

PETER PAZZAGLINI

COMMENTS ON THE COMPARABLE PRACTICES
OF MEDIEVAL IMPRISONMENT



SIENA
CIRCOLO GIURIDICO DELL' UNIVERSITÀ
1974

ESTRATTO da « STUDI SENESI »
LXXXVI (III Serie, XXIII) 1974 - Fasc. 1

COMMENTS ON THE COMPARABLE PRACTICES OF MEDIEVAL IMPRISONMENT *

Mr. Pugh's scholarly presentation of the general and early history of imprisonment in medieval England provides an excellent point of reference for some remarks on the nature of imprisonment in medieval Italy, especially in Siena¹. The value of his pioneering study is unquestioned and will assuredly stimulate comparable studies of the theory and practice of imprisonment and its relationship to judicial process and punishment. The quality of prison life and prison buildings presumably varied from country to country, but the management of prisons and the distribution and classification of prisoners were generally the same everywhere.

Albertus Gandinus (d. 1305) believed that prisons were for men deserving of detention and advocated the custody solely of those accused of serious crimes requiring personal penalties, such as hanging, branding, or the loss of a limb². Describing a prison as a secure and fearful place, Pseudo-Bartolus also warned against its employment as a penalty for wrongdoers³. Though penal imprisonment in theory was foreign to Roman law, a tendency towards the use of prison as *poena* had developed even in classical practice⁴. In the middle ages, the custodial, coercive, and penal functions of imprisonment eventually merged. Mr. Pugh argues that imprisonment as punishment appeared early in English

* RALPH B. PUGH, *Imprisonment in Medieval England*, Cambridge, At the University Press, 1970, pp. xvi + 419.

¹ Reviews of Mr. Pugh's book have appeared in the *American Historical Review* (December, 1969), *The Times Literary Supplement* (January 22, 1970), and the *English Historical Review* (April, 1970).

² ALBERTUS GANDINUS, *Tractatus de maleficiis*, rub. *Quid sit agendum reo presente et non contumace*, num. 4 in H. KANTOROWICZ, *Albertus Gandinus und das Strafrecht der Scholastik*, Berlin-Leipzig, 1926, II, pp. 153-154.

³ PSEUDO-BARTOLUS, *Tractatus de carceribus*, caput primum, num. 2 in *Tractatus universi iuris*, Venetiis, 1584, t. 11, pt. 1, fol. 201r.

Domenico MAFFEI discusses the authorship of this treatise in *Il 'Tractatus Percussionum' pseudo-bartoliano e la sua dipendenza da Odofredo*, « Studi Senesi », III, 15, 1966, pp. 7-8.

⁴ U. BRASIELLO, *La repressione penale in diritto romano*, Napoli, 1937, pp. 414, 487. See D. 48. 19. 8. 9 '...carcer enim ad continendos homines, non ad puniendos haberi debet'.

practice as an integral part of a system considered at first to be custodial and coercive. Bracton viewed imprisonment not only as custodial but also as punitive; within two hundred years after the Conquest, imprisonment was a punishment for violent disseisin, false accusation, poaching and contempt of court⁵. Statutory penal imprisonment in England was for a definite or indefinite term, frequently went hand in hand with a fine or 'ransom', and sometimes involved the loss of office or the restitution of property. Mr. Pugh refers to statutes from 1272 to 1523 authorizing such imprisonment. By Westminster II (1285) kidnappers suffered perpetual imprisonment, and salmon fishers using nets in the close season incurred three months' confinement for the second offense; by 1495 the stealing of hawks' and swans' eggs was punished with a fine and a year and a day's imprisonment, the most frequent term where the duration was limited by statute (Pugh, pp. 29-32). In short, the growing incidence of punitive imprisonment in medieval England was mainly the work of statute legislation.

As a result of Roman law influence, it is uncommonly difficult to find examples of punitive imprisonment in Italian town statutes of the thirteenth and fourteenth centuries. A Florentine statute of 1322 punished with six months' imprisonment any man who failed to pay a fine imposed for the illegal purchase of chickens, mushrooms, and cheese within a specified area⁶. Unfortunately, no clear evidence of punitive imprisonment appears in the Siense constitutions of 1262 and 1309-10. A provision of 1309-10 detained for one month in communal prisons rogues and idlers caught playing games in the market place of the town; although the legal text contains the medieval Italian infinitive *ditenere*, the penal intention of such imprisonment is arguable⁷. It is easier to find examples of punitive imprisonment within Siense ecclesiastical jurisdiction; after condemnation by the bishop's court, a *clericus*

⁵ BRACTON, *De legibus et consuetudinibus Angliae*, f. 124. rub. *De custodia reorum* and f. 155, rub. *De minoribus et levioribus criminibus quae civiliter intentantur* in G.E. WOODBINE, *Bracton de legibus et consuetudinibus Angliae*, trans. S. THORNE, Cambridge, 1969, II, pp. 349-350, 438. For additional information on punitive imprisonment in England read F. POLLACK and F.W. MAITLAND, *History of English Law*, Cambridge, 1968, II, pp. 516-517.

⁶ G. BOHNE, *Die Freiheitsstrafe in den italienischen Stadtrechten des 12-16 Jahrhunderts*, Leipzig, 1925, I, p. 144.

⁷ A. LISINI ed., *Il Constituto del Comune di Siena volgarizzato nel 1309-10*, 2 vols, Siena, 1903, dist. V, rub. xxviii. Examples of punitive imprisonment in late medieval Italy are to be found in BOHNE, *Die Freiheitsstrafe*, I, pp. 111, 120-121, 142-144. The arbitrary use of imprisonment to suppress political opposition was not uncommon in thirteenth century Siena. See F. TEMPESTI, *Provenzan Salvani*, « *Bullettino Senese di Storia Patria* », VII, 1936, p. 48.

or *ecclesiastica persona* suffered perpetual incarceration for rebellion, homicide, or forgery⁸. Canon lawyers naturally considered penal imprisonment as a form of penance and means to avoid bloodshed. With an inadequate diet, English Cistercians endured confinement for life in the twelfth century, if convicted of killing another member of their order (Pugh, pp. 376-377).

In the late thirteenth century, imprisonment for debt began to be provided for by English statute. Debts became more of a problem with the increase of commerce and the lack of provisions for credit. In theory, coercive imprisonment forced debtors to discharge their liabilities; in reality, many lacked the means to do so and relied on their creditors or charity for sustenance. The Statutes of Acton Burnell (1283), of Merchants (1285), and of Westminster II (1285) sanctioned the coercive imprisonment of defaulting debtors. Mr. Pugh clearly details the obligations these statutes placed on jailers to protect the interests of the creditor. By 1285, the mayor or chief warden of an English town was responsible for delivering a man in arrears to the local prison keeper, and the keeper assumed responsibility for the debt if the debtor was not received; jail keepers in England, moreover, were liable for the debt of an escaped debtor. Insolvent debtors were at the mercy of beneficent testaments, almsgiving, occasional pardons, and periodic releases to beg in nearby towns. English practice separated debtors from suspected felons and, in this respect, resembled the Sienese manner of establishing segregated quarters in communal prisons for *banniti pro avere*⁹. In the Sienese prisons, the indigent were set apart from their wealthier counterparts so that almsgivers might recognize those in need¹⁰; at times, the commune gave outright grants for the assistance of these prisoners¹¹. Sienese constitutional redactions of 1262 and 1309-10 regulated the detention of insolvent debtors and placed restrictions on the *captores exbannitorum*, officials in

⁸ L. ZDEKAUER, *Statuti Criminali del Foro Ecclesiastico di Siena*, « Bull. Sen. St. Patria », VII, 1900, pp. 239, 243, 247, 251.

⁹ Siena, Archivio, Statuti, n. 4, f. 326r. At the end of this essay, Sienese prison regulations of February 5, 1298, listed as Statuti di Siena, Ordinamenta Vera, n. 4, fols. 326r-327r, have been edited for the first time. William BOWSKY gives a brief description of these ordinances in *The Medieval Commune and Internal Violence: Police Power and Public Safety in Siena, 1287-1355*, « American Historical Review », October, 1967, pp. 2-3. Cfr. LISINI, dist. I, rub. cdxxxviii; dist. II, rub. lxxi.

¹⁰ LISINI, dist. I, rub. cccxcvii.

¹¹ W. BOWSKY, *The Finances of the Commune of Siena 1287-1355*, Oxford, 1970, p. 31.

charge of arresting a *bannitus pro avere* at the wish of the creditor¹². If procedural rules were not obeyed, these officials sustained fines and assumed the debts of impoverished debtors. In addition to imprisonment for debt, Sieneese legislation provided for the detention of citizens who did not pay their taxes or satisfy damages inflicted on property¹³. Though nobles, soldiers, doctors of law, and honorable women were normally exempt from imprisonment for debt in Italy, Siena had established by the fourteenth century a separate house for female debtors¹⁴. As a rule in Italy, debtors were detained in a public prison and not in a *carcer privatus* maintained by one or more creditors.

Mr. Pugh explains how the classification and distribution of prisoners influenced the structure of prison buildings since inmates did not mingle indiscriminately. For the most part, debtors and misdemeanants were separated from suspected felons, nobles from commoners, laymen from clergy, citizens from foreigners, and males from females. Certain prisons, such as the Fleet and the King's Bench, offered special accommodations for the noble, and the best rooms within each prison usually went to the well-to-do¹⁵. The *Dialogus de Scaccario* stipulated that the king's debtors of knightly rank could not be lodged in close quarters but merely within the precincts of a prison¹⁶. The majority of the prisoners in the Fleet were civil trespassers, held either for debts or unpaid fines; if accompanied by a keeper or *baston*, they had the privilege of leaving their lodgings to settle business affairs in town. Citizens and foreigners were kept apart at Newgate, a major municipal prison for suspected felons and the most dangerous types of criminals¹⁷. Women locked up in 1279-80 at Maidstone occupied

¹² L. ZDEKAUER ed., *Il Constituto del Comune di Siena dell'anno 1262*, Milano, 1897, dist. II, rub. ii, i (à); dist. I, rub. dxxiii; dist. II, rub. lvii; dist. II, rub. lv. Cfr. LISINI, dist. II, rub. lxxii, rub. lxxiv. Italian practice prohibited entrance into a debtor's home for the purpose of arresting him. See G. SALVIOLI, *Storia della Procedura Civile e Criminale*, Milano, 1927, pp. 749-751; this work has been reprinted at Frankfurt/Main - Firenze in 1969.

¹³ ZDEKAUER, dist. I, rub. cclvi; dist. IV, rub. xl. Cfr. G. ROTONDI, *Sena Vetus*, « Rivista Storica Italiana », IX, 1892, pp. 214-215. Concerning the imprisonment of Sieneese citizens acting as guarantors for insolvent *gabella* purchasers see W. BOWSKY, *The Impact of the Black Death upon Sieneese Government and Society*, « Speculum », XXXIX, January, 1964, p. 29.

¹⁴ LISINI, dist. II, rub. lxxii. Cfr. PSEUDO-BARTOLUS, *Tractatus de carceribus*, cit., num. 3.

¹⁵ See M. BASSETT, *The Fleet Prison in the Middle Ages*, « University of Toronto Law Journal », V, 1944, pp. 393-397.

¹⁶ R. PUGH, *The King's Prisons before 1250*, « Transactions of the Royal Historical Society », V, 1955, p. 15.

¹⁷ M. BASSETT, *Newgate Prison in the Middle Ages*, « Speculum », XVIII, 1943, p. 240.

their own chamber whereas a stone tower was constructed exclusively for them at Newgate in 1406. In addition to a separate women's ward at the Fleet, five sections, including accommodations for beggars, divided prisoners according to social position and the charges held against them. As Mr. Pugh acknowledges, this form of segregation was not peculiar to medieval England. In comparison, the communal government of late thirteenth century Siena distributed prisoners into three jails on the basis of sex, social status, type of condemnation, and whether they were convicted or only accused: the first jail was divided into two chambers separating males condemned for very serious crimes from those convicted of minor offenses; the second jail isolated male debtors from women detained by the commune for whatever reason; and in the third jail lived all men awaiting trial and against whom accusations, denunciations, or inquisitions pended¹⁸. With license to move about when necessary and only if surety was given, nobles and *boni homines*, except those accused of crimes involving the death penalty, lived under house arrest or in places specifically designated by the *podestà*¹⁹. An individual summoned for an offense requiring a pecuniary penalty who gave the proper surety was free of imprisonment while awaiting trial²⁰. As for the general theory of imprisonment of women in Italy, Albertus Gandinus cautioned against their incarceration for debts or crimes: if accused of a crime and awaiting trial, a woman was entrusted to *fideiussore*s or allowed to offer a sworn bond to appear in court and to pay the judgment debt; if accused of a very serious crime, she was placed in a convent or handed over to other women for safekeeping²¹. The imprisonment of harlots for debts, however, was sanctioned by Pseudo-Bartolus²².

The Assizes of Clarendon (1166) directed the building of jails at the king's expense in all counties where there were none²³. Nevertheless, Mr. Pugh defines at length how prison management posed difficult economic problems in the middle ages. Selling

¹⁸ Statuti, n. 4, f. 326r. Cfr. BOWSKY, *Police Power*, pp. 2-3.

¹⁹ Statuti, n. 4, f. 326r. Cfr. LISINI, dist. I, rub. lxxi.

²⁰ Statuti, n. 4, f. 326v. This policy reduced the number of prisoners in communal prisons, difficult to guard when crowded. Cfr. LISINI, dist. V, rub. cdv. See also J. KOHLER, *Das Florentiner Strafrecht des XIV. Jahrhunderts*, Mannheim, 1909, pp. 88-89.

²¹ Albertus GANDINUS, *Tractatus de maleficiis*, cit., num. 4. Cfr. J. FICKER, *Urkunden zur Reichs- und Rechtsgeschichte Italiens*, Innsbruck, 1874, IV, p. 477, n. 20.

²² PSEUDO-BARTOLUS, *Tractatus de carceribus*, cit., num. 3.

²³ W. STUBBS, *Select Charters*, Oxford, 1966, p. 171: 'Et in singulis comitatibus ubi non sunt gaiolae, fiant in burgo vel aliquo castello regis de denariis regis et bosco eius si prope fuerit, vel de alio bosco propinquo, per visum servientium regis, ad hoc ut vicecomites in illis possint illos qui capti fuerint per ministros qui hoc facere solent et per servientes suos, custodire'.

temporary custody of the jail to someone or granting the jailership in fee with land for its support partly relieved English sheriffs of the full responsibility for building, mending, and guarding county jails. Notwithstanding that English sheriffs in the thirteenth century frequently hired jailers whose wages were paid by the Exchequer, 'farmed' jailerships to devoted royal servants, franchises which the king granted like other rights connected with the administration of justice, were becoming more common. By the mid-thirteenth century, castles acquired an increased value as a place of detention. In fact, the Assizes of Clarendon declared that castles and fortresses were to serve as jails if specific buildings designed for this purpose were lacking. Whenever castles were unavailable, populous and conveniently located villages furnished suitable locations for county jails, usually constructed of wood before 1250²⁴. In contrast, the prisons of Siena were originally located in private towers, palaces, or homes rented by the commune. A constitutional measure of 1262 permitted the rental of a tower and palace or house where *banniti pro maleficio* and *banniti pro avere* were lodged respectively²⁵; a recorded payment by the commune in 1263 financed the construction of a prison for captured exiles in a private tower²⁶. The custody of communal jails was farmed to citizen-contractors, the *soprastanti delle prigioni*, who collected fixed fees and taxes²⁷. By the thirteenth century, Siennese prisoners mainly financed their own keep and, in effect, subsidized the salaries of those officials supervising and guarding the prisons²⁸. No prisoner in Siena could be admitted or released without the payment of an established fee to the *soprastanti* and without the consent of the *camarlingo* and the *quattro provveditori* of the Biccherna, the magistracy of the commune which managed its finances and maintained lists of all those held in its prisons²⁹.

²⁴ PUGH, *The King's Prisons*, p. 13 ff.

²⁵ ZDEKAUER, dist. I, rub. dv; dist. II, rub. lvii.

²⁶ TEMPESTI, *Provenzan Salvani*, p. 54. Cfr. *Cronache Senesi in « Rerum Italicarum Scriptores »*, t. XV, pt. VI, Bologna, 1932, p. 142, n. 1.

²⁷ LISINI, dist. I, rub. diii; Statuti, n. 4, f. 326v. Cfr. ZDEKAUER, dist. I, rub. cxlv; dist. I, rub. dv. See also *Cronache Senesi*, p. 142, n. 1; Siena, Archivio, Biccherna, Deliberazioni, nn. 751-968.

²⁸ Statuti, n. 4, f. 326v.

²⁹ Siena, Archivio, Biccherna, Banditi e Carcerati, n. 740, f. 1r: 'In nomine domini amen. Hic est liber in quo scripti sunt carcerati comunis sen., videlicet illi qui sunt in carceribus comunis sen. exbanniti et condempnati comuni sen. et tempore quo fuerunt condempnati et cause et quantitates in quibus sunt condempnati ipsi et quibus eorum factus et compositus tempore camarlingatus Dompni Uguiccionis monaci Sancti Galgani camerarii comunis sen. et Soczini domini Giannis, Mei Guidi, Jacobi Uguiccionis Bonecti et Naddini Tuccii Leonardi, quattuor provisorum comunis sen. et de eorum mandato

Any person charged with an offense but not yet convicted or absolved, besides offering the proper surety, if he was permitted to do so, was required to pay the customary fee for release; the Siense constitution of 1309-10 attempted to regulate with financial penalties the fees of prisoners³⁰. Likewise in England, jail keepers viewed their prisoners as a source of remuneration, collected lawful and customary fees from them, and occasionally extracted extortionate payments for the discharge of their duties. Mr. Pugh does not condemn this practice of fee-paying but instead sees it as an unavoidable first stage in the development of a modern prison system. Attempts in the fifteenth century at the regulation by statute of fee-collecting made the exactions less arbitrary yet no less heavy. In addition to fees, jail keepers charged prisoners for goods and services, like beds, bedding, lights, food and drink. A prisoner faced a series of regular exactions at the Fleet in the middle ages: payment of the admission fee, a reward for the clerk who drew up his bond for good behavior, the offer of tips to the chamberlain, porter, and jailer, the rental of his lodging, the regular purchase of necessities from the warden, and the final settlement of the release fee. Most fees and charges were fixed in a sliding scale determined by ability to pay³¹. There were some efforts to regulate the sale of goods and services; by 1434, the keeper of Newgate was forced to swear before London officials that he would charge equitable prices for ale or coals³². Mr. Pugh connects the use of 'ironing' with payments by the prisoner to the jailer. English prisons were frequently understaffed with sufficient turnkeys and weak in construction; security was achieved

tempore regiminis nobilis et potentis militis domini Henrici de Tanghetinis de Brixia honorabilis potestatis civitatis sen. in anno domini millesimo ccc.ii., indictione XV, de mense maii proxime et sic inferius per ordinem apparebit'. This series (fols. 1r-51v) runs from May, 1302 to June, 1304 and offers many examples of individuals condemned and imprisoned for various offenses, ranging from impeding the work of the *captore exbannitorum* (f. 19r) and gambling (f. 24r) to sodomy (f. 35r). The name of the prisoner was cancelled after his execution: f. 39v, '... fuit cancellatus quia fuit eidem capud amputatum'. Occasionally a death occurred before a fine was satisfied (fols. 11r, 18r, 33r, 38v). Many prisoners were set free on festive occasions (fols. 11r, 19r, 24r), and others were released after payment of their condemnations to the officials of the Biccherna (fols. 19r, 35r). Cfr. Siena, Archivio, Soprastanti alle Carceri, Registri dei Carcerati, nn. 1-13: these thirteen registers list the names of prisoners assigned to the soprastanti from 1394 to 1557 with annotations of release or death. See also Biccherna, Misture, nn. 480, 611.

³⁰ LISINI, dist. I, rub. diii. A diplomatic document of 1257 provided for the release of foreign soldiers from the prisons of Mantua only after they had satisfied all expenses for food and drink; see FICKER, *Urkunden*, IV, p. 437.

³¹ A detailed discussion of fees and charges appears in BASSETT, *Fleet Prison*, p. 395.

³² BASSETT, *Newgate Prison*, p. 241.

by loading prisoners with chains and manacles. Though it was normal to fetter suspected felons to prevent escape, English jailers often affixed irons to all types of prisoners in order to sell their removal at a price determined by the inmate's status. If prosecuted for killing a Sienese citizen or *contadino* in a street fight or quarrel and unable to pay a heavy fine, a convict was detained in communal prisons and bound around the feet, arms, and neck with irons of specified weight until he gave full satisfaction³³.

Mr. Pugh devotes two chapters to the earlier (before 1273) and later system of regularly clearing prisons of their populations, especially suspected felons, by king's bench judges, circuit judges, and commissions of jail delivery. He praises the work of the justices of jail delivery because few suspects came before the eyre in the county, the normal system of jail delivery; needless to say, without the hope of pardon or the possibility of acquittal at the eyre, many defendants were contumacious, fled, and subsequently were outlawed³⁴. The author of the *Italian Relation* (c. 1500) observed that jail deliveries by the chief justice or his lieutenants occurred at least twice a year in the kingdom and more frequently in London³⁵. No doubt English justices of assize or jail delivery and the king's bench judges were just as efficient as the criminal judges of the *podestà* in Siena. Approximately twenty thousand persons from the city and the Sienese contado were condemned from July, 1270 to June, 1296 for theft, homicide, and lesser violations³⁶. Only a small percentage of those convicted paid the financial penalties imposed while the remainder possibly suffered mutilation, imprisonment, death, or banishment from the town. If the fine was paid, cancellation of the condemnation was made by a notary of the *Biccherna* in the *Libri Clavium* and from the official list of communal prisoners³⁷.

³³ LISINI, dist. V, rub. ccxlviii. Cfr. *Cronache Senesi*, p. 142, n. 1.

³⁴ See T. GREEN, *Societal Concepts of Criminal Liability for Homicide in Medieval England*, « *Speculum* », October, 1972, p. 671, n. 5, p. 672, n. 11.

³⁵ *An Italian Relation*, Camden Society, XXXVII, 1847, p. 36 in BASSETT, *Newgate Prison*, pp. 243-244. Many specific references to the jail delivery rolls, especially the Newgate rolls, of Edward I's reign are made by RALPH B. PUGH in *Some Reflections of a Medieval Criminologist*, « *The Proceedings of the British Academy* », LIX, 1973, pp. 1-24.

³⁶ Siena, Archivio, *Biccherna*, *Banditi e Carcerati*, n. 725, fols. 1r-1052r. According to WILLIAM BOWSKY, Sienese archival records (*Podestà*, *Malefizi*, n. 6, fols. 1r-34r) indicate that only one judge for a single third of the city heard seventeen criminal cases within three weeks in 1298. See BOWSKY, *Police Power*, p. 3. Cfr. *Podestà*, *Malefizi*, n. 10, fols. 1r-58v for additional criminal cases from July to August, 1305.

³⁷ See *Biccherna*, *Banditi e Carcerati*, n. 740, fols. 1r-51v and BOWSKY, *Police Power*, p. 3, n. 5.

Wholesale enlargements of prisoners occurred only rarely in medieval England, according to Mr. Pugh, who recognizes many examples of individual pardons and indulgences, including the release of many prisoners under Edward I for service in foreign wars. Except for the liberation of prisoners after Henry II's death to rectify the many cases of arbitrary imprisonment by administrative order during the king's later years, Mr. Pugh found only one notable example of the wholesale release of prisoners, on a festive occasion, Charles V's visit to London in 1522. On the other hand, in honor of Christmas, Easter, and the Assumption of the Virgin Mary, Sienese prisoners were regularly freed; archival records contain lists of the prisoners emancipated on such occasions³⁸. For example, on August 14, 1295 twenty-two men and three women were freed apparently in honor of the Virgin Mary³⁹. Important restrictions on pardons existed: an English statute of 1390 prohibited pardons for certain felonies and required for some offenders a year's imprisonment before the purchase of a pardon, the price fixed according to social rank (Pugh, p. 41); a Sienese prisoner convicted to pay a fine of over one hundred *lire* was not eligible for release until he had served at least two years⁴⁰.

In England, imprisonment of lunatics was common. Along with pregnant women convicted of crimes and those who had slain others in self-defense, the insane formed part of many prisoners on remand. As Mr. Pugh demonstrates, these individuals were either bailed or pardoned eventually. In Siena, to protect ordinary citizens from the violence of the insane, the commune forcefully incarcerated them if a close relative failed to provide sufficient guarantee⁴¹.

If their charges escaped, English jailers in fee, sheriffs or other royal officers sustained fines in the fourteenth and fifteenth centuries; alternative penalties included permanent loss of franchise,

³⁸ See Siena, Archivio, Biccherna, Banditi e Carcerati, n. 741, fols. 1r-42r for lists of prisoners liberated on major feasts; the series covers April, 1428 to June, 1473. Cfr. PSEUDO-BARTOLUS, *Tractatus de carceribus*, cit., num. 6, 9. The liberation of prisoners eased the burden of supervising and guarding them.

³⁹ BOWSKY, *Police Power*, p. 3, n. 7. Supplications of prisoners in the fourteenth and fifteenth centuries for release or diminution of their penalties are extant in Siena, Archivio, Concistoro, Scrittura Concistoriali, Carcerati, nn. 2162-2163. Prisoners in Siena were regularly freed in honor of the Virgin Mary; see Archivio, Consiglio Generale, nn. 470-473 (1337-1382). With the arrival of each new *podestà*, furthermore, prisoners were released; see also Biccherna, Banditi e Carcerati, n. 742.

⁴⁰ LISINI, dist. I, rub. dxxxix. Concerning the requirement of an instrument of peace before release read BOWSKY, *Police Power*, pp. 12-13. See also J. BELLAMY, *Crime and Public Order in England in the Later Middle Ages*, London, 1973, p. 191 ff..

⁴¹ LISINI, dist. V, rub. xeviii.

imprisonment, and even death. *Britton* and *Fleta* drew early distinctions between negligent and voluntary escapes, as did Westminster I, in determining the keeper's penalty. Analyzing the available evidence, Mr. Pugh finds death an uncommon punishment for a keeper guilty of helping an escape and encourages more study of the Statute of Escapes (1504) which proclaimed a scale of fines for keepers according to the offense of the escaper. Much earlier, Bracton treated suspected felons who escaped as convicted felons, even if they were found innocent of the crime for which they were jailed⁴². By 1275, prison-breaking was considered an irrepleviable offense and a felony; an English statute of 1295 sought to limit the death penalty to escaped, suspected felons. When escapes occurred, furthermore, English townsmen were obliged to aid sheriffs and bailiffs in the capture of fugitives, especially felons. Pseudo-Bartolus supported a capital penalty for escapers in Italy, if entrance to the prison had not been left open; the *incarceratus* or *reus* confessed to the crime by his flight since he would not have fled had he hope of release⁴³. Anyone aiding or abetting the escape of Siense prisoners was susceptible to punishment *in avere et persona*, including the destruction of all his goods, at the will of the *podestà*; if prisoners successfully escaped from communal prisons, the *soprastanti delle prigioni* were threatened with a condemnation *in persona* and their guarantors with a fine⁴⁴.

Mr. Pugh's analysis of the relationship of outlawry to imprisonment is significant, considering the absence of scholarly interest in the subject. An Englishman, thought to have fled from justice or accused of a crime, was summoned and failed to appear; after a lawful period of time, he was outlawed. Bracton clearly outlines the procedure⁴⁵. In the 1330's, the Fleet prison was filled with outlaws arrested by local commissioners in the various counties; both the Fleet and the King's Bench were assigned as places for the surrender of outlaws in anticipation of pardons in the fourteenth century. If a man, suspected of a crime or indicted, fled, he was put in exigent; by surrendering to jail and securing a statement that the surrender took place, he avoided the consequences of outlawry and waited for a conditional pardon, release by writ, or delivery by special commissions, circuit justices, or justices of the peace. Regulations were established by the Parliament of York

⁴² BRACTON, *De legibus*, cit., rub. *De custodia reorum*.

⁴³ PSEUDO-BARTOLUS, *Tractatus de carceribus*, caput secundum, num. 5. Cfr. BOHNE, *Die Freiheitsstrafe*, II, pp. 31, 33.

⁴⁴ LISINI, dist. V, rub. ccciii. Cfr. PSEUDO-BARTOLUS, *Tractatus de carceribus*, caput secundum, num. 6.

⁴⁵ BRACTON, *De legibus*, f. 125, rub. *Qualiter reus criminosis sit requirendus, et si non venerit qualiter utlagandus*.

(1322) and again by statute in 1331 for the surrender of outlaws; special commissions of 1334, 1335, and 1382 searched for and imprisoned them; and the first Statute of Praemunire (1353) imprisoned *and* outlawed with loss of lands and goods any Englishman in contempt of a summons by the king's court for suits brought to the Roman *Curia*.

Sieneſe ſtatutes, court procedures, and the judicial decisions of the *podestà* and his judges provide ſufficient evidence for analyzing the relationship of baniſhment to imprisonment. Apart from its theoretical formulation by Italian jurists, the medieval practice of baniſhment involved diſverſe judicial and executive magiſtracies and their functions in the commune⁴⁶. As a rule, a *bannitus pro maleficio* and a *bannitus pro avere* ſuffered diſſerent ſanctions and the conditions of their imprisonment varied⁴⁷. Sieneſe citizen-officials, the *ſupraſtantes et captores exbannitorum*, *custodes carcerum*, and the *ſupraſtantes preſigionum*, played ſignificant roles in the arreſt and in the cuſtodial or coercive incarceration of *banniti*, *male or female*⁴⁸.

Further ſtudies of the comparable practices of medieval imprisonment will delineate the changing ſocial attitudes toward its employment for debtors, miſdeemeanants, and felons; the history of imprisonment needs incorporation into medieval ſocial history⁴⁹. Italian communes, like Siena, preferred corporal and financial penalties to punitive imprisonment, particularly in the thirteenth and fourteenth centuries. Mutilation ſerved as an additional puniſhment, in lieu of a pecuniary fine, or to force payment of ſuch a fine; recent investigation has demonstrated the importance of mutilation as a physical puniſhment related to execution and

⁴⁶ Italian towns and the legal problem of the *banniti*, 1200-1310, is the ſubject of my forthcoming doctoral diſſertation at Columbia University. Emphaſis is given to Siena.

⁴⁷ For the imprisonment of *banniti pro avere* in medieval Siena ſee R. BAUMGART, *Die Entwicklung der Schuldhaft im Italieniſchen Recht des Mittelalters*, Berlin, 1914, pp. 75, 76, 158-159. The perpetual imprisonment of a *bannitus pro maleficio* was poſſible; ſee BOHNE, *Die Freiheitsſtrafe*, I, p. 100. Regarding the ſeparation in communal priſons of *banniti pro avere* from *banniti pro maleficio* read FICKER, *Urkunden*, p. 477, n. 20. Salvioli claims that Italian jurists preferred arreſt to baniſhment; SALVIOLI, *Storia della Procedura*, p. 707.

⁴⁸ Anyone who impeded the work of the *captoreſ exbannitorum* was puniſhed. See Biccherna, *Banditi e Carcerati*, n. 740, folſ. 19r, 35r. If hiſ fine remained unpaid, the imprisonment of a *captore� exbannitorum* was poſſible (f. 49r).

⁴⁹ Medieval man did not conſider ſeriously the problem of rehabilitation within priſons.

imprisonment⁵⁰. Mr. Pugh is probably right in asserting that penal imprisonment was practiced earlier in England than on the Continent, especially in Italy, where it increased somewhat by the fifteenth century. Imprisonment is always part of the larger history of judicial process and punishment. Demonstrating that fact, Mr. Pugh's book is a valuable contribution.

APPENDIX

SIENA, Archivio, *Statuti*, n. 4, fols. 326r-327r f. 326r: In nomine domini amen. Infrascripta sunt ordinamenta facta et inventa per sex sapientes et discretos viros electos per dominos novem gubernatores et defensores comunis et populi civitatis sen. secundum formam reformationis generalis consilii campane et populi civitatis comunis scilicet duos per terzerium ad revidendum ordinamenta lecta in generali consilio campane et populi comunis sen. inventa quo modo et qua forma et per quos carceres comunis sen. debeant chustodiri secundum formam statuti cabelle loquentis de predicta materia, quod sic incipit:

Item statuimus et ordinamus pro honore comunis sen. quod per dominos novem gubernatores et defensores comunis et populi civitatis sen. et per executores cabelle de mense januarii proxime venturo debeant eligi duo boni et sapientes homines per terzerium qui debeant providere quo modo et qua forma et per quos, carceres comunis sen. debeant chustodiri: cum per presentem modum fiant et conmiectantur inlicita et iniqua, et quicquid per predictos fuerit provisum et ordinatum debeat reduci ad generale consilium campane et populi civitatis sen. et secundum quod in dicto consilio fuerit firmatum executioni mandetur.

In primis statutum et ordinatum est quod in civitate sen. sint et esse debeant tres carceres in uno quorum detineantur condemnati pro enormibus maleficiis de quibus loquitur statutum comunis sen. in quinta distinctione positum quod sic incipit.

⁵⁰ Statuti, n. 4, f. 326v; Albertus GANDINUS, *Tractatus de maleficiis*, cit., num. 4; LISINI, dist. V, rub. cccviii, cccix, cccx. See also BELLAMY, *Crime and Public Order*, pp. 181-185.

'Item si quis fuerit accusatus vel denuptiatus'¹. Et tales detineantur per se in aliquo receptaculo sive camera. In alio vero receptaculo sive camera dicti carceris detineantur alii condemnati pro aliis malefitiis. In secundo carcere sint duo receptacula, in uno quorum detineantur exbanniti pro avere, in aliquo receptaculo sive camera detineantur mulieres ex quacunque causa detineantur. In tertio vero carcere detineantur omnes homines contra quos procederetur occasione alicuius delicti, malefittii vel excessus, salvo quod pro nobilibus civitatis et comitatus sen. et pro bonis hominibus civitatis de quibus videbitur potestate ordinetur certa domus vel certus locus in quo vel qua detineantur dicti nobiles et boni homines contra quos procederetur pro malefittii vel excessibus recepta securitate ab eis sicut videbitur potestate et suis iudicibus. Quod de dicta domo non discedent sine licentia potestatis vel sui iudicis, salvo quod si procederetur pro aliquo malefittio de quo deberet condemnari in persona debeat detineri in quocunque carcere dominus potestas voluerit et sibi videbitur².

f. 326v: Item statutum et ordinatum est quod ut facilius dicti carceres chustodiantur, quod si contra aliquam personam procederetur de aliquo malefittio vel excessu per accusationem, denuptiationem vel inquisitionem, cuius malefittii vel excessus pena ordinata ex forma statuti sit pecuniaria, si talis persona voluerit dare fideiussores de se representando et de solvendo condemnatione de ipso malefittio, non ponatur in carcere set libere relaxentur et tradatur fideiussoribus qui pro eo fideiusserint. Et possit et debeat iudex accipere fideiussores de adprobatis. Et etiam possit accipere de non adprobatis si videbitur iudici quod sint sufficientes. Et intelligatur condemnatio pecuniaria etiam condemnatio in qua opponitur, quod si non solverit infra certum tempus quod sibi debeat certum membrum ascindi vel alio modo in persona puniri.

Item statutum et ordinatum est quod supstantes et chustodes carcerum eligantur per dominos novem cum illo salario quod eis videbitur, et quod dictum salarium recolligatur pro comuni sen. a carceratis. Et alia venditio de dictis carceribus non fiat vel fieri possit. Et super predictis silicet de salario dando supstantibus et chustodibus et de eo recolligendo ab³ carceratis possint providere per se et per alios sapientes viros quos voluerint.

Item statutum et ordinatum est quod dominus potestas debeat compellere dominos quattor ad dictos carceres faciendos et domum inveniendam et ordinandam per totum mensem februarii in quo

¹ A. LISINI, *Il Costituto del Comune di Siena volgarizzato nel 1309-10* (Siena, 1903), II, dist. V, rub. cccxxix.

² *et sibi videbitur* is repeated.

³ written *ad*.

sumus, et etiam infra dictum tempus teneatur dictus dominus potestas supradicta ordinamenta facere et executioni mandari⁴.

f. 327r: Lecta et adprobata fuerunt supra dicta ordinamenta sen. in generali consilio campane et populi civitatis sen. cum adiunta .L. per terzerium cohadunato ad sonum campane et per bannum missum, in palatio comunis sen. ut moris est de mandato nobilium virorum S. domini Cantis de Gabriellis de Eugubio honorabilis potestatis civitatis predicte et domini Cervi de Bononia capitanei comunis et populi sen. facto diligenti partito in dicto consilio, in anno domini millesimo. CCLXXXVII, indictione XI^a, die V^a mensis february coram domino Teo Tighi, domino Viviano domini Buonaiute iudicis, Frederigo Renaldi, Jacobo Uguccionis et Ser Duccio Arrighi testibus presentibus.

Ego Soczus notarius quondam milane[n]sis⁵ et nunc scriba dictorum officialium pro comuni sen. ad predicta facienda sive scribenda deputatus confectioni et adprobationi dictorum ordinamentorum interfui; et de voluntate et licentia dicti consilii campane et populi cum adiunta ea omnia scripsi et in publicam formam redegi sub anno⁶, die, loco et iudicibus predictis et coram dictis testibus.

⁴ *et executioni mandari* is repeated.

⁵ *written milanesis.*

⁶ *written annis.*

DOMENICO MAFFEI - *Direttore responsabile*

INDUSTRIA GRAFICA PISTOLESI - SIENA