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MEAN STREETS

A REPORT ON THE CRIMINALISATION OF HOMELESSNESS IN EUROPE

POVERTY IS NOT A CRIME. IT'S A SCANDAL.

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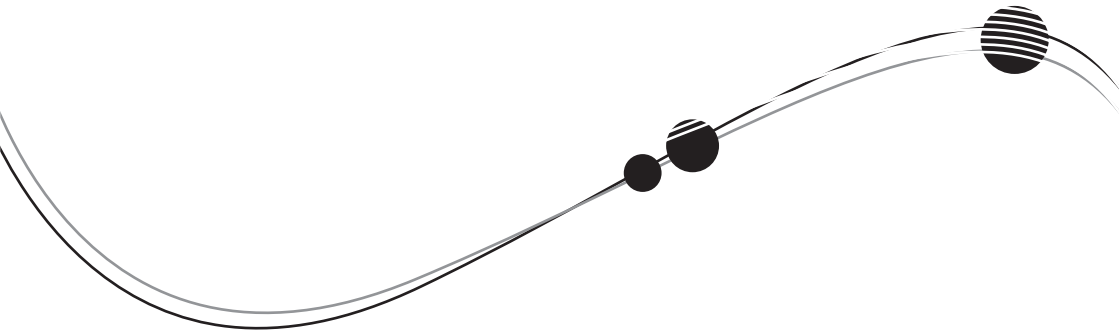
CHAPTER II

Penalising Homelessness



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In its majestic equality, the law forbids
rich and poor alike to sleep under bridges,
beg in the streets, and steal loaves of bread.

Anatole France (1844-1924)

Traditionally, the legal system has responded to "crime" primarily with "punishment". But this link between crime and punishment breaks when incarceration rates and crime rates are very weakly correlated in virtually all countries for any period in history (González, 2011). Rusche and Kirchheimer (1939) broke with this association of crime and punishment by revisiting the history of how poverty was regulated up to the start of the twentieth century. These authors show how both the amount and type of punishment vary according to economic needs, particularly in terms of the jobs held by those convicted. Piven and Cloward, in their book *Regulating the Poor* (1971), also show that the evolution of social-assistance programs is cyclical, with alternating periods of expansion, when popular unrest and the risk of political crisis is significant, and periods of shrinkage when more labor is required, shifting the beneficiaries of public aid to the job market. These two aspects (breaking the crime-punishment dynamic and linking social and criminal policies) are the basis of Wacquant's analysis (2009) in a bid to understand the current criminal situation. Wacquant reveals the duality of policies targeting the poor: the mixing of criminal and social policies. In other words, social policy and criminal policy are two sides of the same political coin: managing poverty (González, 2011).

To penalise means to impose a sanction or punishment as a result of the violation of a legal rule, whether it be a law or regulation. The UN Special Rapporteur on extreme poverty and human rights uses the expression "penalisation measures" to refer in general to policies, laws and administrative regulations used to punish, segregate and control people living in poverty. Some of these measures give rise to direct penalisation, with the prosecution and jailing of these people, while others excessively regulate and control different aspects of their lives (Sepúlveda; 2011). That is, a person can be penalised without having committed any violation. For example, simply not having one's identification papers can, for many immigrants, mean a penalty in terms of access to public services or entitlements, and wearing "dirty clothes" can be enough for someone to be forcibly removed by the police from, say, a metro station. The International Council on Human Rights Policy (ICHRP) published a report, titled *Modes and Patterns of Social Control: Implications for Human Rights Policy*, which highlighted the implications for human rights of contemporary social control patterns; that is, the ways in which laws, policy and administrative regulations define, construct and address people deemed to be "undesirable", "dangerous", or whose behavior is defined as criminal or characterized as socially problematic (ICHRP, 2010). One of the main conclusions of the research is that people living in poverty are disproportionately subject to a series of control mechanisms exerted by government as well as private agencies. These mechanisms are framed within a range of legal and administrative policy measures relating,

among others, urban planning, police, social assistance, health care, security and justice. The study underscores the grave consequences that extending surveillance, criminalisation, segregation and incarceration has on the enjoyment of human rights by people living in poverty (ICHRP, 2010). As regards homelessness, there are different cases and experiences of penalisation that focus on the criminalisation that homeless people suffer in the streets as a result of laws against vagrancy and begging that regulate behavior in public spaces, restricting a person's ability to sleep, eat, drink, or wash. In addition, certain homeless people , such as those who have a history of rent arrears or a criminal record, face administrative difficulties when trying to access social housing, for example, those who have a history of rent arrears or a criminal record. These exclusion dynamics can result in the incarceration or banishment of homeless people. Therefore, the grounds of the so-called social constitutionalism in the postwar period, along with the guarantees of rights to due process under the criminal justice system, are gradually being left behind, and defending the human rights acquired through history is now an urgent matter.

In this chapter we will focus on how the forms of penalising and controlling people living in poverty have changed, paying special attention to their impact on homeless people. These cannot be analyzed separately from their context, as they are intricately intertwined (O'Sullivan, 2007). Therefore, it is necessary to bear in mind the impact that dominant neo-liberal thinking has had on the development of criminal law, criminology and its consequences on the penalisation of people living in poverty and, in particular, homeless people.

RECENT CHANGES IN CRIMINAL LAW

In the twentieth century, the interest of criminology lay in providing explanations about the causes of crime, under the assumption that criminals could be transformed by correcting or modifying their behavior to prevent them from committing crimes in the future. This is the "correctional" model, which involves investment by the states in social reinsertion and prevention strategies (De Giorgi, 2005). But the model was bankrupted by the crisis of the social state and the economic and political transformations in the international context of the 1970s and 1980s that translated into a neoconservative offensive, which led to an authoritarian turn in relations between the state and society (Rivera, 2005). Wacquant argues that the generalised increase in the prison populations of developed societies is due to the growing use of the penal system as an instrument for managing problems of social safety, as well as to contain the social disruption created at the base of the social structure caused by neoliberal policies that deregulated and cut back the social welfare system (Wacquant, 2003). The function assigned to the penalty or to criminal law varies substantially due to three simultaneous factors originating in the 1970s and 1980s: the collapse of the rehabilitating ideal, the advent of the risk paradigm and the economic analysis of crime (Del Rosal, 2009).

Thus, first, we see that the "correctional" model is progressively abandoned, as welfare is considered to foment individuals' dependency on the state, which involves

a high economic cost for the state's coffers, and limits and hampers the productivity of the private sector. As Iñaki Rivera (2005) from the University of Barcelona's Penal System and Human Rights Observatory explains, the crisis of the criminal legal system questioned the theorists and meant that those involved in political struggle became aware of the discourse on the reasons and legitimacy of penal punishment. In this context, and under the growing pressure of rising crime rates in the 1960s, the increased fear of crime, and the victimisation of increasingly larger swathes of the American and British middle classes, along with the hardened rhetoric and neoliberal and neoconservative practices of the Reagan and Thatcher governments, campaigns aimed at restoring the lost "law and order" were revived (Lea *et al.* 1993). These campaigns are characterised by their demands for punitive rigor and inflexibility, and capitalised on the "war on crime" rhetoric in the political arena and the media (Rivera, 2005).

Moreover, the "risk society" concept, defined at length by Ulrich Beck (1992), is based on the assumption that, in current societies, social production of wealth is systematically accompanied by a growing social production of risk. Human needs have limits and, once satisfied, some time is required for them to be reactivated. Instead, according to Beck, the ideological imposition of "risk" implies a bottomless well of needs that are never met. In this way, Beck's analysis leads to the assumption that the perception of risk is linked to a need to consume. Therefore, it does not depart in any way from capitalist development, but rather expands it. Consumer goods, income and wealth are distributed as scarce resources that generate gaps between different social groups. The opposite of the appropriation logic, denial, is thus imposed. For this reason, the collateral damages of excess and unsustainable consumption are denied, questioned or censored by the privileged groups that sustain such practices and are finally legitimized by it in the eyes of the entire population (Korstanje, 2010). Thus, in the "risk society", as Gemma Nicolás (2005) explains, criminality is viewed and managed as a non-eradicable risk. The idea that crime exists as a result of certain social deprivations or problems is abandoned. No interest is shown in the causes of crime, or in the conditions in which it is committed, or in the responsibility society may have in it, thus restoring the criminal's responsibility for his own acts (O'Malley, 2004).

Finally, "actuarial criminology" is based on the premises of law and economics, which considers that basic economic concepts, like rationality, maximization, expected costs and profits, institutional arrangements, special interests, property rights, balance and efficiency are also fundamental for understanding, explaining, predicting and effectively combating criminal activity (Roemer, 2002). This economic discourse is founded on the idea that crime is a rational choice. The criminal is a "rational, amoral person" (Roemer, 2002) who chooses crime after a preliminary analysis in which the expected benefit is perceived to be greater than the cost of the crime (the punishment or the victim's resistance). The main goal of the economic theory of crime and punishment is deterring the commission of crimes by changing the "price" to be paid by criminals, whether potential or actual, that is, by imposing harsher sentences (Cooter *et al.*, 1999). Thus, as Gemma Nicolás (2005) explains, "actuarial justice" thinks in terms of risk rather than culpability. The fact that an individual belongs to a specific social group previously classified as "at risk"

is pursued more avidly than the specific conduct or the facts of the crime, but when the crime is committed, the response is implacable. This diffuses the perpetrator's identity, because he/she is no longer viewed only as a person engaging in conduct described by the laws to be criminal, but rather as part of a broader category. This is reflected in the rise in "administrative sanctions", whose goal is to discourage the perpetration of crime or risky conduct by establishing sanctions in the field of civil and administrative law (Nicolás, 2005). Administrative law is viewed as a more efficient and effective means of handling at-risk populations than criminal law. The existence of "almost-criminals" or "almost-crimes" is a hybrid result of administrative and/or criminal violations and sanctions (Rutherford, 2000), and in many cases homeless people are directly affected.

The construction and management of risk categories are in step with social inequalities and certain moral pronouncements regarding dangerous population groups (Nicolás, 2005). A risk category is superimposed onto social class, with the populations at risk being the inhabitants of exclusion zones. The poor are viewed as the new "dangerous class" that generates risks. Social problems appear as criminal matters, while crime is blended with broader problems of risk and safety (Lea, 2004). No attempt is made to reeducate or rehabilitate criminals, or even to eradicate crime, but simply to make it tractable or tolerable, minimizing the harm it can cause society, which means lengthening jail terms or detering crime through control or fear. Consequently, "actuarial justice" will trend toward reducing environmental circumstances favoring deviating behaviour and trying to set (almost always physical) limits to the groups under surveillance and control. One method of actuarial justice is to alter the environment of potential victims to prevent crime from being committed. This is what some authors call "situational prevention" (De Giorgi, 2004; O'Malley, 2004). The underlying idea is that, if the opportunities for committing crime are reduced, so will the number of criminals. "Actuarial justice" must be seen as credibe and legitimate by citizens to allow its widespread use to control crime (Lea, 2004). Furthermore, there is a crucial role for the media to play to assist in the social and cultural construction of the perception of risk by establishing and perpetrating an atmosphere of fear (Nicolás, 2005).

THE CRIMINOLOGY OF INTOLERANCE – FROM BROKEN WINDOWS TO ZERO TOLERANCE

Political-criminal trends that Young (1999) calls "the criminology of intolerance" have spread as a result of the above developments in policy and perception. In 1982, James Q. Wilson and George Kelling published an article called "Broken Windows" about policing and crime prevention. Its impact was notable and immediate, and has been the subject of debate ever since. The "Broken Windows" theory holds that crime increases in areas that are left to deteriorate, where there is more and obvious carelessness, filth and disorder. For example, if a window is broken and remains unrepaired, all the other windows will soon be shattered. If a community shows signs of deterioration and no one seems to care, crime will flourish. If even minor crimes like littering and public drinking go unpunished, more and more serious

crimes will follow. If parks and other deteriorating public spaces are progressively abandoned by most people (who no longer go because they are afraid), these same spaces will be progressively taken over by criminals (Wilson *et al.*, 1982). The "Broken Windows" theory spawned a police-oriented response that established that even the most petty violations, or mere suspicions, must be dealt with in the harshest way to prevent crime from increasing (Rivera, 2004).

In 1994, the mayor of New York, Rudolph Giuliani, implemented a "Zero Tolerance" policy based on this theory. However, it's not "zero tolerance" against the person committing the crime, but rather "zero tolerance" of the action itself. The strategy set out to create clean, orderly communities and to forbid any transgressions of law and civic-duty rules, thus sparking the "war on poverty" (Rivera, 2004). Beyond the fact that different studies have questioned the success of these penal policies in contrast to other American cities like San Diego, which experienced the same drop in crime under other preventive schemes like community policing (Rivera, 2004), many acknowledge that these policies allowed the censorship and social exclusion of those who refused to submit to responsibilities or who persisted in their "deviant" behavior, with the brunt being borne mostly by the emerging American underclass and blacks or Hispanic immigrants (Hughes, 1998). Finally, the "Three strikes and you're out" laws seek to ensure that repeat offenders receive the highest possible sentences. Bernardo del Rosal (2009) explains how this expression, in the field of criminal legislation, means that subjects convicted of committing a third crime are liable to prison terms ranging from 25 years to life, depending on the state. The first state to implement these laws was Washington, in 1993, where committing a third violent crime means a life sentence without parole.

The export of the "criminology of intolerance" to Europe is more widely questioned. As Iñaki Rivera (2004) explains, exporting American penal strategies to Europe would clash with another particularly worrisome European political-criminal trend. Since the 1970s, Europe had begun to experience its own crisis of the Social State, which in the criminal domain was structured as a "culture of emergency and/or criminal exceptionality" (sic). In short, this line of criminal policy was characterized by abandoning the primary instruments of the democratic European states that emerged after World War Two. The postwar social constitutionalism, built to forestall repetition of the Holocaust by providing criminal guarantees preventing the abuse of power, gave ground to different phenomena of political violence. In terms of prisons, the "culture of emergency and/or criminal exceptionality" started to justify the need for and building of maximum-security prisons, "special" regimes for "special" prisoners, penitentiary isolation practices, dispersing of groups of prisoners or the creation of computer databases, giving rise to the so-called "Criminal Law of the Enemy" (Rivera, 2006), which we will discuss below.

CULTURE OF EMERGENCY AND/OR CRIMINAL EXCEPTIONALITY

Having restored peace, social and democratic states now aspired to the "guaranteeist model" under the rule of law, and thus began to reform in the context of an

international law of human rights. Such a paradigm shift meant that criminal (and procedural) guarantees acquired the dual nature that allows them to be contemplated as citizens' rights on one hand, and/or as a limit to the punitive power of the state (e.g. a state is not permitted to torture its citzens) on the other. The firmament of human rights was thus erected as a substrate of punitive intervention.

Mónica Aranda *et al.* (2005) from Observatory on the Penal System and Human Rights (OSPDH) explains that in this context of social constitutionalism and criminal guaranteeism, in the 1970s most of the countries of Western Europe checked their penitentiary reform processes against principles including "special positive prevention", prohibition of capital punishment and forced labor; principle of legality in fulfilling the penalties, etc. However, the very foundations of these reforms were subverted by events. Indeed, almost simultaneously, the phenomenon of political violence reared its head in several European countries. Ireland, the Federal Republic of Germany, Italy and Spain, to mention the most obvious examples, faced "terrorism" and immediately reacted. Convinced that the ordinary instruments available were not sufficient, States decided to use new and extraordinary tools. Thus arose so-called "emergency legislation" or, more precisely, the "culture of emergency" (Aranda *et al.*, 2005).

The new "emergency" rules began to make headway in Europe three decades ago under two guises: these laws were enacted to combat a special phenomenon (terrorism), and it was stressed that they would only be in force as long as strictly necessary. Now that the phenomenon for which emergency laws were enacted has virtually disappeared, they have not been dismantled and in fact invade many other spheres of ordinary life and criminal legislation. The halo or fetish of efficiency (police, court, penitentiary) became a new discourse used over time to legitimize the expansion of the emergency to new spheres (Aranda *et al.*, 2005).

To end this section, we can say the "emergency" was conceptualized as "a set of measures characterized by:

- basing actions on urgency and exception;
- creating social tension and activating the authoritarian side of social sensitivity;
- implementing restrictive and even repressive measures, which violate fundamental rights and guarantees; and
- altering basic principles of the constitutional order without suppressing them".

It is clear that the more that one resorts to the criminal system –– and criminal exceptionality –– the more the democratic system and equality in the eyes of the law are affected through the progressive sanctioning of a dual punitive system (Aranda *et al.*, 2005).

SYMBOLIC CRIMINAL LAW, THE RESURGENCE OF PUNITIVISM AND CRIMINAL LAW OF THE ENEMY

From a criminal point of view, the above is directly linked to the recent transformations in the legal systems of countries with developed economies. Although national

contexts can condition many of these changes both quantitatively and qualitatively, there are notable common features and possibly some common underlying explanations for these new legal orientations (Del Rosal, 2009). We can distinguish three types of explanations, though each is closely related to the other: "Symbolic Criminal Law", the "New Punitivism" and the "Criminal Law of the Enemy", which arises from the blending of the first two. As noted by Manuel Cancio Meliá (2006), the so-called "Symbolic Criminal Law", and what can be called the "Resurgence of Punitivism" are two concepts that are not clearly separated in legislative reality, but rather their two lines of evolution are intertwined and end up laying the foundations for the "Criminal Law of the Enemy". When the concept of "Symbolic Criminal Law" is used, it refers to the fact that certain political agents only pursue the goal of "giving a soothing impression of being an alert, decisive legislator" (Silva, 2001), and criminalisation results irrespective of whether the rule is perhaps totally inadequate to achieve a reasonable level of application. But as Hassemer (1995) notes, those who use "symbolic" elements in relation to the criminal system have no regard whatsoever for the very real and unsymbolic harshness of the experience of those who are arrested, prosecuted, accused, sentenced, and incarcerated. That is, it does not take into account that a specific harm is inflicted by the punishment to achieve rather more than a symbolic effect. But criminal law is not only an instrument for generating reassurance by simply enacting rules that are not enforced, there are also criminalisation processes based on the introduction of new criminal laws aimed at promoting their effective enforcement or harsher sentencing in the case of existing laws, which would entail a "resurgence of Punitivism" (Cancio, 2006). For instance, if radically punitivist legislation on drugs or prostitution is introduced, it has an immediate impact on criminal prosecution statistics. But in spite of this, it is obvious that an essential element motivating legislators to approve such laws lies in the "symbolic" effects by their mere enactment. Conversely, it also appears that regulations that, in principle, should be classified as "merely symbolic", like laws against begging, can in some countries lead to "real" criminal proceedings (Cancio, 2006).

The truth of the matter is that, in fact, the term "Symbolic Criminal Law" does not refer to a well-defined set of criminal violations characterized by their lack of enforcement or lack of real impact on the "solution". It only identifies the special importance given by legislators to short-term communication aspects in approving the relevant laws (Cancio, 2006). If people who engage in prostitution or begging cannot pay a fine, this does not matter, because the goal is the message of order and safety sent to society. These effects can even be integrated in strategies for preserving political power. Symbolic Criminal Law not only identifies a certain "deed", but also (or above all) a specific type of perpetrator of the deed, who is defined not as an equal, but as an "other". That is, the existence of the criminal rule pursues the construction of a certain image of social identity through defining the perpetrators as "others", not sharing in this identity. Thus it is important that "begging" becomes "aggressive begging" and that people who rummage through garbage bins looking for food or scavenging materials are part of "organized mafias". So Symbolic Criminal Law and Punitivism are fraternally related, and the "Criminal Law of the Enemy" arises from these fraternal ties (Cancio, 2006).

THE CRIMINAL LAW OF THE ENEMY

According to Jakobs (2006), the Criminal Law of the Enemy is built on the distinction between Citizen and Enemy (Person and Non-Person). For Jakobs, the status of "person" is a normative social attribution. Human beings, in the physical-psychic, biological sense, are not "people" per se; they are only persons so as long as society attributes this status to them. According to Jakobs, the social attribution of this status, and above all its preservation, depends on the individual's conduct in a social context. If this conduct is generally aligned with the behavioral models that are judged to be socially acceptable, then the individual preserves his or her status as a "person". If, however, his or her behavior transgresses these models, either by choice or by the individual's inability to behave otherwise, he/she loses his/her status as a "person" and is reduced to a "non-person". Contemporary positive law only recognizes the rights, legitimate interests or judicial guarantees for "persons". Jakobs's theory tells us that individuals deprived of their basic normative social dimension are not part of the community of subjects of law, they may only be passive subjects of state regulation depending on the collective interest or that of certain "persons" (Campderrich, 2007). When these individuals represent a "danger" from a factual point of view, that is, when they are a source of "risks" for the survival of the established social order, they should be subjected to the dictates of the "Criminal Law of the Enemy". That is, there will be a Criminal Law of the Citizen and a Criminal Law of the Enemy. The distinction between the "two criminal laws" explains the existence of particularly dangerous activities that justify an excessive response by the legal system through punishment that manages to deter the violators. Consequently, the main task is to maintain the Criminal Law of the Enemy as the best formula for preserving the Criminal Law of the Citizens (Jakobs, *et al.* 2006).

As noted by Manuel Cancio Meliá (2006), the Criminal Law of the Enemy is characterized by three elements. First, the legal-criminal system becomes prospective (with the point of reference being the possible future deed) instead of retrospective (with the point of reference being the actual deed). Second, the punishment is disproportionately high, and third, certain procedural guarantees are relativised or even suppressed. That is, seeing the "symbolic" process from this perspective, the decisive element is that a certain category of subjects is excluded from the circle of citizens, so that it can be said that, in this regard, the defense against risk is actually the least of problems. In this regard, "punitivism" (the idea of increasing the penalty as the only instrument for controlling crime) is recombined with Symbolic Criminal Law (criminal classification as a mechanism for creating social identity) giving rise to the Criminal Law of the Enemy. Manuel Cancio Meliá (2006) also mentions a second structural characteristic: what lies at the base of the criminal classification is not (only) a certain "deed", but also other elements, as long as they serve to characterize the perpetrator as belonging to the category of the "enemy". Therefore, the Criminal Law of the Enemy seeks to "Exclude" rather than "Prevent"; consequently, the Criminal Law of the Enemy is not a Criminal Law based on deeds, but on the perpetrators of such deeds. Manuel Cancio Meliá (2006) concludes that from the perspective of criminal policy, it can be stated that the Criminal Law of the Enemy in current legislations is not the consequence of an external factor (triggered

by an attack or a circumstantial political majority) of the evolution of legal-criminal systems. Rather to the contrary, an analysis of the political-criminal developments and studies prior to the current "Criminal Law of the Enemy" wave in official sources shows that their origins lie in history (Bacigalupo *et al.,* 2005). Also, precisely because it is not a temporary phenomenon and is not due to exogenous factors, the current "Criminal Law of the Enemy" is not simply the return of an authoritarian criminal policy, but rather a new evolutionary stage.

HOMELESSNESS, IMMIGRATION AND CRIMINAL LAW OF THE ENEMY IN EUROPE

We can affirm that the three characteristics of the Criminal Law of the Enemy –– "criminalisation in the prior state", failure to fulfill the principle of proportionality in penalties and minimisation of procedural guarantees –– are almost always part of legislation in many democratic European states, particularly those with a history of armed struggle. Therefore, the novelty would lie only in the appearance of a doctrinal support backing the need for a law with full guarantees for "Persons" and another law, without the classic rights, for "Non-Persons". Although a more restrictive criminal and procedural legislation regarding the accused's rights has traditionally developed in regards to terrorism and drug trafficking, recently this more restrictive approach has spread to include organized groups that traffic with immigrants and sex slaves (Chazarra, 2006). The limits and guarantees of Criminal Law are also being applied more often to vulnerable groups (Chazarra, 2006). The concept of "Enemy" is undetermined, and over time can be extended without limit (Krasmann, 2007). Currently in Europe we are now seeing this category expand to include. Foreigners, migrants, asylum seekers, refugees, terrorism suspects and the Roma population.The labeling of foreigners is an integral part of the State's construction of individuals and groups as "friend" or "enemy", usually defined in relation to the "citizen". Labels divide human migrants into relatively arbitrary categories of "risk" and vulnerability, which do not always resonate with contemporary mobility patterns (Oberoi, 2009).

As Capdevila and Garreta (2010) explain, historically in Europe there has been a dangerous association between immigration and crime. European governments have always put the immigration issue on the public-order agenda, as subject to the ministries of the interior (home affairs), grouped together with of issues of police control and European border control. The TREVI group, created in Europe in 1976, is a framework for inter-governmental cooperation set up to work internationally on a series of problems affecting all countries. The acronym stands for the issues covered: Terrorism, Radicalism, Extremism, Violence and Immigration. The association does not merit further commentary (Pajares, 1999). The Maastricht treaty, in Article K1, jointly deals with the issues of immigration and crime. The Tampere agreements ask for immigration policy to be oriented toward regulating the entry and residency of foreign workers, establishing a common framework of rights and duties, includion policies for immigrants, common European immigration policies and the fight against illegal immigration (Pinyol, 2005). In 2005, Austria, Belgium, France, Germany, Luxembourg, The Netherlands and Spain signed the Prüm Convention, which seeks

to introduce specific regulations concerning illegal immigration, like the collection of data like DNA, fingerprint information, vehicle use and others (Freixes, 2008).

It is necessary to bear in mind that European countries have significantly expanded their use of detention as a response to the arrival of asylum seekers and irregular migrants (Catarina, 2010). In the United Kingdom, for example, capacity has risen ten-fold since the early 1990s.[1] France's aggregate detention capacity has increased considerably, from 739 in 2003 to 1,724 in 2007.[2] The Lampedusa detention center in Italy has a capacity of just 800 but in March 2009 it housed 1,800 detainees.[3] While the lack of accurate statistics tracking the number of migrants and asylum seekers in detention in all Council of Europe member states has often been criticized, in 2008, the French NGO Cimade documented 235 camps in the European Union, with a total capacity of more than 30,000 people.[4] But in many European countries an exceptional procedural system is being set up to facilitate the expulsion of foreigners. As Fekete and Webber (2009) explain, if two people commit a crime and one is a foreigner, they both serve the same sentence in prison but the foreigner is then detained for deportation, while the person who is a national of the country can then return to his family. In the debate about crime committed by foreigners, the fact that foreign offenders are treated at least as harshly as a country's own citizens and that deportation is frequently imposed as an additional punishment is generally overlooked. Deportation is, moreover, often a far greater punishment than a period of imprisonment, since it breaks up families and disrupts people's lives, while making rehabilitation in the host country impossible (Fekete *et al.,* 2009). Deportation to a "home country" means having to start again in a society that an individual left years ago, or sometimes never knew. In European countries, the law has changed to establish a new baseline for deportations, resulting in an exponential increase in the number of foreign nationals being expelled following a prison sentence. It comes as no surprise to learn, therefore, that many criminologists suggest that the true purpose of the foreign national crime debate is to use deportation as an instrument to drive down prison numbers. Not only is the number of deportations for criminal offenses increasing, but also the notion of what actually constitutes crime is changing. The extreme Right now campaigns for deportation for the new crime of "failure to integrate"; which they characterise by, for example, failure to find employment, etc. (Fekete *et al.,* 2009).

In this regard, a growing trend in the development of the Criminal Law of the Enemy applied to immigration in Europe can be observed. But can the same be said of the application of the Criminal Law of the Enemy to homeless people? Antonio

1. See www.globaldetentionproject.org.
2. See "Rapport Cimade 2008", www.scribd.com/doc/2662304/Rapport-Cimade-2008; see also, "Memorandum by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, following his visit to France from 21 to 23 May 2008", CommDH(2008)34, Strasbourg, 20 November 2008, paragraph 93.
3. The centre has since been emptied.
4. Itano N., "Greece plans to lock up illegal migrants. A new Greek law increases the amount of time illegal immigrants can be detained", Global Post, 13 July 2009; See for more information UN High Commissioner for Refugees, Measuring protection by numbers (2005), November 2006.

Tosi defends that homeless people are not the explicit target of rules and orders regulating public spaces, but they do suffer the effects disproportionately as a result of their dependence on public spaces to carry out their daily activities (Tosi, 2007). In addition, in many European countries, the most prominent target group of public fear and hence of control measures are migrants. Migrants are subject to similar discursive mechanisms as homeless people, so while the penalisation of poverty has not (yet) represented a dominant factor in European policies and for homeless people even less so, it has increased as regards immigrants (Tosi, 2007). But in recent years, as Nicholas Pleace (2011) explains, migrant homelessness has become increasingly visible in some parts of the EU. Failed asylum seekers and other undocumented migrants were appearing at increasing rates among roofless people and in low-threshold homelessness services. People who had been accepted as refugees and who were awaiting asylum assessments were also appearing in homeless populations (Edgar *et al.*, 2004). Nicholas Pleace (2011) cites different studies that show the existence of three broad concerns that may be identified at EU level with respect to migrant homelessness:

- A growing representation of Accession States (A-10[5]) citizens in the homeless populations of EU-15 member states, particularly people living rough and houseless people using emergency and low-threshold homelessness services.
- Evidence of the presence of refugees, asylum seekers and undocumented migrants among homeless people, again centered on people living rough and using emergency and low-threshold homelessness services.
- Ethnic and cultural minorities who appear to be at a disproportionate risk of homelessness but who are not recent migrants.

So, if on the one hand the immigrant population is subject to a generalized increase in penalisation, in particular with regard to the criminal policy expressed in the Criminal Law of the Enemy, and on the other hand immigrants are increasing in numbers among the homeless population, then we can conclude that we need to reflect on the development of the Criminal Law of the Enemy based on the exclusion of foreigners among homeless people in Europe.

For example, in Bilbao (Basque Country, Spain), the local police and the National Police Force's Aliens' Unit entered an abandoned mortuary where 63 homeless people were sleeping. Forty-four of the people found did not have proper documents and were detained by the Aliens' Unit, which opened proceedings against them for being in the country with an irregular status. Those people without a prior police record were released while their paperwork was completed. The paperwork was an expulsion order and those people who had already received deportation orders were detained in an internment centre and eventually deported. The police intervention was prompted by neighbourhoods complaints about "the presence of indigents who spend the night in the abandoned building or report[ed] fights," and, according to

5. The 2004 A-8 accession states: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia, plus the 2007 accession states, Bulgaria and Romania.

the city councillors responsible for "Citizens' Security", "we know they are there and are aware of the conditions, a situation that is not permissible due to reasons of security" and to "deplorable health conditions".[6] The police intervention was thus carried out to eliminate an area that promoted exclusion and unsanitary conditions. The building's owner was instructed to prevent its possible occupation. Perhaps not coincidentally, three days before the police raided the mortuary, the people living there complained about the inhumane conditions in which they lived to a regional newspaper. "What we have here is a nutritional emergency. Some people have [permission to] eat at the soup kitchen, and sometimes they bring us back leftovers. Other times we ask our countrymen to help us so we can eat, and sometimes they bring us food that is about to expire." These were the words of Abdulai Wai and Ngoleke Ebeneger, two young Africans affected by the situation, who say they want to "study or work and be integrated in the society. We know that now's not the best time, with the crisis and all, but we need to find a way out, not having to wonder how we're going to keep alive one more day...".[7] Three days later, the police intervention ended their dream.

Having said this, we consider that while it is not possible to affirm that the Criminal Law of the Enemy is being applied to homeless people in a generalized way, we can say that we are, at the European level, on the verge of a problematic situation in which Symbolic Criminal Law and the resurgence of Punitivism prevail. Therefore, we cannot speak of an exceptional procedural system for homeless people. The crossover between the criminology of intolerance and the culture of emergency and criminal exceptionality are beginning to demonstrate a dismantling of the protective nature of criminal systems inherent to social and democratic states under the rule of law (Rivera, 2004).

Homeless people are over-represented both in arrest rates and in prison populations (Seymour *et al.,* 2005). This should not be taken to mean that homeless people exhibit higher levels of criminal behavior due to their situation, but rather that it is the criminalisation of their "survival strategies" that is making them illegal and punishable. Moreover, as the European Observatory on Homelessness warns, prison is not only the last link in the chain of the exclusion process, it can also be the start of a homelessness process, since a prison stay can result in home loss or eviction. Consequently, the criminalisation of homelessness is an additional stigma that deepens the situation of exclusion and that, moreover, jeopardizes people's chances of social integration (Busch-Geertsema *et al.*, 2010). Across the EU in recent years, both at national and municipal level, controversial attempts have been made to regulate behaviour in public space. However, the regulation of public space, through ordinances that prohibit certain forms of behavior or exclude people from city areas, may in fact constitute an attack on homeless people. The conflicts over the rights of homeless people arise in both low profitability spaces that are marked

6. http://www.deia.com/2011/09/15/bizkaia/bilbao/una-operacion-policial-desmantela-el-asentamiento-del-tanatorio-de-basurto
7. http://www.deia.com/2011/09/12/bizkaia/bilbao/somos-invisibles-para-la-gente

for transformation and in high profitability spaces. Eradicating signs of poverty and traces of the poor is often integral to "cleaning up" public spaces and enhancing their value (Fernàndez, 2011).

It is worrying to see the current practices governing homelessness and public spaces across Europe that are increasing the exclusion, institutionalization and criminalisation of poor and homeless populations, trying to render them invisible rather than addressing the root causes of the problem. Some policies on homelessness may be driven by considerations that are not at all aimed at helping homeless people. The incorporation of homelessness in the European political agenda is being interpreted in some countries and by some sectors to mean that homeless people should not be on the street, and therefore going to a shelter need not be voluntary –– they should be physically forced into shelters. Another way of interpreting it is by, for example, removing homeless people from the areas of the city frequented by tourists. The possible legislative development of such measures, together with Symbolic Criminal Law and Punitivism, would be truly dangerous, since (although in some cases under the guise of humanitarian reasons) it can open the door to arbitrary policy action, which can culminate in the Criminal Law of the Enemy. This means criminalizing people before they commit crimes, disproportionate penalties, and minimalist procedural guarantees. Practice will vary country to country since homelessness can be presented as a public order problem associated with drugs, alcohol and crime, or from the perspective of people as victims of exclusion and poverty processes with needs, as shown in the study on "Homelessness in the Written Press: a Discourse Analysis" (Meert *et al.*, 2004). It depends, among other variables, on the opportunistic use (or not) of poverty and exclusion by politicians looking for media attention or seeking to send messages of reassurance or social action to the population. Thus, following the thesis of Symbolic Criminal Law and Punitivism, in many cases the creation of laws and rules that regulate public spaces will not apply in all situations; rather, the framework is set up to be applied based on a political or police decision, and perhaps a subjective one that may have a real effect on people. But we must not lose sight of the fact that poverty and homelessness are not a voluntary lifestyle decision –– they are problems associated with social exclusion.

HUMAN RIGHTS AND THE CRIMINAL LAW OF THE ENEMY

Manuel Cancio Meliá (2006) argues that there are no "enemies" under Criminal Law. All human beings are citizens. From this viewpoint, José Ignacio Núñez (2009) employs six arguments against Criminal Law of the Enemy based on Dignity.

One has to be a citizen and a person in order to violate the Criminal Law of the Citizens (Gracia, 2005). The Criminal Law of the Enemy has no real, empirical targets; rather, these targets are created through the application of this criminal law, not before. As a result, the Criminal Law of the Enemy applies to citizens whose condition is degraded by a (usually court or administrative) decision (and therefore not necessarily representative of the people's will) to subject them to such a set of

rules. Thus, a court decision (not even a legal decision) defines which citizens are "worthy" and which are not. The Criminal Law of the Enemy positivises the source of dignity, as only those subjects who vow to adhere to the applicable law acquire and preserve the status of citizen or person. In this sense, the conditions would only be the result of fulfilling a legal duty. As noted by Gracia Martín (2005), the target of Law –– and especially of its sanctions –– can only be the individual, the human being, a pre-legal, natural entity. It is the person that creates the Law, not the other way around. And to structure itself, this creation must take into account human beings' attributes, like their responsibility. The latter doubtless stems from an ontological substrate of the human being, otherwise it would be impossible to demand it in the form of laws and regulations. If Laws address humans rather than forces of nature or animals, then the human being's humanity should be considered first. And the human being's dignity is precisely at the core of this essence. Hence, denying dignity, in this context, means denying one of the pillars of the legal system.

CONCLUSIONS

As Gerardo Pisarello and Jaume Asens (2012) explain, the discourse of law has become a valuable instrument for those wielding power to explain their actions –– actions that are doubtless legitimate, but also actions that are arbitrary. There is no power, public or private, that does not attempt to use law to legitimise its actions or that fails to present its legal arguments as a substitute for moral discourse. The criminology of intolerance and the culture of exceptionality embody this will. Stating that homeless people are considered to be an "enemy" in Europe might seem exaggerated and without solid evidence at a time when homelessness is not directly criminalised by legislation and where the fight to eradicate homelessness is on the European political agenda. But it is undeniable that the use of different legal and administrative provisions increasing the penalisation of homelessness is spreading as a result of the blending of the criminal policy trends described earlier: the criminalising of their day-to-day activities when they are out on the streets, the penalising of their access to public services and social benefits, and the increased pressure through dynamics like incarceration and deportation. Although homeless people are not explicit targets of these measures, in many European countries, the most prominent target group is migrants, and the increasing number of homeless migrants are also affected by the use of the "Criminal Law of the Enemy". Other ethnic and cultural groups who were not recent migrants (including Roma) are bearing the brunt of Symbolic Criminal Law and the resurgence of Punitivism. It is crucial to remember that poverty and homelessness are not a voluntary lifestyle decision: they are problems associated with social exclusion.

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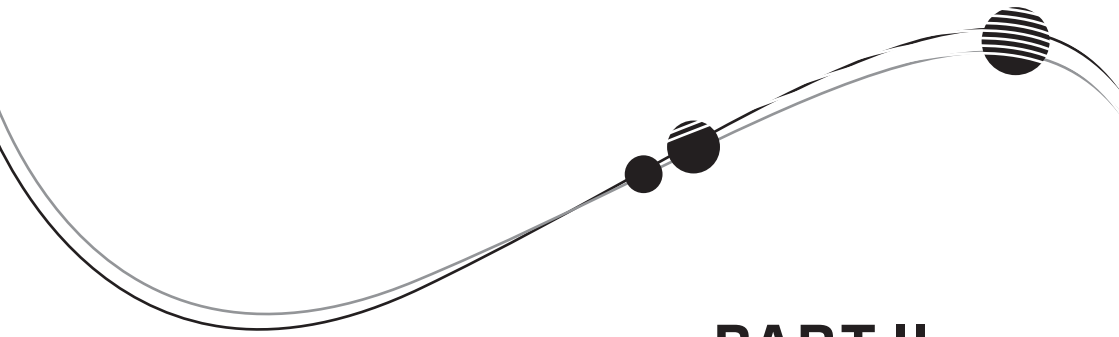

PART II

WHAT DOES PENALISING HOMELESSNESS LOOK LIKE?

MEAN STREETS

A REPORT ON THE CRIMINALISATION OF HOMELESSNESS IN EUROPE

Criminalising and penalising homeless people for carrying out life-sustaining activities in public because there is no where to go is a problem across the EU. Policies and measures, be they at local, regional or national level, that impose criminal or administrative penalties on homeless people is counterproductive public policy and often violates human rights.

Housing Rights Watch and FEANTSA have published this report to draw attention to this issue. This report brings together articles from academics, activists, lawyers and NGOs on the topic of human rights and penalisation. Divided into three main sections, the report provides an important theoretical and historical background, before highlighting examples of penalisation across the EU, and finally suggesting measures and examples on how to redress this dangerous trend.

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