolini's Italy", *The American Historical Review*, 71, 2, January 1966, p. 487-506; A. J. Gregor, *The ideology of Fascism: The rationale of totalitarianism*, New York, The Free Press, 1969; J. P. Diggins, *Mussolini and Fascism*: *The View from America*, Princeton, Princeton University Press, 1972; D. F. Schmitz, *The United States and fascist Italy, 1922-1940*, Chapel Hill, University of North Carolina Press, 1988; J. Q. Whitman, "Of Corporatism, Fascism and the First New Deal", *American Journal of Comparative Law*, 39, 4, Fall 1991, p. 747-778; A. De Grand, *Italian fascism: its origins & developmen*t, Lincoln, University of Nebraska Press, 2000, 3rd ed.; W. Schivelbusch, *Three New Deals. Reflections on Roosevelt's America, Mussolini's Italy, and Hitler's Germany, 1933-1939*, New York, Picador Paper, 2007; A. J. Gregor, *Italian Fascism and Developmental Dictatorship*, Princeton, Princeton University Press, 2014.

45. R. Pound, *Criminal Justice in America,* New York, Henry Bolt and company, 1929, p. 214.

46. Arthur H. Steiner (1905-1991) was an international relations and political theory professor at UCLA. During the thirties he focused his attention on the Fascist political system, publishing a number of articles. His main work is *Government in Fascist Italy*, foreword by F. Morstein Marx, New York and London, McGraw-Hill, 1938.

47. A. H. Steiner, "The Fascist Conception of Law", *Columbia Law Review*, 36, 8, Dec. 1936, p. 1267-1283.

48. *Ibid*., p. 1276.

49. *Ibid.*

50. "This may be a logical consequence of the totalitarian, ethical conception, but to Anglo-Saxons trained to think only juristically, the result is an elementary error" (*ibid*.).

51. *Ibid*., p. 1283.

52. J. Stone, "Theories of Law and Justice of Fascist Italy", *The Modern Law Review*, 1, 3, Dec. 1937, p. 193. Julius Stone (1907-1985) took his law degrees in Great Britain and in U.S. Professor at the University of Leeds, he was then for thirty years a very important professor of Jurisprudence and International Law at the University of Sidney.

53. *Ibid*., p. 197. "But the fascist exaltation of the state has reversed these tendencies. The destruction of the most elementary safeguards of accused persons by the Italian Code of Criminal Procedure has already been mentioned" (p. 201). Stone quotes M. Ploscowe, "La Procédure Criminelle dans l'Italie Fasciste"*, Revue des Sciences Politiques*, 55, 1932, p. 497-523. Ploscowe also analyzed jury reform in fascist Italy (1931). The new structure – very different from that of the liberal tradition – was not in itself "authoritarian" but he argued that in the Italian political context there was a strong risk of missing the independent, critical, contribution of lay jurors, who were now appointed and not selected by lot. Referring to Silvio Longhi, "This means simply that since the magistrates and assessors are picked by the government, the latter no longer has anything to fear from the decisions in the corte d'assise. In cases of a political character, therefore, the Italians will not have the benefit of judgment by an independent tribunal but will be left to the mercies of a party justice" ("Jury Reform in Italy", *Journal of Criminal Law and Criminology*, 25, 4, Nov.-Dec. 1934, p. 583).

54. Nathaniel Cantor (1898-1957) has been an important professor of criminology and sociology at the University of Buffalo. He was one of the main commentator of Fascist Criminal Law reforms during the Thirties. We know that he spent some months in Italy in 1934 to study the Italian debate on criminology and penology ("La scienza criminologica nel Nord America", *La Scuola Positiva. Rivista di Diritto e Procedura Penale*, XIV, 1934, First Part, p. 384). On the important

works published by Cantor in the thirties see Th. A. Green, "Freedom and Criminal Responsibility", *op. cit.*, p. 2041. See also S. Skinner, "Fascist by Name, Fascist by Nature?", *op. cit.*, p. 72-73.

55. N. Cantor, "Measures of Social Defense", *Cornell Law Review*, 22, 1, Dec. 1936, p. 27.

56. "The classical system of punishments and the modem concept of social defense cannot dwell alongside each other without leading to fantastic results. First the offender is given the. punishment he deserves and then treated in order to protect society" (N. Cantor, "Conflicts in Penal Theory and Practice", *Journal of Criminal Law and Criminology*, 26, 3, Sept.-Oct. 1935, p. 347-48).

57. N. Cantor, "Measures of Social Defense", *op. cit.*, p. 32. "In all other codes, the various measures of security are fitted into or scattered throughout a classical framework, whereas the Italian code is divided into two parallel parts, one devoted to the application and execution of punishments and the other to the application and execution of measures of safety. In other words, the Italian Code represents the first actualized project combining both the classical and positivist functions of the criminal law. How successful such systematization is will be seen as we proceed" (p. 31). Cantor insists on the 1930 Italian Code in term of eclecticism and organic contradictions: "A penal law characterized by the traditional concept of punishment cannot, without contradiction, accept the principles of positivism. A brief examination of the concrete differences between punishments and measures of security will reveal at once the inevitable confusion which follows both in theory and practice" ("The New Prison Program of Italy", *Journal of Criminal Law and Criminology*, 26, 2, July-August 1935, p. 220).

58. William Teulon Swan Stallybrass (1883-1948) was a reader in Criminal Law at the University of Oxford, Principal of Brasenose College and then Vice-Chancellor of the English University.

59. "The genius of the Italian is for theory; the genius of the Englishman is for practical administration. Each in his own way has contributed much to the improvement of criminal law. Each still has much to learn from the other" (W. Stallybrass, "A Comparison of the General Principles of Criminal Law in England with the Progetto Definitivo di un Nuovo Codice Penale of Alfredo Rocco, Part. I", *Journal of Comparative Legislation and International Law*, 13, 4, 1931, p. 203-204). The articles were published in origin in Italian in *Studi di Diritto Penale Contemporaneo. I. Saggi Critici, Il Progetto Rocco nel pensiero giuridico contemporaneo*, Rome, Edizione dell'Istituto di Studi Legislativi, 1930. In English they were published in *Journal of Comparative Legislation and International Law*, 13, 1931, p. 203-2015; 14, 1, 1932, p. 45-61; 14, 4, 1932, p. 233-243; 15, 1, 1933, p. 77-88; 15, 4, 1933, p. 232-241. On Stallybrass comparaison see G. L. Radbruch, "Jurisprudence in the Criminal Law", *Journal of Comparative Legislation and International Law*, 18, 4, 1936, p. 212-225. Now see in particular S. Skinner, "Fascist by Name, Fascist by Nature?", *op. cit.*, p. 66-69.

60. "The Progetto Rocco is the result of long, careful and single-minded labour and thought to a great end – the improvement of the criminal law by the reassertion of the responsibility of human beings. As such it will win the unstinting admiration of the civilized world. The testing-time for it and for Italy will come when the new code is put into force" (W. Stallybrass, "A Comparison of the General Principles of Criminal Law", *op. cit.*, p. 235).

61. G. Battaglini, *Principii di diritto penale in rapporto alla nuova legislazione: questioni preliminari*, Milan, Istituto Editoriale Scientifico, 1929.

62. These aspects of Battaglini's biography are now very well highlighted by G. Dodaro, *Giuliano Vassalli tra fascismo e democrazia. Biografia di un penalista partigiano (1915-1948)*, Milan, Giuffrè-F. Lefebvre, 2022, p. 98-113.

63. In the short biographical sketch prefacing Battaglini, "The Exclusion of the Concourse of Causes in Italian Criminal Law", *The Journal of Criminal Law, Criminology, and Police Science*, 43, 4, 1952, p. 441-450, it is recalled that Battaglini was a polyglot and that "The first series of articles was occasioned by his friends and colleagues, the late Professors James W. Garner and John H. Wigmore. The author has hitherto published in this JOURNAL as follows: Function of Private

Defense in the Repression of Crime 2 370 (1911). Some Fundamental Problems of Criminal Politics 3 347 (1912). Eugenics and the Criminal Law 5 12 (1914). Fascist Reform of the Penal Law in Italy 24 278".

64. "The theory of government is reflected particularly in the penal law, because that is the most powerful legal means which the government has at its disposal to achieve its political objectives" (G. Battaglini, "The Fascist Reform of the Penal Law in Italy", *Journal of Criminal Law and Criminology*, 24, 1 May-Jun. 1933, p. 278).

65. *Ibid*., p. 279.

66. *Ibid*.

67. *Ibid*.

68. *Ibid*., p. 280.

69. *Ibid*., p. 283-284

70. *Ibid*., p. 287.

71. *Ibid*.

72. *Ibid*., p. 288.

73. *Ibid*., p. 289.

74. G. Novelli, "The Prison Program of Italy", *The Annals of the American Academy of Political and Social Science*, 157, Sept. 1931, p. 210.

75. U. Conti, "Rapport présenté", *Actes du Congrès Pénal et Pénitentiaire International de Berlin*, ed. J. Simon van der Aa, Aug. 1935, Berne, Bureau de la Commission international pénale et pénitentiaire, 1936, vol. II, p. 4.

76. "No one may be punished for an act which is not expressly deemed to be an offence by the law, nor with punishments which are not established by the law" (art. 1); "No one can be subjected to security measures that are not expressly established by law and outside the cases provided for by the law itself" (art. 199).

77. W. Stallybrass, "A Comparison", Part I, *op. cit*., p. 205.

78. See L. Lacchè, "Rule of Law metamorphoses in the Twentieth Century", *Rule of Law vs Majoritarian Democracy*, ed. G. Amato, B. Barbisan and C. Pinelli, London, Hart Publishing, 2021, p. 25-41. On the contemporary Italian debate about the Nazi law of 1935 replacing the principle of legality with that of *nullum crimen sine poena* see M. Pifferi, "Brief Remarks on the Prohibition of Penal Analogy in Fascist Italy", *Strafrecht und Systemunrecht, Festschrift für Gerhard Werle zum 70. Geburtstag*, ed. F. Jeßberger, M. Vormbaum and B. Burghardt, Tübingen, Mohr Siebeck, 2022, p. 625-634.

79. See *Il diritto del Duce. Giustizia e repressione nell'Italia fascista*, ed. L. Lacchè, Rome, Donzelli, 2015; L. Lacchè, "The Shadow of the Law: the Special Tribunal for the Defence of the State between Justice and Politics in the Italian Fascist Period", *Fascism and Criminal Law: History, Theory, Continuity*, *op. cit*., p. 15-33; *id*., "5 novembre 1926. Le leggi speciali: lo Stato autoritario", *Il Fascismo nella storia italiana*, ed. S. Lupo and A. Ventrone, Rome, Donzelli, 2022, p. 83-96.

80. This category is widely developed by Garfinkel in his book *Criminal Law in Liberal and Fascist Italy*, *op. cit*. About this see the critical remarks of M. Gibson, review in *Law and History Review*, 37, 1, Feb. 2019, p. 313-315.

81. J. Hall, "Nulla poena sine lege", *The Yale Law Journal*, 47, 2, 1937, p. 186-187. Jerome Hall (1901-1992) was an estimated professor and scholar, spending the majority of his professional career as a professor of law at Indiana University in Bloomington from 1939 to 1970, author of important works as *Theft, Law and Society* (1935), *Readings in Jurisprudence* (1938), *General Principles of Criminal Law* (1947), *Studies in Jurisprudence and Criminal Theory* (1958).

82. J. Hall, "Nulla poena sine lege", *op. cit*., p. 185-186. See M. Pifferi, *Reinventing Punishment op. cit*., p .243-246.

83. L. R. Yankvich, "Changing Concepts of Crime and Punishment, *Georgetown Law Review*, 32, 1, Nov. 1943, goes no further the general remark that "The tendency to deal rigorously with crimes

against the established order is, of course, due to the rise of the autocratic state, which tolerates no opposition" (p. 6). Yankvich, born in Romania, studied law in U.S., was lawyer and then a judge of the Superior Court of Los Angeles County until 1935 when President Franklin D. Roosvelt nominated him to the United States District Court for the Southern District of California. Archibald Hunter Campbell, professor of the University of Edinburgh, in an article published in 1946 ("Fascism and Legality", *Law Quarterly Review*, 62, p. 141-151) argued that Fascism "maintained in principle, though not always in practice, the idea of legality, of respect for law, at least on non-political cases", in contrast with Nazi Germany's rejection of law and legality (quoted by S. Skinner, "Fascist by name, Fascist by Nature?", *op. cit.*, p. 81).

84. N. Cantor, "The Fascist Political Prisoners", *Journal of Criminal Law and Criminology*, 27, 2, Jul.-Aug. 1936, p. 169-179.

85. B. Petrocelli, "Per un indirizzo italiano nella scienza del diritto penale", *Rivista italiana di diritto penale*, 1941, p. 20. Cf. G. Neppi Modona, "Principio di legalità e giustizia penale nel periodo fascista", *Quaderni fiorentini per la storia del pensiero giuridico*, 37, 2007, *Principio di legalità e diritto penale* (Per Mario Sbriccoli), t. II, p. 983-1005. For the discussion on this point see E. Musumeci, "Fascism and Criminal Law in Italy: an outline", *Forum historiae iuris*, 2017.

86. M. Pifferi, *Reinventing Punishment*, *op. cit.*, p. 226 ff.; *Ideology and Criminal Law*, *op. cit*.

87. S. Skinner, "Violence in Fascist Criminal Law Discourse: War, Repression and Anti-Democracy", *International Journal for the Semiotics of Law*, 26, 2, 2013, p. 439-458; C. Poesio, "Violenza, repressione e apparati di controllo del regime fascista", *Studi storici*, 55, 1, 2014, p. 15-26; L. Klinkhammer, "Was there a fascist revolution? The function of penal law in fascist Italy and in Nazi Germany", *Journal of Modern Italian Studies*, 15, 3, 2010, p. 390-409.

88. Morris Ploscowe (1904-1975) was born in Russia. Having graduated from Harvard Law School in 1928, he went to Europe as a Sheldon Fellow of Harvard to study the administration of criminal law. Returning to the U.S. in 1930, he joined the staff of the National Committee on Law Observance and Enforcement (the Wickersham Commission) and wrote analyses of Federal crime statistics and the causes of crime for Wickersham publications. He worked with the Columbia University Criminological Survey and went to Europe again in 1931 as a fellow of the Social Science Research Council.

89. M. Ploscowe, "Purging Italian Criminal Justice of Fascism", *Columbia Law Review*, 45, 2, Mar. 1945, p. 240.

90. On this topic see now the special issue: "The 'constitutional entanglement' of Fascism: materials for a conceptual map", *Journal of Constitutional History*, 43, I, 2022, ed. M. Gregorio, L. Lacchè and I. Stolzi.

91. See above all P. Piasenza, "Tecnicismo giuridico e continuità dello Stato: il dibattito sulla riforma del codice penale e della legge di pubblica sicurezza", *Politica del diritto*, X, 3, 1979, p. 290 ff.; M. Sbriccoli, "Le mani nella pasta e gli occhi al cielo. La penalistica italiana negli anni del fascismo", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 28, II, 1999, p. 821-822, 829, 843 and 846; M. Donini, "La gestione penale dal fascismo alla democrazia in Italia. Appunti sulla memoria storica e l'elaborazione del passato "mediante il diritto penale"", *Materiali per una storia della cultura giuridica*, 39, 1, 2009, p 183-216; L. Lacchè, ""Sistemare il terreno e sgombrare le macerie". Gli anni della "costituzione provvisoria": alle origini del discorso sulla riforma della legislazione e del codice di procedura penale (1943-1947)", *L'inconscio inquisitorio. L'eredità del codice Rocco nella cultura processualpenalistica italiana*, ed. L. Garlati, Milan, Giuffrè, 2010, p. 271-304; F. Colao, *Giustizia e politica. Il processo penale nell'Italia repubblicana*, Milan, Giuffrè, 2013, p. 1-31; E. Musumeci, "The Positivist School of Criminology", *op. cit.*, p. 52-55.

92. "The suggestion is that law deriving from, or connected with, a violent authoritarian regime such as Fascism is tainted, both because of the effect of such foundational violence on it, and because of its contaminating effect (actual or potential) on the politico-legal structure in which it exists" (S. Skinner, "Tainted law? The Italian Penal Code, Fascism and democracy", *International*

Journal of Law in Context, 7, 4, 2011, p. 440). See also S. Skinner, "Fascist by name, Fascist by Nature?", *op. cit.*, p. 59-60; M. A Livingston, "Criminal Law, Racial Law, Fascist Law: Was the Fascist Era Really a 'Parenthesis' for the Italian Legal System?", *Fascism and Criminal Law*, *op. cit.*, p. 88-89.

ABSTRACTS

This article considers how American scholars and articles published in English viewed the Italian reforms of Criminal Justice implemented between the "Ferri project" (1919) and the Fascist regime. It analyzes in particular how Fascist criminal reforms have been received, interpreted and assessed from that perspective. To summarize the views of American legal thinkers on Fascist criminal reforms we can say that, despite the popularity of positivism in the U.S. at the turn of the century, the *radical* Ferri Code was criticized in several respects. By the mid-1930s American responses were still focused on questions of criminal science, rather than the nature of the regime itself. The *isolationist* policy of the U.S. did not prevent a number of scholars from assessing certain aspects of Fascist codes and criminal reforms, pointing out problems and contradictions. The transnational viewpoint is therefore important to understand better the real nature of the Fascist regime and the formal maintenance of the principle of legality.

Cet article examine la manière dont les experts américains et les articles publiés en anglais ont perçu les réformes pénales italiennes mises en œuvre entre le « projet Ferri » (1919) et la politique du droit du régime fasciste. Il analyse en particulier la manière dont les réformes pénales fascistes ont été reçues, interprétées et évaluées à partir de cette perspective. Pour résumer les points de vue des juristes américains sur les réformes pénales fascistes, nous pouvons dire que, malgré la popularité du positivisme aux États-Unis au tournant du siècle, le Code Ferri a été critiqué à plusieurs égards. Au milieu des années 1930, les réponses américaines étaient encore axées sur les questions de science criminelle, plutôt que sur la nature du régime lui-même. La politique isolationniste des États-Unis n'a pas empêché un certain nombre de savants d'évaluer certains aspects des codes et des réformes pénales fascistes en soulignant les problèmes et les contradictions. Le point de vue transnational est donc important pour mieux comprendre la nature réelle du régime fasciste et le problème du maintien formel du principe de légalité.

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