

CAPÍTULO VI

WOMEN IN THE ITALIAN PENITENTIARY SYSTEM BETWEEN PROTECTION OF MOTHERHOOD AND (ALMOST) INVISIBILITY

MULHERES NO SISTEMA PENITENCIÁRIO
ITALIANO ENTRE PROTEÇÃO DA
MATERNIDADE E (QUASE) INVISIBILIDADE

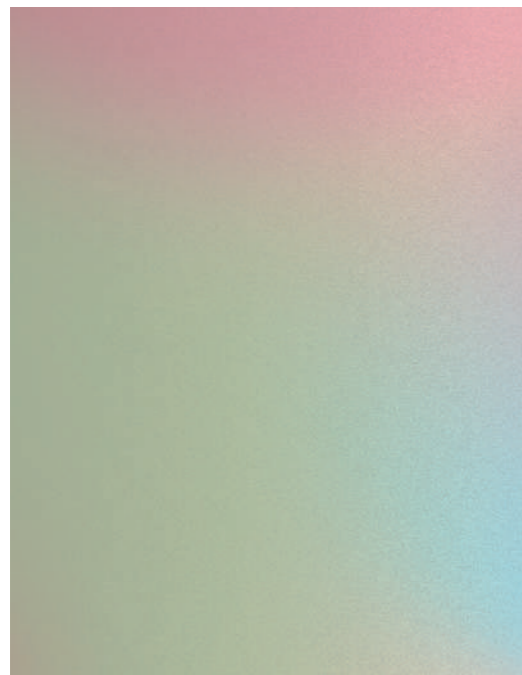
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ABSTRACT



This paper intends to reflect on the legal rules of Italian penitentiary law using gender as a category of analysis. The aim is to highlight the ways in which gender operates within legal norms. In fact, it will be stressed how the Italian penitentiary system, also using the legal rules that discipline it, tends to hide the female gender in a normative system modeled on the male standard. At the same time, in some cases, the legal system provides for differentiated treatment for inmates that are mothers, contributing to create and consolidate a fixed female identity, based on motherhood.

After a brief overview of the measures introduced over time to protect mothers in prison, the legal rules introduced through the latest legislative innovations will be examined in detail. It will be seen how even this legislation has largely focused on the issue of motherhood in prison, intending also to prevent children from entering prison. It will also be highlighted

how the latest reform of Italian penitentiary law no. 354/1975 – which took place in 2018 – alongside the measures to protect motherhood tried, even if timidly, to focus more on the protection of rights and specific needs of all women in prison, regardless of whether they are mothers or not.

Keywords: Women in prison; Female Gender; Italian Penitentiary Law; Motherhood; Children in Prison.

I. INTRODUCTION

This article aims to reflect on the treatment of women in Italian penitentiary law, using gender as a category of analysis¹. When penitentiary law no. 354 of 1975 came into effect, a number of acts designed to protect the relationship between women in prison and their children were introduced. Assuming that “law operates as a technology of gender”, the analysis will focus on the ways in which law has contributed, through these reforms, to produce “fixed gender identities”². In fact, rarely is there any specific reference to the woman in prison in Italian legislation: when the law refers to women, it mainly refers to inmates that are mothers. In this scenario, the female gender is almost always associated with motherhood by the penitentiary system³.

Particular attention will be given to the latest legislative innovations on the topic that could contribute, mainly on a symbolic level, on the one hand to further promoting female subjectivities within the prison and on the other hand to provide additional tools for protecting the mother-child relationship, also aiming to avoid children of socially disadvantaged women entering prison.

II. GENDER IN THE ITALIAN PENITENTIARY SYSTEM BETWEEN NEUTRALITY AND SEXUAL DIFFERENCE

As is well known, legal feminism has been concerned with deconstructing law in Western societies. The law is usually presented as “rational, objective, abstract and principled”⁴. In fact, the system of rights has historically been built on an apparently neutral, autonomous and unconstrained subject⁵. Criminal law in its historical construction has followed this same pattern, but the abstractness and generality of the law tend to hide the fact that it was modelled on a male subject. In the wake of these considerations, the main theories of punishment tend to take the male model as a reference in reflecting on what penalty should be applied to women. A first theoretical orientation maintains that the same penal model applied to men should be used for women: women should be considered by the penal system as fully responsible individuals. A different theoretical orientation states that the penal system must treat women differently from men by applying a care model, based on the specific needs of the female gender⁶. The Italian penitentiary law of 1975, as highlighted by Pitch, adopts both these perspectives and applies them to men and women: the law formally places the protection of the rights of prisoners at the center, but imprints on prison treatment a series of paternalistic welfare mechanisms that end up privileging those who have

¹ Joan Scott (1986), “Gender: A Useful Category of Historical Analysis”, *The American Historical Review* 91, no. 5 (1986): 1053-1075.

² Carol Smart, “The Woman of Legal Discourse”, *Social & Legal Studies* 1 (1992): 34.

³ Sofia Ciuffoletti, “Le politiche legislative sulla detenzione femminile in Italia. Tra effettività e propaganda”, *Studi sulla questione criminale* IX, no. 3 (2014): 48.

⁴ Frances Olsen, “Feminism and Critical Legal Theory”, *International Journal of the Sociology of Law* 18 (1990): 205.

⁵ Tamar Pitch, “Tess e io. Differenze e disuguaglianze nelle differenze”, *Ragion pratica* 2 (2004): 348.

⁶ Tamar Pitch, “Quale giustizia per le donne: appunti per un dibattito”, in *Donne in carcere. Ricerca sulla detenzione femminile in Italia*, ed. Enzo Campelli et al. (Milano: Feltrinelli, 1992), 176-179.

the greatest economic and social resources and excluding the most vulnerable people⁷. In this system, the treatment of inmates that are women is substantially the same as that of men. The subject of the penitentiary system is, once again, not formally gendered. However, the standard reference of the legal system is male. The rare occasions in which penitentiary law deals with women it treats them as exceptions to the male rule, confining the female identity to the single dimension of motherhood⁸. The main reforms adopted in favor of female prisoners will be highlighted in the following paragraphs.

THE MEASURES ESTABLISHED BY THE LEGAL SYSTEM TO PROTECT THE MOTHER-CHILD RELATIONSHIP INSIDE AND OUTSIDE OF PRISON

There are two norms in Italian penitentiary law which provide for home detention measures for mothers of children under the age of ten. A law of 1986 introduced a form of “ordinary” home detention for inmates that are mothers who must serve a sentence of no more than four years⁹. Law no. 40 of 8 March 2001 introduced a “special” measure of home detention for mothers who have to serve a term of imprisonment of more than four years¹⁰. It is interesting to note that both measures, that are meant for mothers in prison, can be granted to the father only when the mother is dead or is unable to take care of her children. The law also provides that “special” home detention can be granted to fathers only when their children cannot be entrusted to other people. The same concept is contained in another legal rule, that introduced the possibility for sentenced women to be admitted to care for and assist their children up to ten years of age outside of prison¹¹. This measure can be granted to mothers in prison under the same conditions that Italian penitentiary law provides for both men and women to be admitted to work outside of prison¹². Even in this case, the father can be admitted to care for children outside of prison only if the mother is deceased and it is not possible to entrust said children to other people. With this measure the legal system seems to be equating childcare effected by women with paid work outside of prison. This action seems to reflect the social dynamics that are still widespread in Western societies today: as it has been pointed out, unpaid family work is still mainly carried out by women¹³.

Also, from the parliamentary proceedings that led to the approval of law no. 40/2001, it emerges that this measure is considered to be not only a woman’s right to maintain a relationship with her children, but also as an element of the prison rehabilitation process of women who have committed a crime.

⁷ Pitch, “Quale giustizia per le donne”, 179-180.

⁸ Ciuffoletti, “Le politiche legislative”, 48; Pitch, “Tess e io”, 346.

⁹ See article 47-ter of law no. 354/1975, introduced by law no. 663/1986.

¹⁰ See article 47-quinquies of Italian penitentiary law introduced by law no. 40/2001.

¹¹ However, this measure has been granted in a very small number of cases, see Ciuffoletti, “Le politiche legislative”, 60.

¹² See article 21-bis of law no. 354/1975 introduced by law no. 40/2001.

¹³ Chiara Saraceno and Manuela Naldini, *Sociologia della famiglia* (Bologna: il Mulino, 2013): 215.

Since the birth of modern prison, the belief has spread that women found guilty of a crime should above all be educated to re-embrace the traditional roles associated with them in society¹⁴. Traces of this theoretical approach are found in today’s penitentiary system: empirical research conducted in the women’s wings of some Italian prisons has shown a widespread belief in female prisoners and prison workers that a woman who has committed a crime, in order to be readmitted into society, must become or go back to being a good mother¹⁵.

In order to safeguard the relationship between women in prison and their children, law no. 62/2011 has established some institutes that foresee attenuated custody for inmates who are mothers: these institutes should be located outside the prison walls¹⁶, prison workers do not wear a uniform inside them, there are no bars on the windows and they are designed to represent a more suitable environment to accommodate children¹⁷. These institutes host: women who have received a pre-trial detention order together with their children up to six years of age; women who serve the first part of the prison sentence, waiting to be admitted to the measure of special home detention, together with their children up to ten years of age¹⁸. Ciuffoletti has clearly highlighted the critical issues related to the introduction of this institutions, underlining how on one hand they have allowed a reduced entry of children into prison, but on the other hand they still determine an unjustified, long term presence of children within a total institution, even if it is less obvious than a prison¹⁹.

Law no. 62/2011 has also established protected group homes for mothers that have received an ordinary or special home detention measure with their children up to ten years of age, if they do not have a suitable residence while serving the sentence²⁰. This institutes could prevent children from entering prison and increase the number of mothers benefiting from the alternatives to prison. In fact, it has been highlighted that women without a suitable domicile – just like women of Roma or Sinti ethnicity – frequently cannot obtain home detention measures, thus impeding the application of this legal tools²¹.

¹⁴ Simona Trombetta, *Punizione e carità. Carceri femminili nell’Italia dell’Ottocento* (Bologna, il Mulino: 2004), 15.

¹⁵ Susanna Ronconi and Grazia Zuffa, *Recluse, Lo sguardo della differenza femminile sul carcere* (Roma: Ediesse, 2014), 258.

¹⁶ Actually, this legal rule has not always been implemented: some of this institutes – like that of Venice or Turin – have been built inside the prison areas.

¹⁷ Giulia Fabini, “Donne, non solo numeri. Uno sguardo qualitativo sulla detenzione femminile. Cosa significa essere il 4% della popolazione detenuta, quanto è difficile affermare i propri diritti”, in *Il carcere secondo la Costituzione. XV rapporto sulle condizioni di detenzione*, Antigone (Roma: Associazione Antigone, 2019), 174.

¹⁸ Article 47-quinquies provides that special home detention can be granted to mothers who have served at least one third of the prison sentence or at least fifteen years in case of a life sentence. The law provides that for mothers in prison one third of the sentence can also be served in an institute with attenuated custody.

¹⁹ Ciuffoletti, “Le politiche legislative”, 62.

²⁰ Women can also enter protected group homes to serve the first third of their sentence with their children up to ten years of age, as provided by article 47-quinquies, already mentioned; also indicted mothers – or fathers, when the mother is deceased or absolutely unable to take care of the children – under house arrest could enter these institutes with their children up to six years of age.

²¹ Ciuffoletti, “Le politiche legislative”, 58.

The establishment of protected group homes, however, has not solved the problem of finding a suitable domicile for women without a home to serve their sentence in. In fact, in Italy there are currently only two of these homes that are active and they are located in Rome and Milan²². The difficulty of opening this kind of institute must also be attributed to the fact that the rules that have dealt with this issue have not provided for the allocation of funds for the creation of protected group homes for inmates that are mothers. In fact, article 4 of law no. 62/2011 establishes that the Minister of Justice may stipulate agreements with local authorities aimed at identifying suitable structures to be used as protected group homes without adding new or greater burdens for public finance.

The same provision is made clear in point 10 of the ministerial decree 8 March 2013 which contains the requirements of these institutes.

Law no. 178 of 30th December 2020 established, in the budget of the Minister of Justice, a fund with an endowment of 1.5 million euros for each of the years 2021, 2022 and 2023²³. The same law specifies that the financial resources are to be divided between the Italian regions in accordance with a decree issued by the Minister of Justice, to be approved by two months before the date of entry into force of law 178/2020²⁴.

Even if this legal norm still remains “in the books” for the moment²⁵, it represents a step forward in the process of implementation of the law that established protected group homes.

As highlighted by the Guarantor for persons deprived of liberty in the Lazio Region, Stefano Anastasia, the economic resources allocated could allow to accommodate 50-60 women together with their children, creating a national circuit²⁶. A sign of the will to further commit to the implementation of the law came from the Conference of the Presidents of the Italian Regional Councils. The Conference has approved an order of the day in which it undertook to solicit the decree of implementation from the Minister of Justice and make use of the help and direct experience of the Guarantors of the rights of persons detained to define the criteria and procedures for the distribution of the funds to be allocated among the Regions²⁷. This legal norm would help to ensure the effective protection of the mother-child relationship by avoiding children entering prison, even in cases in which women live in a condition of greater vulnerability as they lack a suitable place to serve home detention.

²² To analyse the Milan case see Andrea Tollis, “Le case famiglia protette e il “caso milanese””, *Donne Ristrette*, ed. Giulia Mantovani (Milano: Ledizioni, 2018), 329-363.

²³ See article 1, points 322-323 of law no. 178/2020.

²⁴ The decree of the Minister of Justice should be adopted by 1 March 2021.

²⁵ To deepen the difference between law in the books and law in action see Roscoe Pound, “Law in Books and Law in Action”, *American Law Review* 44 (1910): 12-36.

²⁶ Stefano Anastasia, “Madri e bambini in carcere, un passo per farli uscire”, *il Riformista* (2020).

²⁷ To learn more about the order of the day see the following link: <http://www.regioni.it/riforme/2021/01/25/carceri-ok-odg-porrello-a-conferenza-assemblee-regioni-attuare-fondo-case-protette-627103/>.

WOMEN AND MOTHERS IN PRISON IN THE LATEST LEGISLATIVE INNOVATIONS

The approach focused on motherhood highlighted in the previous paragraph was partly maintained in last penitentiary law reform, planned by in law no. 103/2017 and effected by three legislative decrees²⁸.

One of the objectives of the reform was to introduce legal rules that aimed to protect the specific needs and rights of women in prison²⁹. This goal was largely overlooked: few rules have dealt with the issue of female detention in the decrees. One of the legal norms that could have changed with the reform of 2018 is the one that provided, in every prison for women, special services for pregnant women and for women who have just given birth³⁰. The National Guarantor for the rights of persons detained or deprived of liberty, Mauro Palma, has criticized the formulation of this norm, stating that it would have been better to provide specialized health services for all women, not just those who are pregnant or mothers. In the advisory opinion that the National Guarantor issued on the text of the reform before its approval he reminded the legislator that law no. 103/2017 clearly referred to all women, not just mothers. In the 2018 decrees this critical consideration of the Guarantor has been ignored.

The aforementioned reform has not changed the legal norm of the Italian penitentiary law that establishes that women can keep their children with them in prison up to the age of three, specifying also that special nurseries are foreseen to children in prison. The National Guarantor Mauro Palma has criticized also this legal norm in his advisory opinion, as it is not aimed at overcoming the presence of children in the nursery wings of prisons. This norm protects the mother-child relationship in the first years of the child’s life, but it provides for this protection by imprisoning the children. Legislative Decree no. 123/2018 has not modified the norm criticized by the National Guarantor, but it moved the rule in question from article 11 to article 14 of law no. 354/1975³¹.

The 2018 reform also addressed the issue of women in prison without referring to mothers. The law has in fact reaffirmed the provision – already present in the penitentiary system – that the women’s wings must be separated from the men’s wings. The separation of women from men in prison is an issue that dates back to the debate among reformers in the early nineteenth century³² and it is one of the pillars on which the penitentiary policies of the Italian legal system

²⁸ No. 121/2018, no. 123/2018 and no. 124/2018.

²⁹ See article 1, subsection 83, letter t). of law no. 103/2017.

³⁰ See article 11, subsection 8 of law no. 354/1975.

³¹ It should be noted that article 11 is dedicated to the health service in prison, while article 14 is dedicated to the assignment, grouping and types of inmates. On this point it has been highlighted that expunging the mentioned norm from the article dedicated to the health service by moving it to article 14 is coherent with the aim of removing the issue of children in prison from medicalization, see Susanna Marietti, “Il trattamento e la vita interna alle carceri”, in *La riforma dell’ordinamento penitenziario*, ed. Patrizio Gonnella (Torino: Giappichelli, 2019), 28.

³² Trombetta, *Punizione e carità*, 26-28.

are based³³. In Italy there are prisons only for women – currently there are four of them – and forty-three wings for women within men’s institutes³⁴. Very often the women’s wings host a very low number of women, with the consequence that few reintegration activities are organized for them. The 2018 reform added the need for women to be assigned to the women’s wings in such a number as not to compromise treatment activities to the legal rule of separation³⁵.

In this sense, as Marietti stated, the legislation could have provided to conduct some daily activities in common with men, keeping the separation between men and women only at night³⁶. This could favor the development of positive relationships between male and female inmates, avoiding an absolute separation during the daily activities that could contribute consolidating diversified treatments based on gender.

The 2018 legislation also introduced a general legislative provision: through the planning of specific initiatives, women prisoners are guaranteed equal access to cultural and professional training³⁷. This norm represents a step forward in making the female gender more visible in prisons beyond motherhood. In fact, the reintegration activities organized within women’s prisons often do not include higher education, due to the small numbers of inmates³⁸. Even if some good practices are being tested, working, training and recreational activities offered to women still concern far too often activities traditionally considered to be feminine, like cleaning, laundry, cooking and tailoring³⁹. The legal norm in question is very general, but it constitutes an attempt to achieve the objective of protecting the specific needs of women in prison, expressed by the aforementioned reform. On this point it has been stated that it is hoped that this standard is implemented so as to guarantee greater access for women to cultural and professional training and not as a further invitation to organize activities traditionally considered more suitable for women⁴⁰. Otherwise, the perverse effect could be that a legal rule, despite it being aimed at better guaranteeing the needs and rights of women, regardless of their maternal role, instead provides normative coverage to special treatment for women that contributes to further consolidate a fixed gender identity for female prisoners⁴¹.

³³ The other pillars are the formal equality between men and women and the protection of the mother in prison, both of which have already been mentioned, on this topic see Ciuffoletti, “Le politiche legislative”, 57.

³⁴ Antigone, Salute, Tecnologie, Spazi, Vita interna. Il carcere alla prova della fase 2 (2020), 4-5.

³⁵ See article 14 of the law no. 354/1975.

³⁶ Marietti, “Il trattamento e la vita interna”, 28.

³⁷ See article 19 of the law No. 354/1975 modified by the Legislative Decree No. 123/2018.

³⁸ Giulia Fabini, “Donne, non solo numeri”, 171-172. The numbers of women in prison have always been very low: since 1991 the percentage of women in prison has always been between 4 and 5.43% of the prison population, see Michele Miravalle, “Quale genere di detenzione? Le donne in carcere in Italia e in Europa”, Donne Ristrette, ed. Giulia Mantovani (Milano: Ledizioni, 2018), 34-36.

³⁹ See Fabini, “Donne, non solo numeri”, 171-172.

⁴⁰ Marietti, “Il trattamento e la vita interna”, 28.

⁴¹ Smart, “The Woman of Legal Discourse”, 34.

III. FINAL CONSIDERATIONS

It has been highlighted that the Italian penitentiary system tends to consider women mainly as mothers providing for a series of legal instruments to protect motherhood inside and outside prison, confining the female identity to a single dimension. These norms are conceived as exceptions to the male norm on which the prison system is modelled.

The very fact that the term “special” has been associated with a form of home detention provided for mothers in prison reveals the exceptionality and marginality of the measures established to protect women. When a legislation tends to take the male norm as the gold standard anything different is not conceived as enriching, but as inferior or deviant⁴².

In this scenario, women who are not mothers for a long time has been forgotten by the legal system.

The latest prison reform has fixed the requirement to protect the specific needs and rights of women in prison in a norm. In the parliamentary proceedings in which the aims of the reform were discussed, it was stated that this norm was very general, but it was nevertheless decided to insert it, as it was considered a question of *civilization*⁴³. The provision to protect women’s access to education involves a small application of the objectives of the reform. It is also hoped that it will be, de facto, implemented: in prison the legal norms that are considered as principles are often perceived as less binding than rules⁴⁴. The symbolic meaning of this norm is still appreciable, which, almost fifty years after Italian penitentiary law came into force, seems to have begun to consider, if only minimally, women beyond motherhood.

⁴² M. Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 2013), 58; T. Pitch, “Sesso e genere del e nel diritto: il femminismo giuridico”, *Diritto come questione sociale*, ed. Emilio Santoro (Torino: Giappichelli, 2010), 103.

⁴³ To analyse the parliamentary proceedings see the following link: <https://www.camera.it/leg17/126?tab=5&leg=17&idDocumento=2798&sede=&tipo=>

⁴⁴ C. Sarzotti, “Il campo giuridico del penitenziario: appunti per una ricostruzione”, *Diritto come questione sociale*, ed. Emilio Santoro (Torino: Giappichelli, 2018), 198-199.

IV. REFERENCES

- Anastasia, S. (2020). Madri e bambini in carcere, un passo per farli uscire. *Il Riformista*. <https://www.ilriformista.it/madri-e-bambini-in-carcere-un-passo-per-farli-uscire-184999/>
- Antigone (2020). Salute, Tecnologie, Spazi, Vita interna. Il carcere alla prova della fase 2. <https://www.antigone.it/upload2/uploads/docs/PreRapporto2020.pdf>
- Ciuffoletti, S. (2014). Le politiche legislative sulla detenzione femminile in Italia. Tra effettività e propaganda. *Studi sulla questione criminale*, IX(3), 47-71.
- Fabini, G. (2019). Donne, non solo numeri. Uno sguardo qualitativo sulla detenzione femminile. Cosa significa essere il 4% della popolazione detenuta, quanto è difficile affermare i propri diritti. In *Antigone, Il carcere secondo la Costituzione. XV rapporto sulle condizioni di detenzione* (pp. 165-177). Associazione Antigone. <https://www.antigone.it/quindicesimo-rapporto-sulle-condizioni-di-detenzione/wp-content/uploads/2019/06/xv-rapporto-antigone.pdf>
- Marietti, S. (2019). Il trattamento e la vita interna alle carceri. In P. Gonnella (Ed.), *La riforma dell'ordinamento penitenziario* (pp. 15-31). Giappichelli.
- Minow, M. (1990). *Making All the Difference: Inclusion, Exclusion, and American Law*. Cornell University Press.
- Miravalle, M. (2018). Quale genere di detenzione? Le donne in carcere in Italia e in Europa. In G. Mantovani (Ed.), *Donne ristrette* (pp. 29-58). Ledi- zioni.
- Olsen, F. (1990). Feminism and Critical Legal Theory. *International Journal of the Sociology of Law*, 18, 199-215.
- Pitch, T. (1992). Quale giustizia per le donne: appunti per un dibattito. In E. Campelli, F. Faccioli, V. Giordano, T. Pitch (Ed.), *Donne in carcere. Ricerca sulla detenzione femminile in Italia* (pp. 175-183). Feltrinelli.
- Pitch, T. (2004). Tess e io. Differenze e disuguaglianze nelle differenze. *Ragion pratica*, 2, 339-362.
- Pitch, T. (2010). Sesso e genere del e nel diritto: il femminismo giuridico. In E. Santoro (Ed.), *Diritto come questione sociale* (pp. 91-128). Giappichelli.
- Pound, R. (1910). *Law in Books and Law in Action*. *American Law Review*, 44, 12-36.
- Ronconi, S., & Zuffa, G. (2014). *Recluse. Lo sguardo della differenza fem- minile sul carcere*. Ediesse.
- Saraceno, C., & Naldini, M. (2013). *Sociologia della famiglia*. il Mulino.
- Sarzotti, C. (2010). Il campo giuridico del penitenziario: appunti per una ricostruzione. In E. Santoro (Ed.), *Diritto come questione sociale* (pp. 181-238). Giappichelli.
- Scott, J. W. (1986). Gender: A Useful Category of Historical Analysis. *The American Historical Review*, 91(5), 1053-1075.
- Smart, C. (1992). The Woman of Legal Discourse. *Social & Legal Studies*, 1(1), 29-44.
- Tollis, A. (2018). Le case famiglia protette e il "caso milanese". In G. Man- tovani (Ed.), *Donne Ristrette*, (pp. 329-363). Ledi- zioni
- Trombetta, S. (2004). *Punizione e carità. Carceri femminili nell'Italia dell'Ot- tocento*. il Mulino.