

## FROM PIETRO ELLERO TO ENRICO FERRI: THE GENESIS OF PENALISTICA SOCIALE\*

### DA PIETRO ELLERO A ENRICO FERRI: LA GENESI DELLA PENALISTICA SOCIALE

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*Abstract English:* This article treats the genesis of the *penalistica sociale* that emerged in the last two decades of the nineteenth century, which was a movement of jurists who showed great sensitivity to the social dimension of law and who attributed a decisive role to social factors in the generation of crime. The first part of the article will focus on the definition of *penalistica sociale* and the overcoming of the label 'legal socialism'; then the different contributions made to *penalistica sociale* by Pietro Ellero and Enrico Ferri will be examined. The two authors can be considered the precursors of *penalistica sociale*.

*Keywords:* *penalistica sociale*; legal socialism; Pietro Ellero; Enrico Ferri; criminal law 19th century

*Abstract Italiano:* L'articolo tratta la genesi della *penalistica sociale* che si afferma nell'ultimo ventennio del XIX secolo, ovvero un movimento di giuristi che mostra grande sensibilità per la dimensione sociale del diritto e attribuisce un ruolo decisivo ai fattori sociali nella generazione dei crimini. Una prima parte dell'articolo si concentrerà sulla definizione della penalistica sociale e sul superamento dell'etichetta socialismo giuridico; successivamente verranno considerati i diversi contributi apportati alla penalistica sociale da Pietro Ellero e da Enrico Ferri. I due autori possono essere considerati i precursori della penalistica sociale.

*Parole chiave:* Penalistica sociale; socialismo giuridico; Pietro Ellero; Enrico Ferri; diritto penale XIX secolo

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\* This paper is drawn from my doctoral dissertation entitled *La penalistica sociale. Dal socialismo giuridico alla Scuola sociale del diritto penale*, which analyses the scientific penal movements that animates the last two decades of the nineteenth century. Here I propose a review of the chapter devoted to the genesis of the so-called *penalistica sociale*. Trying to translate *penalistica italiana* into English is a difficult and perhaps aimless task. For this reason to indicate the movement of criminal law jurists sensitive to social criminal law I will use the concept of *penalistica sociale*.

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### 1. Introduction: from Legal Socialism to Social Criminalistics

It is well known that the category of legal socialism<sup>1</sup> is unsuitable to describe the development of that movement which animates Italian criminal law at the end of the 19th century and which Mario Sbriccoli has famously defined as «social criminal law» to describe a «cultural presence» which «crosses different schools and different moments»; a composite tendency «moved by a general need for justice»<sup>2</sup> and not a school of jurists generated by a social-political socialist design. Moreover, reflection on so-called legal socialism has mainly concerned the science of civil law, considering its development with reference to the new trend of European civil law<sup>3</sup>, and there is only brief mention in the sources of legal socialism in criminal law. Therefore, it is not surprising that historiography has studied more the jurists of civil law<sup>4</sup>, so that the reflection in the field of criminal law is limited to a few, albeit important, contributions that have dealt directly with legal socialism in criminal law<sup>5</sup>. Conversely, there has been copious writing on the Positive School and the process of socialization of criminal law in the last two decades of the nineteenth century, with a nod to socialist and solidarist theories that influenced the Italian penal system<sup>6</sup>.

The reduced reflection on criminal legal socialism is certainly due to the combination of two factors: on the one hand, there is the label of legal socialism that has been devised for the definition of civil law theories, which are almost indissolubly linked with the development of labor law and in general with the estab-

<sup>1</sup> About the legal socialism: Panunzio, 1906; Cosentini, 1910; Donati, 1910. More recent: Sbriccoli, 1976; Cascavilla, 1987 and Grossi, 1988; but also Maestri, 2020. To these works are added numerous articles written in various reviews: Ungari, 1970, pp. 241-68 e 387-403; the number III-IV, 1974-1975 of *Quaderni fiorentini per la storia del pensiero giuridico moderno*, titled *Il socialismo giuridico. Ipotesi e letture*; Carini, 1981-1982, pp. 54-100. At the end: Stronati, 2012, pp. 405-412.; e di Mazzarella, 2015, pp. 381-423.

<sup>2</sup> Sbriccoli, 1974-75, pp. 557-642: 559. Please note: the translation of Sbriccoli's words is mine. Likewise for the quotations, between the quotation marks «», that follow in the text.

<sup>3</sup> In this subject Grossi, 1988

<sup>4</sup> Schirò, 2020, pp. 1-22.

<sup>5</sup> See: Neppi Modona, 1971, pp. 29-33; Guerini, 1974, pp. 431-475; Sbriccoli, 1974-75.

<sup>6</sup> The citations in this sense can be many, for example: Papa (ed.), 1985, Mazzacane, 1986, Cavassoli, Lacaita (ed.), 2002; Lacchè, Storti, Colao (ed.), 2015. Also: Colao, 2012, pp. 349-356; Latini, 2017, pp. 1-12.

ishment of the welfare State<sup>7</sup>; on the other hand, the presence and expansion of the Positive School has absorbed any movement or tendency that is far from the liberal tradition, or that shares, even partially, the principles and ideals of the Positive School itself, so that the socialization of criminal law has been reduced to a current of the Positive School.

Having said that, it seems appropriate to note that all researchers who have dealt directly with penal legal socialism recognize the distance of this movement from political socialism in the strict sense and denounce the equivocal nature of the label legal socialism<sup>8</sup>. In point of fact the socialism of jurists is a *lato sensu* socialism, a heart's socialism, a sort of *sensibility* for each jurist that understand the gravity of the social issue, a question that involves the criminal law and produces the criminal matters<sup>9</sup>. In the theories of these jurists there is truly little reference to socialism, but rather an empathy with the social dimension of the criminal phenomenon, which is attested by recognizing the privileges of the bourgeois class in the order and law, asserting the importance of social factors as causes of crime, and arguing for the need for reform in this area for the resolution of the criminal question. In fact, these jurists criticize the abstractionism of criminal law, which ends up being arbitrary and unjust, so to use Ferri's words, the socialization of criminal law is affirmed to overcome the «excess» of individualism and «restore the balance between the social element and the individual element»<sup>10</sup> in crime. The label legal socialism, therefore, is «useless and false»<sup>11</sup>, a redundant simplification of a series of theories that have little to do with socialism.

The historiographical fortune of an alleged group of socialist jurists is due to the historical contingencies of the second half of the European nineteenth century in which every theory, aimed at supporting the realization of a new social order based on equality of economic conditions, general welfare for all classes and the right to decent work for all, is traded on the basis of only «family resemblance»<sup>12</sup> to socialism. In this period there are a medical socialism, an anthropological socialism, a philosophical socialism and also a legal socialism, but the latter appears, in my opinion, particularly inappropriate as it leads to a juxtaposition of the theses concerning the socialization of law with socialism.

<sup>7</sup> About the welfare State see: *Quaderni Fiorentini per la storia del pensiero giuridico moderno* XLVI, 2017 titled *Giuristi e Stato sociale*; in particular: Stolleis, 2017, pp. 17-40; Costa, 2017, pp. 41-102; and Cazzetta, 2007, pp. 103-140. In addition: Stronati, 2016, pp. 380-386.

<sup>8</sup> Neppi Modona, 1971, and Sbriccoli, 1974-75.

<sup>9</sup> About the *questione criminale*: Lacchè, Stronati (ed.), 2014.

<sup>10</sup> E. Ferri, *Sociologia criminale*, Torino, 1900<sup>4</sup>, p. 23.

<sup>11</sup> The legal socialis is for Paolo Grossi «una indicazione sofferente» a label «evocata ed invocata da molti in questi nostri ultimi venti anni come categoria storiograficamente appagante e munita di un grosso valore definitorio per il suo apparire a tutta prima come un monolito». Grossi, 1988, p. 16.

<sup>12</sup> Petrucciani, 2018, pp. 371-388.

The most suitable adjective for describing the general trend involving many jurists at the end of the century is not socialist but is instead social. Social in its most authentic sense (i.e., not individual) refers to a series of theories concerning a complex society made up of different subjects and endowed with rights that must be protected by law. The doctrines of the jurists were «social», not socialist, and all followed «a triumphant principle of sociality»<sup>13</sup> rather than socialism. Having said that, it is possible to identify jurists who fully embrace the era of sociality, and are seduced by evolutionist, Darwinist, solidarist, democratic and anti-individualist theories; they support the new scientific method of positivist study, they carry out various and extensive references to sociological research aimed at identifying universal laws of behavior and human development, to which the law must necessarily draw as it is the result of a specific society in a specific historical period.

The crisis of the individualistic system, the rediscovery of the social produced by the great revolutions of the nineteenth century, and the affirmations of the social sciences led to the birth of a heterogeneous movement of jurists who proposed a socialization of law as a means for the resolution of the social question, and thus gave birth to a «new tendency», which is «positive and social»<sup>14</sup>, which converges not in legal socialism but in movements that can be indicated as: *penalistica sociale* (social penalistic).

Within the category of *penalistica sociale* it is possible to include those jurists who show evident sensitivity to social issues, such as: Bernardino Alimena (1861-1915), Emanuele Carnevale (1861-1946), Napoleone Colajanni (1847- 1921), Eugenio Florian (1869-1945), Luigi Majno (1852-1915), Carlo Manes (1887-1971), Alfredo Pozzolini (1877-1936), Filippo Turati (1857-1932), Adolfo Zerboglio (1866-1952); but also Giovan Battista Impallomeni (1846 1907) and Michele Angelo Vaccaro (1854-1937). These authors give a decisive role to social factors in the generation of crimes; they interweave the social sciences with criminal law in an anti-individualist and sociological key, proposing, with different theoretical gradations, a resolution to the criminal and social question that afflicts European society. Using the category of social penalistic allows us to overcome the ambiguity of legal socialism by reconstructing more accurately the movement of jurists who, while starting from different traditions and scientific inclinations, affirmed the need for a socialization of criminal law and found legal answers to the many social problems that afflict society. In other words, changing the research coordinates of the time, abandoning the category of juridical socialism, allows us to

<sup>13</sup> The words are by Enrico Cimbali, who speaks of a «principio trionfante di socialità». E. Cimbali, *La nuova fase del diritto civile nei rapporti economici e sociali con proposte di riforma della legislazione civile vigente* (1884), poi inserite in Id, *Opere complete*, Torino, Utet, 1895, p. 40.

<sup>14</sup> See G. Vadalà-Papale, *La nuova tendenza del diritto civile in Italia*, in «Rivista di Giurisprudenza di Trani», VIII, 1893, pp. 588 ss.

reconstruct more clearly a syncretic juridical movement that reaffirms the link between society and law, denounces the inequalities perpetrated by the codes and proposes a series of reforms in order to achieve a law, and therefore a more equitable and just society.

After this indispensable premise, the following pages focus on the figures of Pietro Ellero (1833-1933) and Enrico Ferri (1856-1929) who, in different ways and a decade apart, can be considered the precursors of social penalistic, among the first to express the need to connect the Italian penal system to the political-social and economic conditions of the country.

The following comparison of the two authors concerns exclusively the contribution they give to the affirmation of Italian criminal social law, without wishing and being able to deepen the numerous differences existing in the juridical theses of these two great criminalists; after all, the two authors do not belong to the same school of thought and are committed to very different criminal law themes connected to two different historical periods<sup>15</sup>. The only comparison that can be made concerns Ellero's reflection on social law which ends, as will be seen, at the beginning of Ferri's reflection.

## 2. *Prevention is better than cure: Pietro Ellero and the prevention of crime*

Pietro Ellero's works influenced the theories of many jurists at the end of the century, and his personality is certainly worthy of further investigation. Ellero is an «anomalous penalist»<sup>16</sup> whose ideas cannot be fully incorporated into any legal school of the time. However, he managed to influence and anticipate not only the jurists who dealt with punitive law and, more specifically, with capital punishment<sup>17</sup>, but also all those who worked to reform the Italian penal system from a social point of view. With regard to the theme of this contribution, it should be noted that he is among the first to denounce the responsibility of society in the formation of delinquency, identifying an etiological link between the bourgeoisie and crime, where the dominant class indicates as delinquency everything that goes beyond its value system and condemns those who are victims of the

<sup>15</sup> In fact, Ellero had been formulating his penal theories since the early 1860s: the *Trattato della critica criminale* (1860), the pamphlet *Della prevenzione dei crimini* (1861), and the booklet *Sulla emenda penale* (1861), to which he added his thoughts on the death penalty (from 1861 until 1964, with Carrara, he directed *the Giornale per l'abolizione della pena di morte*) and his writings on criminal laws and on the Italian penal code. All these works were partly incorporated into *Opuscoli criminali* of 1874 and *Trattati Criminali* of 1875. On the other hand, Enrico Ferri, from the 1880s onwards, tackled very different themes and issues related to a different historical period.

<sup>16</sup> The definition is from Floriana Colao in her preface to Alberto Torini's essay, see Torini, 2020, p. 11.

<sup>17</sup> On Ellero's important role in the debate on the abolition of the death penalty see Torini, 2020, pp. 25-60

misfortune of being born poor. According to the jurist, society is built on the basis of the interests of a particular social class and criminal law is transposed as a means of maintaining a system of power and to counter the claims of other classes. Preliminarily, it should be noted that Ellero is not a jurist close to socialist circles, indeed socialism is considered almost like “witchcraft”<sup>18</sup> and, moreover, it should be noted that many of his penal theories are closer to the Liberal School than to the Positive School<sup>19</sup>; however, there is no doubt that some of the works of the Friulian jurist show an evident sensitivity to the themes of social criminal law. He, in fact, perceives the poor function of an excessively dogmatic and abstract criminal law, which struggles to find the measures to regulate reality and cope with the spread of crime. According to Ellero, the law that has focused on the repression of crimes has essentially failed, which is why legislation must be more concerned with prevention. Hence Ellero’s idea to intervene on the penal norms by abolishing «atrocious punishments» and operating «the diminishing of myths». Prevention must become a «social institution» through legislation that makes it «stable, regular, systematic, universal», until it becomes «similar and superior» to the «ministry of punishment»<sup>20</sup>. The law, and more specifically criminal law, must be immersed in the social reality that generates it, so that in order to address the criminal problem it is necessary to «penetrate the inner darkness of the human heart, and together syndicate the life of ‘people, and customs and cults, and up to the hinges on which rests the social coexistence»<sup>21</sup>, in this way it is possible to foresee measures of crime prevention, which in all likelihood anticipate many of the *sostitutivi penali* elaborated by Enrico Ferri. Thus, according to Ellero, the ultimate preventive measure is education:

l’educazione, presa in un senso generale, raggiante dal trono, dal pergamo, dalla tribuna, dalla cattedra, dalla scena... imperante coi precetti, insinuante con gli esempi, attraente con gli affetti<sup>22</sup>.

<sup>18</sup> Ellero writes: «il socialismo più recente è in certo modo ciò che la stregoneria era negli andati tempi: vale a dire questa, cosa di donnicciole erotomania che, schifose e spregiate, che in mancanza di meglio si davano al diavolo; e quello di sciatti e ignoranti proletari, che veggono il mondo attraverso le botole dei sotterranei e gli abbaini delle soffitte loro» P. Ellero, *La questione sociale*, Bologna, 1874, p. 152.

<sup>19</sup> Of the same opinion Dell’Erba, 1985, pp. 299-305. More precisely, Ellero can hardly be inserted in a school or in a tradition considering the heterogeneity of his production and of his often emphatic and abstract style, it is not surprising that historiography has inserted the author now among the «conservative liberals», now among the «conservative socialists», now among the socialists of law, now among the anti-socialists (See. Vano, 1993, pp. 512–520).

<sup>20</sup> P. Ellero, *La questione sociale*, Bologna, 1874, p. 44.

<sup>21</sup> *Ivi*, p. 42.

<sup>22</sup> *Ivi*, p. 54.

Ellero conceives education as a means by which to become morally and intellectually perfect, so that “civil and juridical protection” is a guarantee ready to intervene only as a last resort, in order to re-establish «the life happy and free». Investing in education means reforming the school and the family, but also «religion, literature, and art» which «are the three primary educators; all three direct man to the good, the true, and the beautiful»<sup>23</sup>.

Alongside these preventive measures, which can be called social, Ellero identifies legal «measures» to «avoid criminal stimuli and appetites», which he calls *reagenti criminali* (criminal reagents). Among these I can mention «the protection of cults and beliefs» by the State. For Ellero, in fact, moral and religious teaching has a double value, on the one hand «appeasing wickedness», and on the other relieving the «victim of social injustice». Still, a civil and religious institution on which to intervene to prevent crime is, for Ellero, the family, because it is difficult to «forget the admonitions and lessons of the family». A good citizen is first and foremost a good son, and every human being «before the justice of the magistrate is subject to that of his father, before he learns virtue and faith from his mother, then he learns them from the tutor and the priest»; therefore a criminal reagent is certainly the protection of the family «sanctified in the marriage, constituted in the patria potestà», and therefore the family unit is, according to the jurist, a fundamental means for the prevention of the crime<sup>24</sup>.

Other measures identified are related to school and theatre performances, in particular the latter, according to Ellero, often have an «evil influence» capable of corrupting and inviting people to crime, therefore it is necessary to control and limit their performance. While the author attributes a fundamental role in the prevention of crimes to education, in fact, according to the Friulian jurist, the school must uproot «a flourishing and deadly plant: ignorance»<sup>25</sup>; for this reason he argues the necessity of a public education from preschool to university.

The purpose of *reagenti criminali* is «remove the occasions that generate wicked inclinations», in this way it is «impossible to commit a crime», and the best method to do this is: guarantee every citizen «more freedom to say and to do what they want, when it does not violate justice».

Ellero, moreover, writes that it is important to provide a slender legal system, with a «good police» that are vigilant and protect «all social fibres»<sup>26</sup>; in this context also the criminal law must be slight, with punishments aimed at prevention and that are certain, public and appropriate<sup>27</sup>.

For the jurist legislation has to consider the needs of society and so:

<sup>23</sup> *Ivi*, p. 55.

<sup>24</sup> *Ivi*, p. 57.

<sup>25</sup> *Ivi*, p. 58.

<sup>26</sup> *Ivi*, p. 64.

<sup>27</sup> On the function of punishment as crime prevention see pp. 129 e ss.

dare a tutti di lavorare e di vivere, poiché il maggior numero di delitti (abbiatele a mente) viene dalla miseria e dall'ozio. Fondare colonie, costruire grandiose opere pubbliche, istituire ricoveri per la mendicizia, abolire il lotto, vietare ad ogni costo l'accattonaggio (che ingenera tutti i più turpi vizi) quietare gli ammutinamenti fin dal nascere... e tali altre sono le misure atte a togliere lo stimolo delle voglie criminose<sup>28</sup>.

From the analysis of *reagenti criminali* it is possible to understand that Ellero thinks that the reasons for crime are *inside* the delinquent, are moral causes connected to the emotions and passions of the criminal, for this reason the principal aim of prevention is to stop «the hidden sources of crime, to surprise the future criminal in the remote virtuality of the crime, still before the crime flashes in his mind»<sup>29</sup>. Ellero writes that in men's minds, in front of external social impulses, the possibility of crime may arise, but with preventive measures called *reagenti criminali*, it is possible to intervene by nullifying these social impulses, preventing the criminal intent from forming in the individual's conscience.

The defect of Ellero's provisions resides in their abstractness; many measures, in fact, lack the concrete proposals necessary for their realisation. In other words, the references to the propaedeutic social reforms to give life to the various criminal reagents are missing, which, in fact, require structural and long-term interventions which Ellero seems to ignore. However, despite the obvious incompleteness of his theory, the novelty of the Friulian jurist's reasoning appears undoubted. He approaches the criminal phenomenon to the social question, perceiving the need to implement wide-ranging social reforms to counter the spread of crime, identifying the delinquent not as an abstract subject to whom a sanction can be mechanically applied, but as an individual immersed in a complex social reality that produces delinquency through stimuli external to his conscience.

### 3. Ellero's social works

Ellero's original elaboration of crime prevention measures reveals his undeniable sensitivity to the issues of social criminal law, a sensitivity that can be inferred mainly from his major social works: *La questione sociale* (1874), *La tirannide borghese* (1879), *La riforma civile* (1879) with which, wrote Achille Loria (1857-1943) on the occasion of his commemoration: «disertava il placido lago degli studi criminali per cimentarsi nell'oceano periglioso delle generalizzazioni sociologiche»<sup>30</sup>.

Ellero's sociological analysis is based on the social question that developed in Italy during the 19th century in relation to a series of factors that led to the crisis of the legal and social system, which for Ellero can be traced back to four main

<sup>28</sup> *Ivi*, p. 59.

<sup>29</sup> *Ivi*, p. 66.

<sup>30</sup> A. Loria, *Pietro Ellero*, in "Archivio Giuridico Filippo Serafini", vol. CIX, 1933, pp. 129-131: 130.



causes: «il perturbamento delle idee morali, l'affievolimento delle forze conservative, la larghezza delle forme politiche, e l'asprezza delle condizioni civili e soprattutto economiche»<sup>31</sup>. According to the jurist, society is marked by a «moral chaos» that leads to the questioning of every principle and moral rule, a chaos favoured by a political situation in perpetual crisis, given that the revolutions of the previous century (English, American and French) have generated in people a particular restlessness that leads them to a state of «continua febbre e in periodici sussulti»<sup>32</sup>. In this state of political and moral turmoil and fragility, it «is natural» that «the social elements are in turmoil», all the more so if the legal system is left to «demagogues and autocrats, doctrinaire and empirical» who concentrate on «striking out against antiquarian orders»<sup>33</sup>; such moral and legal arrangements lead to a general crisis in society. Ellero analyses the *social question* and identifies a series of reforms to resolve this issue, reforms involving «the property, the family, the state and the religion»<sup>34</sup>, according to the author, the foundations of society. The Friulian jurist's observations introduce many themes that were later taken up by the authors of social penalistics and also by socialist thought, although Ellero is highly critical of socialist political theories, which he defines as the bearers of a reactionary revolution, aimed at creating a society made up only of «factories, a kind of large industrial plant». On this point he clarifies: «I agree that both the rich and the poor have an equal right to happiness, and that the interests of the 15 million idle Europeans must be silenced in the face of the needs of the 60 million workers», but for him socialism «proposes an unattainable aim»<sup>35</sup> and wants all workers or all labourers. The jurist's aversion to socialism, after all, is not surprising; in his observations on the condition of the underprivileged, on the crisis of criminal law, he alternates lucid social analyses with abstract and moralistic considerations of reality. Ellero appears extremely conservative, almost aristocratic, but at the same time a farsighted innovator; and using almost nostalgic tones of the *Ancien Régime*, he fiercely criticises the bourgeoisie, that «elected» and «dominant» class which is responsible for the social question and the crisis of criminal law, but above all is responsible for the condition of misery and delinquency of the «plebs». In his 1879 essay entitled *La tirannide borghese* (The bourgeois tyranny), Ellero shows his aversion to this class which is the «greatest cause of today's suffering»:

Ebbene, perché una coorte di sensali e di appaltatori, come stormo di corvi e di avvoltoi, si è precipitata sul campo di battaglia a spogliare i cadaveri degli eroi e a satollarsi delle loro carni? Perché tanto tesoro di affetti e di sacrifici si è violato e

<sup>31</sup> P. Ellero, *La Questione sociale*, cit., pp. 7-8.

<sup>32</sup> *Ivi*, p. 9.

<sup>33</sup> *Ibidem*.

<sup>34</sup> *Ivi*, p. 25. For an in-depth analysis of the reforms identified by Ellero, see: Brini, 1887; e Zanichelli, 1901, pp. 506-519.

<sup>35</sup> *Ivi*, p. 153.

dissipato; e il mercimonio e il guadagno, la menzogna e la furberia, lo scetticismo e il cinismo ne occupano il luogo? Perché fino l'amor di patria è diventato una malinconia da vecchi rimbambiti, e le attrattive sublimi della grandezza e della gloria vezzi da sguadrine sfatte? Perché il popolo ebbe lo sfratto dallo stato stesso, cui aveva creato; e lo si alloppia e dissangua e scarnifica ognora senza misericordia? Perché non si parla in tanta sua miseria d'altro, che di opulenza e di prosperità, d'economia e di finanza, di baratti e di cambi; e le lettere e le arti, piegando il capo per vergogna e smorzando le faci, mandano un ultimo bagliore livido e sinistro? Donde in somma sono proceduti tutti codesti abominii, che io descriverò qui entro in più centinaia di capitoli; da quale antro e da quale mostro d'averno?

The answer to these questions, Ellero continues, «is summed up in two words». bourgeois tyranny. If in the past the «caste of warriors» prevailed, at other times «that of priests» prevailed:

Ora prevale quella del cetto industriale e di tutto si fa mercatanzia, e la bottega e il banco sostituiscono il tempio e il trono. Di guisa che, se un giorno dovesse l'infima turba laboriosa prevalere, l'officina avrebbe l'impero, e lo eserciterebbe co' gl'istinti ruvidi della manualità e co' gli stimoli rabbiosi della fame. Onde la tirannide borghese, che non è altro, se non la beffarda e avida signoria del predetto cetto, costituisce la speciale oppressione del periodo storico, in cui viviamo; la fase sociale, cui attraversiamo, e la fonte suprema de' nostri odierni mali<sup>36</sup>.

The jurist professes to be free in his thinking and does not fear «punishment» or desire «rewards», and states that his is «a purely individual and universally rejected thought» and that he is «alone, alone, alone» in his «spiritual rebellion»<sup>37</sup>.

The author is extremely harsh on the «filthy monster» bourgeois class, which generates «disgust» and «horror». A social class made up of «traffickers» who have taken the place of «gentlemen and priests in the control of society» who have their main activity in the «abusive predominance of wealth», who above all pervert and deprave society with their lack of morals: «the economy becomes a science, a political art, a moral system, a religion; and the ministry of finance the supreme areopagus». This class, considered by the jurist to be selfish and greedy, deemed «soldiers to be parasites, philosophers to be fools, and the poor to be evildoers», and oppresses all classes, but especially the less well-off.

Ellero, after explaining who the bourgeois are, roughly calculates their number on the basis of the «lists of taxpayers of the tax on mobile wealth», and states that «the bourgeois of Italy are only 52,791»<sup>38</sup>, which means fewer than the gentlemen belonging to the noble families, but especially far fewer than the popular masses, which means smaller than the number of gentlemen of the noble families, but above all much smaller than the popular masses. Ellero, after historically

<sup>36</sup> *Ivi*, p. 15.

<sup>37</sup> *Ivi*, p. 13.

<sup>38</sup> *Ivi*, p. 26.

reconstructing the birth and development of the bourgeoisie, arriving at his contemporary society, examines all the characteristics of the bourgeoisie, denouncing its amorality, selfishness, abuse and oppression. In particular, he denounced the absence of any moral principle and value, the «brutality towards literature and the arts», «the particular enrichment to the detriment of the universal», «hardships reserved for the wretched», «iniquity of the tax system» and above all, and on this point it must be acknowledged that the author is prophetic, he denounced the «squandering of state property». According to Ellero, the bourgeoisie will go so far as to squander and destroy even seemingly «inexhaustible» natural assets such as water and air, which they will commercialise and then eliminate, depriving the poor of the last fragments of their property:

Già col dilapidar quello, ch'era proprietà di tutto il popolo, e quindi tanto de' poveri come de' ricchi, si veniva, per mitigar gli oneri ai ricchi, a privare i poveri d'una quota de' comuni averi. [...] Spogliamo i cari nostri concittadini della proprietà popolare: e poiché non vi sono altri diritti sacri, che gl'individuali, e i poveri non ne hanno veruno, [...] spogliamo costoro addirittura della loro particolar proprietà. [...] Perfin l'acqua potabile, è tal volta sottratta alla comunione umana: e potrà esserlo anche l'aria in futuro, con qualche investitura nuova, se non altro per muovere qualche mulino a vento<sup>39</sup>.

According to Ellero, tyranny is manifested and enforced by the bourgeois legal system which, as in every tyranny, is embodied in unjust law:

basterà mentovare la restrizione de' suffragi a un cetto di persone, che non è il popolo, e l'avvocazione de' giudizi criminali, detti di fatto, al medesimo cetto, ch'è precisamente il dominante e soverchiatore del popolo stesso; per conoscere tosto, come la ingiustizia sia proprio stata posta a fondamento dello stato<sup>40</sup>.

For Ellero, the denial of universal suffrage in favour of an electoral system based on the opinion of only «605,044 Italians» appears to be the first great injustice against the people who are «on earth the only lord of themselves». Hence a wide-ranging criticism of the legislation in force «which sanctions only one religion of the state», denying freedom of worship; or which focuses on the right to property with a «proud and jealous» defence of it, «forgetting all other social and human goods» and above all confiscating the property «of the church and other property of the people and of the poor». Again, the law hypocritically sanctions the equality of citizens: «what is the value of the proclaimed equality of all before the laws, if these same laws are not equal for all?». Ellero's criticism then focuses on the «defects of the criminal laws» based on the Penal Code, which «still maintains extreme punishment, in spite of the universal horror», but is above all founded on «deference to the rich and derision of the poor»; hence

<sup>39</sup> *Ivi*, p. 405.

<sup>40</sup> *Ivi*, p. 232.

the exhortation:

Date un'occhiata anche a questo, lettori miei, col lume della ragione; cioè liberandovi da que' pregiudizi, pe' quali sembra sacro tutto ciò, ch'è vieto o dall'uso consentito. E troverete gl'identici delitti scontarsi dal ricco con una breve villeggiatura o con un tenue esborso, e dal povero indeclinabilmente colla perdita della libertà (articoli 29, 30 e 67)<sup>41</sup>.

The Penal Code appears to Ellero to be the unjust law par excellence, in that it tends to guarantee bourgeois tyranny and thus severely punishes «offences against their currency and banknotes», but makes no provision for those who «offend the integrity and freedom of the people». The poor, the idle and the beggars are punished for the very fact of being poor, while the duel «which is the right of arrogance and arrogance» is punished lightly but «is never applied» since it concerns the «privileged class». Again, «if for the bourgeoisie charity is a trifle and poverty an abomination, it is easy to imagine what the fate of the thief must be»; in fact, Ellero explains, theft is punished more severely even than patricide; the petty thief is punished in an exemplary manner while there is great tolerance for those who show extreme «wickedness of spirit». So whoever steals risks «twenty years in prison» but for fraud «five years in prison at the most are sufficient, one year for breaking and entering, half a year for indecent exposure»<sup>42</sup>. Even the «bourgeois jurisprudence» is as unjust as the criminal law, indeed the court system for Ellero is the manifestation of bourgeois power and therefore afflicts the poor in a very harsh way since «the poor have very little reason to assert themselves before the courts». Justice is expensive, formal and slow, and appears inaccessible to the poor, so it is not surprising that the system generates injustice with crimes against property being widely and severely punished, while crimes against the person and morals are neglected. Ellero's criticism continues and concerns the police, the lawyers, the judiciary, and then focuses on the relationship between state and religion, on the morality of the bourgeoisie, on corrupt journalism that propagates bourgeois myths, and finally arrives at the possible consequence of bourgeois tyranny: socialism and therefore social subversion. In order to overcome the «extreme catastrophe» of the bourgeoisie, it is not possible to return to the *Ancien Régime*, because according to Ellero «even if we were better off, it would only be harmful to try to restore the past». According to the author, the solution is a series of reforms that can avoid «social subversion» and the socialist regime. For Ellero, socialism is no different from the bourgeoisie, so the anticlerical and amoral system focused on the economy would remain largely intact:

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<sup>41</sup> *Ivi*, p. 237.

<sup>42</sup> *Ivi*, p. 238.

Intanto la condizione economica delle moltitudini, in onta ai vanti degli economisti, rendesi sempre più grave e intollerabile. Tanto che, per non ridir d'altro (ed è del resto tutto quello, che di più atroce si possa asserire), ho già notato, l'alimentazione del popolo italiano non basta più all'uopo. Donde la frequente mortalità de' bambini e la rada longevità degli adulti, in confronto d'altre contrade; e la senilità precoce delle donne e l'orrida pellagra de' contadini. La qual condizione, ancor che fosse negli andati tempi uguale, ora è vie più resa grave e intollerabile dalla stessa libertà vera e supposta, che lascia senza protezione o aita i bisognevoli. Perciocchè allora tutti ne' rispettivi cerchi della società; in cui erano posti, avevano un fermo e stabile assetto; e fino i servi della gleba erano da' propri padroni vestiti e nutriti. Oggi ciascuno vive in una sorte precaria e incerta, lusingato più dalla speranza e deluso più dalla fortuna; e chi ha fame, ha da morir digiuno<sup>43</sup>.

#### 4. *La Riforma Civile*

Ellero's answer to the juridical and social malaise arising from bourgeois tyranny lies in *La riforma civile*. The essay is intended as a continuation of his *La tirannide borghese*, in which he highlights the problems of society, while with his second work, Ellero identifies possible solutions. In fact, through a series of reforms involving all sectors of society, from law to religion, from the economy to the family, the author argues that significant changes to the Italian social order can be achieved, thus avoiding the violence that would have resulted from the «socialist utopias» and communism. In order to solve the social problems afflicting society, the jurist envisages twelve tables of reforms, each one concerning different aspects of society to be intervened upon, so for example he proposes to reform customs with the creation of a «censorial authority»; again, to «resume abandoned customs»; to provide «compulsory and free education for the people»; to promote freedom of religion and a reform of the church; to limit the right to property by reconciling it with the rights «of the person»; to enact «labour legislation»<sup>44</sup>; to introduce universal suffrage and greater protection for the poor. The measures identified by Ellero are many, sometimes chaotic, and it is sincerely difficult not to lose the thread of the discourse in the flood of abstract social reforms. Here, however, I think it is appropriate to go into the reforms indicated by the author in relation to criminal law.

The fifth panel dedicated to the law begins with a declaration of intent: «I have promised that there will not be a proposal in this volume that is not only subversive, nor even in the slightest way, reckless or, as one would say now, socialist: and I will keep my promise», then specifies that proposing «the improvement of law» or «the abolition of servitude and torture» and other measures to protect

<sup>43</sup> *Ivi*, p. 502.

<sup>44</sup> P. Ellero, *La riforma civile*, Torino, 1881<sup>2</sup>, p. 244.

the people does not necessarily translate into being socialist<sup>45</sup>. This statement seems to be an admission of correspondence between the author's theses and socialist principles, a correspondence that embarrasses the jurist and leads him to distance himself from the opposed political thought. Ellero begins by analysing public security, proposing a reform of the police force, which in his eyes appears to be unlimited, often corrupt, almost a ravenous creature with no scruples, so much so that nothing remains «safe from its claws, not pity, not honour and not even the modesty of the citizens»; for Ellero, the police «is precisely the greatest trap, aimed at the liberties and rights of everyone». Police surveillance and coercive residence are the measures that most represent the excessive power of the police, so that «the most honest man, when poor, has no escape at all; he is first put in the condition of not being able to find work, and then (even if he bravely resists temptation) he is dragged from jail to jail, and from gaol to gaol for the rest of his life»; these measures must be reformed. Furthermore, the author denounces the «arbitrary criminal procedure» that regularises torture. Extensive reforms are also needed in this area, involving secrecy of the proceedings, seizure, search, inspection and «other offences against the rights of property, honour and freedom of the home and of the person» which constitute «legal harassment»<sup>46</sup>. Moving on to general criminal law, Ellero affirms the need for wide-ranging reforms that take account of crime, which «is not a thing that can be created at the whim of legislators, but is already marked and cursed by nature, as an act contrary to law, or more briefly, an insult». Consequent to the crime must be a correct «evil», but above all one that is proportionate to the crime, with the aim of deterring recidivism. Consequently, the punishment must have a corrective rather than merely afflictive purpose, so that emendation is to be understood as a «pitiful, noble and profitable act». In this context, the criminal is not «a beast without rights» but «a man and a citizen» with «inalienable and inviolable» rights to be respected, «since society can correct, but not deny the nature of criminal. On the contrary, since it must always respect man and the citizen, it can never annihilate his corporeal personality, nor even his spiritual one»<sup>47</sup>.

According to Ellero, the factors that generate crime often «are outside» the offender, so that, on closer inspection, «criminal imputability», if examined in depth, «even when not completely subjugated by fate», has «very limited limits. The criminal would not have become guilty if he had not been given such a constitution of the body or such a legacy of vice, and then the sad examples, the fatal occasions, the overbearing stimuli, the evil advice and the treacherous allurements». This thesis, later widely affirmed in social penalistic, leads Ellero to consider the criminal in an empathetic way, so that he affirms that «the natural

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<sup>45</sup> *Ivi*, p. 214.

<sup>46</sup> *Ivi*, p. 222.

<sup>47</sup> *Ivi*, p. 228.

sentiment, which it must arouse in us, remains compassion»<sup>48</sup>. After proposing the abrogation of the death penalty and of the most extreme punishments, Ellero deals with «criminal prevention», the only true means of combating crime, and refers to what he had already observed in his *Opuscoli Criminali*.

From what has been said so far, it is easy to understand how Ellero can be considered in every sense a precursor of social penalistics. In fact, in his social works there are many themes that are then widely taken up by later penalistics: his understanding of the criminal, to be treated as a sick person to be cured; the educational purpose of punishment; the identification of the social question, and the main causes of the criminal phenomenon; and above all, certainly among his most innovative ideas, there is the consideration that all social evils come from poor education and poverty. Ellero is in some ways a socialist without knowing it<sup>49</sup>, a latent positivist with his implicit denial of free will, but at the same time a convinced conservative and aristocrat, at times anchored in the past and nostalgic for the *Ancien Règime*, at times perhaps too modern for his time. His reflection, in some parts confused and abstract, nevertheless possesses unquestionable elements of novelty, and therefore I feel I can only partially agree with what Pitter<sup>50</sup> observed regarding the poor fortune and little follow up of Ellero's ideas. In fact, he undoubtedly anticipates Ferri in the elaboration of the substitutes of criminal law, inspires Vaccaro and Impallomeni in the conception of criminal law as an essentially class law, and finally denounces the abuses of the bourgeoisie. It is no coincidence that Ferri, Loria and Turati, his students in Bologna, took up his theses.

It seems reductive to think of Ellero only as the jurist opposed to the death penalty and therefore to link his fortunes to his commitment to the cause. He is clearly endowed with a great sensitivity to social issues, he stands halfway be-

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<sup>48</sup> *Ivi*, p. 229.

<sup>49</sup> It is not surprising that socialist and republican circles initially welcomed his social work with enthusiasm (cf. Zanichelli, 1901). On this point E. Maestri observes that Ellero is included by scholars of the twentieth century now among the «socialist jurists» (Accattatis, 1978), now among the authors of the «Classical School» (Guerini, 1974), now in a median way defining him as both «liberal jurist» and «a singular moralist-sociologist of social works» (Sbriccoli, 1974-75): cf. Maestri, 2020, pp. 87-88. The category of social penalistics, as I have already said, makes it possible to go beyond these schemes and definitions that are narrow to personalities like Ellero, indicating a syncretic cultural tendency, a presence that characterises legal science at the end of the 19th century regardless of the existing schools.

<sup>50</sup> See Pitter, 1993, p. 205; Pitter's thesis is also shared by Torini, who also claims that Ellero's social works «were misunderstood» by the public opinion of the time (Torini, 2020, p. 33). However, it is clear that, apart from the view of bourgeois public opinion, which was clearly shaken by the heavy criticism of the jurist, Ellero's theses are directly referred to by some authors in their works, see the pages of the aforementioned Colajanni, Impallomeni and Vaccaro.

tween the Italian penal tradition and social penalistics, and anticipates many of the themes that will be affirmed about a decade hence. The author, with his contradictions and his originality, can be considered among the precursors of social penalistics, and it is precisely his aforementioned sensitivity to social issues that make it possible to perceive Ellero as less isolated than the tradition states and than he himself probably felt<sup>51</sup>.

### 5. A missed opportunity: Enrico Ferri and social criminal law

In the space dedicated to the genesis of social penalistic, it seems necessary to recall and examine the role of Enrico Ferri in the development of social criminal law. He is the personification of the Positive School, and is among the first to show a certain sensitivity to social issues, an inclination that is evident in the enucleation of the central themes for the new School, relating to imputability and free will. Undoubtedly, the Mantuan jurist tried to give a turn to the Positive School, moving away from Lombrosian atavistic determinism to embrace a social and economic one, even if his theses sometimes appeared contradictory<sup>52</sup>. Indeed, reconstructing Ferri's contribution to the development of social criminal law is a rather complex task, given the author's fickleness on these issues and in view of the volume of his writings and his numerous swings between atavism and social determinism. In spite of this, it is clear that Ferri does not fully belong to the new criminalistic experience of social law, because despite his efforts, he remains too closely linked to Lombrosian theories, the theories that characterise the Positive School of Criminal Law. However, he can certainly be considered among the precursors of social penalistic<sup>53</sup>. In fact, the jurist is immediately aware of wanting to add to the anthropologically-oriented analysis of the criminal phenomenon a reflection on the social factors of crime:

Tutte le ricerche, eseguite finora sulla criminalità, ebbero per oggetto quasi esclusivo i fattori antropologici del reato, e tutt'al più alcuni fattori fisici, specialmente il clima e le stagioni; i fattori sociali invece, che ne fossero la popolazione e la

<sup>51</sup> Torini in his essay reports Ellero's malcontent towards the intellectual circles of the first years of the twentieth century that «ignore my existence at all or value me a thousand times less than a famous musician or novelist», underestimating the undoubted influence he had on the generation of jurists and sociologists of law of the last twenty years of the nineteenth century. Cf. Torini, 2020, p. 34; the words of Ellero: O. Roux, *Illustri Italiani contemporanei*, volume III, Firenze, Bemporad, 1910, pp. 201- 206: 201.

<sup>52</sup> See Latini, 2018. p. 46.

<sup>53</sup> On this subject it should be pointed out that many experts consider Ferri to be the first, and perhaps the most important, author of social criminal law; in this sense see: Cascavilla, 1887; Papa, 2002, pp. 151-169, as well as Neppi Modona 1971; Guerini 1974. The above-mentioned essays, place Ferri in legal socialism for his sociological vein, while Sbriccoli 1974-75, places Ferri among the incunabula of the movement, together with Turati and Colajanni.



produzione agricola, vennero in massima parte trascurati [...]. Quando invece il legislatore abbia una adeguata conoscenza dei fattori sociali del reato e della loro diversa potenza, gli sarà facile non solo di correggere talune idee esagerate o false sull'importanza di certi rimedi contro il diritto, ma di sopprimere anche le cause stesse del disordine, promuovendo un diverso assetto sociale ed attuando così una difesa veramente efficace contro l'attività criminosa dell'uomo<sup>54</sup>.

It is interesting to note that Ferri, when inserting the essay on criminality in France, from which the lines now quoted are taken, into his *Studi sulla Criminalità* of 1900, added an eloquent note to the quoted text:

Mi piace rilevare che, dunque, fino dal 1880 io misi in piena luce la importanza dei fattori sociali della criminalità, contro l'indirizzo fino allora seguito della statistica criminale. Ciò serve di risposta, per una parte, a quelli che in Italia ed in Francia, rimproverarono alla scuola criminale positiva, di preoccuparsi esclusivamente dei fattori antropologici del delitto, trascurando le cause sociali: e, per altra parte, serve a spiegare la logica evoluzione del mio pensiero, che è giunto gradualmente, ma sperimentalmente, fino alle ultime conseguenze della dottrina socialista, nel campo della sociologia generale e della sociologia criminale<sup>55</sup>.

At the beginning of the 20th century, the controversy between Ferri and his critics, both Italian and French, was in its final stages, so it seems quite significant to note that he defended his turn towards social criminal law, a turn his detractors considered weak and never concrete, but which Ferri nevertheless proudly claimed. Already in 1881, in his essay *I nuovi orizzonti del diritto e della procedura penale*, Ferri identified some social factors as causes of delinquency:

Sono fattori sociali: l'aumento della popolazione, l'emigrazione, l'opinione pubblica, i costumi, la religione, la costituzione della famiglia, il regime educativo, l'assetto politico, finanziario, commerciale, la produzione agricola ed industriale, l'ordinamento amministrativo della pubblica istruzione, della pubblica beneficenza, della pubblica sicurezza e infine l'ordinamento legislativo in genere, civile e penale. Una congerie, insomma, di cause latenti che si compenetrano e si intrecciano e si combinano in ogni più riposto meato della società, e che sfuggono quasi sempre all'attenzione dei teorici e dei pratici, dei criminalisti e dei sociologi<sup>56</sup>.

These factors concern the whole of society, from the criminal code to purely economic elements, in an analysis carried out in a sociological key that tends to neglect the theme of class criminal law, the expression of bourgeois power. From the outset, for Ferri, the aim of the Positive Criminal School is to:

<sup>54</sup> E. Ferri, *Studi sulla Criminalità in Francia. Dal 1826 al 1879*, in "Annali di Statistica", vol. XXI, 1881, pp. 8-61.

<sup>55</sup> E. Ferri, *Studi sulla Criminalità ed altri saggi*, Torino, 1901, pp. 17-60: 19.

<sup>56</sup> E. Ferri, *I nuovi orizzonti del diritto e della procedura penale*, Bologna, 1881, p. 72.

studiare la genesi naturale del delitto sia nel delinquente sia nell'ambiente in cui questi vive, per adattare alle varie cause i diversi rimedi. Scuola criminale positiva che ormai costituisce un ramo distinto e rigoglioso della sociologia generale, col nome appunto che dal 1883, io le diedi di sociologia criminale, per comprendervi così i dati sperimentali dell'antropologia, della fisio-psicologia, della psico-patologia e della statistica criminale; come le induzioni scientifiche sulla preservazione (preventiva e repressiva) dal fenomeno della delinquenza<sup>57</sup>.

It is not incorrect to state that in devising the criminal school he intended to integrate the medical-anthropological part of the positive school with different social nuances and, after a «first phase» in which «Lombroso's biological research» prevailed, «in a further phase», «the influence of social factors» was «less obscured by the glow of anthropological findings»<sup>58</sup>.

However, Ferri's thinking on the social factors of crime is contradictory<sup>59</sup> and places him among the most radical members of the Positive School, halfway between atavism and criminal sociology, unable to distance himself from the Lombrosian theories that envelop him and leave him sinking into the quagmire of *wrong science*<sup>60</sup> that characterises the Positive School, an experience that we

<sup>57</sup> E. Ferri, *Sociologia Criminale*, Torino, 1900<sup>4</sup>, p. 2.

<sup>58</sup> *Ivi*, p. 47.

<sup>59</sup> One of the most critical authors of Ferri was Michele Angelo Vaccaro who underlined the contradictions and «fundamental errors» of the Mantuan jurist who neglected social factors in the genesis of the criminal phenomenon, using «inconsistently sociology». See M. A. Vaccaro, *Polemica con E. Ferri*, in «Rivista scientifica del diritto», 1889, then in *ID Saggi critici di sociologia e di criminologia*, Torino, F.lli Bocca, 1903, pp. 233-247, in the same collection of essays see also the proclusion entitled *Sul rinnovamento scientifico del diritto penale. Prelezione al corso di diritto e procedura penale letta il 26 gennaio 1899 nella Regia Università di Roma*, Roma 1899, pp.153-172. More generically on Ferri's contradictions: Papa, 2002; Latini, 2018.

<sup>60</sup> To use the adjective «wrong» to define the science of the Positive School closest to some of Lombroso's theses on the atavism of the criminal phenomenon, in my opinion, does not seem wrong, in view of the fact that many of Lombroso's radicalisms have been disproved in the course of the 20th century, and many of the results of that science have been considered incorrect in the course of the 20th century. Moreover, one cannot deny the often bizarre, contradictory and vague theses elaborated by both Lombroso and Ferri; thus, for example, the credit given by the authors to spiritism, the contradictory theses concerning the death penalty, the racist themes or the inferiority of women, or even the studies on the incidence of the newborn bicycle in the causation of crime. There could be many more examples, all of them manifestations of the excesses of what ends up being an erroneous science. However, it is not my intention to decontextualise the theses of the doctor, and I share the thoughts of Emilia Musumeci, who in her essay *Cesare Lombroso e le neuroscienze* devotes some interesting pages to the «damnatio memoriae» that, especially in the public opinion of today, has affected Lombroso, who is nowadays synonymous with extravagance and curiosity, when in fact his theories in his time «had sense», which explains his scientific fortune (Cf. Musumeci, 2012, p. 24.).

believe should be kept distinct from social penalistics.

The human, in Ferri's view, is not free in his actions<sup>61</sup>, and the criminal phenomenon is determined by «anthropological, physical and social» factors. As proof of his only partial adherence to social criminal law, it should be noted that he never affirms the greater incidence of one of the three factors over the others. In other words, he does not consider the social factors prevailing over the anthropological and natural ones in the determination of the crime, so that «the crime is at the same time, a phenomenon of individual and social pathology - resulting effect of three orders of anthropological, physical and social factors, which constitute its natural genesis»<sup>62</sup>. In any case, anthropological factors seem to be the most important for Ferri as they are the «first coefficient of the crime», especially for «insane and born incorrigible criminals», who are «refractory to the modifying action of social institutions», while social factors would only intervene for second-hand criminals. However, it is in *Socialismo e criminalità* that Ferri expresses himself definitively on the importance of social factors: in fact, while authors such as Filippo Turati and Napoleone Colajanni support the incidence and importance of social factors, the real and «almost the only» determinants of crime, attributing to the bourgeois society the main responsibility in the diffusion of crime, he, using a variegated statistical armoury on delinquency, states that «social factors act, they, as an accidental occasion, while the real genesis, inevitable, - of the crime - is the individual temperament»<sup>63</sup>, denying in fact the bourgeois responsibility for the criminal phenomenon. For the jurist, the idea of a society capable of eliminating the social causes of crime is a mere utopia, precisely because the social factor, which he himself added to the factors influencing crime, is only subsidiary to the others factors elaborated by Lombroso.

Abolite la miseria, se è possibile, ma abolirete la gelosia? Abolite il matrimonio legale, ma se ad un uomo brutto piace una donna bella, che ne rifugge, come impedirete che i fattori individuali e fisici, agenti in qualcuno di questi uomini brutti, non li spingano allo stupro o all'omicidio? Ma si dirà, questi allora sono delinquenti pazzi o nati o per passione, non delinquenti per abitudine o d'occasione. Ah, alla buon'ora. Siamo dunque ben lontani da quella profezia di un roseo avvenire socialistico, in cui le colonie comuniste sarebbero altrettanti paradisi terrestri in moralità e di benessere. [...] Soltanto il sociologo criminalista, della nuova scuola di diritto criminale, abbracciando e non separando i varii ordini dei molteplici fattori criminosi, si pone nel terreno positivo, e, come vedremo, più fecondo perché più pratico anche per alleviare, fin dove è possibile, le attuali miserie del popolo,

<sup>61</sup> Ferri's theses on free will often appear confused, which testifies to his lack of interest in certain philosophical issues. On this point, Carlotta Latini observes that Ferri's «reasoning» on free will is «long and tortuous», «often contradictory and not very juridical». Latini, 2018, p. 46.

<sup>62</sup> E. Ferri, *Temperamento e criminalità*, in «La Scuola Positiva», 1896, also in *Studi sulla criminalità ed altri saggi*, Torino, 1901, pp. 422-428.

<sup>63</sup> E. Ferri, *Socialismo e criminalità*, Torino, 1883, p. 65.

quando osserva che il delitto è un effetto, alla cui manifestazione concorrono insieme e indissolubilmente i fattori individuali, i fattori fisici e i fattori sociali<sup>64</sup>.

Ferri is Ellero's pupil when he identifies social factors among the causes of crime, but at the same time he is Lombroso's student when he does not attribute a preponderant role to these factors in the genesis of the criminal phenomenon. It is not surprising that he, not yet close to socialism<sup>65</sup>, ends up representing that bourgeois class that is ready to absolve itself with regard to the criminal question in the famous polemic on *criminogenic factors*<sup>66</sup>. The *querelle* with Turati and Colajanni developed precisely because of the importance of social factors within the criminal phenomenon, but above all because of the link between the social question and the criminal one. Ferri, in fact, is not entirely convinced, unlike Ellero, that the crisis of criminal law is directly and exclusively linked to the problems inherent in the abuses of the bourgeoisie and the existing social economic order, and ends up defending bourgeois society. Already from the introduction of his 1883 essay *Socialismo e criminalità*, which he elaborated as a response to Turati's pamphlet *Il delitto e la questione sociale*, Ferri affirms what his aim is: to analyse the idea that with the socialist State «crime will disappear», while in reality for him it is necessary to pay attention to the «big idea» inserted in a «small brain», with the popular and peasant masses, whose brains contain «little more than 300 words», which could be excited by socialist ideas and thus end up increasing crime.

For Ferri, Turati's essay can be summarised in five maxims:

La genesi del fenomeno criminoso risiede nella società, com'è ora costituita.  
Più specialmente, e anzi esclusivamente, il malessere economico delle popolazioni, prodotto dalla iniqua disuguaglianza di individui e di classi, è causa di ogni altro malessere morale e intellettuale, e quindi anche del delitto.  
Avvenuta la trasformazione o rivoluzione sociale, nel senso socialista, l'ambiente

<sup>64</sup> *Ivi*, pp. 64-69.

<sup>65</sup> Ferri's turning point towards socialism came in the early 1890s and in particular with his political essay *Socialism and Positive Science* of 1894, a controversial essay in which Ferri took up Colajanni's theories on the influence of Darwinism and evolutionism on socialism. In 1899, the jurist wrote Colajanni a letter which was later published in *Rivista Popolare*, directed by Colajanni, in which he affirmed that his conversion to socialism took place in the autumn of 1892 following a conversation with Lombroso, who argued that «socialism is a fertile mine of truth and human renewal» (E. Ferri, *Fatti e parole, lettera di Enrico Ferri a Napoleone Colajanni*, in "Rivista popolare", IV, no. 14, 15 February 1889, pp. 292-297). In any case, Ferri became a socialist ten years after the *querelle* on the social factors of crime and after entering parliament among the ranks of the radicals. Therefore, it is not surprising that Ferri's socialism is always a bit weak and fluctuating, up to the saddest page of the Mantuan jurist's career with his opportunistic exaltation of Mussolini and Fascism. See: Salvadori 1960, pp. 499-543; Papa 2002 and Latini, 2017.

<sup>66</sup> On this topic: Ganci, 1958, pp. 56-68 e Sbriccoli, 1974-75.

sociale sarà ottimo.

E nell'ordine socialista, anche l'uomo individuo sarà moralmente molto superiore all'uomo corrotto o demoralizzato dalle presenti condizioni.

Ed allora il delitto, come la miseria, come l'ignoranza, come la prostituzione, come l'immoralità in genere, avrà finito la sua triste tirannide nel mondo umano<sup>67</sup>.

The essay develops from here by analysing and refuting such «too simple» statements. In this way, which Colajanni considers unfair, Ferri focuses on theses that are not in truth supported by Turati, so much so that one could almost think that Ferri did not substantially understand the short essay by the socialist author, or, perhaps more probably, did not want to understand it. At the heart of Turati's analysis, in fact, among the first writings of social penalistics, there is not the utopian prediction of a socialist world that succeeds in extinguishing crime, but the denunciation of a social malaise that manifests itself through the uncontrolled increase of delinquency, and social factors are, therefore, placed among the main elements that generate crime. Ferri, who also sensed the importance of social factors in the genesis of crime, refused to link the criminal question to the class in power, and stood alongside Lombroso and Garofalo in defending bourgeois society. His desire seems to be to reconcile himself with the ruling class that was threatened by socialism and the theses of social penal law; this explains the work of the Mantuan jurist who produces a tight critique of Turati's booklet, even in the parts that theoretically should have found his consent, given that he had already elaborated penal substitutes as means of crime prevention. Ferri is sceptical about Turati's idea that the widespread economic well-being of all social classes leads to a reduction in crime and cites a series of French crime statistics showing that technological progress and economic well-being may lead to a reduction in crimes against the personality, but not in crimes against modesty and the person, which would actually increase. Ferri explains that well-being, both economic and technological, has the effect of «increasing the organic forces» of the individual and consequently also «the abnormal and criminal activity», so that the criminal, who is a criminal for physical and anthropological reasons, ends up having more energy to devote to crime, both because of a better diet, and because of the contribution of new technologies in work that tend to «save the amount of muscle power, necessary for production»<sup>68</sup>, which is then used for criminal purposes. Alongside economic well-being, education is also a much overrated measure against crime for Ferri; inasmuch as «every individual, as he is constituted, both physically, intellectually and morally, is the product, and, I would almost say, the ultimate summary of an indefinite series of previous generations, by which he is moulded, according to the iron laws of natural inheritance», education which

<sup>67</sup> E. Ferri, *Socialismo e criminalità*, cit., p. 55.

<sup>68</sup> *Ivi*, p. 85.

intervenes only at an «infinitesimal moment compared to millennia»<sup>69</sup> can only have a limited scope in reducing the criminal phenomenon. The «bad germs», which are stronger in the criminal than the «good germs», can only be marginally limited by education.

Ferri's vision is permeated with Lombrosian theories<sup>70</sup> in such an evident way as to limit the scope of other criminogenic factors such as the social environment, which for Ferri has a circumscribed value compared to other and more relevant aspects in the determination of crime, namely: the physical environment, climate, altitude, seasons and soil. The whole of Ferri's essay, therefore, tends to downplay the importance of the social elements that cause crime in the light of the tyranny of an organism that is marked by the fate of the criminal, a fate that education, moral teachings, economic well-being and the social context in general cannot change. Social and economic reform cannot, therefore, be the solution to reducing crime.

In the light of what has been observed, it is easy to understand how Ferri's writing represents a missed opportunity for a concrete turning point for the Mantuan jurist towards social criminal law, because if it is true that his reflection has the merit of including the social factors of crime in the science of the new school<sup>71</sup>, his resistance to Turatian ideas, his defence to the bitter end of the criminal anthropological principles, appear rigidly conservative. Ferri seems to want to defend the existing bourgeois power structure a priori, absolving the ruling class of its responsibilities, and even goes so far as to criticise, in my opinion knowingly, the theses that he attributes to Turati, even though not actually addressed by the latter. In *Socialismo e criminalità*, one can ultimately appreciate the formidable orator<sup>72</sup> Ferri whose shots tend to dazzle, as they know they are completely off target. In support of this interpretation one can read the letter of 8 November 1883 that Ferri wrote to Colajanni, once he had been informed of the article that the Sicilian author was writing for the *Rivista di filosofia scientifica* on his work. Ferri maintained that he could not afford, at that stage of his life, to take anti-system political positions «I have not been able to comply so far» with the new ideas antagonistic to the bourgeoisie «because in my unfinished official position as professor extraordinaire, if I were to add political heresy to scientific heresy, in an

<sup>69</sup> *Ivi*, p. 97.

<sup>70</sup> Cfr. C. Lombroso, *Educazione anticriminale*, in "Critica sociale", I, n. 9, 1891, pp. 136-137.

<sup>71</sup> Ferri's sensitivity to the social elements of crime, and therefore his attention to the relationship between the criminal and the social environment, is perhaps the greatest difference from Lombrosian criminalist theories. Cf. Latini, 2018, p. 45.

<sup>72</sup> A very famous lawyer, Ferri was the protagonist of many famous cases, defending both poor people and peasants, as well as rich people who paid golden fees. On Ferri's career as a lawyer and his oratorical skills: E. Ferri, *Difese penali*, vol. 1-2, Torino, Unione tipografico-editrice torinese, 1923; Sighele, 1941, pp. 162-171; Passaniti, 2008, pp. 349-376; D'Amico, 2008, pp. 265-290.

open manner, I would run the risk of succumbing too much in that struggle which already absorbs me completely». In some ways Ferri seems to want to apologise to Colajanni for having taken positions that repudiate what he had, instead, up to that moment sustained regarding the social factors of the crime, positions that had procured him the consent of the Sicilian; he continues:

posso scriverle e spiegarle più chiaramente la genesi e la forma del mio ultimo libro (scritto in 14 giorni, mentre sto attendendo ad altra opera gravissima [...]).

La genesi: che è di mettere in vista la parte nuova delle nuove idee di sociologia criminale che costituiscono una opposizione conservatrice [...]

La forma: che è appunto accentuata in senso conservativo, sebbene, in fondo, se si sommano tutte le concessioni parziali da me fatte al socialismo scientifico (di Turati e dello Scamiciato, redatto da un mio carissimo discepolo<sup>73</sup>), sebbene, dicevo la sostanza poi sia rivoluzionaria ben più di quanto può sospettare il lettore superficiale<sup>74</sup>.

Ferri's is an affirmation of opportunism and acquiescence to political needs which lead him, according to him, to change his opinion on socialism and the influence of social factors on crime, thus not separating socialist political ideas from the analysis of social criminal law. His are «unavoidable necessities of struggle for existence» that «force him to accentuate the form in a conservative sense». Ferri was in fact competing for the chair of criminal law in Bologna<sup>75</sup> and considered it convenient to lash out at Turati's booklet, which denounced the responsibilities of bourgeois society, rather than defend the positions of the author from Lombardy, as might have been expected in view of his writings. What should be noted, as mentioned, is Ferri's decision to criticize the text going beyond its real meaning, attacking the socialist theses that even in Turati's essay are not expressed, trying, as he himself admits, to exalt the theses of his criminal anthropology and sociology in a conservative and bourgeois context. Moreover, Ferri in the already mentioned review of Turati's pamphlet<sup>76</sup>, which appeared in *Archivio di psichiatria*, acknowledges that the ideology expressed by Turati «is quite different» from socialism, and again specifies referring to the author that: «what is his socialism reduced to? Nothing more, nothing less than an aspiration for the best, the conviction that the future will be different from the present, just as the present is different from the past. But then who is not a socialist in this sense?»<sup>77</sup>. It is clear, therefore, that *Socialismo e criminalità* served Ferri to take

<sup>73</sup> Ferri alludes here to Prampolini.

<sup>74</sup> Ferri's letter to Colajanni of 8 November 1883 can be read in Ganci, 1959, p. 259.

<sup>75</sup> He will obtain the Chair in 1884.

<sup>76</sup> I refer to Ferri's article: *Socialismo, psicologia e statistica nel diritto*, in "Archivio di psichiatria", vol. IV, 1883, pp. 247-264, in which, among other things, he analyses the work of Turati.

<sup>77</sup>. *Ivi*, p. 259.

a position on socialism rather than on the pamphlet of his colleague and friend. And it was Filippo Turati himself who observed the irrelevance of the Mantuan jurist's statements in a letter to Colajanni dated 26 October 1883:

Vi dirò schiettamente che tutto il libro del Ferri (abbondante, facile, erudito, etc. etc. non se ne parla neppure) non mi pare aver cancellato una sola delle mie righe. È una serie di paralogismi e, che è peggio, paralogismi con tanto di barba. E in quel mio modestissimo libretto [...] tuttavia mi pare che ci sia implicita la risposta a tutte le obiezioni che egli mi fa. Certo io non ho l'arte che il Ferri ha, di stemperare un'idea in venti pagine e neanche quella di esser chiaro per chi non voglia essere attento<sup>78</sup>.

He then adds a criticism that characterises Ferri's entire career:

Il Ferri, in fondo, mi par di quelli che in un libro leggono ciò che essi hanno già nella testa, e sorvolano al resto. In conclusione (ed è strano per un professore di diritto) il concetto di giustizia gli manca affatto: anche quando parla di giustizia appunto e di bontà e di altruismo etc. etc. e si entusiasma all'olocausto di Oberdam e alla generosità dei socialisti, ei non mi pare che un mistico, un mistico senza saperlo<sup>79</sup>.

Turati's observation seems appropriate, Ferri is a «scientist with a fine nose» who «smells the wind and understands which way it blows»<sup>80</sup>. This helps us understand many of the choices made by the Mantuan jurist, even those apparently against the current, which always allowed him to be halfway between the old and the new, first bourgeois, then conservative socialist, then innovator of criminal law, then exaltor of Mussolini and the regime<sup>81</sup>. Antonio Gramsci's judgement on him comes to mind, placing him among the representatives of Lorianism, that is, those intellectuals close to socialism, all supporters of the «petit-bourgeois critique of capitalist production», but substantially incapable of departing from a certain intellectual conformism and possessing «the all-encompassing title of Lorianism», producing «deteriorating and bizarre»<sup>82</sup> texts. Ferri's social criminal law inevitably suffers from the «methodological shortcomings»<sup>83</sup> of the Mantuan jurist who appears hasty in combining together, in a confused way, the theses of Darwin, Spencer and Marx<sup>84</sup>, committing «a serious syncretistic mess»<sup>85</sup>,

<sup>78</sup> In Ganci, 1959, p. 174.

<sup>79</sup> *Ivi*, pp. 174-175.

<sup>80</sup> *Ivi*, p. 175.

<sup>81</sup> In support of this thesis and with regard to Ferri's ability to adapt to different and sometimes contradictory contexts in order to carry out his projects: Sircana, 1997, pp. 139-145; Papa, 2002, p. 151-160; Colao, 2013, pp. 849-852.

<sup>82</sup> A. Gramsci, 2014, p. 225.

<sup>83</sup> Sbriccoli, 1974-75, p. 572.

<sup>84</sup> See: E. Ferri, *Socialismo e scuola positiva (Darwin, Spencer e Marx)*, Roma, Casa editrice Italiana, 1894.

<sup>85</sup> Papa, 2002, p. 153.



which leads him to a «fuzzy»<sup>86</sup> socialism before the opportunistic turn towards Fascism<sup>87</sup>. It is therefore not surprising that he found it difficult, if not impossible, to abandon the perspectives of criminal anthropology in favour of a more precise adherence to social criminal law.

In conclusion, while considering the many authoritative criticisms made against Ferri<sup>88</sup>, we cannot fail to recognise the greatness of some of the theses of the Mantuan jurist who, between light and dark, between opportunism and courageous choices, is certainly among the main and most original protagonists of European criminal law at the end of the century.

### 6. *I sostitutivi penali*

In the reconstruction of social criminal law, Ferri deserves credit for having affirmed and encouraged the spread of theories that had only been sketched out by others before him. Thus, alongside the identification of the social factors of delinquency, Ferri elaborates another fundamental argument of social penality, namely *sostitutivi penali* (criminal substitutes). In *Socialismo e criminalità* he writes:

La scuola positiva di diritto criminale studiando le cause dei reati per togliere in alcune parti, quando sia possibile, od almeno per rattenere dallo straripamento questo fenomeno patologico della delinquenza, propugna lo studio, finora trascurato, della prevenzione sociale e scientifica dei reati, non però prevenzione di polizia ed empirica: quella, prevenzione remota, utile, civile, che va alle radici del male in ogni ordine dell'attività umana e non solo nel campo del Codice penale e terreni limitrofi; questa, prevenzione miope, inutile, violenta, spesso provocatrice, perché pretende di impedire il male imminente, senza curarsi di togliere le cause lontane. E questa prevenzione sociale della criminalità, chiamata col nome di teoria dei sostitutivi penali, si riduce appunto nel modificare l'ambiente sociale nelle sue parti contrarie alle leggi naturali, non di sbalzo, ma di sempre, continuamente, in ognuna delle troppe leggi che si vanno facendo. Ed essa, come tale, rappresenta

<sup>86</sup> The adjective fuzzy to describe Ferri's membership of the socialist party is used by Carlotta Latini (Latini, 2017). This adjective seems to fit perfectly with Ferri's socialism, which is rather moderate, bourgeois in some respects, an oscillating socialism made up of contradictions «openings and amazing reversals of positions». See Papa, 2002, pp. 151-160; more generally on Ferri's socialism: Salvadori, 1960, pp.499-543.

<sup>87</sup> For a bibliography on Ferri and Fascism: Bertazzoni, 1970; Cavazzoli, 1984; Sbriccoli, 2009 (1999), pp.1001-1036; Colao, 2015, pp.129-157.

<sup>88</sup> In addition to Vaccaro's already mentioned criticism of Ferri's contradictions with social criminal law, Antonio Labriola and Benedetto Croce are among the most critical of the master of the Positivist School. The latter was extremely harsh towards Ferri, guilty of never having actually read and understood Marx, becoming a socialist by fashion and therefore belonging «to the folkloristic areas of political culture» (B. Croce, *Materialismo storico ed economia marxista*, Bari, Laterza, 1968). For further details see Gerratana, 1972.

la soluzione positiva e scientifica, liberata dall'ingombro di vedute più o meno idealiste del sentimento e della metafisica sociale<sup>89</sup>.

Ferri elaborated on penal substitutes as early as 1880 in an article entitled *Dei sostitutivi penali* published in *Archivio di psichiatria*<sup>90</sup>, a subject later included in *I nuovi orizzonti* and expanded in *Sociologia criminale*. Ferri's measures are directly inspired by Ellero's *reagenti criminali*. The author's starting point is the observation that for some crimes, and more precisely for crimes of opportunity, generated by «social ills», the punishment has a «very limited repulsive power of the crime», therefore it is necessary to provide «social remedies» that can prevent crimes. The punishment substitutes identified by Ferri, therefore, must be applied mainly for those crimes that are generated mainly by social factors, while they have a limited scope in relation to the born criminal and for crimes generated normally by biological factors. Ferri's only partial affiliation to social criminal law is therefore also manifested in the elaboration of these social crime prevention measures, as they cannot intervene for all those crimes that are generated by biological and physical factors, except indirectly: «by modifying the environment it is possible to influence, in the circle of individual existence, the great mass of occasional delinquents, and in the hereditary circle of a few generations on the cohort of born and insane delinquents»<sup>91</sup>; hence a certain contradiction of Ferri with what he affirmed in *Socialismo e Criminalità*, when he sensibly reduces the anti-criminal scope of education before the fatality of delinquency, which is stratified in centuries of evolution and from which the individual cannot escape. The core of penal substitutes, as already elaborated by Ellero, is crime prevention through social measures that intervene precisely where punishment is ineffective:

il perspicace marito, a conservarsi la fedeltà della moglie, conta su ben altro che sugli articoli del Codice penale contro l'adulterio. [...] Alla nettezza urbana giovano certi ripari in luoghi opportuni, assai meglio che le multe e gli arresti. [...] La mobilità distruttrice dei bambini si regola meglio distraendoli con i giuochi adatti, anziché inutilmente tentando di soffocarla o di punirla con dell'igiene fisica e morale. [...] Si ottiene insomma più dagli uomini col lusingarne l'amor proprio e col sollecitarne l'interesse, che colla compressione e col comando<sup>92</sup>.

Therefore, for bargaining offences, it is possible to provide for measures in place of punishment, those «controspinte penali (penal counter-pushes)» that «Romagnosi» already identified as a reaction to «criminal impulses». These measures operate like economic substitutes:

<sup>89</sup> E. Ferri, *Sociologia e criminalità*, cit., p. 144.

<sup>90</sup> E. Ferri, *Dei sostitutivi penali*, in "Archivio di psichiatria", II, 1880, pp. 66-93, e pp. 194-215.

<sup>91</sup> E. Ferri, *Sociologia criminale*, cit., p. 158.

<sup>92</sup> *Ivi*, pp. 394-395.

Come, nell'ordine economico, il Minghetti notava, che mancando il prodotto principale, si ricorre ai succedanei, che possono supplirlo nella soddisfazione dei bisogni naturali; così nell'ordine giuridico criminale, ammaestrati dall'esperienza, che le pene mancano, quasi totalmente, allo scopo loro attribuito di difesa sociale, bisogna ricorrere ad altri provvedimenti, che possano sostituirle nella soddisfazione della sociale necessità dell'ordine. Di qui il concetto di quelli, che io chiamai sostitutivi penali<sup>93</sup>.

Ferri, however, points out that while *succedanei economici* (economic substitutes) are secondary measures, penal substitutes are primary measures in the fight against crime, with penalties becoming measures that intervene where substitutes fail to «explain their preventive scope». Criminal substitutes, conceived as «antidotes to the social factors of criminality»<sup>94</sup>, are basically social reforms and public administration interventions that can be superimposed on Ellero's *criminal reagents* and, as for the latter, through these social and administrative measures it is possible to favour the evolution of society. For Ferri, the application by the legislator of penal substitutes leads, therefore, to a new society, to a now evolved reality, in which the number of crimes is at a minimum. Thanks to these social interventions, a «social metamorphosis» is achieved with the right timing, i.e. that change which the socialists would like to see immediately and rapidly, but which for Ferri can only be achieved through a slow and gradual evolutionary process. As already mentioned, the measures devised by the jurist are very similar to Ellero's *reagents* and, like the latter, are mainly of an economic, social, educational and religious nature and are connected to a vision of the criminal phenomenon closely linked to social factors such as poverty, illiteracy, promiscuous life and alcoholism. Thus, «let us see some examples», starting from the substitutes of «economic order», such as «free trade», with which it is possible to avoid «famine and the abnormal increase in the price of foodstuffs, which have a direct influence on crimes against property»; and again, «freedom of emigration»<sup>95</sup>, which represents a «safety valve» with the departure of a whole series of subjects inclined to delinquency because of their poverty or their «temperament». Economic penal substitutes also include the reform of the «tax system» with the introduction of a tax on alcoholic beverages; or the «realisation of public works» that manage to avoid «the increase in crimes against property, persons and public order». The measures identified by Ferri are numerous, for example: the construction of houses with wide avenues and street lighting to discourage thieves at night; the reduction of customs tariffs to combat smuggling; the provision of money only in coins to avoid counterfeiting banknotes; the prospect of fair wages; the distribution of wood in winter. It is therefore a true «social legislation» that, the author admits, «could constitute a true code of economic

<sup>93</sup> *Ivi* p. 396.

<sup>94</sup> *Ibidem*.

<sup>95</sup> E. Ferri, *Sociologia criminale*, cit., 399.

substitutes, to be contrasted, with great advantage, to all criminal impulses»<sup>96</sup>. There are also political penal substitutes, the most important of which is the introduction of «administrative federalism», which would make it possible to combat «the mafia and the camorra», types of crime that «originate from the unmet needs and disregarded character of the various parts of a country, different in climate, race, traditions, language, customs and interests». Scientific substitutes, such as the development of the railway, printing, telegraph, photography and the steam engine, which can be «a powerful aid to honest citizens», can also be mentioned, while preventing «the agglomeration of prisoners» or abolishing «the remedies of admonition, surveillance and forced residence» are examples of legislative and administrative substitutes. Among the religious measures, one can mention the provision of marriage for all ecclesiastics in order to avoid «infanticides, procured abortions, adulteries, attacks on modesty»; and also to avoid public processions, which for Ferri are often the cause of disorders and fights. As for substitutes in the family order: «the admission of divorce would prevent many crimes of bigamy, adultery and murder», as would the prohibition of marriage for certain individuals, and the regulation of prostitution. Finally, a series of penal substitutes can be identified in the educational sphere, aimed at encouraging literacy and the development of moral principles. The abolition of cruel and atrocious spectacles, the «suspension of gambling houses», or the fight against the «miserable school teachers», paying attention to the physical and mental care of children, all go in this direction<sup>97</sup>.

The list of penal substitutes is very long, some measures are simply indicated without any concrete application or explanation, others are instead analysed with great care and are supported by statistics concerning European and American crime. Ferri concludes by stating that «the examples mentioned above, which could be multiplied to the point of forming a preventive code to be contrasted with almost every article of the criminal code, clearly show the very large part played by the social factors of crime». However, he also specifies that by applying all possible preventive measures, there would always remain, «in every social environment» what is «inevitable delinquency because it is imposed by the other criminal factors that cannot be entirely suppressed»<sup>98</sup>.

Finally, Ferri himself recognises that the variegated and very numerous list of substitutes can hardly be applied as it would require «entire systems of particular and coordinated reforms» which Ferri, however, does not identify<sup>99</sup>. Therefore,

<sup>96</sup> *Ivi*, p. 426.

<sup>97</sup> *Ivi*, p. 446.

<sup>98</sup> *Ivi*, p. 456.

<sup>99</sup> On this point one cannot but agree with Sbriccoli, who observes that the programme of penal substitutes «appeared weak and attackable due to the absence of an adequate political basis to give it coherence, due to the fact of being abstract from a concrete design of social reform» (Sbriccoli, 1974-75, p. 572). Of the same opinion is Latini, who notes the

the Mantuan jurist affirms the capital defect of his theory of prevention, that is, the necessity of ample legislative, and of cultural and social reforms of long duration to be able to apply it. It is a question, on closer inspection, of the same criticism that can be made of the measures individuated by Ellero, from whom Ferri draws much inspiration. On this point, a reading of the Criminal Pamphlets shows that Ellero's criminal reagents appear more coherent and better argued than Ferri's encyclopaedic enumeration. In my opinion, the enumeration of the master of the Positive School succeeds in being more chaotic and vague than the measures identified by Ellero, many of which are certainly marked by a strong conservatism and an evident religious spirit, so much so as to appear anachronistic for his time, but succeed in being coherently argued according to the Friulian jurist's conception of crime, and are based on a simple principle: to ensure that the individual has no reason to commit crime. The main difference between the preventive measures of the two authors resides in the conception of crime, which for Ellero is the result of an internal psychological process related to the individual conscience of the individual, who in a given social context is driven to crime; for this reason, Ellero's reagents try to intervene before the mental elaboration of the conduct by the individual himself, so that education plays a decisive role in the prevention of crimes. In Ferri's elaboration, instead, there is no reference to the conscience of the individual; the measures identified, therefore, even if often identical to Ellero's, do not take into consideration the connection between the psychological aspect and the criminal conduct, and deal in general with society in its economic, administrative and legislative factors, leaving aside the free decision of the citizen. This approach is a consequence of that ill-concealed and inevitable denial of free will on the part of the jurist of the Positive School, which makes his criminal substitutes appear less incisive than the criminal reagents.

In conclusion, it should be noted, once again, that in Enrico Ferri's theoretical framework there is a complete lack of reference to the direct responsibility of society and the ruling class, so while Ellero's discourse is aimed at indicating to the bourgeois class the interventions necessary to reduce crime, Ferri turns to the classical school, which he believes has direct influence on the legislator, in order to promote his theory on social defence and prevention of crime of opportunity, reproaching liberal jurists for concentrating uselessly on the repression of crime. According to Ferri, the legislator uses the method of «bloodletting», that is, just as the ancient medicine for every pathology prescribes bloodlettings to «expel the *materia peccans* from the body», in the same way the liberal legislator «for all the phenomena of social pathology does not know how to resort to the blood-letting of the prison», even if it appears evident to him that «this alleged remedy does not actually heal anyone, neither the society nor the individuals»<sup>100</sup>.

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weakness “on the legal level” of Ferri's measures (Latini, 2017, p. 4).

<sup>100</sup> *Ivi*, p. 456.

## 7. Conclusions and beginnings

On the basis of what has been said, it appears evident that Ferri, despite his contradictions, can be included, like Ellero, among the precursors of social penalistics. In conclusion, it should certainly be noted that these two jurists, in different ways, laid the foundations for the elaborations of other authors such as Turati, Colajanni, Vaccaro, Carnevale, Impallomeni, but also Florian, Zerboglio and Manes, all jurists who fully belong to the movement of social penalistics. The authors of this juridical movement, previously labelled as members of juridical socialism, regardless of the schools they belonged to, proved to be extremely sensitive to the issues of social criminal law; their voice emerges crystal clear in denouncing the criminal and social question which is generated by a class law which tends to defend the interests of a single social class. Filippo Turati's previously mentioned essay *Il delitto e la questione sociale* of 1883 starts the reflection on the link between crime and the social question, underlining the role of poverty and poor education in causing crimes. The Milanese author's radical sociological studies were taken up and continued by Napoleone Colajanni, a Sicilian doctor and sociologist who was the anti-Lombroso, in that he criticised and went beyond the Verona doctor's criminal anthropology theses in almost all his works. In his major work, *La sociologia criminale* of 1889, Colajanni identifies and studies the main social factors that generate crime. The author overcame the physical and cosmic fatalism of criminal anthropology, refuted the concepts of race and atavism sustained by the Positive School and affirmed the connection between crime and the cultural and economic backwardness of the Italian population, in which poverty and indigence, the main causes of delinquency<sup>101</sup>, spread like a virus. Turati's and Colajanni's theses resonated abroad and were taken up by Alimena and Carnevale who tried to insert themselves, with their third school, in the scientific quarrels between the positive school and the Italian liberal tradition. Michele Angelo Vaccaro followed Ellero's teaching and took up many of Colajanni's theses denouncing the class structure of criminal law<sup>102</sup>. Giovan Battista Impallomeni shows the same social sensibility as the authors mentioned above with his rational positivism capable of standing between two scientific traditions. Finally, a mention of the second generation of jurists of the Positive School, who on the basis of Ferri's social teachings denounced the abuses of bourgeois criminal law<sup>103</sup>. In these authors a particular attention to social criminal law is very

<sup>101</sup> N. Colajanni, *La sociologia criminale*, Catania, 1889.

<sup>102</sup> M. A. Vaccaro, *Genesi e funzioni delle leggi penali*, Torino, 1890.

<sup>103</sup> For example see: E. Florian, *Ingiustizie sociali del codice penale*, in "La scienza del diritto privato rivista critica di filosofia giuridica, legislazione e giurisprudenza", IV, 1896, pp. 46-55 e pp. 81-95; A. Zerboglio, *La lotta di classe nella legislazione sociale*, in "La Scuola positiva nella giurisprudenza penale", VII, 1897, pp. 513-519; C. Manes, *Capitalismo e criminalità. Saggio critico di sociologia criminale*, Roma, 1912.

evident, a cultural presence able to generate a scientifically satisfying category like the social penalistics, which allows us to understand and coordinate the thesis of all those who do not belong to any of the scientific schools of the end of the nineteenth century or for whom the closeness to one of the two dominant experiences appears reductive. Social penalistics thus makes it possible to shed light on a period that was extremely fertile in terms of ideas, and allows us to rediscover authors who have been forgotten or who have been too hastily included in a scientific tradition that is as broad as it is generic, thus silencing their original voice.

In conclusion, this is certainly not the place to go into the theses of the above-mentioned authors, but the reference to social penalistics and the study of jurists such as Pietro Ellero and Enrico Ferri, forerunners of the movement, can be taken as the starting point of a broader investigation, certainly useful in order to deepen our understanding of a crucial moment of junction and maturation of Italian penal doctrine between the nineteenth and twentieth centuries<sup>104</sup>.

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<sup>104</sup> The results of the wide-ranging investigation into social penalistics and its authors, already the subject of my doctoral thesis, are to be incorporated into a forthcoming monographic work.

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