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Nathaniel Cantor

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THE NEW PRISON PROGRAM OF ITALY

NATHANIEL CANTOR[1]

I. *The Background*

In order properly to understand the new prison program of Italy it is essential to keep in mind the underlying ideas of the two most important schools of Italian penal thought, the classical and the positivist.

The two outstanding figures in the history of penal reform in Italy are Cesare Beccaria and Enrico Ferri. Beccaria's classic *Dei Delitti e Delle Pene* (1764) and Ferri's project of a new Italian Penal Code[2] signalize the crystallization of ideas which mark a definite break with the tradition of their time. Beccaria, then a young man of 26, propagandized against the barbarous punishments of his day. He urged that the legislatures fix the penalty for the several crimes rather than the judges. He fought against the atrocities of the inquisitorial procedure and the absurdity of torture. His book marks the beginning of the modern phase in the development of the criminal law. At the base of his penal ideas he placed the concept of social defense through general intimidation. These ideas were adopted by the French penal codes of 1791 and 1810 which, as is known, served as the model for other European countries as well as the United States. The legislation of that period is marked by the principles that punishment should be relative to the gravity of the offense, that all guilty of the same kind of crime should be placed on the same footing. By making the *offense* the point of departure in penal treatment the abuse of judicial power, the capriciousness and tyranny of the judges were removed.

No one may deny to Beccaria, the founder of the classical school of penology, the tribute due the pioneer. For his day he presented the most humane and common sense views of the criminal and the penal law. Between 1764 and 1881, however, knowledge had been

[1]Professor of Criminology, University of Buffalo. Fellow, Social Science Research Council, 1932-1933. The present article considers a few of the principal ideas which will be elaborated in much greater detail in a monograph on *The Prison System of Italy.*

[2]*Progetto Ferri di Codice Penale Italiano,* 1921. Ths code with Ferri's explanation appears in his *Principi di Diritto Criminale,* Torino, 1928, pp. 602-760. A French translation appeared in 1929, Rec. Sirey, Paris.

advancing. When, in 1881, Ferri published his *Sociologia Criminale*[3] (five years after Lombroso published *L'Homme Criminel* and four years before Garofalo published his *Criminologie*) the aim of Beccaria and the classical school, namely, the general prevention of crime through intimidation or deterrence, was radically modified. Henceforth society was to be defended through a scientific study of the causes of crime and through the particular study of criminals.

Despite the divergent views of the positivists they agreed on several fundamental points. The offender and not the offense, which is merely symptomatic of the individual's makeup, was to be central in the drafting of the criminal law as well as in the treatment of the offender. Criminals were to be cured or eliminated, segregated. The educative value of preventive measures was emphasized.

Beccaria and the classical school (e. g., Carrara in his *Programma*) were primarily interested in the practical issue of abolishing the ferocity of the Middle Ages and in the theoretical issue of setting up abstract legal entities, i. e., defining crimes and their corresponding punishments. Ferri, instead, introduced the positive *method,* the method of observation and experiment, into the field of criminology. This method had been successfully applied in other fields and it seemed to Ferri it could likewise be applied to the problems of crime.[4]

Enough has been presented, it is hoped, of the basic ideas of the classical and positivist schools to appreciate the background of the present prison program of Italy.

II. *The New Penal Code and Prison Regulations*

For many years Italy has wanted a penitentiary reform. The rise and growth of the Fascist regime accelerated this insistent de-

[3]The original title of this famous work, now in its 5th edition, (Utet, Torino, 1929) *I nuovi orizzonti del diritto e della procedura penale,* was changed to *Sociologia Criminale* in the 3rd edition published in 1891, since it appeared to Ferri, as he states in the Preface to the 3rd edition, that his study no longer indicated merely the new horizons of penal law but had won its place as a definite introduction to the scientific study of crime. Hence, the new title.

[4]It is difficult to understand why students persist in maintaining that the positive method of Ferri rested upon the positivism of Comte (thus, to cite a recent work of the well-known French criminologist, Prof. H. Donnedieu De Vabres, *La Justice Penale d'aujourd'hui,* Armand Colvin, Paris, 1929, p. 8) especially when Ferri reiterates that by the positive method he means—and even prefers to call it—the Galilean method. Ferri explicitly states, "Once and for all I declare that we name our school positive not because it follows a philosophic *system* more or less Comtian—but only because of the *method* (of observation and experimentation) which we intend to apply in the study of the problems of crime . . . ." *Sociologia Criminale,* 5th edition, p. 25, note 1.

mand, especially, since in the light of the political philosophy of the new government, revision was necessary. In 1921 Ferri was appointed as the leader of a commission to draw up the new project referred to above. This code represented the first systematic legislative declaration of the principles of the positivist school. The concept of moral responsibility was renounced and the idea of "legal responsibility" substituted for it. The break with the traditional classical concept of punishment was definite. Legal "sanctions" justified the application of measures of social defense. Opinion in Italy, however, was not prepared for such radical innovation.[5]

Nevertheless the code in force (the Zanardelli Code, 1889-1931) was considered inadequate. Several other commissions, therefore, were appointed under the direction of ex-Minister of Justice Rocco. Two preliminary drafts were presented (1925-1931) and on July 1, 1931, the new penal law (as well as procedural code) and the new prison regulations went into effect.[6]

The new penal code introduces new legislation, new penal and administrative institutions and more perfect techniques which, however, in the words of Minister Rocco, "do not modify the basic historical tradition of our law and the scientific principles through which it is inspired. Thus the idea of criminal legal responsibility based upon the individual psychical capacity to intend and to will and upon the knowledge and freedom of human acts will continue to dominate to-day, as it has dominated for centuries, the system of our national penal legislation."[7]

Here we have succinctly stated the fundamental point of departure between the classicalists and the positivists. Ferri substitutes *legal* responsibility for *moral* responsibility. The Project of 1921 was based upon an anthropo-sociological view of crime and rejected the view that punishment must retain its afflictive character. Rocco and his aids (among whom were eminent jurists and Italy's most famous legalists) insisted upon the retention of the doctrine of "freedom of the will" and the autonomy of punishment as such. It is my contention that this difference more than any other doctrine accounts for the absolutely irreconcilable points of view in the new

[5]The Ferri Code of 1921 served as the model for the new penal codes of the Soviet Union (1927), Argentina (1922) and Peru (1924). The proposed codes of Cuba (1926), Brazil, Spain, Sweden, Denmark, Yugo-Slavia, Czechoslovakia, Roumania, Poland and Greece have accepted many of the reforms urged by the Italian positivists.

[6]The principal work of this penal reform is documented in 23 volumes, *Lavori preparatori del codice penale e del codice di procedura penale,* Roma.

[7]*Lavori,* etc., vol. 7, p. 9. 1930.

penal code of Italy. We may turn to the recent codes themselves to fortify this contention.

Book I of the penal code conserves the traditional principle of moral responsibility and, therefore, the notion of castigation as such. The modification, application, and execution of *punishment* (Book I, part V) rests primarily upon the syllogistic matching of punishments and gravity of offense—the traditional classicalist doctrine. On the other hand the last 41 articles of Book I, which deal with the administration of the *measures of security,* incorporate the most important concepts of the positivists.

The title of the new penal regulations, viz., "Regolamento per gli istituti di prevenzione e di pena" (Regulations Governing *Penal* and *Preventive Institutions*) indicates the two-fold character of penal treatment.[8] Part I deals with the execution of punishment while part II regulates the "Institutions for the administrative measures of detentive security."

The Code of Rocco and the new "Regulations" attempt to do the impossible. These laws accept the concept of moral responsibility as the criterion and justification for legal responsibility and, at the same time, incorporate many of the recommendations made by Ferri in his Project of 1921, which are based primarily upon the character of the offender.

Before analyzing the differences in point of view between punishment (pene) and measures of security (misure di sicurezza) I should like generally to characterize the prevailing spirit of the new code. On the one hand the measures of security, as viewed by Minister Rocco, have been introduced in the struggle against habitual, professional and the mentally abnormal criminals as well as against juvenile delinquents. It has been recognized that repressive means have not been successful against such classes of offenders. Hence, the measures of security are in nature preventive and not punitive. Similarly, the "Regulations" state again and again that the measures of security are intended to rehabilitate the *individual.* Yet, we find Minister Rocco stating that the new legal philosophy inspiring the new legislative work is only a derivation of the general philosophy of Fascism—a philosophy different from that which inspired the French Revolution of 1789 which declared the Rights of Man and gave rise to the penal code of 1791, and which served also as the model of Italy up to and including the Code of 1889-1931. The fundamental

[8]The "Regulations" are reprinted in the *Rivista Di Diritto Penitenziario,* May-June, 1931.

difference distinguishing the one philosophy from the other is the emphasis upon the individual as against the State. (The present reconstruction of German penal law and administration under the regime of Hitler is a reflex of the new position that the German State is playing at the present time). According to the philosophy of individualism, the right to punish on the part of the state is derived from the various rights of the individual surrendered to the state.

According to the Fascist philosophy the right to punish is the right of conserving and defending the State "born with the State itself" which assures and guarantees the fundamental and indispensable conditions of life in common.[9]

The new Italian code has not exclusively followed either the teachings of the classicalists or the positivists but has been eclectic, keeping an eye on practical needs. "It synthesizes and transcends the various scientific tendencies into a superior unitary organ." Again, Minister Rocco declares, "The truly proper field of penal legislation is and always remains, also according to the new code, the repressive defense against crime."[10]

In similar vein Dr. Giovanni Novelli, the Director-General of the Penal and Preventive Institutions, writes again and again, that the penal law must retain its castigatory (castigo) character and must be based upon the idea of "moral retribution," that it must aim to "intimidate," that the principle of the indeterminate sentence has not been incorporated in the system of punishment because it contradicts the purpose of retribution through punishment.[11]

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.

III. *The Measures of Security*

The idea underlying the measures of security is simple. They are to be imposed in those cases where punishment in itself is an insufficient instrument to protect society against crime. These means of security are intended to protect the state against the dangers of

[9] *Lavori*, etc., vol. 7, pp. 9-13.

[10] *Op. cit.*, pp. 7 et seq.

[11] Novelli, "L'esecuzione delle misure di sicurezza detentive" in *Rivista Di Diritto Penitenziario*, March-April, 1932, p. 8.

recidivism, the activities of the mentally abnormal and to prevent juvenile delinquents from developing into adult offenders. The measures of social defense aim to prevent the commission of crime in the future. Society can best be protected against certain groups of offenders by readapting them socially.

The penal law recognizes two special groups of offenders to whom the measures of social defense may be applied: those declared to be professional, habitual or criminals "through tendency" and those whose punishment has been mitigated because they suffer from some grave psychic infirmity, or are deaf and dumb, or victims of chronic alcoholism or drugs.

Special measures of security are imposed upon the various subclasses depending upon the type of "social dangerousness." The term of sentence is indeterminate except that a minimum period is provided for in certain cases. Discharge from the institution of prevention depends upon whether the "social dangerousness" has ceased to exist.

The measures of security are divided into two categories, personal and proprietary. The personal measures restrict the liberty of the individual through detention or through supervision without detention. The forms of detention are assignment to an agricultural colony or industrial workhouse or infirmary or institution for the physically and mentally unwell or to a reformatory. The forms of non-detention are supervision by the public authorities, the restriction of place of residence and interdiction of certain localities and the deportation of aliens. The proprietary measures consist of the confiscation of goods or objects which have occasioned or may lead to a criminal act, prohibiting the practice of certain professions, and the deposit of a sum of money, or its equivalent, which guarantees good behavior.

IV. *Punishment*

It is essential to note that we have been discussing the administration of measures of security which are always carried out in special institutions of prevention. The execution of punishment (pene) is carried out in entirely different institutions.

As a result of the dual system adopted by the new penal law it was necessary to create two systems of institutions and, hence, two systems of institutional rules. The essential and avowed aim of the prisons is to chastize, to punish. The betterment of the inmate plays only a secondary role. The principle of the indeterminate sentence

has not been accepted in the execution of sentences of punishment since it would detract from the severity and effectiveness of punishment.

The penal institutions have also been specialized in order to realize the aims of prisoners' classification. Special sections have been provided for prisoners over 18 years of age, disciplinary prisons for those who persist in the violation of prison rules, special institutions for "lifers," for those mentally or physically infirm, agricultural colonies and workhouses and "institutions of social readaptation."

Prisoners serving long terms may be transferred to the "institution of social readaptation" after having served a certain fraction of their sentence and having classified as "good" for more than three years. The theory is that a long prison term has made the inmate unfit to resume normal social activity. Hence, the discipline and regulations in this institution are less severe and the director of the institution may alter the general regulations with regard to those privileges which tend to foster sociability. Thus, even within the system of punishment, an attempt is made to overcome the evil effects of prison life.

Before indicating the differences between the system of punishment and the measures of security I should like briefly to comment upon the new administrative and executive institution set up by the new penal legislation to regulate both systems.

V. *The Surveillance Judge*

Under the new provisions of the administrative measures of public safety as well as the administration of punishment the surveillance judge (*giudice di sorveglianza*) occupies the most important position. His jurisdiction is defined and limited by specific sections of the penal code, the code of criminal procedure and the "Regulations."[12] The danger of conflicts between the judge and the director of the institution has been anticipated and, hence, the scope and contents of the powers of each have been specifically defined.

Briefly the director or warden has charge of the internal discipline and organization of his institution while the judge is really a type of penal magistrate with powers of examination, decision and recommendation in the execution of both punishments and the measures of prevention. In a word the surveillance judge legally guarantees the execution of the imposed sentences (instead of rely-

[12]See Code of Criminal Procedure, art. 635; Penal Code, art. 144; arts. 4 and 263 of the "Regulations."

ing, as do most countries, upon the arbitrariness of prison officials).

Article 4 of the Regulations governing penal and preventive institutions defines the jurisdiction of the surveillance judge with regard to the execution of punishments. He must visit the penal institution every 2 months to ascertain whether the legal provisions are being carried out. His observations are reported to the Ministry of Justice. Among other matters the judge deliberates over the admission of juveniles over 18 years of age to special sections, whether a prisoners is adapted to group life, the assignment of prisoners to the institution for social readaptation, to institutions for the mentally abnormal, to an infirmary, and concerning admission to an open air colony. He also decides upon the request for conditional release and hears complaints on the part of the inmates.

Article 263 of the "Regulations" defines the powers of the judge in the execution of the measures of security. The surveillance judge, in this case, visits the preventive institution "frequently" (which in practice is about once a month). Similar powers of transfer from one institution to another are granted the judge. In fact he may modify, change, or revoke any of the measures of security. He also passes upon the granting of certain periods of temporary freedom (*licenza*) to those prisoners maintaining an excellent record or in case of extreme need. This privilege may not be granted the condemned.)

To the surveillance judge is entrusted the important task of deciding whether the inmate's "social dangerousness" has ceased to exist and whether the inmate may be discharged. Such examination, as a rule, takes place at the expiration of the minimum period established by law for that type of security measure. If the outcome is unfavorable the judge fixes a new date for a further examination, which is usually six months later. The judge's decision, in theory, at least, rests also upon the recommendation of the prison director, chaplain and physician.

Each one of the larger prison districts is served by one or two surveillance judges.

VI. *Punishment versus Prevention*

No social theory or system is self-operating. It functions only through some form of organization directed by human agents. To estimate the value of the new penal ideas of Italy one must, therefore, observe the institutions in which they are applied and the personnel directing their execution. To begin with the Italian prison

program calls for differentiated treatment in the case of those sentenced to imprisonment and those detained under a measure of security. The Director-General of the Penal and Preventive Institutions speaking of this difference states that, "Once securing the respect of the rules and discipline the state of detention may be considered a means of making possible the success of the task of reeducation and cure and, therefore, one may divest it of all those restrictions which are not necessary for the attainment of the goal of the institution."[13]

The goal of the measures of security are supposed to be reached by a special regime of education and work which will resocialize the detained. The aim of imprisonment on the other hand is to intimidate the inmate as well as to deter the civil population from committing other criminal acts. One expects, therefore, to discover *essential* differences in both types of institutions. In order to present what are supposed to be the chief differences in the dual system in the most favorable light I should like to quote the Director-General's statement.

Among the most important differences are the following: The condemned are known by a number while the detained are called by name. For the condemned work is always considered an element of punishment while under the measures of security it is essentially a means of reeducation and readaptation. The condemned must pay their maintenance, the court cost of the legal proceedings and the damages resulting from their criminal act. The detained retain all of their wages except the expense for maintenance. Both the condemned and the detained may buy extra food rations but the former are limited in the amount they may spend. (The wages are approximately three to four cents a day. The detained receive approximately a cent more per day than the condemned.) The detained have wider privileges in letter-writing and visits, as well as the privilege of the temporary freedom (which is rarely exercised). The detained may be released when their "social dangerousness" has ceased to exist but the condemned are under a definite sentence.[14]

From the point of view of the purpose of the measures of security, viz., the prevention of future criminal acts through an individualization of treatment, it seems to me that the only factors which may be considered efficacious are the labor and educational elements and the length of time spent in the institution. But even in these

[13]Novelli, *op. cit.*, p. 14.
[14]Novelli, *op. cit.*, pp. 17 et seq.

two cases it is difficult to recognize any significant difference—at least under the present administration of the penal and preventive institutions.[15] I confess that during my visits to the various institutions of punishment and prevention I failed to observe any significant difference in the forms of work. I sought for such differences in the largest industrial prison for the condemned and one of the largest industrial institutions for the detained. Fitting work to the capacity or talent of the inmate is as difficult in Italy as elsewhere. Apart from the economic necessity of limiting the types of work the demand for specific products also limits the kind of work offered by penal and preventive institutions.[16]

The educational activities of both types of institutions have not progressed beyond the stage reached in the prisons of America. Certainly there is no difference in curriculum. The usual elementary school subjects are presented. The libraries do not excite admiration. As for the personnel in charge of moral and social education the problems in Italy are, once again, not different from other countries. One finds a large group of indiscriminate guards with no particular aptitude or training and a few outstanding higher officials who are exceptional. (The new penal program of Italy calls for the continued expansion of the present courses for officers and guards.)

The detained, it will be recalled, are subject to release when their "social dangerousness" ceases. While the condemned receive a determinate sentence they are, nevertheless, subject to conditional release after serving a certain fraction of their sentence. The observation has often been made by experienced prison administrators that the "old-timers" make the better prisoners. Conformance to prison rules is the beginning and end of institutional wisdom. Since the passing of "social dangerousness" is determined in large measure by the institutional record and, since the conditional release of the condemned is also based upon "good" conduct, it seems that there is little difference in establishing the time of release in the two cases. Theoretically, the judge of surveillance is supposed to determine the time of release through a thorough examination of the detained and all the facts bearing upon his offense and previous life. Practically, he

[15]It is interesting to note that both Ferri and Liszt insisted at the International Prison Congress in London that there was no essential difference between measures of security and punishment.

[16]Italy has established a Labor Commission in the Ministry of Justice whose task it is to determine the kind and amount of work to be assigned to the various institutions. Most of this work will be for "state's use." A splendid practical result of this Commission is evidenced by the fact that in relatively few months almost all of Italy's condemned and detained who can work will be employed.

relies upon the prison record, the recommendation of the warden, the reports of the legal proceeding and whatever records the police may be able to furnish. Systematic social case investigation is unknown in Italy so far as the treatment of inmates is concerned. Furthermore, one surveillance judge visiting institutions with four and five hundred or a thousand or more inmates, once or twice a month for a few hours is not likely to effect the kind of "individualization of treatment" the penal theory calls for.

VII. *Penal Philosophy*

The most serious objection to the two-fold system of the Italian prison program is its fundamental lack of clarity. Again and again the higher officials in the Ministry of Justice with whom I had spoken maintained that it was merely a question of time before the program would be integrated. While this may hold true for certain aspects of the new system I think the fundamental character of the new program is both psychologically and logically unsound.

It must be remembered that the execution of measures of security almost always *follow* the sentence of imprisonment. The offender is substantially, if not legally, serving a double sentence, a prison term and a term of preventive detention. First, the offender is punished, castigated, intimidated, given a number instead of a name, made to expiate his crime. Then, after a long prison term which unfits him socially, and which has bred a spirit of vindictiveness, the culprit is to be transferred to an institution of prevention where he is to be socially readapted. (I refer especially to the large group of habitual and professional criminals who constitute the most serious social danger.)

Logically the Italian students have attempted to unite concepts fundamentally opposed. Despite the positivist elements incorporated in the new law the dominant classical tendencies remain entrenched. The basic attitudes of punishment *as such* and prevention are inconsistent with each other. Punishment as one *means* of a system of prevention may be rationally justified, but when accepted as the primary purpose of imprisonment and when justified on the grounds that the *morally* responsible criminal must suffer for his act, it ceases to have any connection with the positivist teachings.

One either supports the traditional classical system with its central doctrines of moral responsibility and matching offense with punishment or else accepts the positivist's view of protecting society

by sanctioning measures of social defense against those who are declared *legally* responsible. The difference, it must be emphasized, is not merely terminological. In one case the problems of crime and criminals are approached with moral presuppositions while in the other the social phenomena of crime are approached as any other group of social phenomena which one wishes to understand in order to control. *The difference in point of view will have far-reaching implications in the institutional treatment of inmates.* To hold both points of view at the same time can lead only to confusion in theory and, what is worse, tragedy in practice. The morals of Moses and the methods of Galileo can no more be mixed than oil with water.[17]

[17]I have not dealt with the treatment of juveniles, the reformatories or the after-care of prisoners. The agricultural and industrial colonies, set up by the Italian government in Sardinia and the Tuscan archipelagos, which cover thousands of acres, offer, to say the least, a remarkable opportunity to the physically weak to rebuild their bodies. The Council of Patrons, the Italian administrative organization supervising the after-care of the inmate, is, I believe, one of the best creations in the new prison program of Italy. I have briefly described this institution under the title, "Council of Patrons." *The Journal of Criminal Law and Criminology*, Vol. 24, Nov.-Dec., 1933, p. 768.