

Is defense of stock the same as defense of race? An itinerary from the Penal Code to racial laws

ERNESTO DE CRISTOFARO

Introduction: The not collected legacy of criminal positivism

A field of study that took the name of «Scuola positiva»¹ arose in the Italian scientific culture of the late nineteenth century. It formed part of the Forensic Medicine and Anthropometry, but quickly turned to the law and other social sciences such as Statistics, Sociology and Psychiatry. It advocates a deterministic reading of human behavior². In particular, from a criminal law point of view, it suggests the reconstruction of the crime dynamics from the description of the offenders. This means that the explanation of crime is rooted in the subjectivity of the author, considered from its organic components point of view and described through the congenital defects and disorders by which it is affected. The insistence with which the main exponents of this school of thought – Cesare Lombroso, Enrico Ferri, Raffaele Garofalo – turn to the assumption of «free will» denying its value

pointed to overturn the classical canons of imputability and aimed to build a criminal law no longer founded on moral responsibility but on dangerousity. Ultimately, the deviant must be viewed as an individual to control and repress because of what he is rather than of what he does. Within this interpretative horizon – in which the malignity of temper is associated with the materiality of the body, with the measurability of the anomalies that may occur in the form of the skull, in the abundance of hair, in the disproportion of the limbs with respect to height (all elements that, more or less visibly, refer to the proximity of the deviant subject with the animal world from which man comes, i. e. to the fact that the deviant is locked to a less complete degree of development than that of the general human species to which he belongs) – the physical parameters, considered as possible relevant factors in the etiology of the delinquent, extend to the point of covering nutrition, environmental health, climate, natural resources and race.

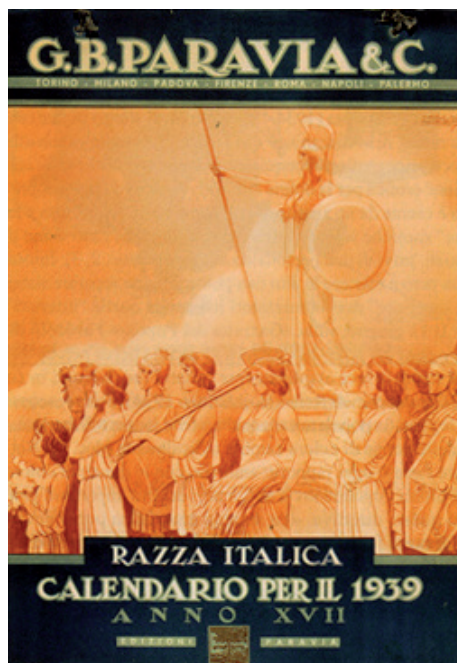
Cesare Lombroso devotes several pages to the crimes committed by the Jews and by the Gypsies. At first, he argues that the historical threat of recurrent aggression and isolation in their regards sometimes led them to commit crimes, because of the need to survive. So, due to their tendency to accumulate and to their proverbial capitalistic greed, they developed a special familiarity in handling money and in making all kinds of wrongdoing – from fraud to embezzlement to forgery – crimes which were more directly related with the economic enrichment³. The Gypsies, on the other hand, are considered by Lombroso «l'immagine viva di una razza intera di delinquenti»⁴. A community devoted, hereditarily, to every kind of wickedness: from prostitution to theft, from violence and exploitation against children to cannibalism. Enrico Ferri is less detailed in his analysis of the factors that predispose to crime, but he admits that the race should also be included among these factors⁵. Essentially, a representative part of the Italian criminal culture of the late nineteenth century considered the existence of a genetic matrix of crime, resulting from the belonging to a given racial community, as a not negligible hypothesis. It can be assumed that this idea has not generated significant sedimentations in the Italian legal and political culture (the following decades were largely refractory to the issues of racial mold) basically for two possible reasons: on one end because the «Scuola positiva», after controversies and divisions, concludes its existential curve and its ideological thrust with the «Progetto Ferri» of Penal Code in 1921 (and later this ideological trend would have virtually disappeared from the scene and would have left the intellectual and academic field «a

ben altro»⁶); on the other end, because the remains of the positivistic ideology regarded as highly problematic the hypothesis of locating a homogeneous matrix in the national community. This is mainly due to the fact that the Italian population consists of a variety of strains and faces which, even at a superficial glance, describe the inhabitants of the South and the North as clearly different from each other, thus preventing from collocating them under a single genealogical heading⁷. In any case, the space that the racial theories had in building the culture of the fascist regime will long be marginal⁸. Although, once these discriminatory measures were introduced in public discourse they would give rise to an insistent backdating of their circulation⁹.

1. *Demography and protection of the seed in the twenties and thirties*

Natality was, in the first decades of the twentieth century, a European-wide phenomenon. Many states adopted measures to support the families, maternity and infancy in view of goals of population growth¹⁰. In Italy, the fascist need to recover ancient primacies also posed an imperative of increment of the population. In a speech to the Chamber of Deputies in May 1927, known as «Discorso dell'Ascensione», Mussolini emphasizes this urgency in the most vigorous way. The fate of nations is, in his view, linked to national demographic power, without which the states are likely to become colonies or satellites of the strongest (because most populous) countries and sentenced to a marginal position in history. It is, therefore, necessary to combine po-

litical, economic, demographic and moral growing together¹¹. In order to do this, the fascist regime had, for some years, invested economic resources and created institutional joint-structures. In 1925, the «Opera Nazionale Maternità e Infanzia» (O. N. M. I.) was established. The main purpose of this institution was the assistance to needy mothers and abandoned children. In particular, it supported the mothers who recognized and suckled their illegitimate children, for breastfeeding was believed to be capable of lowering the infant mortality rate¹². In addition, through medical specialists, this system would ensure support interventions, services to delivery and provide basic clinical assistance both in urban and rural areas of the territory. In 1925, the «Unione Italiana di Assistenza all'Infanzia» arose as well. It was in charge, among other things, of the publication of the (initially quarterly, then monthly) magazine «La Difesa della Stirpe», printed during the years 1926-1929. The purpose of the review was to address all questions of hygienic, prophylactic and charitable care order which were correlated with the development of the younger generations and with population growth. Against the background of these initiatives, occurs the activity of the academic world exponents which, at the end of the twenties and in the first half of the thirties, dealt with themes concerning population and its qualitative and quantitative development. The demographer Corrado Gini was among the most active supporters of the trend described as «eugenica rinnovatrice». According to the theories that it claimed, in 1931, at the founding of I. S. T. A. T. (Istituto centrale di Statistica, headed by Gini from 1926 to 1932) a wide demographic survey on the national



"Italic race", 1939 calendar

territory was started, whose aim was finding out recurrent features and major characteristics of numerous families. In 1928, during a conference at the University of Bari, Gini had the opportunity to explain the lines on which a policy of birth rate growth should move. It was not so much a matter of working on small families or towards individuals reluctant to marriage, but a matter of creating the best conditions around the most prolific families by keeping them at home and facilitating the natural reproductive trends in order to maximize their generative power¹³. In an essay published in 1931 and entitled «Eugenica e stirpe» a professor of Obstetrics at the University of Roma faced problems of similar content. The decline in the birth rate in Italy in the nine-

teenth and twentieth centuries, though not particularly sharp but still such as to suggest the adoption of countermeasures, had to be explained, according to his reading, not in terms of fertility but in terms of inadequate maternity care, both in the economic and in the medical profile. The prevention of abortions and deaths in childbirth was the only way to preserve the biological strength of the nation¹⁴. It must be said that the measures taken by the regime were not always equal to the goals for which they were generated (still in the second half of the thirties, in official circles, one had to admit that the O.N.M.I. was «in una fase sperimentale»¹⁵). Mussolini himself, between 1933 and 1934, did not hesitate to express his disappointment for the results of the Italian natality policy and to put it in comparison with that, in his opinion far more energetic and productive, pursued by Nazi Germany¹⁶. It is, when well observed, a comparison of considerable importance, since in the same year Mussolini takes in several occasions public distances from the racist, anti-Semitic, ideology which had gained ground in that country with the rise of Nazism. So, on one hand Mussolini recognizes that Germany is working positively in terms of demographic issues, but on the other he does not make any concession on other strategic aspects of Nazi policy. Of which, indeed, he emphasizes the unrelatedness with Italian cultural and political tradition.

In 1932, in his talks with Emil Ludwig, Mussolini expresses himself with contemptuous words against German “deliri razziali” and argues that there is no way to prove the biological purity of a community and that the race is «sentimento per il novantacinque per cento»¹⁷. The same argu-

ments appear in the entry «Fascismo» of the «Enciclopedia italiana», published in the same year. The nation is described as

[...] non razza né regione geograficamente individuata, ma schiatta storicamente perpetuantesi, moltitudine unificata da un'idea che è volontà di esistenza e di potenza, coscienza di sé, personalità [...] creata dallo Stato, che dà al popolo, consapevole della propria unità morale, una volontà e quindi un'effettiva esistenza¹⁸.

In a speech to the «Camicie nere» held in Firenze on 23rd October 1933, Mussolini evokes a «latin and mediterranean race», of which the Italian people are part, and he illustrates history analyzing the actions of men like Caesar, Dante, Michelangelo, Napoleon. An ancient race of makers and builders, unique and universal at the same time¹⁹. Finally, once again against the claims of biological purity coming from Germany and in favor of a notion of «race», as a result of sedimentation and historical stratifications, Mussolini writes on the «Popolo d'Italia» an article entitled «Fallacia ariana» in which he states that science is not able to certify the purity of blood of any population²⁰. The same distrust of theories criticized by Mussolini is shared in important sectors of the academic world. In 1934, the political scientist and theorist of *élites* Gaetano Mosca dedicates to the history of racial theories a dense and sharp article, whose polemical target is the idea that one can connect the human progress to the simple racial-organic factor. As if isolating the genetic roots of a community, wherever such operation was possible, one could infer successes and achievements as a mechanical result²¹. What remains still is that defense of the stock, intended as protection of motherhood, childhood and leverage of the demographic development and defense

of the race, understood as protection of an ethnic community from possible contamination with alien groups, belong in Italy to different and not converging universes of discourse. Again, in 1935, the criminal law Professor Alfredo De Marsico – Member of Parliament since 1924 and, for a few months, in 1943, Minister of Justice – gives a conference on the occasion of a national campaign to combat tuberculosis entitled: «Per l'uomo e per la stirpe». The fight against tuberculosis is focused, according to De Marsico, as a part of a broad set of initiatives undertaken by the Fascist regime and all tending to increase the health and productivity of the population: struggle with alcoholism, building of gyms and incentivizing gymnastic, labor discipline and involvement of women in economic activities. Everything is designed to create a prosperous, healthy and industrious community.

Ora – states De Marsico – curare la tubercolosi negli adulti e nei colpiti è impedire che la compagine di una nazione sia violentemente e intensamente mutilata; curarla, prevederla – più che altro – nei fanciulli e nei giovani è impedire che il flusso delle generazioni si arresti o si estenui. Problema dell'infanzia e problema della tubercolosi sono gli aspetti di un unico, indivisibile problema: il problema del domani e del destino della stirpe²².

But this goal of population health protection cannot be confused with other types of operations that claim to protect it highlighting its uniqueness and the occupation of an aseptic and reclaimed space:

Noi, sì, sui nostri confini ergiamo fortificazioni di armi e di anime; noi, sì, sentiamo il dovere di essere forti. Ma perché sentiamo il dovere di essere un cantiere di civiltà dove la vita non è vista sotto la specie della razza ma nella sua universalità, è difesa non in gruppi selezionati da furori

settari ma nelle sue radici e nel suo significato più che etico, religioso; e perciò, per servire la civiltà e il bene, sentiamo il diritto di essere liberi e sicuri²³.

2. *The defense of stock in the Penal Code*

Therefore, even in the mid-thirties, from the top of the political world to the most important sectors of medical, legal, political science culture, no one makes concessions to the racist thesis, and the notion of defense of the stock only indicates the strengthening of the entire Italian population's health and the pursuit of the best reproductive conditions of Italian people. In fact, the Italian lawgiver aims at the same kind of goals when it launches the new Penal Code²⁴. The «Rocco Code», published in 1930 and entered into force the following year, introduces in the second book a title – the tenth – completely new compared to the previous legislation and dealing with «Crimes against the integrity and health of the stock». These offenses are: abortion (articles 545-546-547, depending on whether it is caused with or without the consent of the mother or directly by her), incitement to abortion (article 548), acts of abortion held on a presumed pregnant woman (article 550), procured inability in procreation (article 552), incitement to anti-procreation practices (article 553), contagion of syphilis or gonorrhea (article 554). The sanctions range from a minimum of one year in prison, for incitement to practices against procreation, to a maximum of twelve years imprisonment in the case of constriction of a woman to abortion. Article 551 provides the possibility of mit-

Un giuoco che è una cosa seria
L'EBREO C'E' MA NON SI VEDE
 ossia:
TROVARE IL GIUDEO



Questo disegno, ritagliato secondo la cornice, si presta ad un istruttivo e dilettoso esperimento. Dietro queste figure si nasconde l'ebreo. Basta picciare il disegno in modo da «scoprire» le linee orizzontali della parte inferiore a quelle della parte superiore per avere due tipici esemplari di mezzo-ebreo, e, picchiando ancora il foglio in modo da far combaciare fra loro le linee verticali, salterà fuori la tipica faccia del giudeo.

Cartoon published in "Il Giornalissimo", 1938

igating from half to a third the penalties provided for cases of abortion or instigation to abortion or abortive acts towards a presumed pregnant woman, if action is taken to save the honor of their own or that of a close relative, i.e. in all cases in which the pregnancy is determined outside of a regularly stipulated marital relationship. Within legal doctrine, in the years going from the enactment of the Code until the racial laws – that are issued in late 1938 and the first half of 1939 – there are no interpretative doubts about the meaning and purposes of the provision of «crimes against the integrity of stock». Vincenzo Manzini, one of the

leading criminal jurists of the time – as well as theoretical guide and promoter of the «Rocco Code» –, in 1936 devotes a part of his monumental «Trattato di Diritto penale italiano secondo il Codice del 1930» to this group of cases of indictment. According to his analysis, the crime of abortion, the most important figure of crime in this set, should not be considered as an offence against the person, for the reason that the unborn is not a person and so has no rights. It does not protect either life or *spes vitae* of anyone.

Il vigente diritto penale – writes Manzini – considera essenzialmente il pericolo o il danno inerente ai delitti d'aborto per l'interesse pubblico riguardante la potenza procreativa della nostra popolazione, ed è soltanto per necessario riflesso che riceve tutela anche l'aspettazione di vita relativa a quella determinata gravidanza, che viene frustrata da un singolo delitto d'aborto²⁵.

Considering this, it is significant that Manzini flatly refuses the eligibility of «quella immoralissima dottrina che passa sotto il nome di *eugenica* che pretende di trasportare nel campo umano i criteri selettivi della zootecnia»²⁶. As far as eugenics is concerned, Italy had been a fertile ground of discussion for a few years. But eugenics to which polemically Manzini refers is the negative one, namely the one that encourages a quality selection of progeny through practices such as sterilization (if not elimination) of carriers of hereditary diseases and the systematic interruption of pregnancy for the same subjects, unless they were spayed, or whenever there was a doubt about the good health of the unborn. Significantly, this position – which will be overturned by other jurists after the Italian racial laws – is in contrast to what happened in Germany in the same years, where the practices of inhibition of reproductive capacity of the carriers of hereditary diseases had been taken through repeated regulatory actions in July 1933 (*Gesetz zur Verhütung erbkranken Nachwuchses*) and in October 1935 (*Ehegesundheitsgesetz*)²⁷. Once again the deep theoretical gap that separates, up to a certain point, fascist and nazi bio politics emerges. The damage to the integrity of the stock with the crime of abortion may, alternatively, be presented in the form of the danger in the case of incitement to abortion (provided that such an event, although pursued, did not actually occur). It makes no

difference, according to Manzini, whether the instigation is public and directed to a plurality of recipients or private and directed to a single woman²⁸. But even more significant, in regard to the lowering of the threshold of prevention by the state, is the configuration, among the crimes against the stock, of injurious or fatal acts of abortion on a non-pregnant woman. Here, in hindsight, a tort (injury or suppression) against the life or the health of the woman is being consumed; but in order to operate an action directly against the stock, a really pregnant woman would be necessary. According to Manzini:

L'interesse concernente l'integrità e la sanità della stirpe può venire in considerazione soltanto in modo molto indiretto, cioè in quanto conviene impedire che si attuino pratiche abortive in qualsiasi condizione e apprestare una sanzione penale anche per il caso, in cui nel processo per cagionato aborto, non si sia potuto accertare lo stato di gravidanza²⁹.

Moreover, the acts directed to cause impotence and the acts directed to cause public incitement to anti-procreative practices also belong to the category of «anti-fertility» conducts. In this regard, in the Report to the King («Relazione al Re») on the Penal Code cited by Manzini, it is stated that: «[...] se le aberrazioni neomalthusiane presumessero di varcare i confini d'Italia, troverebbero il trattamento che si meritano»³⁰. In the first case, it is a matter of punishing the reduction of procreation ability of a man or a woman, even if obtained with the consent of the victim. The provision punishes a specific action which is immediately restrictive of generative capacity but it does not punish, for example, the sale of contraceptives which are, however, prohibited by the laws of health in 1934. By 1926,

in accordance with the «Testo Unico di Pubblica Sicurezza», Italian laws considered offensive to the moral and morality all writings, drawings and objects depicting the means to prevent or terminate pregnancy. The Penal Code, by introducing the offense of public incitement to anti-procreative practices, intended to avert the danger that «[...] la popolazione, persuasa dagli istigatori, limiti in qualsiasi modo la procreazione [...]»³¹. Manzini does an important *caveat* that, again, underlines the differences regarding suppressive eugenics adopted elsewhere:

Se anche l'istigatore, rivolgendosi al pubblico, dicesse che devono adottare pratiche contro la procreazione soltanto le persone tarate, è evidente che l'istigazione potrebbe essere accolta anche da malati immaginari o da persone cui l'intento predetto può servire di pretesto per attuare qualche inconfessabile interesse. In ogni modo, conviene sempre impedire la divulgazione nella popolazione delle pratiche di cui si tratta, perché tale divulgazione è pericolosa in se stessa³².

Last type of crime included in Title tenth is the contagion of syphilis or gonorrhea accomplished by those who, concealing their condition, commit acts directed to the spread of the disease from which they suffer. The two considered diseases pose a risk to the procreative capacity or may have particularly serious clinical consequences on children. The person is, again, not considered in a singular dimension of injury victim, but as a link in a chain which is virtually capable of spreading serious diseases to wider and wider circuits. In no case, dealing with crimes against the integrity of the stock, Manzini does the least or most generic reference to political issues of racial purity or penal protection of the Italian ethnic group. The same look, aimed

at the national demographic interest, occupies the analysis that a professor of Forensic Medicine³³ offers on the same theme in 1938, in a magazine founded by Lombroso. On apparently different positions would seem to stay the criminal lawyer Giuseppe Benvenuto. In 1934, he publishes an extensive review of the provisions of Title Tenth of the Penal Code. Initially, he writes that the rigour of the Italian lawgiver in this matter has to be explained because of the exceptional value recognized by fascism to population policy. A few lines further on, he adds that what is at stake is the health, if not the life itself, of the race³⁴. But the preface, signed by Eugenio Florian, one of the last exponents of the «Scuola positiva», says unequivocally what the author means when he comes to demographics and race:

[...] il diritto penale serve a una funzione di civiltà [...]. Ciò può ben affermarsi dei reati qui avanti analizzati, i quali intanto corrispondono alla politica demografica e di tutela della razza, instaurata dal regime; quest'ultima, intesa non in modo per così dire egoistico e separatistico, alla germanica, ma in senso umano, diremmo latino, di preservazione e di sviluppo³⁵.

Therefore, the defense of the stock can also be described as defense of the race avoiding that the linguistic difference involves any semantic sliding, i.e. the passage from one dimension of protection of health and fertility of the population to another one of separation and stigmatization towards groups identified on the basis of ethno-biological parameters and therefore legally discriminated.

3. *Defense of race and defense of stock after the racial laws*

Between late 1938 and 1939, the Fascist regime launches the most important measures of racial discrimination. The guidelines are essentially two: separation of «pure» Italian citizens from the component of Jewish race on the soil of the peninsula, separation of the Italian settlers from the natives in the territories of Italian East Africa. By the «Regio Decreto Legge» 1728/1938, Italian Jews are banned from all roles in the public sector, heavy economic limitations are taken against their properties and they are forbidden to join in marriage with Italian citizens of «Aryan race»³⁶. By the law 1004 of 1939 (which incorporates elements already contained in a decree of 1937), the category of «offenses against the prestige of the race» is established. These are the so-called «Madamato»³⁷, i.e. the behavior of the settler who has a stable relationship of conjugal nature with an indigenous woman and a set of less serious, but still incriminating and defamatory, behaviors such as attending the same haunts of the natives, paying work in their favor, showing drunk in their presence. For these actions, the Italian citizen is punished (in the case of «madamato» with penalties of up to five years in prison) for having contradicted the existence of a hierarchical relationship between whites and blacks and stooping to the level of the latter, offending his origins.

Actually, in spite of the emphasis that the «Manifesto degli scienziati razzisti», published in 1938, had placed on the material dimension (the third step stated: «Il concetto di razza è concetto puramente biologico. Esso quindi è basato su altre

considerazioni che non i concetti di popolo e di nazione, fondati essenzialmente su considerazioni storiche, linguistiche, religiose»), the measures taken by the Italian government left open the possibility that whites and blacks in Africa kept up, even repeated, sexual relations (as far as there was not the stability of a relationship of «conjugal nature», showed by the living under the same roof and the eating at the same table) and Italian «Aryans» and Jews did the same thing and eventually had relations *more uxorio*, as only marriages were banned. So, in practice, the direction of provisions in defense of the race was less marked and stentorian than it appeared to be claimed. The possibility of *commixtio sanguinis* among racially «pure» and «impure» communities remained, in fact, unprejudiced. Despite this, starting from the racial laws, the concept of stock – a term that was used less often in accordance with a directive of 1938 coming from the «Central Bureau for printing» (Ufficio Centrale della Stampa) that in vain pointed to eliminate it³⁸ – assumes a different meaning from what it had up to then in the public debate.

In 1939, in a long article published on the «Annali di Diritto e procedura penale» a jurist from the University of Roma rereads the provisions of Title tenth of the Criminal Code in light of the recent racial turn. In fact, he appeals to the Minister «Keeper of the Seals» Rocco's Report, which states that the interest in preserving the ethnic unity of the nation undertakes to preserve the continuity and integrity of the stock.

Non può invero dubitarsi – writes Rocco in the quoted text – che ogni atto diretto a sopprimere o isterilire le fonti della procreazione, sia un attentato alla vita stessa della razza nella serie delle generazioni presenti e future che la compongo-

no e quindi una offesa all'esistenza della società etnicamente considerata, cioè all'esistenza della nazione³⁹.

On the other hand, as we have seen, the use of the term «race» (when it is rarely used outside the zoo technical field) before the racial laws has a meaning which is far from unambiguous and certainly it allows any possible overlapping with the term «stock», understood as the historical series of generations that have given rise to a community united by memorials, linguistic and religious ties rather than identical biological roots. This same sense also seems to appear in the just mentioned article, when it states that: «[...] persona offesa, in rapporto alla nuova denominazione dei reati contro l'integrità e la sanità della stirpe, è la società intesa come collettività degli individui che compongono la popolazione»⁴⁰. Finally, the community of individuals that forms the entire population and not segments of it isolated through the prism of race. The term «stock» within the meaning introduced by racial laws, comes out in other publications of legal argument in the following years. Giovanni Battista Funaiooli, Full Professor of Civil law in Pisa and for some years Dean of the Faculty of Law in the same city, recalls that the fascist regime, although favorable to the family,

[...] non ha trascurato di porre limiti al matrimonio per la esigenza di preservare la stirpe da gravi tare effetto di penetrazione di elementi diversi ed inferiori. Onde la legislazione razziale, sopra tutto in quanto vieta unioni legali (ed anche extra legali) con persone appartenenti a razze di colore⁴¹.

According to this author, it would be necessary to go all the way and take in matrimonial matters, all preventive restrictions already introduced in other legisla-

tions. Because, until then, the marriage can only be: «il mezzo più efficace alla ripercussione e diffusione di malattie non curabili»⁴². The good relations established in the meantime between Italy and Germany on the front of the reflection on the subject of «race and law» may have useful progressions on the level of matrimonial prophylaxis against hereditary diseases⁴³.

4. Aldo Casalinuovo's synthesis

The combination stock-race finds its space in other dimensions of legal discourse, as well. The first term is used more rarely but its meaning is, now, coextensive to that of the second.

Fulvio Maroi addresses the issue of race as a concretion of a visceral relationship that rural households have historically maintained with the earth. It is not precisely the same latitude, physical and mystic together, of the German *Blut und Boden*, but it comes close to it. Consequently, the bio-somatic homogeneity of the people is the long-term result of the close and endogamous relations of kinship typical of peasant families⁴⁴. Salvatore Riccobono celebrates the memory of Roman law as «indice del genio della stirpe»⁴⁵. But the most ambitious and most original attempt to rebuild the conceptual issue is due to the criminal law jurist Aldo Casalinuovo. He devotes an extensive discussion to the whole subject of criminal laws relating to stock and race: starting from the Tenth Title of the Penal Code, and then moving on to the measures of defense of the race of 1938 and finally to those that protect the prestige of the race of 1939. According to him, each

of these moments of Italian law is autonomous from the others but also connected to them by intimate rules of historical and political development.

It is clear that the Tenth Title and racial laws have different goals: the one «[...] tende a tutelare la integrità della popolazione, al fine di evitare eventuali attacchi all'incremento numerico della stessa»; the others tend to «[...] tutelare le qualità fondamentali della razza italiana, al fine di evitare il loro inquinamento»⁴⁶. Thus, for example, the case of venereal infection considered in the article 554 of the Penal Code would be a crime even if committed against an Italian citizen of Jewish race. Stock is, in fact, the entire population of the State «[...] prescindendo dall'appartenenza dei singoli che la compongono ad una ovvero ad un'altra razza»⁴⁷. However, Casalnuovo believes that one cannot deny the existence of a deep connection between criminal defense of the stock and criminal defense of the race. It is necessary to protect, and raise as much as possible, the overall quality of population health before screening it against the action of harmful and disruptive factors, which depend on the contamination of the strains of higher level that compose it with the remaining weakest. «Sterile fatica, invero, sarebbe quella di curare la purità – cioè la esistenza limpida e non inquinata dei caratteri propri di una determinata razza – in una popolazione numericamente e fisicamente debole»⁴⁸. Thus, the action of the state necessarily moves on several levels and each of these is shown in its instrumentality with respect to the next. It begins with the positive measures to support the births and infancy, it proceeds with the criminal defense of conducts that could be able to undermine the

health of the population seen in its entirety, and finally it comes to the preservation of the «real» Italian race. This race must be defended both on the plan of prophylactic mixtures, and on that of political correct distance from «inferior» groups.

Il diritto penale segue a pieno il discusso problema in tutti i suoi aspetti e aderisce a ciascuno di essi. Mediante la tutela della stirpe [...] esso difende l'aspetto quantitativo del problema e quello eugenetico di miglioramento, che più semplicemente potremmo chiamare qualitativo; mediante la tutela diretta, difende l'aspetto etnico, che potremmo altrimenti definire epurativo, e l'aspetto politico⁴⁹.

Of course, Casalnuovo's speech is built on a series of petitions of principle, since it is hard to see how a healthy and robust population could not derive any benefit from all its health when exposed to a simple contact with an ethnic component which is, in theory, – i.e. according to this upside down logic – genetically less strong. On the other hand, such an outcome is not specifically forbidden by racial legislation since, as already mentioned, it never inhibits – unlike the Nuremberg Laws – sexual contact among different racial groups. The sleep of reason and the ideological delirium have always generated monsters at a political level, sophistry and paradoxes in the territories of more courtier academicism.

- ¹ On the links and on the debts that this approach has with similar currents that spread in the rest of Europe, and in France in particular, and on which it is impossible to stay here analytically, see D. Melossi, *Stato, controllo sociale, devianza. Teorie criminologiche in Europa e Stati Uniti*, Milano, Bruno Mondadori, 2002, pp. 47-56.
- ² For an overview see: E.R. Papa (a cura di), *Il positivismo e la cultura italiana*, Milano, Franco Angeli, 1985; R. Villa, *Il deviante e i suoi segni: Lombroso e la nascita dell'antropologia criminale*, Milano, Franco Angeli, 1985; M. Gibson, *Born to crime. Cesare Lombroso and the origins of biological criminology* (2002), it. tr. *Nati per il crimine: Cesare Lombroso e le origini della criminologia biologica*, Milano, Bruno Mondadori, 2004; finally the dated but not devoid of stimulating ideas U. Spirito, *Storia del diritto penale italiano. Da Cesare Beccaria ai nostri giorni*, Torino, Bocca, 1932, pp. 119-165; pp. 205-226.
- ³ C. Lombroso, *L'uomo delinquente* (1876), in Id., *Delitto, genio, follia. Scritti scelti*, a cura di D. Frigessi, F. Giacanelli, L. Mangoni, Torino, Bollati Boringhieri, 1995, pp. 507-508.
- ⁴ Ivi, p. 509.
- ⁵ E. Ferri, *Studi sulla criminalità in Francia dal 1826 al 1878* (1881), in Id., *Studi sulla criminalità*, Torino, Utet, 1926, p. 17.
- ⁶ M. Sbriccoli, *La penalistica civile. Teorie e ideologie del diritto penale nell'Italia unita*, in A. Schiavone (a cura di), *Stato e cultura giuridica in Italia dall'Unità alla Repubblica*, Roma-Bari, Laterza, 1990, p. 229.
- ⁷ This approach is historically shared by a northern positivist as Cesare Lombroso in his essay *In Calabria* (1862-1897), Soveria Mannelli, Rubbettino, 2009, pp. 89-95; but also by a southern positivist as Alfredo Niceforo in his essay *Italiani del Nord e del Sud*, Torino, Bocca, 1901. On geographical and bio-somatic lombrosian reductionism that enhances the discriminatory contents flying over the deep differences between very differently developed realities and social contexts takes a very polemical stand B. Alimena, *La scuola critica di diritto penale* (1894), in Id., *Note filosofiche d'un criminalista*, Modena, Formiggini, 1904, pp. 17-20.
- ⁸ Deeper explanations of the "racial turn", of its pragmatic sense, can be found in many researches. Among the most recent and interesting positions: R. Ben Ghat, *Fascist modernities: Italy, 1922-1945* (2001), it. tr. *La cultura fascista*, Bologna, Il Mulino, 2004², pp. 193-206; F. Germinario, *Razzismo e antisemitismo. Progetto razziale e ideologia totalitaria*, Roma-Bari, Laterza, 2009; A. Tarquini, *Storia della cultura fascista*, Bologna, Il Mulino, 2011, pp. 193-202; A. Ventura, *Il fascismo e gli ebrei. Il razzismo antisemita nell'ideologia e nella politica del regime*, Roma, Donzelli, 2013, pp. 3-45.
- ⁹ See E. Collotti, *Il fascismo e gli ebrei. Le leggi razziali in Italia*, Roma-Bari, Laterza, 2003, p. 187.
- ¹⁰ A. Treves, *Le nascite e la politica nell'Italia del Novecento*, Milano, LED, 2001, pp. 73-81.
- ¹¹ B. Mussolini, *Il regime fascista per la grandezza dell'Italia. Discorso dell'Ascensione pronunciato il 26 maggio 1927 alla Camera dei Deputati*, Roma, Libreria del Littorio, 1927. See also D.G. Horn, *Social bodies. Science, reproduction and italian modernity*, Princeton, Princeton University Press, 1994, pp. 46-64; C. Mantovani, *Rigenerare la società: l'eugenetica in Italia dalle origini ottocentesche agli anni Trenta*, Soveria Mannelli, Rubbettino, 2004; D. Bidussa, *La forza del numero e l'ideologia italiana dello sviluppo*, in F. Migliorino (a cura di), *Scarti di umanità. Riflessioni su razzismo e antisemitismo*, Genova, Il Melangolo, 2010, pp. 87-102.
- ¹² C. Ipsen, *Dictating demography: the problem of population in fascist Italy* (1996), it. tr. *Demografia to-*
- talitaria. Il problema della popolazione nell'Italia fascista*, Bologna, Il Mulino, 1997, p. 207.
- ¹³ F. Cassata, *Molti, sani e forti. L'eugenetica in Italia*, Torino, Bollati Boringhieri, 2006, pp. 168-170.
- ¹⁴ R. Bompiani, *Eugenetica e stirpe*, Roma, Luigi Pozzi, 1931, pp. 2-7.
- ¹⁵ Ipsen, *Dictating demography* tr. cit., p. 221.
- ¹⁶ Treves, *Le nascite e la politica* cit., pp. 246-249.
- ¹⁷ E. Ludwig, *Colloqui con Mussolini* (1932), Milano, Mondadori, 1965, p. 96.
- ¹⁸ B. Mussolini, *Fascismo* (1932), in *Enciclopedia italiana*, Milano, Treccani, 1949, vol. XIV, p. 848.
- ¹⁹ A. Gillette, *Racial theories in fascist Italy*, London-New York, Routledge, 2002, p. 45.
- ²⁰ Treves, *Le nascite e la politica* cit., p. 285.
- ²¹ G. Mosca, *Cenni storici e critici sulle dottrine razziste*, in «Reale Accademia nazionale dei Lincei», nn. 7-10, 1933, *Rendiconti della classe di scienze morali, storiche e filologiche* (text delivered by the author on 25 January 1934), pp. 455-470.
- ²² A. De Marsico, *Per l'uomo e per la stirpe. Discorso pronunciato al Reale Teatro dell'Opera il 2 aprile 1935 - XIII*, in presenza di S. A. R. la Principessa di Piemonte, Roma, Federazione fascista per la lotta contro la tubercolosi, 1935, p. 15.
- ²³ Ivi, p. 11.
- ²⁴ On the elements of similarity and continuity between the defense of stock the Penal Code and racial laws insists, however, I. Pavan, *Una premessa dimenticata. Il Codice penale del 1930*, in M. Caffiero (a cura di), *Le radici storiche dell'antisemitismo. Nuove fonti e ricerche*, Roma, Viella, 2009, pp. 129-157; Id., *La cultura penale fascista e il dibattito sul razzismo (1930-1939)*, in «Ventunesimo secolo», n. 17, 2008, pp. 45-78.
- ²⁵ V. Manzini, *Trattato di Diritto penale italiano secondo il Codice del 1930*, Torino, UTET, 1936, vol. VII, p. 495.
- ²⁶ Ivi, p. 504 (italic in the original).
- ²⁷ G. Bock, *Zwangsterilisation im*

- Nationalsozialismus. Studien zur Rassenpolitik und Frauenpolitik*, Opladen, Westdeutscher Verlag, 1986, pp. 100-103; P. Weindling, *Health, race and German politics between national unification and Nazism: 1870-1945*, Cambridge, Cambridge University Press, 1989, pp. 522-532; H. Friedlander, *The origins of Nazi genocide: from euthanasia to the final solution* (1995), it. tr. *Le origini del genocidio nazista*, Roma, Editori Riuniti, 1997, pp. 38-45; E. De Cristofaro, C. Saletti (a cura di), *Precursori dello sterminio. Binding e Hoche all'origine dell'"eutanasia" dei malati di mente in Germania*, Verona, Ombre Corte, 2012.
- ²⁸ Manzini, *Trattato di diritto penale* cit., p. 539.
- ²⁹ Ivi, p. 544.
- ³⁰ Ivi, p. 552.
- ³¹ Ivi, p. 565.
- ³² Ivi, p. 566.
- ³³ G. Canuto, *La medicina legale dei delitti contro la integrità e la sanità della stirpe*, in «Archivio di antropologia criminale, psichiatria e medicina legale», n. 1, 1938, pp. 11-49.
- ³⁴ G. Benvenuto, *I delitti contro l'integrità e la sanità della stirpe. Commento del Titolo X del Libro II del Cod. pen.*, Prefazione di Eugenio Florian, Napoli, «La Toga», 1934, pp. 7-10.
- ³⁵ Prefazione di Eugenio Florian in Benvenuto, *I delitti contro l'integrità e la sanità della stirpe* cit., p. 5.
- ³⁶ The literature on the subject is abundant and growing. An essential reference is: M. Sarfatti, *Le leggi antiebraiche spiegate agli Italiani di oggi*, Torino, Einaudi, 2009³. From a legal perspective: M.A. Livingston, *The fascists and the Jews of Italy. Mussolini's race laws*, Cambridge, Cambridge University Press, 2014.
- ³⁷ A threat taken seriously even in areas of Catholic culture, then, in general, more lukewarm toward the anti-Semitic campaign. In this regard, L. Gualdi, *La ricostruzione dell'Impero di fronte all'eugenica*, in «Rassegna di morale e diritto», n. 2, 1936, pp. 1-6.
- ³⁸ C. Tisci, *Immagini di Igea. La propaganda sanitaria in epoca fascista*, in F. P. de Ceglia, L. Dibattista (a cura di), *Il bello della scienza. Intersezioni tra storia, scienza, arte*, Milano, Franco Angeli, 2013, p. 110.
- ³⁹ A. Rocco, *Relazione al re*, quoted by S. Drago, *La tutela della stirpe in regime fascista. Il Titolo decimo del Codice Rocco nei lavori preparatori, nella dottrina, nella giurisprudenza*, in «Annali di Diritto e procedura penale», n. 7, 1939, p. 566.
- ⁴⁰ S. Drago, *La tutela della stirpe*, cit., in «Annali di diritto e procedura penale», n. 8, 1939, p. 663.
- ⁴¹ G.B. Funaioli, *La sanità della stirpe e il matrimonio*, in «Archivio di studi corporativi», n. 2, 1940, p. 251.
- ⁴² Ivi, p. 252.
- ⁴³ Ivi, p. 256. Id., *Ancora sulla "sanità della stirpe e il matrimonio"*, in «Archivio di studi corporativi», n. 2, 1941, pp. 279-283. But on the same theme, the desired Germanization of matrimonial law prohibitions, from racial prohibitions racial to those against hereditary diseases, see also F. Vassalli, *Studi giuridici*, Roma, Società editrice del «Foro italiano», 1940, vol. I, *Studi di diritto matrimoniale – Studi sulla dottrina della condizione*, pp. 203-205. On scientific relationships about «race and law» between fascist and nazi regimes, E. De Cristofaro, *Codice della persecuzione. I giuristi e il razzismo nei regimi nazista e fascista*, Torino, Giappichelli, 2008, pp. 353-400.
- ⁴⁴ F. Maroi, *Difesa della stirpe e diritto rurale*, in «Rivista di diritto agrario», nn. 2-3, 1938, pp. 161-166.
- ⁴⁵ S. Riccobono, *Il diritto romano come indice del genio della stirpe*, Roma, Istituto di Studi Romani, 1940.
- ⁴⁶ A. Casalnuovo, *La tutela penale della razza italiana*, in «Rivista penale», n. 9, 1939, p. 1175.
- ⁴⁷ *Ibidem*.
- ⁴⁸ Ivi, p. 1176.
- ⁴⁹ Ivi, p. 1177.