

Violence in Fascist Criminal Law Discourse: War, Repression and Anti-Democracy

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Abstract This article constructs a critical historical, political and theoretical analysis of the essence of Fascist criminal law discourse in terms of the violence that shaped and characterised it. The article examines the significance of violence in key declarations about the role and purpose of criminal law by Alfredo Rocco, Fascist Minister of Justice and leading ideologue, in his principal speech on the final draft of the 1930 Italian Penal Code. It is grounded on the premise that criminal law is particularly significant for understanding the relationship between State power and individuals, and so what was distinctive about Fascist thinking in this regard. The article analyses Rocco's declarations as a discourse in order to highlight their contextual foundations, construction and ideological connections. It argues that the core theme of that discourse is violence, which has three principal dimensions: a close historical and rhetorical connection with war, a focus on repressive and intimidatory force, and a paramount concern with subordinating individuals to State interests. The article then uses this analysis to develop a theoretical reading of the nexus between criminal law and violence in Fascism, in terms of its foundations and reversal of ends and means. The article thus provides an original perspective on Fascism and criminal law, which it argues is important for critical engagement with criminal law discourse in our democracies today.

Keywords Fascism · Violence · Criminal law · Anti-democracy · Democracy

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1 Introduction

Fascism is a dark chapter in Europe's past and a presence that lurks in the life and fabric of democracy today.¹ The fascist past lingers within and affects political and legal discourses, in the forms of a ghostly or even explicit antithesis in relation to which democratic systems are situated and assessed, socio-political forces that are never far beneath the surface of democratic life, and unpalatable connections between fascism and European political and cultural history [20, 45, pp. x–xi]. Such vestiges and their effects are perhaps most disturbing in liberal democratic law, where they may be found in terms of conceptual contiguities and, in some cases, direct continuities within law and ways of thinking related to it [22, 36]. These connections are particularly significant in the area of criminal law, which is central to the relationship between State coercive power and individuals, and as such is arguably the crucible of anti-democratic and democratic principles.² As shown by current and ongoing critical engagement with authoritarian tendencies, the erosion of constitutional protections, and the normalization of exceptional measures in liberal democratic States' responses through criminal law to terrorism and various real or perceived threats to security, maintaining a sense of the legal and cultural parameters of democracy in this regard by reflecting on its antithesis is vital [1, 39, 46, 78]. Furthermore, in a time of economic crisis and the rise of far right political groups across Europe, recalling the historical advent of fascist regimes and analysing their construction becomes an urgent political and academic necessity.

This article responds to these concerns by examining how the role and purpose of criminal law were formulated under Italian Fascism. It does this by focussing on the declarations of Alfredo Rocco, the Fascist Justice Minister, in his most important speech on the final draft of the 1930 Italian Penal Code [56].³ The article develops an integrative analysis (or 'thick description') of those declarations in terms of discourse, in order to identify their core components and significance by examining their context, internal construction and external connections [30, p. 144, 35, pp. 128–129, 24].⁴ In that light, the article argues that Rocco's discourse of criminal

¹ This article follows the usual convention of using the capitalised terms 'Fascist' and 'Fascism' to refer to the regime's specific Italian manifestation, and an uncapitalised 'fascist' and 'fascism' in a generic sense [34, p. 1]. Although some references are made to the idea of generic fascism, the article focuses on Italian Fascism.

² Fraser makes a similar argument in relation to Nazi criminal law [22, pp. 97–98].

³ The Penal Code was completed in 1930 and came into force in July 1931, coming to be known as the Rocco Code after Alfredo Rocco and his brother, Arturo, who was also a key influence on its formulation. It is a paradigm example of the problematic connections between the Fascist past and the present, as it is still in force today albeit after extensive reforms. It is important to recall though that the Penal Code was not the only 'Fascist code' with a significant post-Fascist afterlife. The Penal Procedure Code, arguably even more indicative of Fascist intentions and practice, was also introduced in 1931 but was replaced in 1989. The Civil Code and Civil Procedure Code, introduced in 1942, have like the Penal Code remained in force but with numerous amendments. For general discussion see [66, pp. 183–206 and on the Penal Code 68].

⁴ In this analysis, reference is also made to ideology in order to indicate systems of belief or political thought as factors within Rocco's discourse. The term ideology could perhaps be used instead of discourse, because it too could include the interaction of Rocco's beliefs, intentions and rationalizations with 'the external "supra-personal" forces which condition human existence' [34, pp. 15–17]. However,

law was fundamentally shaped and characterised by its foundational relationship with violence, a focus on which reveals its historical embeddedness, theoretical significance, and ongoing relevance.

Even though the extent of the relationship between Rocco's discourse and the actual substance of the 1930 Penal Code is debatable, he was the major Fascist theorist of criminal law and his work is the essential point of reference in exploring Fascist ideology in this area [12, pp. 265–270]. However, despite the large body of work on Rocco and the Penal Code,⁵ and on the nature and history of Fascism and generic fascism, this perspective on Rocco's doctrine has not been explored before [34, 52]. Moreover, although works on all forms of fascism, including key recent studies of Italian Fascism, emphasise violence as a key factor in such regimes' rise to power, the explicit and implicit linkage between violence and Rocco's declarations about criminal law as part of Fascism, in historical, political and theoretical terms, demands attention [11, 28]. This article therefore fills a significant gap in the literature.

To these ends, the article begins by determining its usage of the term violence and locating it in relation to the contested fields of Fascism and Fascist criminal law. It subsequently outlines the development of Rocco's beliefs and connection with Fascism, before turning to examine the ways in which violence was central to his discourse on criminal law, and connected it with Fascism's main contextual and ideological influences. Here the article argues that Rocco's discourse incorporated three principal manifestations of violence: the significance of war; repression and punishment; and the rejection of democratic values in the form of liberal individualism. The article then argues that these connections between Rocco's statements and violence support two central theoretical interpretations of Fascist criminal law discourse, which highlight the fundamental importance of foundational violence and the reversal of ends and means with regard to individuals and the State. In conclusion, the article ultimately argues that the core violence in this area of Fascist discourse was found in the denial of individual value and the focus on State interests. This, it is argued, represents the principal dimension of anti-democratic violence that is of ongoing, antithetical significance for critical engagement with current criminal law and the precarity of democratic standards in a time of crisis.

2 Locating Violence, Fascism and Criminal Law

Italian Fascism was a combination of many influences and factors. Perhaps primarily characterised by its revolutionary, nationalistic rhetoric and ruthless brutality in seeking to construct a new State order, combined with authoritarian,

Footnote 4 continued

given the particular Marxist connotations of the term ideology—perhaps especially in the context of an analysis of Fascism—discourse is preferred here as the main term.

⁵ A full bibliographical survey is not possible here, but key works on Rocco, Fascism and law include [33, 47, 66, 74].

totalising⁶ and dualistic power structures, Fascism defies ready theoretical definition and is generally deemed to be best understood in terms of its actions and lived realities [52, 55, pp. 38, 120–125, 11, pp. 6–7].⁷ Against that backdrop of complexity, this article focuses on the importance of violence in the roots and dynamics of Italian Fascism and in core aspects of its criminal legal discourse. A first question to be addressed, though, is the meaning of violence.

Violence is a notoriously contingent and polysemous concept, with a range of possible meanings and applications, but with a generally negative critical connotation [67, p. 147]. Used empirically, it can encapsulate numerous meanings, including contested forceful hurting and violation, invasion and disruption of integrity, diminution of dignity, disturbance of a dominant order, death and destruction, denial of individual or cultural identity and value. Used theoretically, the term violence can similarly denote such experiential matters, but may also be a more flexible signifier of critical engagement, avoiding fixed meaning in order to represent an unspecified disruptive or generative force driving a critical (op)position [8, 16]. While it may in some instances indicate a particular manifestation of power, the term perhaps more accurately suggests a particular modality in the expression, application and impact thereof. As a critical device, violence may signify an engagement with power, but can also be used in order to construct analysis of conditions, relations and discursive practices that produce, as well as derive from, power.

In that light, the term violence needs to be deployed with a constantly circumspect awareness of its plural critical potentialities in addressing the objectives and phenomena giving rise to its usage, yet at the same time threatening to overwhelm them through its own emotive charge and contestable meanings [61, pp. 8–9]. As such, a discussion of violence may even be self-defeating, in that the term may be seen to imply the very critical judgement that its use may be intended to call into question; thus, a discussion in terms of violence is always already reflexively precarious. Consequently, in the absence, or even exclusion, of reductive definition, the critical writer (and reader) needs to be aware of some terminological positioning and some parameters of signifiatory possibility [67, pp. 146–151].⁸

In this regard, in relation to Fascism, use of the term violence can be readily understood in an empirical sense given the significance of foundational and generative experiences of war and the impact of economic crisis in Fascism's formation and rise to power, as well as the regime's well-documented repressive brutality and death toll [32, pp. 13–15, 11, pp. 1–3]. Violence also has important

⁶ The term 'totalitarian' was first used in relation to Italian Fascism but has since been used predominantly in relation to Nazism and Communism. Principal studies here include [3, 23]. Specifically on Italy see [15].

⁷ Engagement with the decades-long struggle to define Fascism and an outline of its principal features is beyond the scope of this article. A useful analysis and bibliographical survey may be found in Paxton's *The Anatomy of Fascism*; Griffin also provides an influential analysis of some key theoretical approaches and disagreements in the field [52, pp. 221–249, 34, pp. 1–25]. Major but not uncontroversial Italian studies include De Felice [19] (for discussion see [10, p. 2, 50]) and Gentile [26, 27].

⁸ This could in itself be seen as a violent act of linguistic and conceptual positioning [61, p. 9]. A full intellectual history of meanings of violence falls beyond the scope of this study, for there are as many meanings and implications as there are theoretical usages.

ideological dimensions in Fascism, including theoretical representations of both abstract and physical violence,⁹ as well as more fundamental manifestations in the radical rejection of core liberal democratic ideas, namely the paramountcy of the individual and bounded State power (addressed below). Consequently, for the purposes of this article, the term violence is used to indicate physical forms of interpersonal and collective forceful hurting, as well as ideological levels of meaning. In this way, reading Fascism and Fascist declarations on criminal law under the sign of violence permits an integrative approach to these varied dimensions.

However, it is important to note two caveats. Firstly, although it is possible to identify significant influences on the development of Fascism, the regime did not emerge as a result of a preconceived or linear process, and while extracting a particular theme in Fascism from the complexities of history may provide a useful ‘X-ray image’ of part of its fabric, it must not be misconstrued as a teleological, experiential explanation of the regime as a whole [34, pp. 18–19]. Secondly, whereas violence is a significant component of Fascist ideology, it should not be deemed to dominate it, as a sort of negative anti-content that effaced any other semblances of ideological belief, in that not all Fascist ideology was ‘about’ (explicit) violence [33, pp. 248–259]. Consequently, while this article argues that violence was a core dimension of Fascism and its criminal legal discourse, this needs to be understood as part of Fascism’s broader matrix of conceptual, contextual and consequential dimensions.

Identifying the distinctive characteristics of Fascist criminal law and its relationship with preceding ideological declarations is, as noted above, equally complex. Apart from the clearly repressive measures of the regime’s ‘ultra-Fascist’ special laws of 1926,¹⁰ the Fascist essence of the 1930 Penal Code has long been debated, both in terms of the Code’s ideological content and its relationship with the preceding Zanardelli Code [47, 48, pp. 784–795, 76].¹¹ Moreover, as Gregor notes:

Clearly, what is required to capture a sense of the fullness of historic reality is that a distinction be made between Fascist thought and Fascist behavior—just as one must distinguish Marxist or democratic thought from Marxist or democratic behavior. Just as gulags, mass murder, and slavery mar the history of Marxist and democratic regimes respectively, and urge us to distinguish behavior from ideological commitment, so Fascist behaviors must be distinguished from Fascism’s argued beliefs. Not to recognize the differences between behavior and beliefs would be to falsify reality. [33, pp. 248–249]

In other words, a distinction also needs to be drawn with regard to the substantive law and its application [37]. Nevertheless, Rocco was the so-called architect of the

⁹ See notes 29–30 and related text on Futurism and Sorelianism, below.

¹⁰ The 1926 *Leggi Fascistissime*, or ‘ultra-Fascist laws’ were introduced under Alfredo Rocco’s direction in order to consolidate the Fascist grip on power. These laws included the reintroduction of the death penalty and other repressive measures to deal with political opposition. See in particular [13, pp. 407–473].

¹¹ It is important to note that an emphasis on the difference between Fascist claims, or propaganda, about the Code and its substance became a crucial part of the post-Second World War reform debate [54].

Fascist State, a major influence on the formulation of the 1930 Penal Code, and the main source of Fascist criminal law doctrine [33, pp. 38–60, 38, pp. 15–38, 64, pp. 1009–1010].

3 Violence in Alfredo Rocco's Discourse on Criminal Law

Alfredo Rocco, born in Naples in 1875, specialised in commercial law (in which discipline he became a leading professor) and was politically active, first with the Radicals for a short period, then the Nationalists (he joined the Italian Nationalist Association in 1913) and finally with the Fascists [33, p. 41, 25, pp. 305–306]. An influential thinker, he formulated his principal opinions as a Nationalist, motivated by Italy's economic, political and military weaknesses. His primary belief was the urgent need to move away from the perceived failings of parliamentary democracy, and towards a form of State that focussed on the collective (economic) strength of the nation rather than individual well-being [33, pp. 41–43, 38, p. 17]. As such, Rocco advocated the need for a strong State, rapid economic, industrial and military development, territorial expansion and domination, and the subordination of individuals to the good of the community [33, pp. 48–50, 25, p. 313, 17, pp. 82–98]. In other words, already in the period leading up to the First World War, Rocco was developing through nationalism his arguments for the 'strong State' or 'corporate State' which would dominate his post-war contribution to the emergence and consolidation of Fascism and the 'total State' [5, 25, p. 329, 74].

Rocco began to turn towards Fascism in the period preceding the March on Rome¹² and, elected to parliament as a Nationalist deputy, he subsequently took on a number of ministerial appointments under Mussolini, culminating in his nomination as Justice Minister in 1925 [25, p. 328]. Rocco rapidly embraced Fascism and became one of the movement's leading thinkers, drawing on his earlier opinions to articulate Fascist theory with a view to its legislative realisation,¹³ and overseeing the legal construction of the total State, including the 1926 special laws [13, pp. 407–473, 4, pp. 65–68]. Subsequently, his major legal undertaking for the Fascist regime was to initiate work on reforming the principal criminal and civil law codes, although he was mainly involved in revising the Penal Procedure Code and the Penal Code itself [75, pp. 61–68, 4, p. 93].

Violence, it is argued here, is evident in Rocco's discourse on the Penal Code at three principal levels: in explicit and implicit references to contextual origins in terms of war; in his specific aims for and claims about the role of Fascist penal law, in terms of punishment, repression and intimidation; and most importantly in his vehement rejection of core liberal democratic values, especially (Kantian) individualism. Rocco's key work focussed on here is his 1930 Report (or Speech) to the King on the Penal Code, the principal record of Rocco's criminal law doctrine

¹² Mussolini formed the *Partito Nazionale Fascista* in 1921 and, benefitting from the anarchy his own followers had caused, led the so-called March on Rome in 1922.

¹³ On this point see further the discussion in [38, p. 30, 41, pp. 60–61, 4, pp. 48–53]. In his floridly Fascist tribute to Rocco, Mezzetti represented all Rocco's ideas as being inherently Fascist, an incorrect elision criticised by Gregor [42, 33, p. 60 fn 60].

[56]. This speech was primarily political in character and was written in order to deliver a rhetorically confident message about Fascist motivations and aims, expressing Rocco's ideology in this regard and, without doubt, seeking to flatter the self-image of a Fascist audience and to impress others. As such, it provides clear insights into Rocco's discourse of Fascist criminal legal thought and its place in the contemporary landscape of ideas and influences [63, pp. 985–986, 12, pp. 265–270].¹⁴

3.1 War and State Power

Rocco's discourse on criminal law is anchored in references to the First World War and the Fascist belief in strength of arms, which ground and frame his Report to the King on the definitive text of the new Penal Code [56]. Given the significance of the First World War in the formation of Fascism and its rise to power, and given that Rocco evidently formulated his speech to please his illustrious audience, it is perhaps hardly surprising that Rocco refers to the war. Beyond this aim, however, warfare and violence also become structuring themes in his commentary and as such can be seen as foundational to his expression of a Fascist understanding of criminal law's status and significance, echoing the foundational importance of war for Fascism.

Before turning to the role of war in Rocco's discourse, it is important to recall its significance for Fascism more generally. Fascism took root in Italy largely as a response to particular socio-economic and political conditions, including a nationalistic sense of Italy's entitlement to a better status among leading European States and injustice at her defeats in the First World War [34, p. 63]. The experience of the war's horrors and the masculine camaraderie of the trenches fuelled nationalistic and virile pride, rather than leading to an anti-war sentiment that prevailed in some other European countries, such as France, and also fostered a combative adoption of violence as a glorified means of advancing Italy's resurgence [43, pp. 32–34, 69, pp.73–74]. Mussolini's supporters in the early period of his rise to political prominence were largely drawn from war veterans and, as Paxton argues, this combination of experience of war and the support of ex-soldiers were significant in the extensive use and appeal of violence in the Fascists' rise to power from 1919 [52, pp. 5 and 30, 11, ch. 4–5, 28, 53].¹⁵ The war also became connected with the turn to violent action instead of reason, becoming the dominant method and ideological point of reference in the development of Fascism [28, 45, pp. 17–18]. Consequently the violence of the First World War was a major contextual influence

¹⁴ As noted by Sbriccoli, Rocco's discourse on criminal law is a body of intentions and political argument rather than actual criminal legal doctrine: [64, p. 1009].

¹⁵ Predominantly made up of ex-soldiers, Sorelian revolutionaries and Futurists, Mussolini's newly-formed *Fasci di combattimento* of 1919 gathered momentum from 1920 through the vigilantism and violent activities of his armed supporters, known as *squadri* [21]. Mussolini then used the ongoing squadrist violence (including the infamous murder in 1924 of the socialist member of parliament, Giacomo Matteotti, who opposed his activities) to his advantage by consolidating his grip on power [11, pp. 210–214].

on, and facilitator of, Fascism, becoming embedded in its ideology and self-perception.

The significance of war is clearly echoed and adopted in Rocco's discourse. In the first three paragraphs of Rocco's Report appear a number of references to the King's glory in arms, recalling both the ancient (Roman) right and power of kings, as well as recent military experiences, and the power to punish is presented as an important part of State power, directly linked with war and the power to use armed force externally. In this way, the State appears in Rocco's discourse as an engine of violence on both the external and internal fronts, with criminal law being one of its instruments in an ongoing war against threats to it in the form of criminality and corrupting foreign influences. Although this imagery recalls Hobbes's Leviathan, bearing the two swords of war and justice, and was a recurrent theme in nineteenth-century theories of States' punitive power, in Rocco's discourse it is closely linked to the centrality of war—even the War—in Fascist ideology. Given Italy's experience of an upsurge in criminality and violent crime in the aftermath of the First World War, the image of an internal war on crime also reflected recent experience and perceived needs. The Report's opening makes this clear:

With good reason history will repeat for You the greatest praise that can elate a Monarch: *invictus in armis, in legibus sapiens*.

In Your Kingdom, in truth, the conquests of avenging arms and legislative reforms have been happily associated and are destined to renew the life of the State and the Italian people.

Among the most distinguished monuments of this legislation will be the penal legislative reform, an imposing manifestation of the power of Italian legal genius, which the new national conscience created by war and by Fascism has freed from all traces of foreign ideas and traditions, directing it towards concepts that are ever more originally and genuinely Italian.

In the new legislation the penal reform excels not only for its intrinsic grandiosity, but also for its indubitably superior importance in relation to any other legislative reform. The power to punish is in fact one of the greatest attributes of sovereignty, such that our ancestors considered it to be one of the most essential manifestations of imperium, and likened it, in its fullest extent of application, to the State's power to use armed force (*jus gladii*). And truly such power is also a form of state defence, as it is also a war against enemy activities, which must be defeated in the interests of the State and society.

That victory over external enemies would remain a sterile glory if the most appropriate means were not then adopted to guarantee the existence and conservation of the State in its internal relations with citizens. And first and foremost among these means is the new penal legislation ... [56, p. 7]¹⁶

¹⁶ Author's translation.

Subsequently, when Rocco turns to his general remarks about the Code's roots in Fascist philosophy, he again refers to the war in connection with the establishment of the new regime and its revolutionary impact:

Your Majesty well knows that the political Regime established in Italy with Your Esteemed consent, after the victorious war, was not simply a change of Government, but a substantial and profound transformation of the State [56, p. 11].¹⁷

Further on, when justifying the death penalty (which is also discussed below) he argues that if the State can require its honest citizens to die for it in war, then the State can kill those who offend against its law:

The repugnance that some feel for such a sacrifice [of an individual sentenced to death] is in truth hardly justifiable, in that no one doubts the legitimacy of another sacrifice, much greater and more serious, that the State imposes on citizens: to die fighting for the Fatherland. If such a sacrifice is imposed on hundreds of thousands of honest citizens, why could the legal and moral possibility of inflicting a similar sacrifice on the saddest delinquents ever be in doubt? [56, p. 21]¹⁸

So as these examples indicate, State violence in a physical and collective sense through war is a significant theme in Rocco's discourse about the new Penal Code. References to war anchor and recur in his statements, explicitly and implicitly recalling the experiential and ideological foundations of Fascism and locking this particular set of declarations into Rocco's broader construction of the strong State, rooted in and stemming from war. In this way, violence and criminal law are linked and illustrate what can be seen as a central perception and intention of the Fascist State, that is the paramount social entity wielding the power of life and death over its opponents, external and internal.

3.2 Punishment, Repression and Intimidation

Violence can also be seen in Rocco's discourse about criminal law with regard to the concrete measures that were to be made available to the Fascist State for dealing with those who threatened it, including criminals and political opponents [64, p. 1004]. Rocco had already expressed the importance of the relationship between law and force in theory and practice, and this position combined with the influence of war and Fascist violence more generally was reflected in his statements about punishment [44, p. 71].¹⁹

¹⁷ Author's translation.

¹⁸ Author's translation. This section of Rocco's Report to the King reproduces his earlier speech on the project for the new 'Law for State Defence', the ultra-Fascist law of 1926 that first reintroduced the death penalty [57, pp. 849–855].

¹⁹ Violence and law in relation to Fascism were also discussed by another key Fascist intellectual, Sergio Panunzio. Panunzio devoted much attention to the relationship between law, force and violence, arguing that the latter has an inherent morality and legitimacy when it is used to defend community rights, or

The power to punish is generally a defining feature of a State. In Rocco's discourse though, that power goes beyond and explicitly rejects the view that the State's coercive force is a necessary intrusion on individual liberty (as generally recognised in liberal democracies), as well as the positivist school of criminology's focus on punishment as deterrence,²⁰ becoming instead a conscious adoption and instrumentalisation of force in the interests of the State *against* individual liberty:

According to the individualist philosophical conception that was characteristic of French enlightenment thinking, the right of punishment, in the hands of the State, was conceived of as deriving from an individual's natural right, transferred to the State through alienation or assignment through the so-called social contract, or the contract constitutive of society and the State, or the *pactum subiectionis* that derived from it. [...]

To such ultra-individualist conceptions of the right to punish, which constitute instead more of a negation than an affirmation of that right, considered as a gracious concession made by individuals to the State, in a way that is always changeable and revocable and has as its limits the insurmountable barrier of the individual's natural right to liberty, at least to the extent that it has not been given up, the penal legal philosophy of Fascism is tenaciously and logically opposed. According to such a philosophical conception, the State's right to punish is not derived from an individual's natural right, as natural lawyers would maintain [...]. The right to punish is, instead, according to the Fascist conception [...] none other than a right of conservation and defence belonging to the State, born with the State itself, similar to but substantially different from the individual's right to defence and having the aim of assuring and guaranteeing the fundamental and indispensable conditions for communal life.

This is not simply a right of social defence as understood by the followers of the positivist school of criminology as solely a defence against the danger of recidivism, but a right of defence for society against the danger of crimes or new crimes by all and against all, that is against the danger of criminality as a general social phenomenon: a defence carried out through the threat, the application, and the execution of punishment; and which is explained by way of the general and social prevention of crimes [...] and by way of the intimidation and satisfaction of the general public, as it is by way of the intimidation, the correction and the elimination of individual criminals. [56, pp. 12–13]²¹

This perception of penal power is a central aspect of Rocco's beliefs about the strong State, initially expressed in his Nationalist politics, and subsequently as a

Footnote 19 continued

when it constitutes a necessary revolutionary change in the interests of the community that is not otherwise possible within an existing legal order [51, p. 70, 33, pp. 61–84].

²⁰ Rocco's position in relation to positivist and classical criminology, and the influence of his brother, Arturo Rocco in developing the 'technical legal' approach to criminal law fall beyond the scope of this discussion: see further [62, pp. 522–534].

²¹ Author's translation.

core component of his articulation of Fascism [13, pp. 334–335]. For Rocco, the fundamental relationship between force, or the State's coercive power, and law was supremely important [38, p. 18, 44, pp. 71–72]. As a defining dimension of the new Penal Code, penal powers exceeded those in the previous Zanardelli Code, in quantity and severity, and marked a new stage in Italian penal law [76, pp. 33–37]. This authoritarian turn, it has been argued, built on a pre-existing propensity and tendency in Italian criminal law,²² which had already come to be structured around a tension between conserving order and limiting liberty, demonstrating a degree of continuity in Italian criminal law, but with a notably sharp increase in Rocco's discourse [49, p. 90–91, 64, pp. 1014–1015, 62, pp. 494, 528–534]. As such, this reconceptualisation, extension and augmentation of punitiveness can, it is argued, be seen as another dimension of violence in Rocco's discourse.

Rocco's discourse about reshaping criminal law into a specifically Fascist product involved measures intended to repress dissent, opposition and crime generally, as well as to intimidate subjects through both harsh retributive punishments and dangerousness-based 'security measures', which could be applied in addition to a basic penalty [66, pp. 191–192, 4, pp. 96–98, 18]. In terms of punishments, the principal change in the new Penal Code was to extend the application of the death penalty, which was first reintroduced under the ultra-Fascist laws on the defence of the State in 1926.²³ Towards the end of his Report to the King on the new Penal Code, having repeated the arguments he first used to support the death penalty in 1926, Rocco concluded that its extension under the Code was central to the Fascist transformation, marking a major break with the previous liberal tradition:

Restoring the death penalty in the penal code, the new legislation does not signal a regression, does not abandon any great tradition of which Italy should be proud. On the contrary. Such a reform constitutes another happy sign of the changed spirit of the Italian Nation, of the recovered virility and energy of our people, of the total liberation of our legal and political culture from the influx of foreign ideologies, with which abolitionism is directly linked. [56, p. 25]²⁴

Particularly striking in that statement is Rocco's linkage of the death penalty with key motivational forces in Fascism, namely a nationalistic 'liberation' of Italian (Fascist) penal thought from external influences, a 'recovered virility and energy' as well as war (as discussed above).²⁵ Even though the death penalty was in force elsewhere in Europe at the time, this break from the liberal past was a major step in the ideological construction and positioning of Fascism in terms of criminal law. Consequently, in Rocco's rhetorical formulation, the Penal Code was to be a central component of the reinvigorated Fascist State's ability to wield lawful, penal force in

²² For further discussion of Fascism and continuity, as opposed to Fascism as an exceptional parenthesis in Italian history see [2, p. 12].

²³ For more detailed consideration see [73].

²⁴ Author's translation.

²⁵ Significantly, in his earlier speech on the death penalty in 1926 Rocco also emphasised the fact that leading contemporary democracies had retained the death penalty [57, pp. 847–849].

its war against crime—including the ultimate penalty of death—but in such an increased, deliberately repressive and intimidatory way, linked with the Fascist regime's violent seizure of power and self-represented revolutionary new beginning, that it can be seen as a key dimension of State violence [64, pp. 1003–1007, 44, pp. 71–73]. Read in this way, the significance of the discourse concept as an interpretative tool is particularly apparent, as it underlines the interaction of contextual and ideological forces in Rocco's representation of criminal law. In other words, the context, construction and connections of Rocco's declarations about criminal law show how he sought to draw on these various levels of significance to create a particular, Fascist conception of penalty anchored in a Fascist perception of the world.

3.3 Rejecting Individualism and Democracy

As the previous two sections indicate, the fundamental characteristic of Rocco's declarations in relation to the Penal Code, and of his political ideology more generally as a Nationalist then a Fascist, was the primacy of the State over individuals.²⁶ This view was not only to do with exalting and maximising State power, but also fundamentally grounded on a rejection of eighteenth-century 'liberal-democratic-socialist atomism', Rocco's long-held principal concern, as articulated in one of his early speeches setting out his beliefs under the banner of Fascism [58, pp. 1093–1115].²⁷

Rocco's beliefs in this regard were rooted in the broader matrix of political and philosophical influences that shaped his ideology and the emergence of Fascism. As Sternhell and Neocleous emphasise, Fascism was largely born of the forces of critical modernism, a deeper philosophical movement in late nineteenth- and early twentieth-century Europe involving a turn against post-Enlightenment individualism and its concomitant ideas of materialist reason and rights, together with a reaction against the isolating impact of liberal capitalism and what was perceived to be the stifling influence of tradition [71, pp. 6–7, 45, pp. 10–18, and pp. 59–60, 7, pp. 2–3].²⁸ Violence was a key theme in this movement, with different manifestations including Futurism²⁹ and the revolutionary Syndicalism of Georges

²⁶ The Fascist doctrine of the strong State was not the sole product of Rocco's ideas, however, and was also influenced by other key Fascist thinkers, as well as Mussolini's own political doctrine [48, pp. 780–784, 33].

²⁷ The speech delivered on 30th August 1925 in Perugia was entitled 'The Political Doctrine of Fascism' and came to be one of his landmark works for Fascist doctrine [58].

²⁸ As Neocleous argues with regard to generic fascism 'Far from being a parenthesis in European history, fascism is a product of philosophico-political struggles within European intellectual, cultural and political history, and ... is in turn constitutive of that history' [45, pp. ix–x].

²⁹ According to Paxton, Futurism 'dismissed the cultural legacies of the past' and 'praised the liberating and vitalizing qualities of speed and violence' [52, p. 6, 9]. From its beginnings in Filippo Marinetti's delineation of literary Futurism in 1909, the movement became a pro-war political force at the outbreak of World War I [52, p. 6, 65]. The Futurists were only part of the Fascist intellectual corpus and later diverged from it [33, pp. 252–254].

Sorel,³⁰ both of which were to differing degrees influential on Fascism. However, the key foundation of Fascism focussed on here, and the central aspect of its ideological violence, was the critical rejection of individualism and the values of the French Revolution.³¹ On this basis:

[Fascism] was thus a general attack on the political culture dominant at the end of the nineteenth and the beginning of the twentieth century, on its philosophical foundations, its principles, and their application. It was not only the theory of natural rights and the primacy of the individual that were questioned, but all the institutional structures of liberal democracy [71, p. 7].

This rejection of the importance of individuals and democracy is central to Rocco's Report on the Penal Code, which includes an overt rejection of the values of the French Revolution, of the previous liberal State, and—most notably—an explicit denial of the Kantian argument that the individual must always be treated as an end in herself not as a means [56, p. 21]. Here Rocco expressly argues instead that the individual is nothing but a means to the ends determined by the State and—in his most famous ideological construction—that the strong Fascist State is paramount over any sense of individualism, or society as a collection of individuals:

As a socio-economic organism, the State is no longer represented as the arithmetic sum of the individuals that compose it, but rather as the result, the synthesis or composition of the individuals, of the categories and of the classes that constitute it, having its own life, its own aims, its own needs and interests which transcend in extent and duration the life of individuals, categories and classes and extend over all generations past, present and future. To these pre-eminent aims and interests which are the aims and interests of the State, are therefore subordinated, in any case of conflict, all other individual or collective interests of persons, categories and classes which have in contrast transient characteristics, and not immanent like the interests concerning the life of the State. [56, p. 11]³²

Although he claimed that the principles of criminal responsibility reflected in the Penal Code were still based on the idea of individual, rational free will, despite an increase in the use of objective liability in the Code, Rocco was otherwise explicit in his rejection of the Kantian conception of individual value, the paradigm of Enlightenment philosophy [56, pp. 18–19, 75, pp. 65–66]. As part of his lengthy discussion of the death penalty, he vehemently denied the validity of the Kantian understanding:

It is not in fact true that the individual is the end of all life and all social activity. It is true, on the contrary, that society, considered as the organism that draws together the infinite series of generations, and the State which is

³⁰ Sorel's writing idealised the dynamic and unifying action of the general strike, and subsequently nationalist revolution, as a 'mythical' violence that could galvanise the proletariat, and from it the nation as a whole, into throwing off the chains of liberalism and democracy [52, pp. 32–33, 60, 70, 31, p. 54].

³¹ On modernism and the Enlightenment more generally see [6].

³² Author's translation.

society's legal organisation, have their own ends and live for these: whereas the individual is only an infinitesimal and transient element of social organisation, to the ends of which he or she should subordinate his or her own action and existence. This more just conception of society and the State reveals the error in the Kantian affirmation, that the individual, being an end, can not be reduced to the value of means. No. The individual is in fact the means to social ends, which greatly exceed individual life. [56, p. 21]³³

Rocco's conception of the strong State thus denied the primacy of the individual as a bearer of rights and favoured instead the collective interest in the form of a personified State. As a theoretical model, and an expression of intention for Fascist criminal law, this was a radical departure from the preceding understanding of the penal relationship in Italy, despite the authoritarian tendencies of pre-Rocco criminal law. This, it is argued, is the principal form of violence that may be identified in Rocco's criminal legal discourse and in Fascism [40, pp. 122–123].³⁴ Such anti-individualism opened the possibility of abandoning and dismantling individual worth in practice, justifying the violence of Fascism's specific ideologies, including virilism and later racism, and its actions. In that sense, this ideological move meant that violence was deliberately incorporated into the State and its treatment of subjects, rather than merely being an exceptional force that grounded the State, or that was only wielded by it punitively. Here, the discourse model again shows how Rocco turned the external elements of his ideology inwards, channelling violence from context and connection into essence and self-construction.

4 Fascist Criminal Law and Violence: Theoretical Interpretations

As this article has shown, there were significant connections among the forms of violence that were influential in the rise of Fascism and Rocco's criminal law discourse. Violence was found in Fascism's conditions of possibility, that is the importance of the First World War in opening the way for the regime's emergence. Violence was central, in an abstract sense, to some of its ideological influences (especially Futurism and Sorelianism) and it was Fascism's chosen method of action in its rise to power. Violence was also manifest in its intimidatory and repressive objectives through criminal law. Of particular importance, however, is the form of violence implicit in the adoption of a State-centric ideology that rejected the paramountcy of individuals as bearers of rights.

These forms and themes of violence in Rocco's discourse also need to be considered though, as Paxton has argued, in terms of their functions in that discourse [52, pp. 39–40]. Thus the forms of violence in Rocco's discourse on criminal law can be seen as a way of seeking to consolidate his doctrine, and the

³³ Author's translation. In this part Rocco goes on to declare that in such an understanding it is clear that it is at times necessary to sacrifice the individual to the ends of society through capital punishment: see excerpt above comparing the death penalty with war.

³⁴ This refrain was central to Fascist thought more generally, appearing frequently in declarations of Fascist ideology by Mussolini and Gentile [45, pp. 24–25, 29, pp. 303–304].

new Penal Code, through association with the camaradery, sacrifices and perceived glory of the First World War. They also served to give an appearance of strength in the fight against criminal threats to the State, and to reorient understanding of punishment away from both classical, rights-based *and* positivist models, to a new Fascist conception of intimidation and repression in the interests of State paramountcy. Lastly, rejecting the perceived weaknesses of Kantianism served to reconfigure criminal law as the tool of the State, rather than the guarantor of individual rights against the State, in order to formulate and legitimate the new Code's aims.

Taking these forms and functions together, it is argued that violence represents what can be termed a disjunctive connection in Fascism and Rocco's criminal law discourse. Violence is disjunctive in that it gave rise to Fascism as a regime born of war and crisis rejecting previous values, and was one of its principal defining (and self-selected) traits, in contrast with the peaceful (self-)image of liberal democracy. Yet at the same time violence is connective in that it runs through the lived realities that generated Fascism, through its ideology and predominant ideological influences, through the methods used to consolidate its power and its effects, as well as its criminal law discourse. Violence is thus a connective theme within Fascism and a theme that shows Fascism's rootedness in the experiential and ideological conditions of its time. In other words, that which *prima facie* arguably sets Fascism apart as an (undesirable) exception—its violence—is also the very factor that grounds, situates and explicates it historically.

In theoretical terms, the law-violence nexus in Rocco's discourse can also usefully be recast by reference to two seminal works on that problematic relationship. The first is a critical study of law and violence in a democratic State, which is particularly informative because it highlights the perceived opposition between law and violence in democracy, and thus the contrast with Fascism [16]. The second is a major abstract reflection on law and violence, which was written in the period immediately before the March on Rome and startlingly (although not consciously) prefigures the terminology of Rocco's repositioning of ends and means [8].

Drawing on the first of these works, Robert Cover's influential article about the harsh reality and limits of legal interpretation, Fascist criminal law discourse can be seen as being born of and constituted within 'a field of pain and death', including its origins and genesis [16, p. 1601, 61]. However, whereas the relationship between law and justice with regard to today's (democratic) law in Cover's argument is deemed to be impeded by law's often obscured relationship with violence, Fascist criminal law in Rocco's discourse is anchored in and served by violence: its field of pain and death is its condition for being and its explicit reason for being, in both an explanatory and motivational sense. In this way, Fascist criminal law's foundational violence is not an obstacle, but its valued origin and framework.

This law-violence relationship in Rocco's criminal law discourse is constructed in the name of the strong State and the paramountcy of State interests. As indicated in the sections above, in Rocco's discourse the State became the central factor due to the economic, social and post-war conditions of crisis that revealed Italy's weaknesses, leading Rocco the Nationalist and then Fascist to construct a

politico-legal doctrine that would place the collective above the individual, but endow that collectivity with a unitary and authoritarian force beyond its possible conception as a sum of individuals [44, pp. 71–72]. The strong State for Rocco must be violent, and must constitute and be constituted by anti-democratic violence, in order to define itself and survive.

In that light, with regard to the intentions and motivations expressed by Rocco in the criminal legal sphere, the violence that characterised Fascist criminal law is not law's opposite, but a force that shaped and ran through it. This was especially evident in Rocco's inversion of the Kantian conception of ends and means in his rejection of individualism and his focus on the State. The resounding echo here is of the second major theoretical work referred to above, namely Walter Benjamin's famous critique of violence, in which he sought to displace the distinction between law and violence in terms of ends and means, in order to shed new light on their interrelationships [8, 59, p. 149, 1, pp. 53, and 61–64]. Moving away from the position that '[n]atural law attempts, by the justness of the ends, to "justify" the means, positive law to "guarantee" the justness of the ends through the justification of the means', Benjamin formulated a revealing model of what he called mythic, or lawmaking violence [8, pp. 237]:

For the function of violence in lawmaking is twofold, in the sense that lawmaking pursues as its end, with violence as the means, *what* is to be established as law, but at the moment of instatement does not dismiss violence; rather, at this very moment of lawmaking, it specifically establishes as law not an end unalloyed by violence but one necessarily and intimately bound to it, under the title of power. Lawmaking is powermaking, assumption of power, and to that extent an immediate manifestation of violence [8, p. 248].

Rocco's discourse on criminal law embraced violence as the coercive means to achieve State ends through control and repression, but also fundamentally reconfigured the liberal democratic model (at that time) of individual-State relations, subordinating the former to the latter. In this way his formulation of criminal law's theoretical foundations rejected the Kantian model and incorporated anti-individual, anti-democratic violence. Rather than a concept of State using force to support law in achieving the ends of the social collective of individuals as bearers of rights, with law as the guarantor of those rights through the just use of (exceptional) coercive force, Fascist criminal law in Rocco's discourse would use individuals to achieve the ends of the State, with violence the guarantor of law in upholding that relationship of subordination and thus State interests. Law, violence and the ends of the State (State interests and power) were thus in Benjamin's above phrase 'intimately bound together.' Fascist criminal law in Rocco's discourse, from this perspective, was thereby the antithesis of the liberal (post-French Revolution, Kantian) model, ceasing to act in the name of justice or liberty and becoming violence [40, p. 123, 14, pp. 90–96].

5 Conclusion

This article has shown that the theme of violence enables an integrated reading of the connections it represents in the history of Fascism and Fascist criminal law discourse, revealing the latter's core dimensions. To do this, the article has indicated the need for differentiated deployment of the term violence, and for a nuanced reading of its significance with regard to political and historical analyses of Fascism. In its principal sections, the article has demonstrated how violence in the form of war, repression and anti-democracy both grounded and connected Rocco's declarations with the broader influences on and concerns of Fascism. Moreover, the article has argued that the law-violence nexus in Fascist criminal law discourse may also be interpreted in theoretical terms, particularly with regard to the context and effects of that nexus in relation to State interests, and its subversion of Kantian values in terms of ends and means.

The reading presented here of Rocco's declarations on criminal law in terms of discourse has significantly emphasised the imbrication of context and ideas, demonstrating how Rocco's construction of a Fascist model of criminal law was anchored in the forces affecting the regime's rise to power, Rocco's own formative ideology, and the broader matrix of ideas within and surrounding Fascism. In particular, this has shown how Rocco's presentation of Fascist criminal law involved responses to history and conditions, leading to a reconstruction of their significance for legal thought, and then a projection of a new identity to ground practice that had yet to be developed. In this way Rocco's discourse, before the new Penal Code came into force and its implementation could be assessed, sought to orient its reception and intentions to suit Fascist purposes and State interests.

With regard to its relevance today, this study is important in drawing attention to the shadows of the anti-democratic past that affect current legal discourse and recur in ongoing debate about the shape and role of criminal law in the incessant crisis that afflicts us. As Fraser has noted in relation to Nazism, the themes of Fascist criminal law discourse resonate today in the intimidatory language of toughness on crime and responsibilities to the community [22, p. 100]. They also find echoes in the imagery of the 'war on terror', executive impatience with liberal values and human rights, and the normalization of exceptional powers [1, 39, 46, 78]. This is not to devalue the term Fascism (or fascism) by using it as a loose, dramatic expression of political disagreement, or to suggest a reductive (albeit in some cases also seductive) parallel between Fascism and current systems [77, pp. 392–393]. Instead the aim is to emphasise that, although discourse and practice today, as under Fascism, are not necessarily the same thing, the distance between them is short and bounded by the power of intentions, cultural restraint and systemic beliefs [22, p. 437, 72, pp. 21–22]. In Rocco's discourse, the value of individual liberty and rights was readily overturned in the name of the State, its interests and its need for strength. In a time of crisis and increasing State powers, the discourse of criminal law and the shadows of history demand close attention.

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