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**Overcriminalization and Prison
Overcrowding:
In Search for Effective Solutions**

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INTRODUCTION

The purpose of this thesis is to analyze the problem of prison overcrowding in Italy, Europe and the United States and to offer some creative proposals for addressing this problem.

In chapter I, we will analyze the most recent statistical data on prison population growth and prison overcrowding in the United States (with particular emphasis on the case of California) and Europe (with particular emphasis on the case of Italy). As we will see, California and Italy have two of the most overcrowded prison systems in the United States and in Europe.

In chapter II, a comparative analysis of the most recent decisions on prison overcrowding by highest courts in the United States and in Europe will be conducted. As we will see, these decisions have indeed been taken against California and Italy. Then, in an effort to grant inmates a more meaningful protection of their human rights in prison, a new approach to prison overcrowding will be proposed for litigators and the courts. This approach, which will revolve around what we will identify as the European concept of "minimum living space" in prison, will be developed based on the most recent jurisprudence of the European Court of Human Rights.

In chapter III, IV, V and VI, some efforts will be made to address the problem of prison overcrowding at the source. First, in chapter III, we will provide a detailed analysis of the "criteria for criminalization" that have been identified by criminal law scholars in recent years, from both the European-continental and the Anglo-American literature. These are the criteria that should guide the legislator in the enactment of criminal offences. With a view to making them more comprehensible to legislators and policy makers, they will be summarized in a schematic, intelligible form. They will be provided to limit the dramatic expansion of the criminal law that has occurred in Europe and the United States over the last decades (so-called "overcriminalization").

Then, in chapter IV, we will define the possible "alternatives to criminalization" in theory. We will define "decriminalization" and "legalization", which are terms that

often lead to misunderstanding in the debate on reforms. Also, we will analyze the role of decriminalization measures within the framework of the Council of Europe, and we will identify those areas of the law that are particularly good candidates for decriminalization reforms, according to several criminal law scholars. This chapter will provide the theoretical foundations for the case study that will follow.

In chapter V, we will analyze some "alternatives to criminalization" in practice, through case studies on best and worst examples of decriminalization. In particular, we will conduct a comparative analysis of the most recent decriminalization reforms that have been adopted by Italy and Portugal in the field of drug legislation. Drug legislation, as we will see, severely impacts on prison overcrowding in Italy and Portugal. More in general, it severely impacts on prison overcrowding in Europe and the United States. Thus, reforms in this area - though politically hard to enact - are very much needed to solve the problem of prison overcrowding at the source.

Finally, in chapter VI, we will make two policy proposals in the field of drug legislation, in light of the analysis and case study that will have been conducted in the previous chapters. The first policy proposal will be addressed to those legislators in Europe and the United States that at the moment still criminalize drug use and possession, while the second policy proposal will be specifically addressed to the Italian legislator. As we will see, what emerges from the most recent social studies and public surveys on the issue of drug is that citizens' attitudes are nowadays shifting from the acceptance to the refusal of the use of the criminal law in the field of drug, particularly for cannabis. Therefore, if the criminal law is to be respectful of the so-called *Kulturnormen*, there appears to be a compelling reason to reassess cannabis legislation.

I. PRISON OVERCROWDING IN THE UNITED STATES AND IN EUROPE

More than 10.1 million people are held in penal institutions throughout the world, according to the latest edition of the World Prison Population List.¹ The number of inmates detained in correctional facilities has been growing in all five continents over the past years.² As a result, prison overcrowding has become one of the most common problems for criminal justice systems across the world. It is a problem that is shared by both developed and undeveloped countries.

The purpose of this chapter is to provide some of the most recent statistical data on prison population growth and prison overcrowding in the United States (with particular emphasis on the case of California) and Europe (with particular emphasis on the case of Italy). California and Italy have been chosen as the focus of our analysis because they have two of the most overcrowded prison systems in the United States and in Europe. Thus, they provide examples of how, even in modern developed democracies, prison overcrowding may represent an extremely serious concern.

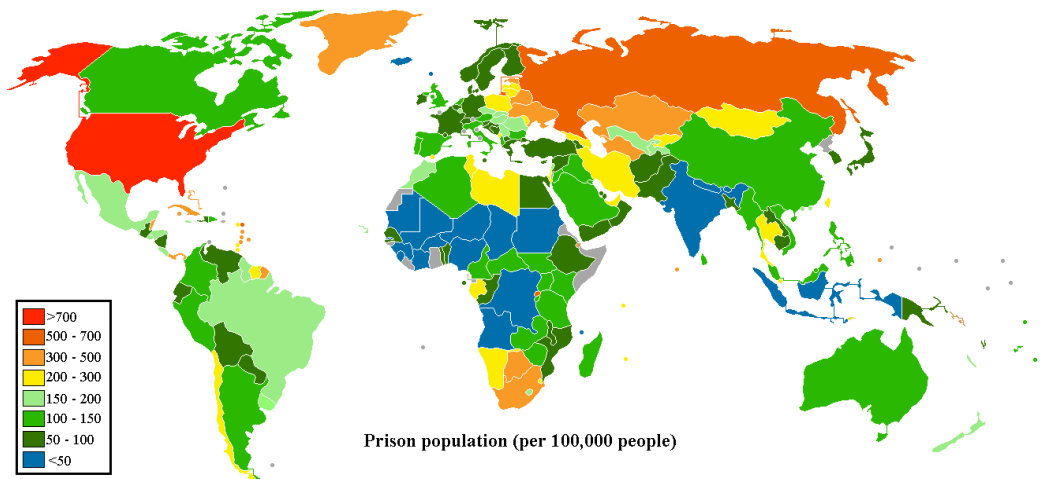
1. Prison overcrowding in the United States - The case of California

The United States maintains the world's largest incarcerated population, at more than 2.2 million, and the world's highest per capita incarceration rate, at 716 inmates per 100.000 residents.³

¹ R. WALMSLEY, *World Prison Population List* (9th ed.), available at www.prisonstudies.org (Accessed 30 September 2013 - the information is the latest available in early May 2011). The World Prison Population List gives details of the number of prisoners held in 218 independent countries and dependent territories. It shows the differences in the level of imprisonment across the world and makes possible an estimate of the world prison population total.

² *Id* at 1. Updated information on countries included in previous editions of the World Prison Population List shows that prison populations have risen in 78% of countries (in 71% of countries in Africa, 82% in the Americas, 80% in Asia, 74% in Europe and 80% in Oceania).

³ INTERNATIONAL CENTRE FOR PRISON STUDIES, *World Prison Brief - United States*, available at http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=190 (Accessed 30 October 2013). As to the total incarcerated population, data refer to the 2012 U.S. Bureau of Justice Statistics, which reported a total incarcerated population of 2,239,751 at yearend 2011, i.e. 1,504,150 inmates in state or federal prisons at 31 December 2011 plus 735,601 inmates in local jails at 30 June 2011. As to the per capita incarceration rate, data are based on an estimated national population of 312.72 million at end of 2011 (U.S. Census Bureau).



Source: UN Human Development Report 2007/2008

Prison population growth has been an ever-increasing problem in the United States since the early 1970s.⁴ In the nearly five decades between 1925 and 1972 the number of state prisoners⁵ had increased by 105%,⁶ at a steady rate that closely tracked growth rates in the general population.⁷ In the four decade since, however, the number grew by 705%.⁸ This was an unprecedented expansion of the criminal justice system. The change was fueled by stiffer sentencing and release laws, combined with harsher decisions by courts and parole boards, which sent more offenders to prison and kept them there for longer terms.⁹ In 2008, the Public Safety Performance Project of the Pew Center reported that the overall incarcerated population had reached an all-time high of 2.319.258,¹⁰ with 1 in 100 adults living behind bars.¹¹

⁴ C. I. BARRETT, *Does the Prison Rape Elimination Act Adequately Address the Problems Posed by Prison Overcrowding? If Not, What Will?*, 39 NEW ENG. L. REV., 2005, 391.

⁵ The great majority of convicted inmates in the United States serve their sentences in state institutions: state prisons confine approximately 90% of all inmates. S. Y. CHUNG, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 FORDHAM L. REV., 2000, 2354.

⁶ P. A. LANGAN-J. V. FUNDIS-L. A. GREENFELD, *Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86*, U.S. Department of Justice, Bureau of Justice Statistics (1988), at 15.

⁷ PEW RESEARCH CENTER, *Public Safety Performance Project - Prison Count 2010*, 2010, available at http://www.pewcenteronthestates.org/report_detail.aspx?id=57653.

⁸ P. A. LANGAN-J. V. FUNDIS-L. A. GREENFELD, *Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86*, *supra* note 6.

⁹ A. BLUMSTEIN-A. J. BECK, *Reentry as a Transient State Between Liberty and Recomittment*, in J. TRAVIS-C. VISHER (eds.), *Prisoner Reentry and Crime in America*, Cambridge, 2005, at 50-79.

¹⁰ PUBLIC SAFETY PERFORMANCE PROJECT, *One in 100: Behind Bars In America 2008*, Pew Center on the States, The Pew Charitable Trusts (28 February 2008), available at http://www.pewcenteronthestates.org/report_detail.aspx?id=35904.

¹¹ *Id.* at 5. In 2009, after nearly four decades of uninterrupted growth, the first slight annual drop in the state prison population was reported by the Pew Center. See Public Safety Performance Project, *Prison Count 2010*, *supra* note 15 at 1. The year 2010, moreover, saw the first slight decline in the combined (i.e. state and federal) prison population. See P. GUERINO-P. M. HARRISON-W. J. SABOL, *Bureau of Justice Statistics Bulletin: Prisoners in 2010 (2011)*, U.S. Department of Justice, Bureau of Justice

Even of more concern than the increase in imprisonment rates themselves are the conditions of confinement that have prevailed in the United States as a result of it. In fact, the inability of state and federal governments to construct detention facilities commensurate with the increasing prison population, mainly due to the phenomenal costs of new prisons,¹² has resulted in severe "prison overcrowding".¹³ While this term may appear redundant, it is most commentators' word of choice:¹⁴ not only prisons in the United States are "crowded", they are "overcrowded".

It is important to note that, despite the magnitude of the problem, no uniform definition of "prison overcrowding" has yet been developed in the United States. Federal courts have defined prison overcrowding in a variety of different ways. They have used this term to refer to conditions that "shock[] the general conscience",¹⁵

Statistics, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2230>. While the Pew Center survey showed an overall decline, it revealed great variation among jurisdictions: the prison population declined in 26 states, while increasing in 24 states. Such variation shed light on the role that state policy plays in determining the size and cost of the prison system. *Id.* at 3. Admissions began to decline and releases started to rise for a variety of reasons, but an important contributing factor was that some states began to realize that they could effectively reduce their prison populations, and save public funds, without sacrificing public safety. Reforms enacted by several states diverting low-level offenders, probation and parole violators from prison, strengthening community supervision and re-entry program, and accelerating the release of low-risk inmates who completed risk reduction programs are among the causes that led to the decline in the prison population. (California is a good example in this regard. One of the primary reasons for California's past prison growth has been its high rate of parole revocations. Over the past two years, the state has sought to cut the number of low-risk parolees returning to prison for technical violations, by expanding use of intermediate sanctions to hold violators accountable without a costly return to prison. See *ibidem.*) After nearly four decades of uninterrupted growth, an annual drop in the state and combined prison population is certainly worthy of note, no matter the scale and the variety of factors contributing to the decline. On the one side, of course it is possible that the decline is simply seasonal and may adjust upward in the next years. On the other side, there are also reasons to believe that the decline could be the beginning of a sustained downward, though small in numbers, trend. The decline in the combined population was confirmed in yearend 2011 (which registered an additional slight decline in the combined prison population of 0.9%, see E. A. CARSON-W. J. SABOL, *Bureau of Justice Statistics Bulletin: Prisoners in 2011 (2012)*, U.S. Department of Justice, Bureau of Justice Statistics available at www.ojp.usdoj.gov) and yearend 2012 (which registered an additional slight decline of 1.7% from yearend 2011, see E. A. CARSON-D. GOLINELLI, *Bureau of Justice Statistics Bulletin: Prisoners in 2012 (2013)*, U.S. Department of Justice, Bureau of Justice Statistics available at www.ojp.usdoj.gov). California had the greatest population decline in yearend 2012, with 15,035 fewer prisoners than in 2011 in part due to the state's Public Safety Realignment policy. California accounted for 51% of the decrease in the total state prison population (E. A. CARSON-D. GOLINELLI, *Bureau of Justice Statistics Bulletin: Prisoners in 2012 (2013)*, at 1). Nevertheless, with only 5% of the world total population, the United States still has almost a 25% of the world prison population. The United States will likely continue to lead the world in incarceration for the near foreseeable future (PEW RESEARCH CENTER, *Prison Count 2010*, *supra* note 7 at 6).

¹² P. M. ROSENBLATT, *The Dilemma of Overcrowding in the Nation's Prisons: What Are Constitutional Conditions and What Can Be Done?*, 8 N.Y.L. SCH. J. HUM. RTS., 1991, 490.

¹³ C. I. BARRETT, *supra* note 4 at 391.

¹⁴ P. M. ROSENBLATT, *The Dilemma of Overcrowding*, *supra* note 12 at 491.

¹⁵ CHAVIS V. ROWE, 643 F.2d 1281, 1291 (7th Cir. 1981).

offend the "contemporary standards of human decency",¹⁶ or simply involve the accommodation of inmates "beyond design capacity".¹⁷ If this third definition, as we will see in chapter II, has been explicitly rejected by the Supreme Court in *Rhodes v. Chapman* as a ground for constitutional violations, definitions of overcrowding that refer to the "contemporary standards of human decency" remain essential to the constitutional analysis. Correctional authorities have provided different definitions as well. Three parameters are usually taken into consideration:¹⁸ design capacity (i.e. the number of inmates that planners or architects intended for a facility), operational capacity (i.e. the number of inmates that can be accommodated based on a facility's staff, existing programs, and services) and rated capacity (i.e. the number of beds or inmates assigned by a rating official to institutions within a jurisdiction). The "highest capacity" of a correctional facility¹⁹ is measured as the maximum number of beds reported across the three capacity measures, and is the threshold generally used to define when prison overcrowding occurs. Data based on the available parameters of prison overcrowding testify to an alarming situation. As of December 31, 2010, there were 21 state systems that were operating at or above their "highest capacity", with 7 states at least 25% over their highest capacity, led by California and Alabama (at 196%), Illinois (at 144%) and Massachusetts (at 139%).²⁰ The Federal Bureau of Prisons operated at 36% above its reported capacity²¹. These data, when compared to previous years' data, confirm that overcrowding has become a chronic condition in most prisons in the United States.

¹⁶ *CAMPBELL V. CAUTHRON*, 623 F.2d 503 (8th Cir. 1980).

¹⁷ *RHODES V. CHAPMAN*, 452 U.S. 337, 347-48 (1981). See S. Y. CHUNG, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, *supra* note 5 at 2368.

¹⁸ P. GUERINO-P. M. HARRISON-W. J. SABOL, *Bureau of Justice Statistics Bulletin: Prisoners in 2010 (2011)*, *supra* note 11, Table 23 at 34 and definition of terms.

¹⁹ The "highest capacity" is the capacity level required to maintain basic custody, security, custodial operations and limited programming, see S. S. MESSNER-R. ROSENFELD, *Strengthening Institutions and Rethinking the American Dream*, in R. D. CRUTCHFIELD-C. E. KUBRIN-G. S. BRIDGES (eds.), *Crime Readings* (3rd ed.), 2008, 427. According to the authors, the focus of corrections has shifted away from a concern with administering levels of punishment that individuals deserve, or a concern with rehabilitating these offenders, to a preoccupation with more efficient "risk management of dangerous population". *Ibidem*.

²⁰ P. GUERINO-P. M. HARRISON-W. J. SABOL, *Bureau of Justice Statistics Bulletin: Prisoners in 2010 (2011)*, *supra* note 11. Twenty-six state systems were operating at or below their highest capacity: Mississippi was operating at 46% of its highest capacity, followed by New Mexico (53%) and Utah and Wyoming (each at 79%). *Ibidem*.

²¹ *Ibidem*.

Reported state and federal prison capacities, December 31, 2010

Region and jurisdiction	Type of capacity measure			Custody population as a percent of—						
	Rated	Operational	Design	Highest capacity ^a	Lowest capacity ^a					
Federal	126,863	...	...	136%	136%					
Northeast										
Connecticut ^b	...	...	...	...%	...%	
Maine	2,339	2,133	2,339	84	92					
Massachusetts	...	...	8,029	139	139					
New Hampshire	...	2,281	1,945	115	134					
New Jersey	...	22,503	16,152	96	134					
New York	57,505	58,546	56,590	96	100					
Pennsylvania	43,837	43,837	43,837	107	107					
Rhode Island ^c	4,283	4,273	4,028	74	78					
Vermont	1,613	1,613	1,322	94	115					
Midwest										
Illinois	33,700	33,700	29,791	144%	163%					
Indiana	...	29,574	...	83	83					
Iowa	...	...	7,209	131	131					
Kansas	9,054	...	...	100	100					
Michigan ^c	45,281	44,420	...	102	104					
Minnesota	...	9,099	...	103	103					
Missouri ^c	...	31,423	...	97	97					
Nebraska ^c	...	3,969	3,175	116	145					
North Dakota ^c	1,044	991	1,044	136	143					
Ohio	38,389	...	...	127	127					
South Dakota ^c	...	3,523	...	96	96					
Wisconsin ^c	...	...	17,596	125	125					
South										
Alabama ^c	...	...	...	13,403	196%					
Arkansas	14,025	14,025	13,461	101	105					
Delaware ^c	6,378	5,210	4,161	100	153					
Florida	...	105,814	...	96	96					
Georgia ^c	58,763	54,137	...	93	100					
Kentucky	13,902	13,902	14,237	87	89					
Louisiana ^c	19,008	20,333	...	108	115					
Maryland	...	23,016	...	99	99					
Mississippi ^c	...	24,236	...	46	46					
North Carolina	...	41,705	35,756	97	113					
Oklahoma ^{c,e}	25,352	25,352	25,352	95	95					
South Carolina	...	24,319	...	95	95					
Tennessee	20,946	20,498	...	71	73					
Texas ^d	163,381	159,396	163,381	86	89					
Virginia ^c	32,921	...	...	92	92					
West Virginia	4,304	5,114	4,304	99	118					
West										
Alaska	3,058	3,206	...	122%	128%					
Arizona ^c	37,089	43,011	37,089	81	94					
California	...	149,624	84,181	110	196					
Colorado ^c	...	15,032	13,065	121	140					
Hawaii	...	3,327	2,291	101	147					
Idaho ^{c,e}	7,028	6,677	7,028	103	108					
Montana ^d	...	1,679	...	97	97					
Nevada	/	/	/	/	/					
New Mexico ^c	6,139	7,123	6,128	53	61					
Oregon	/	/	/	/	/					
Utah	...	6,661	6,901	79	82					
Washington	16,420	17,801	17,801	96	104					
Wyoming	2,381	2,381	2,221	79	84					

Source: BJS, National Prisoner Statistics Program.

Notably, approximately one-quarter of people detained in U.S. prisons or jails have been convicted of a drug offense. Overall, the United States incarcerates more people for drug offenses than any other country. With an estimated 6.8 million Americans struggling with drug abuse or dependence, the growth of the prison population continues to be driven largely by incarceration for drug offenses.²² On 31 December 2011, there were 197,050 sentenced prisoners under federal jurisdiction. Of these, 94,600 were serving time for drug offenses, 14,900 for violent offenses, 10,700 for property offenses, and 69,000 for "public order" offenses (of which 22,100 were sentenced for immigration offenses, 29,800 for weapons offenses, and 17,100 for "other").²³ On the same date, there were 1,341,804 sentenced prisoners under state jurisdiction. Of these, 225,242 were serving time for drug offenses, 710,875 for violent offenses, 245,351 for property offenses, 141,803 for "public order" offenses (which include weapons, drunk driving, court offenses, commercialized vice, morals and decency offenses, liquor law violations, and other public-order offenses), and 18,534 for "other/unspecified".²⁴

²² JUSTICE POLICY INSTITUTE, *Substance Abuse Treatment and Public Safety*, Washington, DC, 2008, p. 1, available at http://www.justicepolicy.org/images/upload/08_01_REP_DrugTx_AC-PS.pdf.

²³ E. A. CARSON-WILLIAM J. SABOL, *Bureau of Justice Statistics Bulletin: Prisoners in 2011 (2012)*, *supra* note 11 p. 9-10.

²⁴ E. A. CARSON-D. GOLINELLI, *Bureau of Justice Statistics Bulletin: Prisoners in 2012 (2013)*, *supra* note 11 p. 11. For more statistics see: http://www.drugwarfacts.org/cms/Prisons_and_Drugs#sthash.ddzPFJc9.dpuf

Estimated number of sentenced prisoners under state jurisdiction, by offense, sex, race, and Hispanic origin, December 31, 2011

Offense	All inmates ^a	Male	Female	White ^b	Black ^b	Hispanic
Total	1,341,804	1,250,214	91,590	465,180	509,677	282,353
Violent	710,875	678,786	33,695	228,782	284,631	162,489
Murder ^c	163,762	154,359	9,821	45,369	65,568	37,956
Manslaughter	21,051	18,544	2,587	8,107	7,408	3,456
Rape/sexual assault	165,656	163,863	2,032	79,282	39,975	35,863
Robbery	181,415	173,640	8,177	38,312	99,096	36,694
Aggravated or simple assault	138,574	131,100	7,816	42,375	56,281	38,252
Other violent	40,416	37,281	3,262	15,336	16,304	10,270
Property	245,351	220,753	25,486	108,560	78,197	38,264
Burglary	128,823	122,837	6,298	53,547	46,795	22,038
Larceny-theft	42,029	35,195	7,046	19,617	12,679	5,679
Motor vehicle theft	14,703	13,782	963	6,596	3,330	4,132
Fraud	30,333	22,000	8,559	14,738	8,256	2,628
Other property	29,463	26,940	2,621	14,063	7,137	3,786
Drug^d	225,242	203,081	22,971	67,271	91,775	47,479
Public order^e	141,803	134,203	7,954	54,834	50,489	32,275
Other/unspecified^f	18,534	13,391	1,484	5,733	4,585	1,846

Note: Counts are based on state prisoners with a sentence of more than 1 year under the jurisdiction of state correctional officials. Detail may not sum to total due to rounding and missing offense data.

^aIncludes American Indians, Alaska Natives, Asians, Native Hawaiians, other Pacific Islanders, and persons identifying two or more races.

^bExcludes persons of Hispanic or Latino origin and persons of two or more races.

^cIncludes nonnegligent manslaughter.

^dIncludes trafficking, possession, and other drug offenses.

^eIncludes weapons, drunk driving, and court offenses; commercialized vice, morals, and decency offenses; and liquor law violations and other public-order offenses.

^fIncludes juvenile offenses and other unspecified offense categories.

Sources: Bureau of Justice Statistics, National Prisoner Statistics Program and National Corrections Reporting Program, 2011.

California, as we have anticipated, provides one of the most striking examples of prison population growth and prison overcrowding in the United States. From 1982 to 2000, California's prison population increased by 500%. As a result, in 2005 the per capita incarceration rate of the state of California reached the alarming level of 616 per 100,000 adults. There are many explanations for California's prison population growth. One of the most important factors was certainly the tough "war on drugs" declared by Nixon in 1971, that severely impacted on prison facilities all across the United States.²⁵ Mandatory minimum guidelines and longer prison sentences meant that more people were sent to prison and spent longer time there. Moreover, unemployment led many citizens to commit property-related crimes, although, ironically, California has a relatively low rate of property crime occurrence compared to other states. Last, but not least, during this period the citizens of California passed the so-called three strikes law, stipulating a life sentence for those people who are convicted of three felonies. Today, California has a considerable lead over all other states in issuing life sentences.²⁶ To accommodate the population growth, the state of California built 23 new prisons from 1982 to 2000. By way of comparison, during the 112-year-long period between 1852 and 1964, the state of California had constructed

²⁵ See FRONTLINE, *Thirty Years of America's Drug War - A Chronology*, available at <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> (Accessed 30 October 2013).

²⁶ K. WATTLEY, *Insight into California's Life Sentences*, in *Federal Sentencing Reporter - Realignment California Corrections*, vol. 25, No. 4, (April 2013), p. 271-275.

only 12 prisons. Nevertheless, prison overcrowding reached appalling levels. While the United States, according to the latest data of the International Center for Prison Studies, has an overall rate of prison overcrowding that is just under 100% capacity, placing it below the top 100 worst-ranking countries worldwide, if California were a country of its own it would rank in the top 50 most overcrowded countries worldwide.²⁷

In 2011, California's grossly overcrowded prisons were subject to severe evaluation by the United States Supreme Court, in the landmark case of *Brown v. Plata*. This decision, as we will see in chapter II, acknowledged that California's prisons had operated at around 200% of design capacity for at least 11 years, depriving prisoners of adequate medical care. Therefore, it affirmed a decision by a three-judge panel of the Eastern and Northern Districts of California that had ordered California to reduce its prison population to 137.5% of design capacity within two years.

2. Prison overcrowding in Europe - The case of Italy

Prisons across Europe, similarly to prisons across the United States, are facing an overcrowding crisis.²⁸ This is a manifestation of at least three trends: tougher penalties, particularly for drug-related offenses, a slow criminal justice system, with a high number of people in pre-trial detention and a lack of resources to build new facilities, further exacerbated by the recent economic downfall.²⁹

This crisis is particularly acute in Italy. On the one side, Italy's per capita incarceration rate is not particularly alarming when compared with data from Europe and the rest of the world. In fact, according to the report published by ISTAT in 2012,

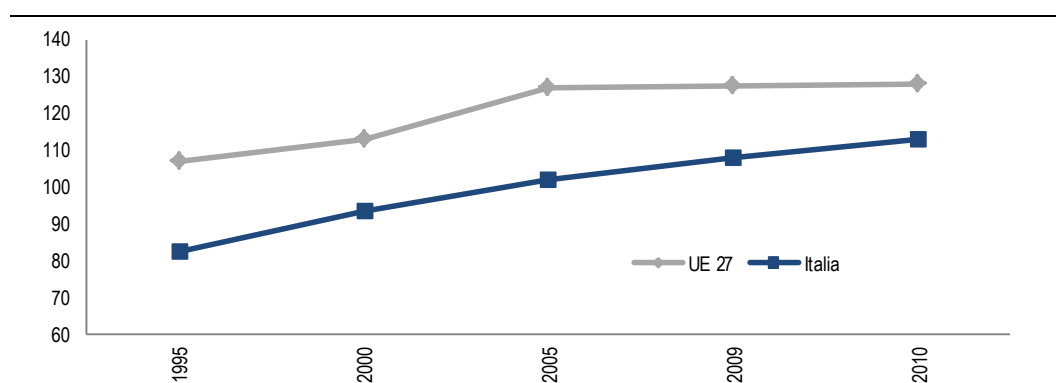
²⁷ See *infra* note 43.

²⁸ This trend was identified, among others, in the study conducted in 2005 by British expert Roy Walmsley, which covered 25 countries of Central and Eastern Europe. See R. WALMSLEY, *Prison in Central and Eastern Europe*, Heuni paper n. 22, Helsinki, 2005 (claiming that overcrowding, when calculated according to the official capacity of the prison system, seems to have become significantly worse since 1994). *Id* at 8.

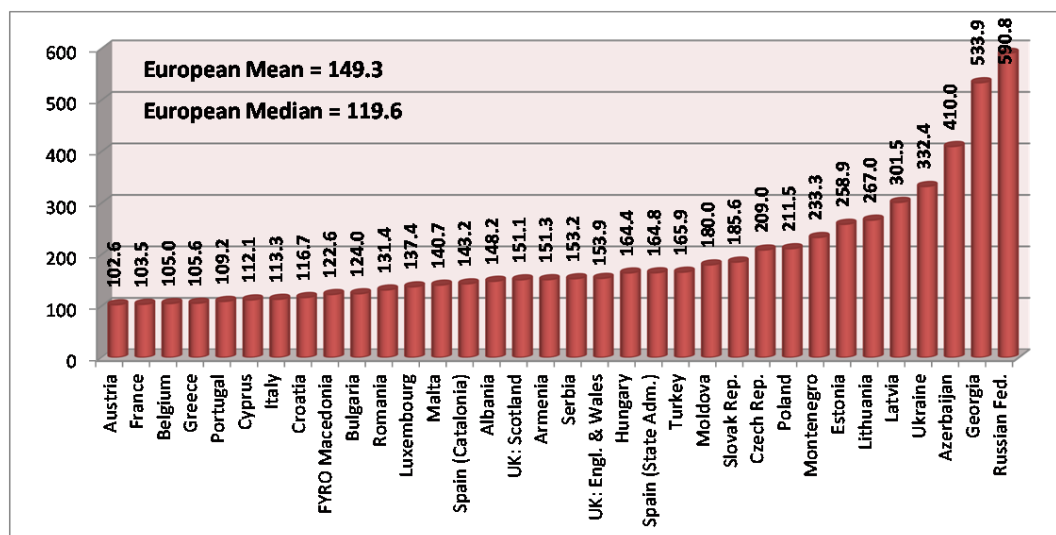
²⁹ For a very recent analysis of the prison systems in Europe see V. RUGGIERO-M.RYAN (eds.), *Punishment in Europe: A Critical Anatomy of Penal Systems*, Palgrave Macmillan, 2013. The book explores twelve different Western and Eastern European countries, identifying the national particularities but also the commonalities and cross talk between penal systems. In particular, for an analysis of the Italian prison system, see P. GONNELLA, *Italy, Between Amnesties and Emergencies*, *Ibidem*, p. 226-244.

Italy maintained in 2010 a per capita incarceration rate of 112.6 inmates per 100.000 residents, which is below both the European average (127.7) and the world average (156.0).³⁰ The United States, as we have seen, has a much more alarming per capita incarceration rate: it has the world's highest per capita incarceration rate, at 716 inmates per 100.000 residents. Figures from the 2012 ISTAT report and the 2010 Council of Europe SPACE I report on per capita incarceration rate are provided below.

FIGURA 1. TASSO DI DETENZIONE IN ITALIA E NELL'UNIONE EUROPEA, Anni 1995-2010, detenuti per 100.000 abitanti



Fonte: Elaborazioni Istat su dati di fonte Ministeri della Giustizia, Ministeri degli Interni, Uffici Nazionali di Statistica dei Paesi in Tavola, anche confrontati e integrati con dati Eurostat e UN, SPACE, ICPS



Countries with more than 100 prisoners per 100,000 inhabitants (highest prison population rates) - Source: 2010 Council of Europe SPACE I report, p. 51.

³⁰ ISTAT, *I Detenuti Nelle Carceri Italiane - Anno 2011*, 2012, available at <http://www.istat.it/it/archivio/77789> (accessed 30 september 2013), p. 2.

On the other side, however, Italy has a severe level of prison overcrowding. As of 31 December 2009, 64,791 people were incarcerated despite an official prison capacity of 44,073 people. This means an overcrowding level of 147%.³¹ As a result, on January 2010 Italy declared, for the first time in history, the state of "national emergency" because of prison overcrowding,³² which was later reiterated twice. Some legislative measures (the so-called *Piano-carceri*) were adopted in an effort to reduce prison overcrowding.³³ The strategy adopted since January 2010 is essentially based on 4 areas of intervention: the first and the second areas aim at increasing prison capacity through construction of new facilities (which is in itself a remarkable step, since several decades have passed with no prison construction programs in Italy); the third area relates to legislative measures; and the fourth area relates to an increase in the number of correctional authorities.³⁴ This strategy yielded some (very) slight results in the years that have followed its adoption. As of 31 December 2011, 66,897 people were detained in correctional facilities across Italy, despite an official prison

³¹ See data on Italian prison population and prison capacity for the second semester of 2009. Data are recorded by the *Dipartimento dell'Amministrazione Penitenziaria* and are available at http://www.giustizia.it/giustizia/it/mg_1_14.wp.

³² The decree, which was issued by Silvio Berlusconi, is available at www.ristretti.it/...carceri/decreto_emergenza_13_gennaio_2010.

³³ See *Piano carceri: Quattro Pilastrini per Affrontare l'Emergenza*, available at www.governo.it.

³⁴ For a detailed analysis, in Italian, of the three main legislative measures that have been adopted since 2010 (i.e. L. 26 November 2010 n. 199, L. 17 February 2012 n. 9 and L. 9 August 2013, n. 94), see, in relation to L. 26 November 2010 n. 199 (so-called "legge svuota carceri", that, among other things, essentially extended the possibility of home detention to people sentenced to no more than 12 month imprisonment): L. DEGLI INNOCENTI-F. FALDI, *Le Nuove Disposizioni in Materia di Detenzione presso il Domicilio*, in *Cass. pen.*, 2011, 2816 ff.; F. DELLA CASA, *Approvata la Legge c.d. Svuotacarceri: Un Altro "Pannicello Caldo" per l'Ingravescente Piaga del Sovraffollamento Carcerario?*, in *Dir. pen. proc.*, 2011, 5 ff.; S. TURCHETTI, *Legge Svuotacarceri e Esecuzione della Pena Presso il Domicilio: Ancora una Variante sul Tema della Detenzione Domiciliare?* in *Riv. it. dir. proc. pen.*, 2010, 1787 ff.; F. FIORENTIN, *Commento alla L. 26 Novembre 2010 n. 199*, in *Guida al dir.*, 2011, 52-67; C. FIORIO, *Detenzione Domiciliare Obbligatoria e Sovraffollamento Carcerario*, in *Giur. mer.*, 2011, 1204 ff.; in relation to L. 17 February 2012 n. 9 (that, among other things, further extended the applicability of home detention, now available for the execution of sentences not longer than 18 months, and that developed other measures to reduce the so-called "sliding doors" phenomenon) see: L. PISTORELLI (ed.), *Relazione a Cura dell'Ufficio del Massimario della Corte di Cassazione, Rel. n. III/4/2012*, available at http://www.penalecontemporaneo.it/materia/-/-/1310-legge_17_febbraio_2012_n_9_di_conversione_con_modificazioni_del_decreto_legge_n_211_d_el_2011_cd_svuota_carceri_disposizioni_rilevanti_per_il_settore_penale/; and, in relation to L. 9 August 2013, n. 94, (which, among other things, for the first time amended the conditions for the use of pre-trial detention, which impacts heavily on prisons overcrowding in Italy since half of detainees are in prison waiting for trial), see: A. DELLA BELLA, *Convertito in Legge il Decreto Carceri 78/2003: Un Primo Timido Passo per sconfiggere il sovraffollamento*, available at http://www.penalecontemporaneo.it/materia/-/-/2471-convertito_in_legge_il_decreto_carceri_78_2013_un_primo_timido_passo_per_sconfiggere_il_sovraffollamento/.

capacity of 45,700 people. This means an overcrowding rate of 146.4%, as it is shown from the detailed table provided below, from the 2012 ISTAT report.³⁵

PROSPETTO 11. CAPIENZA REGOLAMENTARE DELLE STRUTTURE PENITENZIARIE E DETENUTI PRESENTI OGNI 100 POSTI DISPONIBILI, DISTINTI PER REGIONE DI DETENZIONE E SESSO. Situazione al 31/12/2011, valori assoluti e per 100 posti disponibili

Regione di detenzione	Capienza regolamentare al 31/12/2011			Detenuti presenti ogni 100 posti disponibili		
	Maschi	Femmine	Totale	Maschi	Femmine	Totale
Piemonte	3.478	150	3.628	142,7	105,3	141,1
Valle d'Aosta/Vallée d'Aoste	175	6	181	161,1	-	155,8
Lombardia	4.925	491	5.416	178,0	121,0	172,8
Liguria	1.087	43	1.130	158,4	197,7	159,9
Trentino-Alto Adige/Südtirol	474	46	520	76,2	32,6	72,3
Bolzano/Bozen	93	-	93	132,3	-	132,3
Trento	381	46	427	62,5	32,6	59,3
Veneto	1.761	211	1.972	170,1	75,8	160,0
Friuli Venezia Giulia	513	35	548	160,6	85,7	155,8
Emilia Romagna	2.329	124	2.453	165,5	116,9	163,1
Toscana	3.031	155	3.186	133,9	118,1	133,1
Umbria	1.060	74	1.134	151,6	97,3	148,1
Marche	759	16	775	150,1	212,5	151,4
Lazio	4.522	316	4.838	139,4	130,4	138,8
Abruzzo	1.467	64	1.531	132,4	100,0	131,0
Molise	401	-	401	129,7	-	129,7
Campania	5.550	216	5.766	137,1	144,9	137,4
Puglia	2.282	181	2.463	187,3	118,2	182,2
Basilicata	416	24	440	109,6	66,7	107,3
Calabria	1.843	32	1.875	161,9	184,4	162,3
Sicilia	5.084	322	5.406	144,1	60,9	139,1
Sardegna	1.984	53	2.037	105,9	109,4	106,0
Nord-Ovest	9.665	690	10.355	162,8	121,3	160,0
Nord-Est	5.077	416	5.493	158,3	84,1	152,7
Centro	9.372	561	9.933	139,9	125,0	139,0
Sud	11.959	517	12.476	148,7	128,8	147,9
Isole	7.068	375	7.443	133,4	67,7	130,1
ITALIA	43.141	2.559	45.700	148,6	109,7	146,4

In 2012 and 2013 the slow downward trend in prison overcrowding was confirmed. There was a decrease in the total incarcerated population as well as an increase in prison capacity, through the construction of new prison facilities. As of 31 December 2012, in fact, 65,701 people were detained in correctional facilities across Italy, despite an official prison capacity of 47,040 people. This means that as of 31 December 2012 there was an overcrowding level of 139.6%. As of 30 September 2013, 64.758 people were detained in correctional facilities across Italy despite an official prison capacity of 47.615, which means an overcrowding level of 136.0%.³⁶ The slow decrease in prison overcrowding that has occurred since 2010 is the result of several factors. Some legislative measures, as we have seen, have been taken by the

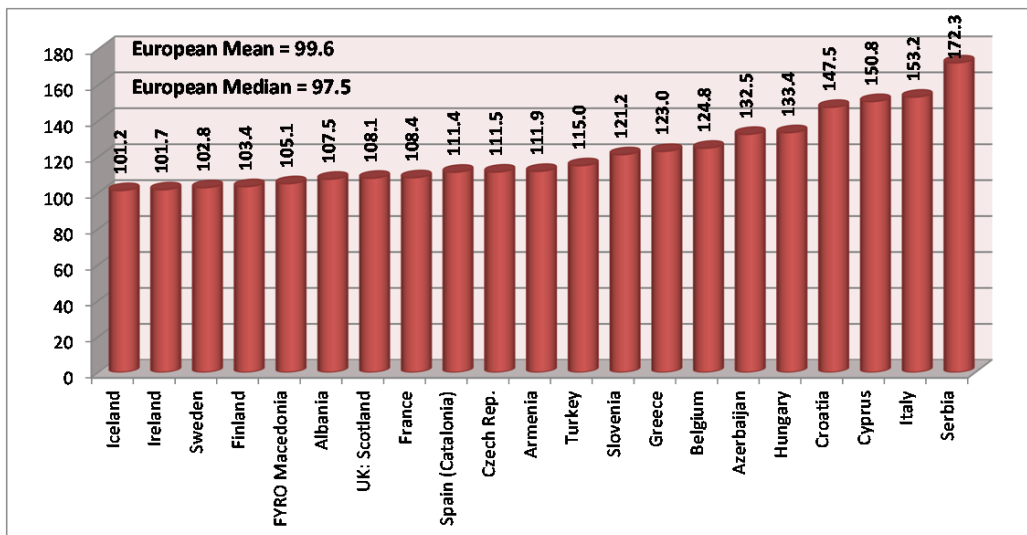
³⁵ ISTAT, *I Detenuti Nelle Carceri Italiane - Anno 2011*, supra note 30, p.1.

³⁶ 2012-2013 statistics are from the *Dipartimento dell'Amministrazione Penitenziaria, Ufficio per lo Sviluppo e la Gestione del Sistema Informativo Automatizzato, Sezione Statistica*, and are available at http://www.giustizia.it/giustizia/it/mg_1_14.wp

Italian government, also in light of decisions adopted against Italy by the European Court of Human Rights that will be later analyzed³⁷.

These measures though, despite a good start, are not likely to solve the problem at the source. Several scholars have argued that they must be integrated with more systematic reforms, such as the ones that will be proposed later in this thesis in the field of drug legislation.³⁸

Putting data on prison overcrowding in Italy within the European context yields the following, alarming results: according to the 2010 Council of Europe SPACE I report by Marcelo Aebi and Natalia Del Grande, in September 2010 Italy had the second most overcrowded prison system in Europe (153.2%), behind Serbia (172.3%) only.³⁹



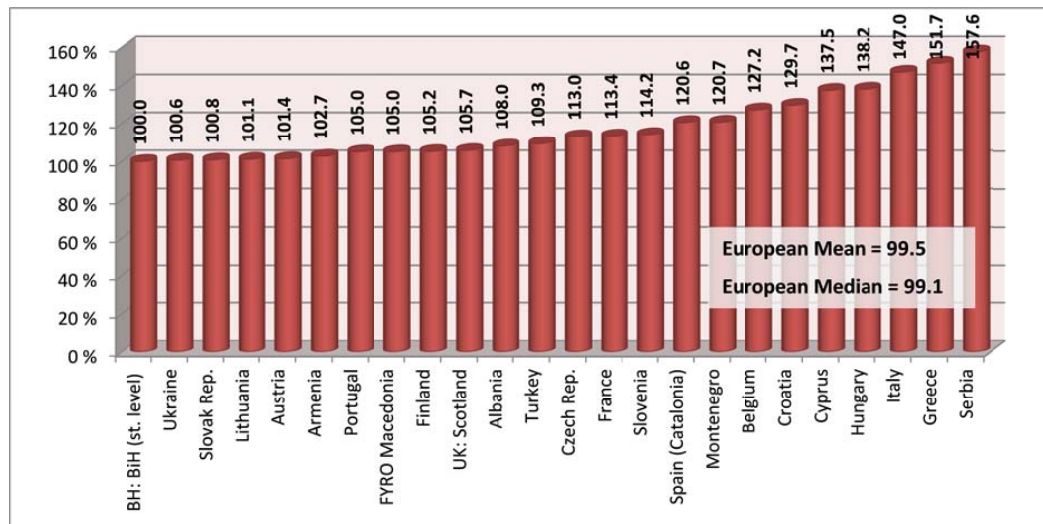
Countries with prison population overcrowding (more than 100 prisoners per 100 places) - Source: 2010 Council of Europe SPACE I report, p.51

³⁷ See *infra* chapter VI.

³⁸ See, in Italian, F. PALAZZO, *Riforma del Sistema Sanzionatorio e Discrezionalità Penale*, in *Dir. pen. proc.*, 2013. According to the author, long term strategies must be added to measures aimed at increasing prison capacity. These long term strategies should address the causes of prison overcrowding in light of the composition of the prison population: "muovendo dall'ovvia considerazione che le categorie che più l'alimentano fino all'abnormità sono quelle: dei detenuti non definitivi, dei detenuti stranieri, dei detenuti socialmente marginali provenienti in stragrande maggioranza dalla delinquenza degli stupefacenti". *Id.* at 101. See also F. CANCELLARO, *Sovraffollamento Carcerario: Una Sentenza Pilota Condanna l'Italia per la Sistematica Violazione dell'Art. 3 CEDU*, in *Ius 17*, 3, 2012, at 73.

³⁹ M. AEBI-N. DEL GRANDE, *Council of Europe Penal Statistics, 2010 SPACE I Report*, available at <http://www3.unil.ch/wpmu/space/space-i/situation-on-1st-september-2010/> (Accessed 30 November 2013).

This decreased to 147.0% in 2011, placing Italy behind Serbia and Greece only. Figures from the 2011 Council of Europe SPACE I report by Marcelo Aebi and Natalia Del Grande, which refer to the situation as of September 2011 and are the most current comparable data, are provided below.⁴⁰



Countries with prison population overcrowding (more than 100 prisoners per 100 places) - Source: 2011 Council of Europe SPACE I report, p.58

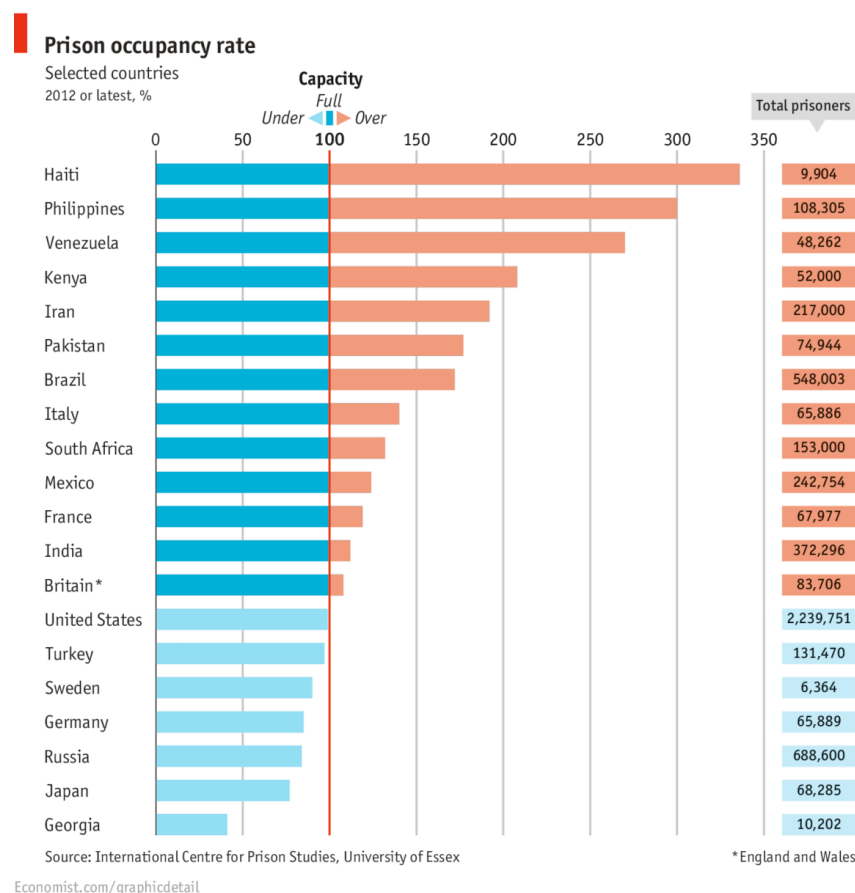
Putting data on prison overcrowding in Italy within the global context, as well, is quite shocking. Italy is currently among the top 100 most overcrowded countries worldwide, ranking 63 as to the latest available data of the International Center for Prison Studies, which report a 135.9% occupancy rate as of 31 August 2013.⁴¹ As it appears from the table provided below, the United States has an overall rate of prison overcrowding that is just under 100% capacity, placing it below the top 100 worst-ranking countries worldwide.⁴² However, it is important to note that, as we underlined

⁴⁰ M. AEBI-N. DEL GRANDE, *Council of Europe Penal Statistics, 2011 SPACE I Report*, available at <http://www3.unil.ch/wpmu/space/space-i/space-i-2011-main-indicators/>.

⁴¹ See INTERNATIONAL CENTRE FOR PRISON STUDIES, *Prison Occupancy Rate*, available at http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_occupancy.

⁴² See INTERNATIONAL CENTRE FOR PRISON STUDIES, *World Prison Brief - United States*, available at http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=190. The United States, overall, has a rate of prison overcrowding that is just under 99% capacity, according to the latest data of the International Center for Prison Studies. This puts the United States at number 114 in the list of the most overcrowded prison system worldwide. See http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_occupancy

in the previous chapter, if California were a country of its own it would rank in the top 50 most overcrowded countries worldwide.⁴³



Notably, around 40% inmates are detained in Italian prisons because of drug offences. As of December 2011, according to the 2012 ISTAT report, 41% i.e. 27,459 people were detained in Italy for drug offences. The various property crimes were second on the list, with 25.8% i.e. 17,285 people detained for robbery and 19.6% i.e. 13,109 people detained for theft.⁴⁴ Below we provide a detailed list of the offences mostly represented in Italian prisons as of is December 2011, from the ISTAT report.

⁴³ C. GRODEN, *The Ten Worst Countries for Prison Overcrowding*, in *The Time Newsfeed*, 5 August 2013, available at <http://newsfeed.time.com/2013/08/05/the-10-worst-countries-for-prison-overcrowding/>.

⁴⁴ ISTAT, *I Detenuti Nelle Carceri Italiane - Anno 2011*, supra note 30, p. 9. According to the report: "I reati più frequenti commessi dai detenuti presenti sono la violazione della normativa sugli stupefacenti (41%), la rapina (25,8%), il furto (19,6%), la ricettazione (17,2%), le lesioni personali (15,6%), la violazione della legge sul possesso delle armi (15,1%), gli omicidi volontari (13,8%). Seguono la resistenza a pubblico ufficiale (11,2%) e le estorsioni (11,1%), la violenza privata e la minaccia (10,5%), i reati di associazione a delinquere di stampo mafioso (9,7%), i reati contro l'amministrazione della giustizia (9,5%), la falsità in atti e persone (5,9%), la violenza sessuale (5,4%). Per quanto riguarda la violazione di cui al Testo Unico sugli stupefacenti, è opportuno ricordare che la maggior parte di essi consegue all'imputazione di cui all'art 73 (produzione, traffico e detenzione illecita di sostanze stupefacenti). A questo tipo di violazioni risulta per lo più associato il fenomeno

PROSPETTO 4. GRADUATORIA DELLE TIPOLOGIE DEI REATI COMMESSI (a) DAI DETENUTI AL 31/12/11 E POSIZIONE GIURIDICA

Per 100 detenuti con le stesse caratteristiche

Graduatoria	Principali tipologie di reato	A disposizione dell'autorità	Graduatoria	Principali tipologie di reato	Condannati	Graduatoria	Principali tipologie di reato	Sottoposti a misure di sicurezza
1	Produzione e spaccio stupefacenti	40,1	1	Produzione e spaccio stupefacenti	43,2	1	Lesioni personali volontarie	22,5
2	Rapina	21,6	2	Rapina	29,5	2	Omicidio volontario	22,1
3	Furto	12,1	3	Furto	25,3	3	Violenza privata, minaccia	16,6
4	Lesioni personali volontarie	11,7	4	Ricettazione	22,5	4	Violenza, resistenza, oltraggio, ecc.	14,7
5	Armi	11,3	5	Armi	18,2	5	Furto	11,6
6	Associazione di stampo mafioso	11,0	6	Lesioni personali volontarie	18,1	6	Rapina	11,2
7	Estorsione	11,0	7	Omicidio volontario	16,2	7	Maltrattamenti in famiglia	10,6
8	Ricettazione	10,5	8	Violenza, resistenza, oltraggio, ecc.	14,0	8	Estorsione	7,9
9	Omicidio volontario	10,0	9	Contro l'amministrazione della giustizia	13,8	9	Danni a cose, animali, terreni, ecc.	7,4
10	Violenza privata, minaccia	7,5	10	Violenza privata, minaccia	12,4	10	Contro l'amministrazione della giustizia	6,2
11	Violenza, resistenza, oltraggio, ecc.	7,1	11	Estorsione	11,3	11	Ricettazione	4,6
12	Associazione per delinquere	3,9	12	Associazione di stampo mafioso	9,0	12	Violenze sessuali	4,5
13	Contro l'amministrazione della giustizia	3,8	13	Falsità in atti e persone	9,0	13	Produzione e spaccio stupefacenti	4,3
14	Violenze sessuali	3,8	14	Violenze sessuali	6,6	14	Armi	3,2
15	Violazione delle norme in materia di immigrazione	2,9	15	Associazione per delinquere	5,4	15	Ingiurie e diffamazioni	1,8
16	Danni a cose, animali, terreni, ecc.	2,3	16	Danni a cose, animali, terreni, ecc.	5,3	16	Falsità in atti e persone	1,5
17	Maltrattamenti in famiglia	1,9	17	Violazione delle norme in materia di immigrazione	4,3	17	Atti osceni	1,3
18	Prostituzione (istigazione, sfruttamento e favoreggiamento)	1,8	18	Truffa	3,0	18	Associazione di stampo mafioso	1,1
19	Falsità in atti e persone	1,8	19	Contro il sentimento religioso	2,8	19	Atti sessuali con minorenni/corruzione di minorenni	0,8
20	Insolvenza fraudolenta	1,2	20	Maltrattamenti in famiglia	2,4	20	Contro il sentimento religioso	0,7
21	Contro il sentimento religioso	0,7	21	Atti sessuali con minorenni/corruzione di minorenni	2,3	21	Strage	0,6
22	Prostituzione minorile	0,6	22	Prostituzione (istigazione, sfruttamento e favoreggiamento)	1,7	22	Violazione delle norme in materia di immigrazione	0,5
23	Atti sessuali con minorenni/corruzione di minorenni	0,6	23	Falsità in sigilli	1,6	23	Rissa, abbandono di incapace, ecc.	0,5
24	Truffa	0,5	24	Sequestro di persona	1,1	24	Percosse	0,4
25	Sequestro di persona	0,5	25	Rissa, abbandono di incapace, ecc.	1,1	25	Falsità in sigilli	0,3
26	Peculato, malversazione, ecc.	0,4	26	Ingiurie e diffamazioni	1,0	26	Insolvenza fraudolenta	0,3
27	Omissione d'atti d'ufficio, ecc.	0,4	27	Falsità in monete	1,0	27	Associazione per delinquere	0,3
28	Arbitraria invasione aziende	0,4	28	Insolvenza fraudolenta	1,0	28	Omicidio colposo	0,3
29	Rissa, abbandono di incapace, ecc.	0,4	29	Omissione d'atti d'ufficio, ecc.	1,0	29	Omicidio preterintenzionale	0,3
30	Pornografia minorile/detenzione materiale pornografico	0,2	30	Appropriazione indebita	0,7	30	Omissione d'atti d'ufficio, ecc.	0,3
31	Ingiurie e diffamazioni	0,2	31	Bancarotta	0,7	31	Lesioni personali colpose	0,2
32	Falsità in monete	0,2	32	Peculato, malversazione, ecc.	0,7	32	Prostituzione (istigazione, sfruttamento e favoreggiamento)	0,2
33	Percosse	0,2	33	Prostituzione minorile	0,6	33	Truffa	0,2
34	Falsità in sigilli	0,2	34	Strage	0,5	34	Bigamia, incesto, ecc.	0,1
35	Lesioni personali colpose	0,2	35	Lesioni personali colpose	0,5	35	Contro la personalità dello stato	0,1
36	Bancarotta	0,2	36	Atti osceni	0,5	36	Peculato, malversazione, ecc.	0,1
37	Contro la personalità dello stato	0,2	37	Percosse	0,4	37	Prostituzione minorile	0,1
38	Strage	0,1	38	Omicidio preterintenzionale	0,4	38	Violazione obblighi assistenza familiare	0,1
39	Omicidio colposo	0,1	39	Violazione obblighi assistenza familiare	0,4	39	Falsità in monete	0,1
40	Omicidio preterintenzionale	0,1	40	Omicidio colposo	0,4	40	Interruzione della gravidanza	0,1
41	Atti osceni	0,1	41	Arbitraria invasione aziende	0,4	41	Sequestro di persona	0,1
42	Appropriazione indebita	0,1	42	Contro la personalità dello stato	0,3			
43	Bigamia, incesto, ecc.	..	43	Pornografia minorile/detenzione materiale pornografico	0,3			
44	Violazione obblighi assistenza familiare	..	44	Bigamia, incesto, ecc.	0,2			
45	Interruzione della gravidanza	..	45	Interruzione della gravidanza	0,2			
46	Frode nell'esercizio del commercio	..	46	Frode nell'esercizio del commercio	..			
			47	Pubblicazioni e spettacoli osceni	..			
			48	Infanticidio	..			
			49	Vendita sostanze alimentari non genuine	..			
			50	Emissione di assegni a vuoto	..			

(a) La somma degli indici percentuali è maggiore di 100, poiché a un singolo detenuto possono essere attribuiti più tipi di reato.

In 2013, Italy's grossly overcrowded prisons were subject to severe evaluation by the European Court of Human Rights, in the landmark case of *Torreggiani and Others v.*

della tossicodipendenza in carcere, in quanto l'uso di sostanze stupefacenti risulta correlato positivamente con la commissione di reati di produzione, traffico e detenzione illecita di sostanze stupefacenti (art. 73 della legge n. 309 del 1990)". Obviously, property crimes, rather than drugs crimes, are first on the list if one considers the aggregated values (i.e. theft plus robbery plus purchase of stolen goods, for a total of 33.647 detainees). For 2008-2012 data see the statistics from the Ministry of Justice, available at http://www.giustizia.it/giustizia/it/mg_1_14_1.wp?facetNode_1=0_2&facetNode_5=0_2_10&facetNode_4=1_5_28&facetNode_3=1_5_29&facetNode_2=3_1_6&previousPage=mg_1_14&contentId=SS_T613925. According to these statistics, as of 31 December 2012 39.4% people were detained in Italian prisons because of drug offenses.

Italy. This decision, as we will see in chapter II, acknowledged that Italian prisons reported an overcrowding rate of 148% on 13 April 2012. Despite the Court showed appreciation for the efforts carried out by the Italian government since 2010, which had resulted in a 3% points reduction in prison overcrowding in the period 2010-2012, it ordered Italy to put in place, within one year, more incisive measures to provide redress for violations of the European Convention on Human Rights resulting from prison overcrowding. Thus, with severely overcrowded prisons and under court order, Italy is the California of Europe when it comes to conditions of confinement.⁴⁵

II. HOW HIGHEST COURTS HAVE DEALT WITH PRISON OVERCROWDING IN THE UNITED STATES AND IN EUROPE

1. Shared problems, but different in magnitude: the reasons behind it

One point that emerges from the statistical data that have been provided in the previous chapter is that the severity of prison overcrowding is much more alarming in the United States, with California's prisons operating at around 200% of design capacity for at least 11 years, than in Europe, with Italian prisons operating at around 150% prison capacity. If, on the one hand, California and Italy share the same problem, on the other hand, the gravity of the problem seems to be quite different on the two sides of the Atlantic.

What, if anything, will prevent Italian prisons to become as overcrowded as California's prisons in the next years? In Europe, the answer is found in the jurisprudence of the European Court of Human Rights (ECtHR), that through strict interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁴⁶ has provided inmates effective protection and redress for violations of their rights. The ECtHR, with its increasingly active role in the field of conditions of confinement, has preserved - and will likely continue to

⁴⁵ I borrow this expression from Palash Ghosh, who used it in its article of 18 June 2013 *available at* http://sentencing.typepad.com/sentencing_law_and_policy/2013/06/with-overcrowded-prisons-and-under-court-orders-italy-is-the-california-of-the-europe.html

⁴⁶EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221, 222.

preserve in the next years - the right to be free from "torture, inhuman and degrading treatment",⁴⁷ i.e. the European equivalent of the American right to be free from "cruel and unusual punishment".⁴⁸

In the United States, inmates seeking to challenge their conditions of confinement face several obstacles. Not only must they satisfy the strict exhaustion requirements set forth by the Prison Litigation Reform Act of 1996,⁴⁹ but they bear the burden to prove compelling objective and subjective elements, established by the Supreme Court in its jurisprudence on conditions of confinement.⁵⁰ As to the Prison Litigation Reform Act of 1996, some preliminary clarifications may be of help. In recent years, the Eighth Amendment's prohibition on "cruel and unusual punishment" is interpreted by courts in the United States as imposing constitutional limits on both criminal punishment and conditions of confinement.⁵¹ This has not always been the case. Prior to the 1960s, in fact, most courts declined jurisdiction over complaints filed by prison inmates regarding their conditions of confinement.⁵² The Eighth Amendment was invoked by courts primarily to check legislative abuse in the determination of punishment,⁵³ and the courts were reluctant to interfere with the correctional facilities administration.⁵⁴ Starting from the 1960s, however, some courts departed from this "hands-off" judicial doctrine.⁵⁵ They allowed prisoners to obtain relief for their inadequate conditions of confinement by filing a petition for a "writ of

⁴⁷ *Id.*, at art 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

⁴⁸ The 8th Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".

⁴⁹ PRISON LITIGATION REFORM ACT OF 1996, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 132-66 (1996) (codified as amended in scattered sections of 18 U.S.C. & 28 U.S.C.).

⁵⁰ See *infra* chapter II. section 2.

⁵¹ M. GUTTERMAN, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV., 1995, 376.

⁵² D. J. GOTTLIEB, *The Legacy of Wolfish and Chapman: Some Thoughts About "Big Prison Case" Litigation in the 1980s*, in I. P. ROBBINS (ed.), *Prisoners and the Law*, 1999, at 4.

⁵³ E. G. WOODBURY, *Note - Prison Overcrowding and Rhodes v. Chapman: Double-Celling by What Standard?*, 23 B.C. L. REV., 1982, 717.

⁵⁴ The lack of involvement by the courts was mainly due to the separation of powers doctrine, the demand for federalism, fear of undermining prisons' disciplinary system and judicial inexperience. See S. Y. CHUNG, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, *supra* note 5 at 2358.

⁵⁵ The erosion of the "hands-off" doctrine was supported by *Robinson v. California*, where the Supreme Court applied the Eighth Amendment protection against cruel and unusual punishment directly to the states through the Fourteenth Amendment. See U.S. Const. amend VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); E. G. WOODBURY, *supra* note 53 at 719-22.

habeas corpus".⁵⁶ Thus, courts started issuing orders to reduce prison population, especially when overcrowding jeopardized the health and safety of the inmates. As a consequence, 35 jurisdictions were operating under court orders or consent decrees to reduce prison overcrowding as of April 1989.⁵⁷ The reaction of Congress to the explosion of prison conditions litigation and judicial activism came in 1996, with the Prison Litigation Reform Act.⁵⁸ First, the PLRA established a very strict exhaustion requirement: before prisoners could challenge their condition of confinement in federal court, they had to exhaust any available administrative remedies, by pursuing to completion whatever inmate grievance and appeal procedures their prison custodians provided.⁵⁹ Secondly, the PLRA was designed to curb the discretion of the courts: it provided that courts could not grant or approve any prospective relief unless 1) they had found that such relief was narrowly drawn, 2) it extended no further than necessary to correct the violation of the federal right, and 3) it was the least intrusive means.⁶⁰ As a result of this legislation, it is nowadays very hard for inmates in the United States to bring challenges to their conditions of confinement to federal courts. And for those few cases that successfully navigate the PLRA and make it into the federal courts, the threshold that has to be met to establish a constitutional violation, in light of the two-prong test of the Supreme Court that will be analyzed in the next section, is rather high.

In Europe, instead, an approach to prison overcrowding that gives substantial weight to the space provided to inmates in their cells has developed in the most recent jurisprudence of the European Court of Human Rights. Although, similarly to the United States, all domestic remedies have to be exhausted by European inmates before they can seek redress for violation of their rights in front of the European Court of Human Rights, the approach recently adopted by the ECtHR provides inmates a more meaningful protection of their rights in case of severe prison overcrowding.

This chapter argues for the adoption by litigators and the courts in the United States of an approach similar to the one developed by the ECtHR, and it encourages a more

⁵⁶ I. P. ROBBINS, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY, 1980, 214.

⁵⁷ C. E. ANDERSON, *Uncle Sam Gets Serious: A Report From the Front Line*, A.B.A. J., 1990, 63.

⁵⁸ PRISON LITIGATION REFORM ACT OF 1995, *supra* note 49.

⁵⁹ *Ibidem*.

⁶⁰ *Ibidem*.

widespread use of this approach by litigators and the courts in Europe. First, we will conduct a study of the U.S case law on prison overcrowding, with particular regard to the U.S. Supreme Court jurisprudence and the jurisprudence of U.S. circuit courts. Then, we will analyze the approach to prison overcrowding that has been developed in the most recent jurisprudence of the ECtHR. Finally, we will argue for a more widespread in the evaluation of conditions of confinement both in Europe and in the United States of what we identify as the "minimum living space" approach, in light of the lessons that can be learnt from (the poor records of) Italy and (the successful human rights mechanisms of) Europe.

2. The United States Supreme Court jurisprudence on prison overcrowding

The U.S. Supreme Court is the highest federal court in the United States. It has ultimate (and largely discretionary) appellate jurisdiction over all federal courts and state court cases involving issues of federal law, in addition to original jurisdiction over a small range of cases.⁶¹ In the legal system of the United States, the Supreme Court is the final interpreter of federal constitutional law.

The U.S. Supreme Court has considered prison overcrowding as a ground for constitutional violations in its jurisprudence on conditions of confinement, under the Eighth Amendment prohibition of "cruel and unusual punishment". Differently from the ECtHR, that has been increasingly active in the field of conditions of confinement in recent years,⁶² the Supreme Court has so far established only very few clear points in the field of conditions of confinement. In particular, it has only established that for conditions of confinement to amount to "cruel and unusual punishment" a two-prong test must be met, which includes an objective and a subjective element.

The objective element of the test was established in *Rhodes v. Chapman*,⁶³ where the Supreme Court for the first time reviewed the application of the Eighth Amendment

⁶¹ The U.S. Constitution specifies that the Supreme Court may exercise original jurisdiction in cases affecting ambassadors and other diplomats, and in cases in which a state is a party. In all other cases, however, the Court has only appellate jurisdiction. It considers cases based on its original jurisdiction very rarely; almost all cases are brought to the Supreme Court on appeal. In practice, the only original jurisdiction cases heard by the Court are disputes between two or more states.

⁶² See *infra* chapter II. section 3.

⁶³ *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981).

to an overcrowding claim. The Court's findings in *Rhodes* were limited to the facts of the case,⁶⁴ which challenged the practice of "double-celling"⁶⁵. The Court failed to articulate a specific standard for lower courts to follow when interpreting the Eighth Amendment in relation to conditions of confinement.⁶⁶ Nevertheless, the Court did make clear that, in order to establish a constitutional violation, the complainant must prove that the alleged deprivation is serious. In particular, the alleged deprivation must "involve[s] unnecessary and wanton infliction of pain"⁶⁷ in light of the "contemporary standards of decency that mark the progress of a maturing society".⁶⁸ On the one side, the Court held that neither double-celling nor prison crowding in excess of design capacity violated the Constitution in and of themselves.⁶⁹ On the other side, through the reference to the "contemporary standards of decency", the Court characterized the objective element of the test as an adaptable and evolving standard. This is a very important point in relation to the appropriateness for U.S. circuit courts to look at the standards developed by the European Court of Human Rights, as part of the "contemporary standards of decency" analysis.

In the following years, *Wilson v. Seiter*⁷⁰ and *Farmer v. Brennan*⁷¹ clarified the subjective element of the test. In *Wilson*, the plaintiff's complaint alleged generally poor prison conditions including overcrowding, excessive noise, inadequate heating and cooling, improper ventilation, unsanitary facilities and housing with mentally and physically ill inmates.⁷² The Court held that, in cases challenging conditions of confinement that are not formally imposed as a sentence, the standard for wantonness is one of "deliberate indifference": the complainant must prove that the prison official had knowledge of and disregarded "an excessive risk to health and safety".⁷³ As a preliminary matter, the Court stated that confinement conditions are unconstitutional only if they produce "the deprivation of a single, identifiable human need such as

⁶⁴ *Id.* at 349 n.14.

⁶⁵ Double-celling consists of housing two prisoners in a cell designed to accommodate only one inmate. Each prison cell in the instant case measured approximately 63 square feet. *Id.* at 340-41.

⁶⁶ *Id.* at 347. See S. Y. CHUNG, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, *supra* note 5 at 2359.

⁶⁷ *Rhodes* at 346 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976))

⁶⁸ *Id.* at 348 n. 13.

⁶⁹ *Id.* at 347-48.

⁷⁰ *Wilson v. Seiter*, 501 U.S. 294 (1991).

⁷¹ *Farmer v. Brennan*, 511 U.S. 825, 829 (1994).

⁷² *Wilson v. Seiter*, *supra* note 70, at 296.

⁷³ *Id.* at 299-304.

food, warmth, or exercise; for example, a low cell temperature at night combined with a failure to issue blankets."⁷⁴

Some considerations are to be made on the Supreme Court jurisprudence on conditions of confinement, with specific regard to constitutional challenges based on prison overcrowding.

In the absence of a clear Supreme Court standard, circuit courts in the United States⁷⁵ have so far adopted three approaches to determine whether conditions of confinement, and in this context prison overcrowding, amount to "cruel and unusual punishment": 1) a totality-of-the-circumstances, 2) a core-conditions and 3) a *per se* approach.⁷⁶ The totality-of-the-circumstances approach considers a broad range of conditions, including conditions that may cause psychological harm.⁷⁷ In deciding whether the challenged prison conditions fall below constitutional norms, courts that adopt such approach⁷⁸ examine not only the availability of basic necessities, such as food, clothing, safety, and shelter, but also other factors such as overcrowding, adequacy of staff supervision, and availability of recreational opportunities.⁷⁹ The core conditions approach, instead, examines specifically the deprivation of food, clothing, safety, shelter, sanitation and medical care. Courts that adopt such approach⁸⁰ generally do

⁷⁴ *Id.* at 304.

⁷⁵ The American judicial system comprises several court systems, broadly divided into the federal and state courts. District Courts and Circuit Courts are part of the federal court system, of which the U.S. Supreme Court is the ultimate authority. District courts are lower courts and have the responsibility for holding trials, while circuit courts are appellate courts that do not hold trials but only hear appeals for cases decided by the lower court. The district court system is spread over 94 different geographical areas while the circuit court has 13 administrative regions covering the United States.

⁷⁶ S. Y. CHUNG, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, *supra* note 5.

⁷⁷ *Id.* at 2365.

⁷⁸ The Second and Third Circuit Courts of Appeals, for example, adopted the totality-of-the-circumstances approach. As to the Second Circuit, see *Mitchell v. Cuomo*, 748 F.2d 804, 805 (2d Cir. 1984). As to the Third Circuit, see *Tillery v. Owens*, 907 F.2d 418 (3d Cir. 1990), and *Nami v. Fauver*, 82 F.3d 63 (3d Cir. 1996), where the Third Circuit held the conditions unconstitutional in light of the cumulative impact of double celling inmates in a 80 square feet cell and "the length of confinement, the amount of time prisoners must spend in their cells each day, sanitation, lighting, bedding, ventilation, noise, education and rehabilitation programs, opportunities for activities outside the cells, and the repair and functioning of basic physical facilities such as plumbing, ventilation, and showers" *Id.* at 67.

⁷⁹ S. Y. CHUNG, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, *supra* note 5 at 2366.

⁸⁰ The Eighth, Ninth and DC Circuit Courts of Appeals, for example, adopted the core-conditions approach. As to the Eighth Circuit see *Cody v. Hillard*, 830 F.2d 912, 914 (8th Cir. 1987). As to the Ninth Circuit see *Wright v. Rushen*, 642 F.2d 1129, 1133 (9th Cir. 1981) and *Hoptowitz v. Ray*, 682 F.2d 1237 (9th Cir. 1982). As to the DC Circuit see *Occoquan v. Barry* 844 F.2d 828 (D.C. Cir. 1988).

not consider overcrowding as a core condition.⁸¹ As a result, under this approach a court cannot find an Eighth Amendment violation on the basis of prison overpopulation alone, unless it leads to a deprivation of a core condition.⁸² This approach focuses on factors that cause acute physical pain for prisoners, not encompassing conditions that may produce severe psychological pain.⁸³ The *per se* approach, finally, considers prison overcrowding itself to be a violation of the Constitution. Although courts taking this approach have not provided a clear definition of "overcrowding", its meaning has ranged from conditions that "shock[] the general conscience" to those that offend "contemporary standards of human decency" to simply the "accommodation of inmates beyond design capacity".⁸⁴

It is important to note that, if *Rhodes* explicitly rejected the idea that prisons that operate above design capacity lead to an immediate finding of "cruel and unusual punishment", i.e. rejected the *per se* approach where it defines overcrowding as housing inmates in excess of design capacity, it did not affect a *per se* approach that defines overcrowding by the minimum personal space.⁸⁵

Also, it has been argued that *Wilson v. Seiter* and *Farmer v. Brennan* narrowed the totality-of-the-conditions approach requiring the deprivation of a specific human need for a finding of unconstitutionality.⁸⁶ It is worth noting, however, that the list of human needs that has been set in these decisions is not exhaustive. To the contrary, by using the term "such as"⁸⁷ the Court left extensive flexibility to lower courts. Ultimately, there is a strong argument that "living space" is a single, identifiable human need, as it has been acknowledged, among others, by the Fourth Circuit court in its 1992 decision in *McCrae v. Oldham*.⁸⁸

⁸¹ See *Wright v. Rushen*, 642 F.2d 1129, 1133 (9th Cir. 1981); See also P. M. ROSENBLATT, *The Dilemma of Overcrowding*, *supra* note 12 at 500.

⁸² See *Hoptowit v. Ray*, 682 F.2d at 1246-47 n.3 ("The *Rhodes*' rationale suggests that the Court would require evidence of specific conditions amounting to one of the enumerated deprivations."); D. J. GOTTLIEB, *The Legacy of Wolfish and Chapman*, *supra* note 52, at 18.

⁸³ S. Y. CHUNG, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, *supra* note 5 at 2368.

⁸⁴ *Supra* chapter I. section 1.

⁸⁵ See S. Y. CHUNG, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, *supra* note 5 at 2370 (claiming that "a constitutional challenge based on the size of the cell may still apply").

⁸⁶ *Id.*, at 2361.

⁸⁷ *Wilson v. Seiter*, *supra* note 70, at 304.

⁸⁸ *McCrae v. Oldham*, 976 F.2d 726 (4th Cir. 1992).

In conclusion, with the exception of requiring a strict objective element (i.e. "unnecessary and wanton infliction of pain in light of the contemporary standards of decency that mark the progress of a maturing society") and a strict subjective element (i.e. "deliberate indifference"), no other clear points have so far been established by the Supreme Court in its jurisprudence on conditions of confinement, and thus prison overcrowding. Therefore, no obstacle is currently present, at the Supreme Court level, to prevent the development - among circuit courts in the United States - of what we identify as the "minimum living space" approach, which has been adopted in the most recent jurisprudence of the European Court of Human Rights on prison overcrowding.⁸⁹

2.1 Brown v. Plata

The most recent and most important decision by the Supreme Court on prison overcrowding was issued in the 2011 landmark case of *Brown v. Plata*.⁹⁰ This decision came after almost 20 years without a Supreme Court ruling in the field of conditions of confinement.

The case of *Brown v. Plata* reached the Supreme Court after 20 years of protracted litigation in the lower courts, attesting to the fact that the PLRA continues to present formidable obstacles for inmates seeking to challenge their conditions of confinement. As acknowledged by the Supreme Court itself, the degree of overcrowding in California's prisons was "exceptional".⁹¹ The State's prisons had operated at around 200% of design capacity for at least 11 years, grossly depriving prisoners of adequate medical care.⁹² *Amici curiae* from several public health associations emphasized that California prisons did not meet the nationally recognized minimum standards for

⁸⁹ See *infra* chapter II, section 3.

⁹⁰ *Brown v. Plata*, 131 S. Ct. 1910, 1917 (2011). This Supreme Court decision affirmed a decision by a three judge panel of the United States District Court for the Eastern and Northern Districts of California which had ordered California to reduce its prison population to 137.5% of design capacity within two years. The case on appeal as *Brown v. Plata* in the Supreme Court was a class action that combined one case most recently captioned *Coleman v. Brown* (docket no. 2:90-cv-00520-LKK-JFM (Eastern D. Cal.)) and another most recently known as *Plata v. Brown* (docket no. 3:01-cv-01351-TEH (Northern D. Cal.)).

⁹¹ *Brown v. Plata* at 1923. The three-judge court's order reported that the "extent of overcrowding in the California prison system, approximately 190% of systemwide design capacity, is 'extraordinary' and 'almost unheard of'. The problem is 'widespread' and 'not restricted to just a few institutions. It's occurred throughout the system'". *Coleman v. Schwarzenegger*, CIV S-90-0520LKKJFMP, 2009 WL 2430820 (E.D. Cal. Aug. 4, 2009) at 55.

⁹² *Plata* at 1918.

required medical care in prisons, and created public health problems that reached beyond the prison walls.⁹³ Thus, in a landmark five to four opinion by Justice Kennedy, the Supreme Court held that crowding was the primary cause of the Eighth Amendment violations and that a prison population cap at 137.5% of design capacity was necessary to remedy to the constitutional violation.⁹⁴

Following this decision, California adopted the so-called "realignment plan": many newly convicted offenders who under prior rules would have come into the state system are now instead serving their time in county jails. Parole violators are also being channeled to jails rather than prisons and their numbers, altogether, have dropped significantly. As a result, California's state prison population is currently more than a quarter smaller than the 2007 peak. As of November 2012, the state housed about 125,000 prisoners, which put the total population at about 147% of rated prison capacity; an additional 8,600 prisoners were housed out-of-state.⁹⁵ The Plata order (if not amended) requires still more prison population reduction: an additional decrease of nearly 15,000 (over 23,000 if the out-of-state prisoners are brought back home, as the California Governor Jerry Brown has declared they will be)⁹⁶. In a press conference with state legislators held on 9 September 2013, California's Governor Jerry Brown announced that, while he plans to reduce California's prison overcrowding to 137.5 % of capacity by adding thousands of beds and transferring inmates to private prisons, lawmakers need more time to comply with the federal ruling. Brown said the December 31, 2013 deadline to drastically reduce the state prison population was too soon.⁹⁷

Of course, *Brown v. Plata* did not mark the beginning of the end of mass incarceration in the United States, nor of the abusive conditions that proliferate in prisons and jails. Unlike the landmark prisoners' rights cases of the 1960s and 1970s, this decision is

⁹³ Brief of *amici curiae* American Public Health Association, American Nurses Association, American Association of Public Health Physicians, Academy of Correctional Health Professionals, and Society of Correctional Physicians in support of Appellees, *Brown v. Plata*, 131 S. Ct. 1910 (2011), at 7.

⁹⁴ *Plata* at 1923.

⁹⁵ CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, *Weekly Report of Population as of midnight October 24, 2012* (Oct. 29, 2012), available at http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/WeeklyWed/TPOPIA/TPOPIAd121024.pdf.

⁹⁶ CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, *The Future of California Corrections: A Blueprint to Save Billions of Dollars, End Federal Court Oversight, and Improve the Prison System* 5 (23 April 2012) available at <http://www.cdcr.ca.gov/2012plan/docs/plan/complete.pdf> (Accessed 6 July 2012).

⁹⁷ See <http://rt.com/usa/california-governor-prison-time-overcrowding-639/>

unlikely to spur many successful "copycat lawsuits" to impose prison population caps.⁹⁸ Moreover, it will be important to monitor the "very real possibility that Plata could succeed at chopping the head off of unconstitutional conditions of prison confinement in California, only to cause fifty-eight counties to develop unconstitutional conditions of jail confinement."⁹⁹ Nevertheless, this decision raised public consciousness on the problems of mass incarceration and prison overcrowding in the United States. Hopefully, this decision will revitalize the courts as a major forum to challenge abusive prison and jail conditions, in line with the argument put forward in this thesis.

3. The European Court of Human Rights jurisprudence on prison overcrowding

The European Court of Human Rights (ECtHR) is Europe's court of last resort. It is in charge of the interpretation and the enforcement of the European Convention on Human Rights and Fundamental Freedoms (ECHR). As of today, the ECtHR is the only supranational human rights body that issues binding decisions for States at an international level. In light of its quasi-constitutional character (its ultimate authority makes it comparable to the Supreme Court), its influential role and its evolutionary approach, the jurisprudence of the ECtHR should be given particular attention by courts in the United States. In fact, the idea of using human rights law in prison reform is not as far fetched as it might have seemed a few years ago.¹⁰⁰ Interest in the issue can be seen at every level, from Supreme Court Justices, to circuit courts,¹⁰¹ public interest law groups and individual practitioners¹⁰². Justice Kennedy's opinion in *Lawrence v. Texas*,¹⁰³ for example, referred to some decisions of the European Court of Human Rights to confirm that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."¹⁰⁴

⁹⁸ M. GOTTSCHALK, *Prison Overcrowding and Brown v. Plata* (June 8, 2011), available at <http://www.tnr.com/article/politics/89575/prison-overcrowding-brown-plata-supreme-court-california>.

⁹⁹ M. SCHLANGER, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW, 2012, 168.

¹⁰⁰ A. BRONSTEIN-J. GAINSBOROUGH, *The International Context of US Prison Reform*, 24 PACE L. REV., 2003-2004, 815.

¹⁰¹ See e.g. *Laureau v. Manson*, 651 F.2d 96 (2d Cir. 1981).

¹⁰² A. BRONSTEIN-J. GAINSBOROUGH, *supra* note 100.

¹⁰³ *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) is a decision by the United States Supreme Court that struck down the sodomy law in Texas and, by extension, invalidated sodomy laws in thirteen other states, making same-sex sexual activity legal in every U.S. state and territory.

¹⁰⁴ *Id.* at 2483.

Over the last decade, the ECtHR has been increasingly active in the field of conditions of confinement. The Court has consistently stressed that, for conditions of confinement (and thus for prison overcrowding) to amount to a violation of Article 3 of the ECHR, which prohibits "torture and inhuman or degrading treatment", ill-treatment must attain a "minimum level of severity", i.e. the suffering and humiliation of the detainee must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.¹⁰⁵ More importantly, what emerges from the most recent ECtHR case-law, particularly from 2009 onwards, is that the Court has shifted from the adoption of an all-of-the-circumstances approach to prison overcrowding to the setting of a clear limit under which prison overcrowding amounts, in itself, to inhuman and degrading treatment. Remarkably, this new approach confirms inmates' absolute right to a personal living space of 3 square meters.¹⁰⁶ Some recent decisions against Italy are particularly

¹⁰⁵ Although measures depriving a person of his liberty may often involve such an element, in accordance with Article 3 of the Convention the State must ensure that a person is detained under conditions which are compatible with respect for his human dignity and that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI).

¹⁰⁶ The ECtHR, even before 2009, had frequently found a violation of Article 3 of the Convention (prohibition of "torture and inhuman or degrading treatment") on account of "lack of personal space afforded to detainees". See for example *Mamedova v. Russia*, no. 7064/05, §§ 61 et seq., 1 June 2006; *Khudoyorov v. Russia*, no. 6847/02, §§ 104 et seq., EUR. CT. H.R. 2005-X (extracts); *Labzov v. Russia*, no. 62208/00, §§ 44 et seq., 16 June 2005; *Novoselov v. Russia*, EUR. CT. H.R. no. 66460/01, §§ 41 et seq., 2 June 2005; *Mayzit v. Russia*, no. 63378/00, §§ 39 et seq., 20 January 2005; *Kalashnikov v. Russia*, no. 47095/99, §§ 97 et seq., EUR. CT. H.R. 2002-VI; *Peers v. Greece*, EUR. CT. H.R. no. 28524/95, §§ 69 et seq., EUR. CT. H.R. 2001-III); *Melnik v. Ukraine* EUR. CT. H.R. (28 March 2006); and *Lind v. Russia*, EUR. CT. H.R. (6 December 2007), Application n. 25664/05. What we will note in our further analysis, however, is that there is an important difference in the reasoning of cases before and after the 2009 decision in *Sulejmanovic*. The case of *Lind v. Russia*, for example, is one of the most cited by the ECtHR after 2009 to support its finding that having less than 3 square meters of personal space justifies, of itself, a violation of Article 3. In that case, however, the reasoning of the Court was still based on an all-of-the-circumstances approach and the Court had not set a minimum baseline as to personal living space. The applicant was held in two different cells. He was initially afforded "less than 3 square meters" of personal space and subsequently had only "2.1 square meters" of personal space. The applicant, despite suffering from a chronic kidney disease, was confined to his cell day and night, save for one hour of daily outdoor exercise. The Court, in its holding, noted that "by keeping the applicant in overcrowded cells and by refusing him medical assistance appropriate to his condition, the domestic authorities subjected him to inhuman and degrading treatment". Thus, at this point in time, the Court was still evaluating conditions of confinement based on an "all-of-the-circumstances" approach and without having set a clear minimum baseline as to personal living space. The same can be said for another case that is often cited by the ECtHR, from 2009 onward, to support that having less than 3 square meters of personal space justifies, of itself, a finding of a violation of Article 3. It is the case of *Andrey Frolov v. Russia*, no. 205/02, §47-49, 29 March 2007. There, despite the applicant was afforded less than 0.7 square meters of personal space and was confined in this cell for more than four years, the decision reads as follow: "the Court finds that the fact that the applicant was obliged to live, sleep and use the toilet in the same cell with so many other inmates for more than four years was itself sufficient to cause distress or hardship of an intensity exceeding the unavoidable level of suffering

significant in this regard and will be analyzed below: they are the 2009 judgment in *Sulejmanovic v. Italy* and the 2013 Chamber judgment in *Torreggiani v. Italy*.

3.1. *Sulejmanovic v. Italy*

In its 2009 decision in the case of *Sulejmanovic v. Italy*,¹⁰⁷ the ECtHR held, by five votes to two, that there had been a violation of Article 3 of the ECHR regarding the applicant's conditions of detention in Italy. This was the first time Italy was found in violation of Article 3 due to prison overcrowding. Let us briefly summarize the facts of the case. During his detention in Rebibbia Prison, Mr. Sulejmanovic was put in a number of different cells, each measuring 16.20 square meters. He claimed that from 30 November 2002 to April 2003 he had shared his cell with five other inmates, each having an average personal space of 2.70 square meters, and, from April to October 2003, with four other inmates, each thus having an average personal space of 3.40

inherent in detention, and arouse in him feelings of fear, anguish and inferiority capable of humiliating and debasing him". In essence, no clear reference to the minimum living space of 3 square meters appears in the ECtHR case law before 2009. From 2009 onward, instead, we can see an abstraction from the single case at issue and the creation of a general rule on the minimum living space. For an analysis, in Italian, of the trend toward considering a personal space inferior to 3 square meters as a violation "in re ipsa" of Article 3 ECHR see A. COLELLA, *La Giurisprudenza di Strasburgo 2008-2010: il Divieto di Tortura e Trattamenti Inumani o Degradanti (art. 3 CEDU)*, in *Dir. pen. cont. - Riv. trim.*, 2011, at 237 ff.; ID., *La Giurisprudenza di Strasburgo 2011: il Divieto di Tortura e Trattamenti Inumani o Degradanti (art. 3 CEDU)*, in *Dir. pen. cont. - Riv. trim.*, 2012, at 223 ff. There, the author claims that: "L'esiguità dello spazio personale a disposizione di ciascun detenuto veniva, fino a un recente passato, quasi sempre valutata unitamente ad altri indici di violazione dell'art. 3 Cedu (quali le precarie condizioni igieniche, il rischio concreto di diffusione di malattie, ecc.), sul presupposto che la stessa non fosse, di per sé, sufficiente a determinare il superamento della soglia minima di gravità. Alcune importanti pronunce rese dalla Corte nel corso del 2009 preludono, tuttavia, al progressivo superamento di tale impostazione: in particolare, nella sentenza *Sulejmanovic c. Italia*, i giudici di Strasburgo hanno riscontrato una violazione dell'art. 3 Cedu per il solo fatto che il ricorrente (detenuto nel carcere di Rebibbia) avesse a disposizione uno spazio personale di soli 2,70 metri quadri". See also ID., *La Giurisprudenza di Strasburgo 2011: il Divieto di Tortura e Trattamenti Inumani o Degradanti (art. 3 CEDU)*, in *Dir. pen. cont. - Riv. trim.*, 2012, at 223 ff. There, the author notes that in the recent years the ECtHR is more and more open to finding a violation of Art. 3 ECHR based on lack of personal space alone in case of severe prison overcrowding.

¹⁰⁷ *Sulejmanovic v. Italy*, EUR. CT. H.R. (16 July 2009), Application n. 22635/03. This decision is available, in French only, at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{%22fulltext%22:\[%22sulejmanovic%20v%20Italy%22\],%22itemid%22:\[%22001-93564%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{%22fulltext%22:[%22sulejmanovic%20v%20Italy%22],%22itemid%22:[%22001-93564%22]}). The press release is available, in English, at [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2802468-3069791#{%22itemid%22:\[%22003-2802468-3069791%22\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2802468-3069791#{%22itemid%22:[%22003-2802468-3069791%22]}). For some valuable comments, in Italian, to the decision adopted by the ECHR in *Sulejmanovic* see M. BORTOLATO, *Sovraffollamento Carcerario e Trattamenti Disumani o Degradanti*, in *Quest. giust.*, 2009, 111 ff.; L. EUSEBI, *Ripensare le Modalità delle Risposte ai Reati Traendo Spunto da C. Eur. Dir. Uomo 19.6.2009, Sulejmanovic c. Italia*, in *Cass. pen.*, 2009, 4938; N. PLASTINA, *L'Italia Condannata dalla corte Europea dei Diritti dell'Uomo per Insufficienza Temporanea dello Spazio Individuale Asseganto a un Detenuto del Carcere di Rebibbia nel 2003, ma Assolta per la Gestione, in quel Contesto, della Sovrappopolazione Carceraria*, in *Cass. Pen.*, 2009, 4928 ff.

square meters. Also, he alleged that he had spent more than eighteen hours per day in the cell. The ECtHR highlighted that having approximately 2.70 square meters of personal space was much inferior to the standards recommended by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which had set 7 square meters per prisoner as a minimum desirable guideline for a detention cell. While the Court took into consideration the various factors of the detention, it found that the "flagrantly insufficient amount of personal space" available to Mr Sulejmanovic from 30 November 2002 to April 2003 had *in itself* constituted inhuman and degrading treatment, in violation of Article 3.¹⁰⁸ After being transferred in May 2003, Mr Sulejmanovic's situation had improved: up until his release, he had been afforded personal space of 3.24, 4.05 and 5.40 square meters respectively. The Court noted that while the prison overcrowding in Rebibbia was extremely regrettable, it had not reached alarming proportions, in an all-of-the-circumstances evaluation. Mr. Sulejmanovic had not complained of heating or hygiene problems and had not specified any actual consequences of his detention for his state of health. Therefore, no violation was found by after he had been transferred.¹⁰⁹

What emerges from a comparison between *Sulejmanovic* and the previous ECtHR decisions on prison overcrowding¹¹⁰ is that *Sulejmanovic* is the first case where explicit reference is made to the minimum threshold of 3 square meters. In this decision, in fact, the Court not only established that there had been a violation of Article 3 in the case at issue, due to the "flagrantly insufficient amount of personal space" available to the applicant, but, more importantly, made a clear distinction between its previous cases where inmates were granted less than 3 square meters - which in itself amounts to a violation of Article 3 - and cases where inmates were granted a greater personal living space - which could amount to a violation of Article 3 only in connection with other generally poor detention conditions.¹¹¹ In essence, the ECtHR in *Sulejmanovic*, distinguishing its previous case-law in two broader categories, indirectly gave a specific indication of the "minimum living space" that

¹⁰⁸ *Id* at 11.

¹⁰⁹ *Id.* at 12.

¹¹⁰ See *supra* note 106.

¹¹¹ *Sulejmanovic v. Italy*, *supra* note 107, at 10.

inmates must be granted in order not to infringe, merely due to lack of personal space, on their rights under Article 3 of the ECHR.¹¹²

The approach adopted in *Sulejmanovic* was confirmed in the following years. The 2011 decision in *Mandic and Jovic*¹¹³ is, among others, an example.¹¹⁴ This case concerned the conditions in Ljubljana Prison, Slovenia. During their detention there, the applicants were held for several months in cells in which the personal space available to them was 2.70 square meters. Applicants had to spend most of their time in the cell. The Court held that the distress and hardship endured by the applicants had "exceeded the unavoidable level of suffering inherent in detention" and had therefore amounted to degrading treatment, in violation of Article 3.¹¹⁵ Similarly to *Sulejmanovic*, the Court recalled, on the one side, its previous cases where applicants had at their disposal less than 3 square meters of personal space, and noted that in those cases it had found that the overcrowding was so severe as to justify of itself a finding of a violation of Article 3.¹¹⁶ On the other side, the Court noted that in other

¹¹² The Court, in relation to the former set of cases, particularly mentioned Aleksandr Makarov v. Russia, EUR. CT. H.R. (12 March 2009) Application n. 15217/07, § 93 (that adopted an all-of-the-circumstances approach with no reference to 3 square meters as a minimum threshold); Lind v. Russia, EUR. CT. H.R. (6 December 2007), Application no. 25664/05 (where the Court considered both overcrowding and the poor physical conditions of the detainee, who suffered from a serious kidney problem, for its holding of violation of Article 3); Kantyrev v. Russia, EUR. CT. H.R. (21 June 2007), Application n. 37213/02, §§ 50-51, (where the Court based its holding on generally unsatisfactory conditions of detentions); Andrei Frolov v. Russia, EUR. CT. H.R. (29 Mars 2007), Application n. 205/02, §§ 47-49 (that made no mention of the minimum threshold of 3 square meters); Labzov v. Russia, EUR. CT. H.R. (16 June 2005), Application n. 62208/00, § 44 (where the Court considers the extreme lack of space to be the focal point for its analysis but gave no general minimum threshold); and Mayzit v. Russia, EUR. CT. H.R. (20 January 2005), Application n. 63378/00, § 40 (where the Court, once again, put particular emphasis on the problem of overcrowding and the length of stay in the cell but gave no general minimum threshold). What these decisions have in common with *Sulejmanovic* is that they all dealt with cases where applicants were afforded, at least for a certain amount of time, a personal living space inferior to 3 square meters. What differentiates *Sulejmanovic* from all these previous cases, however, is that only in *Sulejmanovic* the ECtHR gave, grouping these sets of cases in two broader categories, a specific indication of the "minimum living space".

¹¹³ *Mandic and Jovic v. Slovenia*, EUR. CT. H.R. (20 October 2011), Application n. 774/10 and n. 5985/10, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107139#%22itemid%22:\[%22001-107139%22\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107139#%22itemid%22:[%22001-107139%22])

¹¹⁴ *Mandic and Jovic v. Slovenia*, *supra* note 113. For 2011 similar decisions see, among others, Petrenko v. Russia, EUR. CT. H.R. (29 March 2011), Application n. 30112/04; Vladimir Sokolov v. Russia, EUR. CT. H.R. (5 April 2011), Application n. 31242/05; and Akbar v. Romania, EUR. CT. H.R. (5 May 2011), Application n. 28686/04. For 2012 similar decisions see, among others, Dmitriy Sazonov v. Russia, EUR. CT. H.R. (1 March 2012), Application n. 30268/03 and Borisov v. Russia, EUR. CT. H.R. (13 March 2012), Application n. 12543/09.

¹¹⁵ *Mandic and Jovic v. Slovenia*, *supra* note 113 at 24.

¹¹⁶ The Court particularly mentioned *Sulejmanovic v. Italy*, *supra* note 107 (where the applicant had 2.7 square meters personal space) and all other cases it had already mentioned on this point in its decision in *Sulejmanovic*, i.e. Lind v. Russia, EUR. CT. H.R. (6 December 2007), Application no. 25664/05 (where the applicant was initially afforded less than 3 square meters of personal space and

cases where the overcrowding was not so severe as to raise in itself an issue under Article 3, other aspects of physical conditions of detention had been relevant for its assessment. Such elements included, in particular, the availability of ventilation, access to natural light or air, adequacy of heating arrangements, compliance with basic sanitary requirements and the possibility of using the toilet in private. Thus, even in cases where a larger prison cell was at issue - measuring in the range of 3 to 4 square meters per inmate - the Court had found a violation of Article 3 since the space factor was coupled with the established lack of ventilation and lighting¹¹⁷ or the lack of basic privacy in the prisoner's everyday life.¹¹⁸

3.2. Torreggiani and others v. Italy

In its landmark 2013 decision in the case of *Torreggiani and Others v. Italy*,¹¹⁹ the ECtHR held, unanimously (with the concurring vote of the Italian judge), that there

subsequently had only 2.1 square meters of personal space); *Kantirev v. Russia*, EUR. CT. H.R. (21 June 2007), Application n. 37213/02, §§ 50-51 (where inmates had only 1-1,6 square meters of personal space); *Andreï Frolov v. Russia*, EUR. CT. H.R. (29 Mars 2007), Application n. 205/02, §§ 47-49 (where inmates had to take turns to rest and had less than 0.7 square meters of personal space); and *Labzov v. Russia*, EUR. CT. H.R. (16 June 2005), Application n. 62208/00, § 44 (where the applicant was afforded less than 1 square meter).

¹¹⁷ The Court mentioned, for example, *Babushkin v. Russia*, EUR. CT. H.R. (18 October 2007), Application n. 67253/01, § 44.); and *Ostrovar v. Moldova*, EUR. CT. H.R. (13 September 2005), Application n. 35207/03, § 89.

¹¹⁸ The Court mentioned, for example, *Belevitskiy v. Russia*, EUR. CT. H.R. (1 March 2007), Application n. 72967/01, §§ 73-79; and *Novoselov v. Russia*, EUR. CT. H.R. (2 June 2005), Application n. 66460/01, §§ 32 and 40-43.

¹¹⁹ *Torreggiani and Others v. Italy*, EUR. CT. H.R. (13 January 2013), Application n. 43517/09. The decision is available, in French and Italian only, at <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#%22fulltext%22:%22torreggiani%20v.%20italy%22,%22documentcollectionid%22:%22GRANDCHAMBER%22,%22CHAMBER%22,%22itemid%22:%22001-115937%22>}. The press release is available, in English, at <http://hudoc.echr.coe.int/sites/fra-press/pages/search.aspx?i=003-4212710-5000451#%22itemid%22:%22003-4212710-5000451%22>}. For some interesting comments, in Italian, to this decision and its consequences for the Italian domestic system, see F. VIGANÒ, *Sentenza Pilota della Corte EDU sul sovraffollamento delle Carceri Italiane. Il nostro Paese Chiamato all'Adozione di Rimedi Strutturali entro il Termine di un Anno*, in *Dir. pen. cont.* 9 January 2013, available at http://www.penalecontemporaneo.it/materia/-/-/1990-sentenza_pilota_della_corte_edu_sul_sovraffollamento_delle_carceri_italiane_il_nostro_paese_chiamato_all_adozione_di_rimedi_strutturali_entro_il_termine_di_un_anno/. There, the author reiterates, in line with other scholars, that is now undisputed that the ECtHR will find a violation of Art. 3 in case of conditions of confinement that grant less than 3 square meters per inmate. For a detailed analysis of this decision and the duty (which is a direct consequence of this decision) to create effective domestic legal remedies in Italy to address human rights violations in conditions of confinement, see also: F. CANCELLARO, *Sovraffollamento Carcerario: Una Sentenza Pilota Condanna l'Italia per la Sistematica Violazione dell'Art. 3 CEDU*, in *Ius 17*, 3, 2012, p. 65-83; M. DOVA, *Torreggiani c. Italia: Un Barlume di Speranza nella Cronaca del Collasso Annunciato del Sistema Sanzionatorio*, in *Riv. it. dir. proc. pen.*, 2013, p. 927-966; F. FIORENTIN, *Sullo Stato della Tutela dei Diritti Fondamentali all'interno delle Carceri Italiane, Note in Attesa di un Intervento Riformatore in Linea*

had been a violation of Article 3 of the ECHR due to prison overcrowding. Mr. Torreggiani and the other six applicants were granted, during their detention in the Milano-Busto Arsizio and Piacenza prisons, a personal space of 3 square meters, having shared a 9 square meters cell with two other prisoners. The shortage of space to which the applicants had been subjected, moreover, had been exacerbated by other poor conditions such as lack of hot water over long periods and inadequate natural light and ventilation. Thus, the ECtHR found that there had been a violation of Article 3 of the ECHR through an all-of-the-circumstances evaluation. However, in line with other decisions following *Sulejmanovic*, the ECtHR also reiterated that, despite the limited amount of personal space in prison may not, generally, be considered in itself a violation of Article 3 of the ECHR, in cases of severe overcrowding, i.e. when detainees are granted a personal space inferior to 3 square meters, this amounts, in itself, to a violation of Article 3.¹²⁰

The significance of this decision, rather than in the holding itself, lies in the fact that the court adopted this holding in the framework of the so-called "pilot judgment". The "pilot judgment" has been developed by the Court as a technique of identifying the structural problems underlying repetitive cases in front of the Court against certain states and imposing an obligation on those states to address the underlying problems.¹²¹ It is the most creative tool that the Court has developed in the first fifty years of its existence.¹²² In a "pilot judgment", the Court's task is not only to decide whether a violation of the ECHR occurred in the specific case at issue but also to identify the systemic problem behind it and to give the government clear indications of the type of remedial measures needed to resolve it. Then, it is for the state, subject to the supervision of the Committee of Ministers of the Council of Europe, to choose how to meet its obligation under Article 46 of the ECHR (i.e. binding force and

con la Prospettiva Delineata dalla Corte EDU con la Sentenza Torreggiani e al. c. Italia, in *Dir. pen. cont.*, 25 febbraio 2013, available at www.penalecontemporaneo.it (accessed 20 september 2013).

¹²⁰ Torreggiani, *supra* note 119, at 17-18.

¹²¹ The very work and survival of the Court has been put at risk since the beginning of the 21st century. The number of applications has been rising so sharply – partly due to the accession of a large number of new state parties to the ECHR – that the Court started to deal creatively with large-scale violations of human rights by way of so-called "pilot judgments".

¹²² A. BUYSE, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges*, in *Nomiko Vima*, 2009, p. 1. For a thorough analysis of the pilot judgment procedure see also D. HAIDER, *The Pilot-Judgment Procedure of the European Court of Human Rights*, Leiden, 2013.

execution of judgments).¹²³ A key feature of the "pilot judgment" procedure is the possibility of adjourning, or "freezing", related cases for a period of time on the condition that the government act promptly to adopt the national measures required to satisfy the judgment. The Court can, however, resume examining adjourned cases whenever the interests of justice so require. The first case where a "pilot judgment" was issued was the 2004 Grand Chamber judgment in *Broniowski v. Poland*.¹²⁴ The "pilot judgment" procedure is now formally regulated by Article 61 of the Procedural Rules of the Court, which entered into force on 31 March 2011.¹²⁵

The crucial point of *Torreggiani* is that the ECtHR held that the domestic remedies provided by the Italian legal system to redress violations of the ECHR resulting from prison overcrowding are, at the moment, "not effective". In particular, the procedure available to inmates to lament violations of their rights in prisons, i.e. the procedure in front of the so-called "magistrato di sorveglianza" according to art. 35 and art. 69

¹²³ Art. 46 of the ECHR provides that: "1. The High Contracting parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution".

¹²⁴ *Broniowski v. Poland*, EUR. CT. H.R. (22 June 2004), Application no. 31443/96, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61828#{%22itemid%22:\[%22001-61828%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61828#{%22itemid%22:[%22001-61828%22]}). The case had its origins in one of the legacies of World War II, when the Polish state was moved westwards. Large parts of the east of Poland were incorporated into the Soviet Union, in what today are the states of Ukraine, Belarus, and Lithuania. The Polish inhabitants of those areas were forced to move westwards and under so-called "Republican Agreements" between the Polish authorities and the Soviet republics, Poland undertook to compensate the more than one million displaced persons. This was mostly done by giving them land in the newly acquired western parts of Poland. However, a group of around 100,000 people did not receive any compensation. Since they came from the territories beyond Poland's new eastern border, the Bug River, their claims for compensation were called the Bug River claims. Broniowski was the heir of one of those people. Although, as a lawful heir, he had a right to compensation, he did not receive it. Polish Court's, including the Supreme Court and the Constitutional Court found the state's actions and regulatory framework, which heavily reduced the possibility to receive any compensation, contrary to the constitution. These judicial findings did not improve Broniowski's situation. Therefore, he brought his case to Strasbourg, where the European Court of Human Rights found a violation of the right to peaceful enjoyment of one's possessions. Also, the Grand Chamber decided to specifically acknowledge that the applicant's case was part of a wider problem. The Chamber held that the violation "originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons" (*Id.* at p. 67) and concluded that the state had to take general measures which would deal with the whole group of affected Bug River claimants. Thus, not only the individual case, but also the broader problem had to be tackled.

¹²⁵ Article 61 of the Procedural Rules of the ECtHR is available at http://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&ved=0CGoQFjAJ&url=http%3A%2F%2Fwww.strasbourgconsortium.org%2Fcontent%2Fblurb%2Ffiles%2FArticle_61_Pilot_judgment_procedure.pdf&ei=IHB5UriaI8SU0QWSwIH4DQ&usg=AFQjCNH-ufN8zVs8f1ec8IACUdpZK0_ARg&bvm=bv.55980276,d.d2k

ordinamento penitenziario,¹²⁶ is not a remedy effectively able to "prevent" and "bring about a rapid end to" the violation of the right not to be subjected to inhuman and degrading treatment. In fact, as the Court noted, even those decisions by "magistrati di sorveglianza" that found a violation of Article 3 ECHR ended up being, in practice, mere declaratory judgments, that had no immediate effect on correctional authorities.¹²⁷ The Court observed that, where an applicant is being held in conditions contrary to Article 3, the most appropriate form of redress is to rapidly end the violation, through improvement of his conditions of confinement. Where the person concerned is no longer being held in conditions undermining his dignity, he must be afforded the opportunity to claim compensation for the violence to which he had been subjected. Thus, it is important to implement both "preventive" and "compensatory" remedies. The lack of any effective domestic remedy for violation of Article 3 in Italy, with regard to both "preventive" and "compensatory" measures (being decisions

¹²⁶ According to art. 35 *ordinamento penitenziario (Diritto di Reclamo)*: "I detenuti e gli internati possono rivolgere istanze o reclami orali o scritti, anche in busta chiusa: 1) al direttore dell'istituto, nonché agli ispettori, al direttore generale per gli istituti di prevenzione e di pena e al Ministro per la grazia e giustizia; 2) al magistrato di sorveglianza; 3) alle autorità giudiziarie e sanitarie in visita all'istituto; 4) al presidente della giunta regionale; 5) al capo dello stato. According to art. 69 *ordinamento penitenziario (Funzioni e provvedimenti del magistrato di sorveglianza)*: 1. Il magistrato di sorveglianza vigila sulla organizzazione degli istituti di prevenzione e di pena e prospetta al ministro le esigenze dei vari servizi, con particolare riguardo alla attuazione del trattamento rieducativo. 2. Esercita, altresì, la vigilanza diretta ad assicurare che l'esecuzione della custodia degli imputati sia attuata in conformità delle leggi e dei regolamenti. 3. Sovrintende all'esecuzione delle misure di sicurezza personali. 4. Provvede al riesame della pericolosità ai sensi del primo e secondo comma dell'articolo 208 del codice penale, nonché all'applicazione, esecuzione, trasformazione o revoca, anche anticipata, delle misure di sicurezza. Provvede altresì, con decreto motivato, in occasione dei provvedimenti anzidetti, alla eventuale revoca della dichiarazione di delinquenza abituale, professionale o per tendenza di cui agli articoli 102, 103, 104, 105 e 108 del codice penale. 5. Approva, con decreto, il programma di trattamento di cui al terzo comma dell'articolo 13, ovvero, se ravvisa in esso elementi che costituiscono violazione dei diritti del condannato o dell'internato, lo restituisce, con osservazioni, al fine di una nuova formulazione. Approva, con decreto, il provvedimento di ammissione al lavoro all'esterno. Impartisce, inoltre, nel corso del trattamento, disposizioni dirette ad eliminare eventuali violazioni dei diritti dei condannati e degli internati. 6. Decide con ordinanza impugnabile soltanto per cassazione, secondo la procedura di cui all'articolo 14-ter, sui reclami dei detenuti e degli internati concernenti l'osservanza delle norme riguardanti: a) l'attribuzione della qualifica lavorativa, la mercede e la remunerazione nonché lo svolgimento delle attività di tirocinio e di lavoro e le assicurazioni sociali; b) le condizioni di esercizio del potere disciplinare, la costituzione e la competenza dell'organo disciplinare, la contestazione degli addebiti e la facoltà di discolpa. 7. Provvede, con decreto motivato, sui permessi, sulle licenze ai detenuti semiliberi ed agli internati, e sulle modifiche relative all'affidamento in prova al servizio sociale e alla detenzione domiciliare. 8. Provvede con ordinanza sulla riduzione di pena per la liberazione anticipata e sulla remissione del debito, nonché sui ricoveri previsti dall'articolo 148 del codice penale. 9. Esprime motivato parere sulle proposte e le istanze di grazia concernenti i detenuti. 10. Svolge, inoltre, tutte le altre funzioni attribuitegli dalla legge.

¹²⁷ This was indeed the case in *Torreggiani and Others v. Italy*, where one of the applicants, notwithstanding a finding of violation of Art. 3 by the *magistrato di sorveglianza* of Piacenza, was moved to a more spacious cell by correctional authorities only much later, when he had already filed an application to the ECtHR.

on monetary compensation the exception rather than the rule),¹²⁸ had two implications. First, it was the reason why the Court considered the application of *Torreggiani* admissible: from a procedural point of view, in fact, there is a duty for individuals to first exhaust all domestic, "accessible" and "effective" remedies before applying to the ECtHR. This was satisfied through the application to the "magistrato di sorveglianza".¹²⁹ Secondly, it was the reason why the ECtHR condemned Italy to implement a better system for the protection of inmates' rights through the so-called pilot judgment procedure, having considered that the available procedure is not an "effective" remedy in general terms. Thus, in *Torreggiani* the ECtHR not only decided that a violation of Article 3 of the ECHR had occurred in the case at issue, but also solemnly called on the Italian authorities to "put in place, within one year, a remedy or combination of remedies providing redress in respect of violations of the Convention resulting from overcrowding in prison".¹³⁰

The judgment of the Court in *Torreggiani* became final on 28 May 2013, when a 5-judge panel of the Court rejected the appeal to the Grand Chamber filed by the Italian government. Therefore, similarly to California, Italy will now have until 28 May 2014 to adopt "effective" domestic remedies for the problem of prison overcrowding, under the supervision of the Committee of Ministers of the Council of Europe. As it was noted in the decision, it was not for the Court to dictate how Italy should operate in its choice of penal policy or how to organize its prison systems; these raised complex legal and practical issues which, in principle, went beyond the Court's judicial remit. Nevertheless, the Court wished to stress in this context the Recommendations of the Committee of Ministers of the Council of Europe inviting States to encourage prosecutors and judges to make use of alternative measures to detention wherever

¹²⁸ The only case of a *magistrato di sorveglianza* awarding moral damages for violation of Art. 3, as the ECtHR notes, is a decision of 9 June 2011 from the *magistrato di sorveglianza* of Lecce. Other decisions on the reject claims of moral damages arguing on lack of competence to award such damages. See decision 24 December 2011 from Udine and 18 April 2012 from Vercelli, *available at* www.penalecontemporaneo.it.

¹²⁹ According to Art. 35 § 1 ECHR – Admissibility criteria "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken". In its jurisprudence, the Court specified that applicants are only required to exhaust domestic remedies that are "available" and "effective". A remedy is considered "available" if it can be pursued by the applicant without difficulties or impediments. A remedy is considered "effective" if it exist within the domestic legal system and offer a reasonable prospect of success. See the Practical Guide to the Admissibility Criteria issued by the ECHR *available at* www.echr.coe.int.

¹³⁰ *Torreggiani*, *supra* note 119, at 27.

possible, and to devise their penal policies with a view to reducing recourse to imprisonment, in order to tackle the problem of the growth in the prison population (Rec(99)22 and Rec(2006)13).

Since *Torreggiani*, the hundreds of applications to the ECtHR that have been filed by other inmates in Italy after *Sulejmanovic* have been "frozen".¹³¹ However, the deadline of 28 May 2014, which will "defreeze" this temporary situation, is approaching. It is, thus, of paramount importance that the remedies required by the Court are adopted in the coming months. Reasons of justice, together with the non-neglectable problem (particularly acute in this period of economic crisis of Italy) of avoiding the monetary implications of a (very likely) finding of violation of Article 3 for each of the applications put on hold, so require. As we have seen from the statistical data provided in chapter I, and as will better analyze in chapter V, despite the difficulty of finding a political agreement in this area, the only decriminalization reforms that would truly have an impact on prison overcrowding in Italy are probably those in the field of drug legislation.¹³²

4. The right to the "minimum living space" in prison

The ECtHR, in *Sulejmanovic* and the following decisions that have been analyzed in the previous chapter, has developed what we call the "minimum living space" approach to prison overcrowding. This approach 1) considers *per se* unacceptable a personal living space inferior to 3 square meters per inmate and 2) shifts the burden to the complainant to prove other actual damages (e.g. poor hygienic conditions, lack of light etc.) in case the space is between the threshold of 3 square meters and the CPT recommended minima of 4 square meters (for shared accommodations) or 7 square meters (for single detention cells). In fact, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which is the anti-torture committee of the Council of Europe, recommends a minimum of 4 square

¹³¹ A key feature of the pilot procedure, as we have seen, is the possibility of adjourning, or "freezing," related cases for a period of time on the condition that the Government act promptly to adopt the national measures required to satisfy the judgment. The ECtHR informed that there were 730 applications already pending in front of the Court before *Torreggiani*, and that 2,500 more applications were received after *Torreggiani* from inmates detained in Italian prisons.

¹³² See *infra* chapter V and VI.

meters of floor space per prisoner in shared accommodations and 7 square meters of floor space in single occupancy cells.¹³³

We argue that this approach has established, at an international level, prisoners' right to a "minimum living space" of 3 square meters. There is now a *de iure* presumption of violation of Art. 3 of the ECHR, among the 47 Council of Europe Member States, for conditions of confinement that grant inmates a personal space inferior to 3 square meters.¹³⁴ We strongly support, as to Europe, a more widespread use of the "minimum living space" approach by litigators and the courts and, as to the United States, the adoption of a similar approach by litigators and the courts. This approach, which recognizes inmates the absolute right to a "minimum living space" of 3 square meters (approximately 30 square feet), seems to be the only feasible way - at the moment - to protect prisoners' rights in case of severe prison overcrowding.

As to Europe, final judgments of the ECtHR are binding for the State to which they are addressed and must be directly applied by its national courts. Thus, Italy has currently a duty to adopt effective domestic remedies for the problem of prison overcrowding and will violate the ECHR in case it continues to grant inmates in their cells a personal space inferior to 3 square meters. Moreover, decisions adopted through pilot judgment procedures such as *Torreggiani*, which set general criteria as

¹³³ CPT recommendations are often mentioned in ECtHR decisions. As to collective cells, see, for example, *Ananyev and Others v. Russia*, EUR. CT. H.R. (10 January 2012), Applications n. 42525/07 and 60800/08, §§ 144 and 145 at 44, where the Court noted that "the General Reports published by the CPT do not appear to contain an explicit indication as to what amount of living space per inmate should be considered the minimum standard for a multi-occupancy prison cell. It transpires, however, from the individual country reports on the CPTs visits and the recommendations following on those reports that the desirable standard for the domestic authorities, and the objective they should attain, should be the provision of 4 square meters of living space per person in pre-trial detention facilities". See, also, *Torreggiani and Others v. Italy*, *supra* note 119 at 20, where the ECtHR pointed out that "the standard recommended by the CPT in terms of living space in collective cells is 4 square meters per person". As to single occupancy cells, see, for example, *Kalashnikov v. Russia*, EUR. CT. H.R. (15 July 2002) Application n. 47095/99, at 19, and *Sulejmanovic v. Italy*, *supra* note 107 at 8. See, also, the 2011 CPT General Report, at 8, *available at* <http://www.cpt.coe.int/en/docsannual.htm> (Accessed 30 October 2013).

¹³⁴ See, in Italian, P. PUSTORINO, *Sub art.3 CEDU*, in S. BARTOLE-P. DE SENA-V. ZAGREBELSKY, *Commentario Breve alla Convenzione Europea dei Diritti dell'Uomo*, Milano, 2012, 82. There, the author underlines that there is an "automatic" finding of violation of Art. 3 ECtHR in case of personal space inferior to 3 square meters. Also, F. CANCELLARO, *Sovraffollamento Carcerario: Una Sentenza Pilota Condanna l'Italia per la Sistematica Violazione dell'Art. 3 CEDU*, *supra* note 38. There, the author claims that it now consolidated in the ECtHR case law that "può costituire violazione dell'art. 3 anche la sola circostanza che il ricorrente sia stato confinato in uno spazio detentivo pari o inferiore a 3 metri quadrati. *Id.* at 71.

to the minimum living space in prison, have effects that extend beyond the single case at issue. They should be followed by all Council of Europe Member States and not only by the specific state to which they are addressed, in order to grant a homogeneous application of the European Convention of Human Rights throughout Europe.¹³⁵ In essence, in light of the uncontroversial jurisprudence of the ECtHR from *Sulejmanovic* onwards, inmates in Europe already enjoy a right to a "minimum living space" of 3 square meters. Moreover, they may successfully lament lack of personal space in conjunction with other poor conditions of detention in case the space available to them is between 3 square meters and the CPT recommended minima.

As to the United States, the "minimum living space" approach we propose offers a new way to assess the constitutionality of conditions of confinement. It entitles inmates to a different level of scrutiny based on the amount of space available to them in their cells: 1) conditions of confinement that grant inmates a space inferior to the "minimum living space" should be considered *per se* unconstitutional; 2) conditions of confinement that grant inmates a space comprised between the minimum living space and the standards recommended by accredited bodies should be presumed unconstitutional and 3) conditions of confinement that grant inmates a space greater than the standards recommended by accredited bodies, such as the ABA, ACA and APHA, should be presumed constitutional. In essence, the "minimum living space" approach combines a *per se* analysis (i.e. a *per se* constitutional ban) for prisons' conditions that grant inmates a space inferior to the "minimum living space", and a totality-of-the-circumstances analysis (with a shift from a presumption of unconstitutionality to a presumption of constitutionality) for personal living spaces superior to the threshold. As we have seen, some courts in the United States seem to be open to the possibility of looking at international human rights standards, such as the ones developed by the ECtHR, in their analysis of the "contemporary standards of decency" under the Eighth Amendment prohibition of "cruel and unusual

¹³⁵ For a detailed analysis of the pilot judgment procedure and its effect on domestic legal orders see M. FYRNYS, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 *German Law Journal*, 2011, at 1231-1260, available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1359>. The author claims that the very fact that pilot judgments are focused on the identification of systematic malfunctioning of the domestic legal order and on the indication of appropriate general remedial measures normatively extends the binding effect of the Court's judgments and changes their legal nature, accentuating the Court's constitutional function.

punishment". This openness should be further developed, and creative litigators are encouraged to take the lead. Ultimately, the "minimum living space" approach provides both the benefits of a bright-line rule, for those cases that are inherently "cruel and unusual" (and, nevertheless, increasingly common in the United States), and some form of protection, combined with flexibility, for those cases that still fall below the recommended minima. Hopefully, litigators and the courts that will adopt this approach will grant inmates a more meaningful protection of their constitutional rights. In this perspective, Plata was a right step in the right direction. It reminded the courts of their essential role in protecting the dignity of some of the most vulnerable among us - those behind bars.

III. ADDRESSING THE PROBLEM OF PRISON OVERCROWDING AT THE SOURCE: CRITERIA FOR CRIMINALIZATION

In chapter II, we tried to address the problem of prison overcrowding in its most dramatic concretizations, analyzing the latest jurisprudence of the European Court of Human Rights and identifying a clear limit under which litigators and the courts should not hesitate to challenge conditions of confinement based on lack of personal space. Chapter III, IV and V of this thesis, instead, will try to address the problem of prison overcrowding at the source. We will look at what criminalization principles should guide the legislator in its criminalization decisions and what specific areas of the law should be reassessed, through decriminalization reforms, to generate a significant impact on the problem of prison overcrowding.

In this chapter, in particular, we will summarize the "criteria for criminalization" that have been identified by criminal law scholars in recent years and that should be followed by legislators in the enactment of criminal offences. As we will see, although criminal law scholars often quote the principle that criminal law should only be used as a "means of last resort", the areas touched by criminal law have expanded significantly in the recent years. In particular, most systems of criminal justice today add to their traditional "post-crime" focus, which aims at providing an authoritative response to public wrongs, an "anticipatory" perspective, whose goal is to prevent those wrongs for which people are censured. With the view of avoiding overly extensive and intrusive criminal law, we will argue that any criminalization decision,

and in particular those justified by a preventive rationale, must be taken in conjunction with appropriate restraining principles, that will be identified. Our work has the purpose of providing some clear guidelines for the legislator to limit the dramatic expansion of the criminal law that has occurred in Europe and the United States over the last decades, and that had led to a sharp rise in incarceration rates and prison overcrowding.

1. Criminalization and overcriminalization

"Criminalization", i.e. the resort to criminal law as a means to regulate social problems, is an increasingly significant feature of modern western democracies. The numbers speak for themselves.

As to Europe, in Great Britain, where the Ministry of Justice committed to scrutinize all legislation containing criminal offences and publish annual figures, it was shown that more than 3,000 new criminal offences were enacted during Tony Blair's nine-year government - one for almost every day the government was in power.¹³⁶ This trend was then confirmed by the creation of 712 new criminal offences in the period may 2009-may 2010, 172 in the period may 2010-may 2011 and 292 in the period may 2011-may 2012.¹³⁷ Hungary provides another very clear example of the criminalization trend. The new anti-vagrancy statutes that came into force in April 2012 - the toughest in Europe at the moment - now mean that homeless people sleeping on the street in Budapest can face severe police fines or even the possibility of jail time.¹³⁸ Although statistics on the enactment of new criminal offences are unavailable in several European countries and although even criminal law professors find it impracticable to provide exact data on the number of criminal offences present in their national criminal codes, there is a consensus among legal scholars that the

¹³⁶ THE DAILY MAIL, *3,000 new criminal offenses created since Tony Blair came to power*, 16 August 2006, available at <http://www.dailymail.co.uk/news/article-400939/3-000-new-criminal-offenses-created-Tony-Blair-came-power.html#axzz2KgjNSeJp>.

¹³⁷ OFFICIAL STATISTIC PRODUCED BY THE UK MINISTRY OF JUSTICE, *available at* <http://www.justice.gov.uk/statistics/criminal-justice/new-criminal-offenses>.

¹³⁸ BBC, *Hungary outlaws homeless in move condemned by charities*, 1 December 2011, *available at* <http://www.bbc.co.uk/news/world-europe-15982882>.

areas touched by criminal law have increased substantially in Europe over the last years.

This trend, moreover, is shared by states on the other side of the Atlantic. The state and the federal justice system of the United States, in fact, also dramatically expanded their authority and reach over the last years.¹³⁹ Texas lawmakers, for example, have recently created over 1,700 new criminal offenses, including 11 felonies alone relating to harvesting and handling oysters.¹⁴⁰ And there are today an estimated 4,500 criminal offences in federal statutes, spread out through some 27,000 pages of the United States Code.¹⁴¹ Also, it has long been noted by criminal law scholars that there is a pattern in the United States for a statute establishing an administrative agency to provide that any willful violation of the rules adopted by the agency constitutes a federal felony. As a direct result, one estimate in the 1990s placed the number of federal regulations punishable by criminal penalties at over 300,000.¹⁴² Certainly, part of the expansion of the substantive criminal law that has occurred over the last decades is due to the need to provide an effective response to new forms of threat. However, a substantial part of this is also due to readiness of the legislators to reach for the criminal law whenever social problems emerge, as an instinctive, seemingly costless response.¹⁴³

¹³⁹ William Stuntz maintains that "anyone who studies contemporary state or federal codes is likely to be struck by their scope, by the sheer amount of conduct they render punishable". See W. STUNTZ, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV., 2001, 515.

¹⁴⁰ M. LEVIN, *Time to Rethink What's a Crime: So-Called Crimes Are Here, There, and Everywhere*, Texas Public Policy Institute, 2010.

¹⁴¹ J. BAKER, *Revisiting the Explosive Growth of Federal Crimes*, in *Legal Memorandum*, n 26 (The Heritage Foundation, 2008).

¹⁴² J. C. COFFEE, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models. And What Can Be Done about It*, 101, Yale Law Journal, 1992, 1881.

¹⁴³ See P. ROSENZWEIG, *Overcriminalization: An Agenda for Change*, in *Am. U. Law. Review*, 54, 2005, 809-80; N. PERSAK, *Criminalizing Harmful Conduct: The Harm Principle, its Limits and Continental Counterpart* 5, 2007, 27, claiming that "To propose a new incrimination is, namely, the cheapest, quickest, most memorable and media-inviting act the Member of Parliament can do – the most efficient for a legislator (securing re-election) and the least truly efficient, i.e. problem-solving"; D. J. BAKER, *The Right not to be Criminalized: Demarcating Criminal Law's Authority*, 2011, 6-7.

The increased use of the criminal law to regulate social conduct is part of a broader phenomenon that criminal law scholars define "overcriminalization".¹⁴⁴ This term indicates the use of the criminal justice system without adequate justifications. It relates to both 1) the enactment of new criminal offences and 2) the use of excessive punishment. As to the first aspect, overcriminalization occurs with the creation of far-fetched offenses, some of them so deficient in harmful wrongdoing and beyond any legitimate rationale for state action as to flunk what Erik Luna calls the "laugh test":¹⁴⁵ examples are, under UK law, the crimes of selling grey squirrels, impersonating a traffic warden or failing to nominate a neighbor to turn off a noisy burglar alarm,¹⁴⁶ or, under US law, Maine's prohibition of catching lobsters with something other than "a conventional trap".¹⁴⁷ As to the second aspect, overcriminalization occurs with the use of punishment irrespective of theoretical justification or proportionality, as it is often the case with risk-based possession offences (such as UK mandatory minimum of 5 years imprisonment for mere possession of a prohibited gun)¹⁴⁸ or anti-recidivist statutes (California's three strikes scheme being the most infamous example, with defendants receiving sentences of twenty-five years to life for stealing a slice of pizza).¹⁴⁹

Overcriminalization, and in particular the creation of criminal offences without adequate justification, is problematic because it authorizes the most privatory and condemnatory forms of state power against its citizens. It makes possible the arrest, interrogation, prosecution and punishment by the state, which may result in the

¹⁴⁴ E. LUNA, *The Overcriminalization Phenomenon*, 54 *Am. U. Law Review*, 2005, 712. Some other scholars use the term "criminal law inflation". See, e.g., N. JAREBORG, *Criminalization as Last Resort (Ultima Ratio)*, 2 *Ohio St. J. Crim. L.*, 2005, 524.

¹⁴⁵ E. LUNA, *Overextending the Criminal Law*, 25 *CATO POL'Y RPT.* 1 (2003), available at http://www.cato.org/pubs/policy_report/v25n6/luna.pdf (Feb. 14, 2005), p.1.

¹⁴⁶ *THE DAILY MAIL*, *supra* note 136.

¹⁴⁷ E. LUNA, *supra* note 144 at 715.

¹⁴⁸ A. ASHWORTH, *The Unfairness of Risk-Based Possession Offenses*, in *Crim Law and Philos*, 2011, at 257.

¹⁴⁹ *L.A. TIMES*, "Pizza Thief" Walks the Line, 10 February 2010, available at <http://articles.latimes.com/2010/feb/10/local/la-me-pizzathief10-2010feb10>. See CAL. PENAL CODE § 667(e)(2)(A) (requiring an indeterminate life sentence, with a mandatory minimum of at least twenty-five years, where the defendant has been convicted of any felony and has two or more prior serious or violent felony convictions).

deprivation of the offender's liberty for a prolonged time.¹⁵⁰ As we have seen, the widespread use of the criminal justice system has led to a massive increase in the number of inmates all throughout the world.¹⁵¹ In this regard, the United States stands out from peer nations. Although English imprisonment rate has itself almost doubled, the United States' rate is almost 5 times higher than that of England and Wales.¹⁵² With roughly 5% of the world's population, the US currently confines about 25% of the world's prison inmates.¹⁵³ As a result, prison overcrowding has become so severe that in 2011 a landmark decision of the Supreme Court¹⁵⁴ ordered a reduction of California's prison population by more than 30,000 inmates. Despite the difference in magnitude, prison overcrowding is a growing concern for most European states as well, as it is documented by the abundant case law of the European Court of Human Rights on the violations of the right to be free from "torture, inhuman or degrading treatment".¹⁵⁵ To use Professor Kadish's words, until these problems of overcriminalization are systematically examined and effectively dealt with, some of the most besetting problems of criminal law administration are bound to continue.¹⁵⁶

2. Criteria for criminalization

At a time when governments seem to be creating more and more criminal offences, criminalization has become the subject of vibrant debate among legal scholars. In particular, criminalization has been considered in its descriptive and normative aspects. The descriptive aspect addresses either the existing offenses in a given legal

¹⁵⁰ A. ASHWORTH-L. ZEDNER, *Preventive Orders: A Problem of Undercriminalization*, in R.A DUFF et al., *The Boundaries of the Criminal Law*, 59, 81 2010.

¹⁵¹ See *supra* chapter I.

¹⁵² N. LACEY, *American Imprisonment in Comparative Perspective*, in *Daedalus*, vol. 139 (Issue 3-Summer 2010), 108.

¹⁵³ B. PETTIT -B. WESTERN, *The Challenge of Mass Incarceration in America*, in *Daedalus*, vol. 139, Issue 3, Summer 2010, 6.

¹⁵⁴ *Brown v. Plata*, in which the United States Supreme Court held that California's prison system, that operated at 200% of capacity, was unconstitutional for violation of the 8th Amendment of the U.S. Constitution ("cruel and unusual punishment"). See *supra* chapter II section 2.1.

¹⁵⁵ Art. 3, European Convention on Human Rights.

¹⁵⁶ S. A. KADISH, *The Crisis of Overcriminalization*, in *Am Crim Law Q*, 1968, vol. 7, p. 18.

system or the way in which they were formed politically, historically or otherwise.¹⁵⁷ The normative aspect, instead, involves a value judgment. It relates to the questions: what types of behavior should be criminalized and what types should not? What are the principles to which criminalization decisions should conform?¹⁵⁸

This chapter will focus on the normative aspect of criminalization. It will not address specific types of conduct; rather, it will analyze general criteria for criminalization as they have been developed in the recent academic debate. In an effort to provide a comprehensive analysis of this topic, we will analyze the most recent contribution to the debate from both civil law and common law academics.¹⁵⁹ Traditionally, Anglo-American theorists have been less likely to defend general principles to limit the reach of the criminal sanction than their European counterparts.¹⁶⁰ However, common law and civil law scholars have become increasingly interested in better understanding the achievements of their respective doctrines in recent years. Sinergies have become crucial. And it is nowadays acknowledged that a mutual understanding of the criminalization principles that have been identified by criminal law scholars in different jurisdictions can inform the development of a more sophisticated account of the nature and justification of the criminal law.

2.1. Most significant criteria in the European-continental literature

The European-continental literature has developed different conceptual categories from the one developed in the Anglo-American world to justify and limit the use of

¹⁵⁷ See e.g. N. LACEY-L. ZEDNER, *Legal Constructions of Crime*, in M. MAGUIRE-R. MORGAN-R. REINER (eds.), *Oxford Handbook of Criminology*, 5 ed., OUP, 2012, 159-164-73 (explaining criminalization in historical perspective).

¹⁵⁸ See e.g. A. ASHWORTH, *Criminalization*, in *Principles of Criminal Law*, Oxford, 2009, VI ed., 22-43 (identifying general principles that ought to be considered when deciding whether or not to make conduct criminal).

¹⁵⁹ For a thorough recent comparison, in Italian, of the principles that justify and limit the use of the criminal law in common law and civil law countries, see G. FIANDACA-G. FRANCOLINI (eds.), *Sulla Legittimazione del Diritto Penale. Culture Europeo-Continentale e Anglo-Americana a Confronto*, Torino, 2008.

¹⁶⁰ See D. HUSAK, *Applying Ultima Ratio: A Skeptical Assessment*, 2 Ohio State Journal of Criminal Law, 2, 2005, p. 535, claiming that "Why Anglo-American theorists are less likely to defend principles to limit the reach of the criminal sanction than their European counterparts presents a fascinating question in comparative criminal theory I lack the competence to explore".

the criminal law in the regulation of social conduct. Italian criminal law scholars, in particular, have focused on the concept of "legal goods" (*beni giuridici*) rather than the concept of "harm" (*danno*).¹⁶¹ This is where the main difference between the two systems of law can be found, being the related "offensivity principle" (*principio di offensività*)¹⁶² the "most original and characteristic element of the constitutional approach to criminal law developed by Italian scholars".¹⁶³

The concept of legal goods was first articulated by German legal scholar Birnbaum in the 19th century.¹⁶⁴ Birnbaum referred to legal goods (*Rechtsgüter*) in order to justify the use of criminal sanction for forms of conduct that did not impact on "individual rights" (*Rechte* in the German literature, *diritti soggettivi* in the Italian literature). In particular, Birnbaum attacked Feuerbach's view of crime: according to Feuerbach, in committing a crime the offender did not just violate "the law," or "a statute," but the rights of her individual victim". Birnbaum pointed out, however, that this view of crime was much too narrow, as it could not account for a great many criminal statutes which did not concern themselves with violations of individual rights at all, and yet were not considered to be any less criminal as a result. In Birnbaum's words, Feuerbach's view of crime might work for traditional crimes like murder and theft, but it did not have room for such familiar crimes as "unethical and irreligious acts."¹⁶⁵

From Birnbaum onward, in Germany and other states that follow the German tradition, such as Italy, a crime is to be regarded, instead of a violation of individual rights (*Rechte*), as a "violation of", or a "threat to", "goods (*Giüter*) protected by the

¹⁶¹ A. CADOPPI, *Presentazione. Principio del Danno (Harm Principle) e Limiti del Diritto Penale*, in ID (ed.) *Laicità, Valori e Diritto Penale. The Moral Limits of the Criminal Law. In ricordo di Joel Feinberg*, Milano, 2010, at IX.

¹⁶² This principle has been identified as an "implicit" principle of the Italian Constitution. See G. VASSALLI, *I Principi Generali del Diritto nell'Esperienza Penalistica*, in Riv. it. dir. proc. pen. 1991, at 699 ff; G. FIANDACA, *Introduzione ai Principi Generali del Diritto Penale* in G. FIANDACA-G. DI CHIARA, *Una Introduzione al Sistema Penale per una Lettura Costituzionalmente Orientata*, Napoli, 2003, at 9 ff. For a recent, thorough, analysis of the *principio di offensività* as a limiting principle for the legislator, a guiding principle for the interpretation of the law by judges and a tool for analyzing the constitutionality of criminal statutes see V. MANES, *Il Principio di Offensività nel Diritto Penale. Canone di Politica Criminale Criterio Ermeneutico, Parametro di Ragionevolezza*, Torino, 2005.

¹⁶³ M. DONINI, *Il Principio di Offensività. Dalla Penalistica Italiana ai Programmi Europei*, in Dir. pen. cont. - Riv. trim., 2013, also available at <http://www.penalecontemporaneo.it/area/3-3/-/2494-il-principio-di-offensivit-dalla-penalistica-italiana-ai-programmi-europei/>

¹⁶⁴ J. M. F. BIRNBAUM, *Über das Erfordernis einer Rechtsverletzung zum Begriffe des Verbrechens*, 15 *Archiv des Criminalrechts (Neue Folge)* (1834).

¹⁶⁵ *Id* at 178.

state".¹⁶⁶ These are goods that the states protects in light of the values shared by the community where it applies. The concept of *Rechtsgut* (or *bene giuridico*) is one of the foundational concepts underpinning the German and Italian criminal law systems.¹⁶⁷ The concept serves several crucial functions, at various levels of generality within the criminal law system. Most fundamentally, it defines the very scope of criminal law. By common consensus, the function of the criminal law is indeed the "protection of legal goods".¹⁶⁸ Anything that does not qualify as a legal good falls outside the scope of criminal law, and may not be criminalized. A criminal statute, in other words, that does not even seek to protect a legal good is *prima facie* illegitimate. This principle has been invoked in favor of decriminalizing various morals offenses, such as homosexual sex and the distribution of pornography.¹⁶⁹ In essence, it can be summarized in the following, schematic terms:

RECHTSGÜTER (TEORIA DEL BENE GIURIDICO & PRINCIPIO DI OFFENSIVITA')

A conduct can be considered a crime only if it is a "violation of", or a "threat to", "legal goods", i.e. goods that are protected by the state in light of the shared values of the community.

Italian criminal law scholar Franco Bricola was a critical contributor to the development of the theory of *Rechtsgüter*. In 1973, in his masterpiece "Teoria generale del reato", Bricola claimed that the use of the criminal law to protect the so-

¹⁶⁶ According to Birnbaum, "any violation of or threat to a good that is to be guaranteed by the state equally to everyone and that is attributable to the human will", *id.* at 179.

¹⁶⁷ D. KIENAPPEL, *Strafrecht: Allgemeiner Teil* 39 (4th ed. 1984). According to the author, the theory of the *Rechtsgut* is "one of the immovable cornerstones of German criminal law doctrine".

¹⁶⁸ See, e.g., ARMIN KAUFMANN, *Die Aufgabe des Strafrechts* 5 (1983) ("no one in criminal legal science seriously doubts that the protection of legal goods is the objective of criminal law"); D. KIENAPPEL *supra* note 167 ("despite some criticism" legal good remains "one of the immovable cornerstones of criminal law doctrine, today more than ever"). For Italian criminal law literature, see, e.g. the recent contribution by M.DONINI, *Danno e Offesa nella c.d. tutela Penale dei Sentimenti. Note su Morale e Sicurezza come Beni giuridici, a Margine della Categoria dell'Offense di Joel Feinberg*, in A. CADOPPI, *Laicità, Valori e Diritto Penale. The Moral Limits of the Criminal Law. In ricordo di Joel Feinberg*, Milano, 2010. According to the author, "è ancora oggi corretto affermare che compito primario del diritto penale è la tutela dei beni giuridici". *Id.*, at 49. It is important to note that there are also some criminal law scholars in Italy who recently argued against the idea of the *bene giuridico* as a limit for the legislator in its criminalization decisions. See e.g. M. ROMANO, *Principio di Laicità dello Stato, Religioni, Norme Penali*, in *Riv. it. dir. proc. pen.* 2007, 509.

¹⁶⁹ See H.-H. JESCHECK-T. WEIGEND, *Lehrbuch des Strafrechts: Allgemeiner Teil*, 5th ed., 1996, at 104-105; C. ROXIN, *Strafrecht: Allgemeiner Teil I*, 3rd ed., 1997 at 11-12;

called *beni giuridici* was legitimate only in so far as it was anchored to the Constitution. In his view, only those forms of conduct that significantly infringe on constitutional values (*beni giuridici costituzionalmente orientati*) can justify the use of criminal sanctions that, through deprivation of personal liberty, infringe on one of the most fundamental constitutional rights themselves. He argued that the Constitution was both the "limit" and the "justification" for the use of the criminal law.¹⁷⁰ This approach based on principled reasoning, i.e. the "constitutional approach to criminal law", has become, with Bricola and his scholars,¹⁷¹ one of the most significant contributions to the debate on criteria for criminalization from the Italian literature.¹⁷² We could sketch Bricola's thinking in these very brief terms:

**BRICOLA'S CONSTITUTIONAL APPROACH TO CRIMINAL LAW
(TEORIA DEL BENE GIURIDICO COSTITUZIONALMENTE ORIENTATO)**

Only those forms of conduct that significantly infringe on constitutional values (*beni giuridici costituzionalmente orientati*) can justify the use of criminal sanctions.

In most recent years, criminal law scholars have noted the following point: if, on the one side, the concept of *Rechtsgut* or *bene giuridico* was a significant achievement of the German and Italian criminal law literature, on the other side, it is a potentially dangerous concept, because it may justify the use of the criminal law for any interest that is considered legitimate by the state, also religious and moral beliefs.¹⁷³

¹⁷⁰ F. BRICOLA, *Teoria Generale del Reato*, in *Nov. mo dig. it.*, vol. XIV, Torino, 1973, 7-93. According to the author, "il legislatore oltre a non poter incriminare fatti che si concretano nell'esercizio di un diritto costituzionale, salvo che per la tutela di un bene avente un superiore perso costituzionale ovvero di un bene che funge da limite previsto dalla norma costituzionale rispetto all'esercizio del diritto, non può adottare la sanzione penale per fatti lesivi di valori che, senza essere antitetici alla costituzione, non trovano in essa alcun riconoscimento esplicito o implicito. (...) Il margine di vincolo è soltanto in negativo: il legislatore cioè non può adottare la sanzione penale se non per fatti lesivi di valori costituzionali; tuttavia, anche in presenza di un fatto dotato di tale forza, potrebbe usualmente fare ricorso a modelli sanzionatori extrapenali". *Id.* at 572.

¹⁷¹ Franco Bricola is widely recognized as the "father" of the so-called "Scuola di Bologna", to which several influential criminal law scholars such as Franco Tagliarini, Filippo Sgubbi, Luigi Stortoni, Gaetano Insolera, Massimo Pavarini, Stefano Canestrari, Lorenzo Picotti, Massimo Donini, Gabriele Fornasari, Alberto Cadoppi, Alessandro Melchionda and Nicola Mazzacuva belong.

¹⁷² M. DONINI, *L'eredità di Bricola ed il Costituzionalismo Penale come Metodo. Radici Nazionali e Sviluppì Sovranazionali*, in *Dir. pen. cont. - Riv. trim.*, 2/2012, 51-74. The author, summarizing Bricola's thinking, stated that: "Per Bricola sono penalmente tutelabili solo i beni giuridici di *significativa* rilevanza costituzionale, almeno implicita, e contro aggressioni di pericolo concreto." *Id.* at 56.

¹⁷³ See, as to the German literature, A. ESER, *Bene Giuridico e Vittima del Reato. Prevalenza dell'uno sull'altra? Riflessioni sui Rapporti tra Bene Giuridico e Vittima del Reato.*, in *Riv. it. dir. proc. pen.*,

Therefore, in light of these difficulties, criminal law scholars have tried to limit the breadth of this concept.

On the one side, they have proposed some additional limiting theories.¹⁷⁴ In particular, Alessandro Baratta has proposed to link the concept of *bene giuridico* to that of human rights¹⁷⁵. Other authors, developing the ideas of German scholars such as Hassemer and Amelung,¹⁷⁶ have proposed to link this concept to public opinion. Alberto Cadoppi, moving from Max Ernst Mayer's theory on the *Kulturnormen*,¹⁷⁷ has argued that the criminal law should only protect those values that are shared by a given society in a given time. More specifically, the *Kulturnormen* work as a limit to criminalization decisions, not as a duty to criminalize: if citizens believe a certain conduct should be criminalized, the legislator is free to disregard this view and adopt less repressive measures to deal with it, but if citizens believe a certain conduct should not be criminalized, the legislator is not free to disregard this view (so-called culturally-constitutionally oriented view of the legal good).¹⁷⁸ This, because public

1997, 1069. See, as to Italian literature, G. FIANDACA, *Introduzione ai Principi Generali del Diritto Penale* in G. FIANDACA-G. DI CHIARA, *Una Introduzione al Sistema Penale per una Lettura Costituzionalmente Orientata*, Napoli, 2003, 108.

¹⁷⁴ See A. CADOPPI-P. VENEZIANI, *Elementi di Diritto Penale. Parte Generale*, IV ed., Padova, 2010, 94 ff.

¹⁷⁵ A. BARATTA, *Principi di Diritto Penale Minimo. Per una Teoria dei Diritti Umani come Oggetti e Limiti della Legge Penale*, in *Dei delitti e delle pene*, 1985, 443 ff.

¹⁷⁶ W. HASSEMER, *Theorie und Soziologie des Verbrechens - Ansätze zu einer praxisorientierten Rechtsgutslehre*, Frankfurt am Main, 1973, 127 ff.; K. AMELUNG, *Rechtsgüterschutz und Schutz der Gesellschaft*, Frankfurt am Main, 1972, 287 ff. These authors refined Mayer's theory adding a sociological component to it.

¹⁷⁷ See M. E. MAYER, *Rechtsnormen und Kulturnormen*, Breslau, 1903 (republished Frankfurt am Main - Tokyo, 1977), p. 16. See also ID, *Der allgemeine Teil des deutschen Strafrechts - Lehrbuch*, 2. Aufl., Heidelberg, 1923, at 49, where the author claims that "there is no prohibited conduct by the state that had not been condemned by the local community in the first place (...) because *Kulturnorm* (the rule in the community) macht (makes) *Rechtsnorm* (the legal rule).

¹⁷⁸ See A. CADOPPI-P. VENEZIANI, *Elementi di diritto penale. Parte generale*, supra note 174, 94 ff.; also, arguing for the need to take the *Kulturnormen* more into account in a *de lege ferenda* perspective, see the significant analysis conducted by the author in A. CADOPPI., *Il reato omissivo proprio*, I, Padova, 1988, 677 ff. ("solo se la *communis opinio* reputa «criminosa» un certo comportamento, tale comportamento può essere definito «reato» dal legislatore", *Id.* at 692). Similarly, with specific regard to economic crimes, ID, *Il ruolo delle Kulturnormen nella "opzione penale" con particolare riferimento agli illeciti economici*, in Riv. trim. dir. pen. ec., 1989, 289 ff. There, the author claims that: "se una norma penale punisce un comportamento che non è ritenuto «criminosa» dalle *Kulturnormen*, allora una tale norma penale è inaccettabile, e va espunta dal sistema dei delitti e delle pene." *Id.* at 297. In line with this view, see G. BETTIOL, *Istituzioni di diritto e procedura penale*, III ed., Padova, 1980, 32. On a different position, and for a critic of Mayer's theory on the coincidence between *Kulturnormen* and legal rules, see N. LEVI, *Dolo e coscienza dell'illiceità nel diritto vigente e nel Progetto*, in *Studi economico-giuridici pubblicati a cura della Facoltà di giurisprudenza di Cagliari*, Anno XVI, 1928, 56 ff.; D. PULITANO, *L'errore di diritto nella teoria del reato*, Milano, 1976, 135 ff.; and, more recently, see the analysis conducted in F. BASILE, *Immigrazione e reati culturalmente motivati. Il diritto penale nelle società multiculturali*, Milano, 2010, at 98 ff. (available at

opinion may be in certain instances too punitive and in need of a rationality screening, while the opposite may not be the case. The idea of relating to the *Kulturnormen* in criminal policy decision is particularly significant for our analysis and we will come back to the theory of *Kulturnormen* in the final chapter of this thesis.

On the other side, criminal law scholars both in Italy and in Germany have recently developed an interest in the Anglo-American concept of "harm".¹⁷⁹ In Italy, Alberto Cadoppi deserves the credit for having been among the first criminal law scholars who argued for the need of integrating continental doctrines with concepts developed in the common law tradition. According to Cadoppi, synergies are crucial for two main reasons.¹⁸⁰ First of all, if the criminal law is to adopt a truly liberal approach, as most criminal law scholars argue today, it is essential to analyze the Anglo-American "harm principle": this principle is indeed rooted in the concept of individual liberty and thus is at the basis of any liberal model of the criminal law.¹⁸¹ Secondly, the increased multiculturalism of modern societies reveals all the shortcomings of using only the concept of *beni giuridici* as a justification and limit for the use of the

http://www.dirittoestoria.it/10/monografie/Basile-Localismo-non-neutralita-culturale-Diritto-penale-immigrazione.htm#_ftnref72.

¹⁷⁹In Germany, the main contributions to the recent debate on the harm principle are by Andrew Von Hirsch. See, e.g., R. HEFENDEHL,-A. VON HIRSCH,-W. WOHLERS (eds.) *Die Rechtsgutstheorie: Legitimationsbasis des Strafrechts oder Dogmatisches Glasperlenspiel?*, Baden Baden 2003, and, in particular, A. VON HIRSCH, *Das Rechtsgutsbegriff und das "Harm Principle"*, *ibidem*. In Italy, only very few authors dealt with the Anglo-American concept of harm in the past. Among them, E. DICIOTTI, *La Giustificazione Paternalistica di Norme*, in *Studi Senesi*, 1, 1988, 76-129; ID., *Il Principio del Danno nel Diritto Penale*, in *Dir. pen. e proc.* 3, 1997, 366 ff.; F. ALBEGGIANI, *Profili Problematici del Consenso dell'Avente Diritto*, Milano, 1995, 6 ff.; and, particularly, A. CADOPPI, *Il Reato Omissivo Proprio. II. Profili Dogmatici Comparatistici e de Lege Ferenda*, Padova, 1988, 1103 ff. and 1279 ff.; ID, *Moralità Pubblica e Buon Costume (Delitti contro la) (Diritto Anglo-Americano)*, in *Dig. disc. pen.*, vol. VIII, Torino, 1994, 187 ff.; For more recent contributions to the Italian debate see G. FIANDACA-G. DI CHIARA, *Una Introduzione al Sistema Penale per una Lettura Costituzionalmente Orientata*, Napoli, 2003, 107 ff.; M. DONINI, *Il Volto Attuale dell'Illecito Penale*, Milano, 2004, 99 ff.; G. FRANCOLINI, *L'Harm Principle del Diritto Angloamericano nella Concezione di Joel Feinberg*, in *Riv. it. dir. proc. pen.*, 2008, 276 ff.; D. PULITANO', *Laicità e Diritto Penale*, in *Riv. it. dir. proc. pen.*, 2006, 68-71; G. FORTI, *Per una Discussione sui Limiti Morali del Diritto Penale, tra visioni "liberali" e paternalismi giuridici*, in E. DOLCINI-C. E. PALIERO (eds.), *Studi in Onore di Giorgio Marinucci*, vol. 1, Milano, 2006, 233 ff. Also, criminal law books adopted in university courses have recently started including reference to the Anglo-American principle of harm. See A. CADOPPI-P. VENEZIANI, *Elementi di Diritto Penale. Parte Generale*, III ed., Padova, 2007, 88 ff.; S. CANESTRARI-L. CORNACCHIA-G. DE SIMONE, *Manuale di Diritto Penale. Parte Generale*, Bologna, 2007, 203 ff.; A. MANNA, *Corso di Diritto Penale. Parte Generale*, vol. I, Padova, 2007, 56.

¹⁸⁰A. CADOPPI, *Presentazione. Principio del Danno (Harm Principle) e Limiti del Diritto Penale*, in ID (ed.) *Laicità, Valori e Diritto Penale. The Moral Limits of the Criminal Law. In ricordo di Joel Feinberg*, Milano, 2010, p. VII-XII.

¹⁸¹*Id.*, at X.

criminal law.¹⁸² In a homogeneous society, where there are no wide discrepancies between values of the population, the concept of *bene giuridico* is rather uncontroversial and citizens expect the criminal law to intervene for the protection of shared moral principles. However, the opposite is true for societies that are characterized by the presence of different minority groups, as it is the case for most current western democracies. In these societies, it is important to stress the role of personal liberty as opposed to the views of the majority of the population, in order to avoid the enforcement of moral values which cause no "harm" to other individuals: in this perspective, the "harm principle" developed in the Anglo-American literature becomes of paramount importance. In an effort to make this principle more accessible to criminal law scholars in Italy, a series of seminars on the work of American legal philosopher Joel Feinberg were organized in 2009.¹⁸³ Feinberg, as we will see below, is internationally distinguished for his research in moral, social and legal philosophy. His major four-volume work, "The Moral Limits of Criminal Law", is internationally recognized as the most refined analysis of the "harm principle".

Another fundamental principle that has been developed in the European-continental literature, the so-called *principio di colpevolezza*, will be analyzed in the next section together with the culpability principle, being these principles less far apart than the *principio di offensività* and harm principle.

2.2. Most significant criteria in the Anglo-American literature

The Anglo-American world has shown, in the last decades, an increasing interest in the principles of criminalization developed in continental Europe¹⁸⁴ (and vice versa,

¹⁸² *Ibidem*. For another recent article on the topic see A. CADOPPI, *Liberalismo, Paternalismo e Diritto Penale*, in G. FIANDACA-G. FRANCOLINI (eds.), *Sulla legittimazione del Diritto Penale. Cultura Europea-Continentale e Anglo-Americana a confronto*, Torino, 2008, 83-124. Particularly, at p. 83, the author stresses that the notion of *bene giuridico* is suffering a "crisis" in modern societies. See also G. FIANDACA-E. MUSCO, *Perdita di Legittimazione del Diritto Penale?*, in *Riv. it. dir. proc. pen.*, 1990, p. 40.

¹⁸³ The seminars, that were held at the University of Parma from November 2007 to May 2008, featured several leading Anglo-American and European scholars such as J. Coleman, D. Husak, R. Shafer-Landau, H. Malm G. Dworkin, M. Donini, S. Canestrari M. Romano and S. Fiandaca. They were dedicated to the memory of Joel Feinberg and Professor A. Cadoppi edited a very valuable book that collects all the contributions to these seminars: A. CADOPPI, *Laicità, Valori e Diritto Penale. The Moral Limits of the Criminal Law. In ricordo di Joel Feinberg*, Giuffrè, Milano, 2010.

¹⁸⁴ The *Rechtsgut* has begun to attract considerable attention among Anglo-American criminal law theorists in the last decades. See, e.g., M. D. DUBBER, *Theories of Crime and Punishment in German*

as we have seen). However, it is important, for our purposes, also to conduct a separate, detailed analysis of the principles that have been developed by Anglo-American criminal law scholars. This, because some of the most recent contributions to the criminalization debate, in terms of the identification of "workable" criteria for criminalization for the legislators, come from the recent Anglo-American literature.

The starting point for any debate on criteria for criminalization in the common law tradition is, as we have anticipated, the "harm principle". This principle, which was first fully articulated by the English thinker John Stuart Mill in 1859, rejects the use of society's power for any purpose other than that of preventing "harm to others". Mill gave a simple answer to the question of when the government can interfere with the activities of individuals:

MILL'S HARM PRINCIPLE

"The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant".¹⁸⁵ This, with the necessary qualification that: "this doctrine is meant to apply only to human beings in the maturity of their faculties".¹⁸⁶

The harm principle was supported by prominent legal scholars in the Anglo-American world, including English legal philosopher Herbert Lionel Adolphus Hart and American legal philosophers Ronald Dworkin.¹⁸⁷ There has been a remarkable

Criminal Law, in *The American Journal of Comparative Law*, vol. 53, No. 3, 2005, pp. 679-707; A.VON HIRSCH, *Der Rechtsgutsbegriff und das "Harm Principle"*, 149 *Goltdammer's Archiv for Strafrecht* 2 (2002); A. DUFF, *Theories of Criminal Law*, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2002), defining *Rechtsgut* as "a good which the law properly recognizes as being necessary for social peace or for individual well-being, and as therefore meriting legal protection". For a very interesting exploration of the concept of *Rechtsgut* from a comparative perspective, see also R. HEFENDEHL et al. (eds.), *Die Rechtsgutstheorie: Legitimationsbasis des Strafrechts oder Dogmatisches Glasperlenspiel* (2003).

¹⁸⁵ J. S. Mill, *On Liberty* (first published in 1859, reprinted in 1863 Boston: Ticknor and Fields), pp. 22-23.

¹⁸⁶ *Ibidem*.

consensus that whatever other principles might be required for an adequate theory of criminalization some form of a "harm to others" is required.¹⁸⁸

This principle, as we have anticipated, was thoroughly analyzed by American legal philosopher Joel Feinberg. Feinberg assessed the harm principle with specific regard to the criminal law, in a book series on four possible criminalization principles: 1) the harm principle (*il principio del danno*), 2) the offense principle (*molestia ad altri*) 3) legal paternalism (*paternalismo giuridico*) and 4) legal moralism (*moralismo giuridico*).¹⁸⁹ Among them, the harm principle was identified by Feinberg as the most acceptable criminalization principle in modern society and, ever since, Feinberg's writings are considered to be the best defense of this fundamental principle.¹⁹⁰ In his work, Feinberg identified four sub-categories of conduct for the concept of "harm": 1) harm to others, 2) offense to others, 3) harm to self and 4) harmless wrongdoing. According to Feinberg, only the first and the second of these sub-categories of "harm" provide an adequate justification for the use of the criminal law. In particular, the "harm to others" principle states that it is always a good reason in support of penal legislation that it would probably be effective in preventing harm to persons other than the one prohibited from acting. The "offense to others" principle states that it is always a good reason in support of penal legislation that it would probably prevent serious offense to persons other than the one prohibited from acting. For Feinberg, the "harm to others principle" and the "offense to others principle" are the only "liberty-limiting principles", which distinguish between those acts which the state may

¹⁸⁷ See H. L. A. HART, *Law, Liberty and Morality*, New York, Vintage Books (1963), where legal philosopher and professor H.L.A. Hart defends Mill's liberal view of *Liberty* against Judge Lord Devlin's claim that there can be no theoretical limit to the power of the State to legislate against immorality. Lord Devlin, as it is well known, strongly argued for the use of the criminal law to sanction immorality (e.g. homosexuality). See also R. DWORKIN, *Lord Devlin and the Enforcement of Morals*, in *Yale Law Journal*, 1966, vol. 75, 992.

¹⁸⁸ See H. PACKER, *The Limits of the Criminal Sanction* 17 266 (1969) (saying that ever since Mill's essay, the dispute between law and morality has been forged upon the formula of "Harm to Others"). Also, see L. FARMER, *Criminal Wrongs in Historical Perspective*, in R. A. DUFF ET AL. (eds.), *The Boundaries of the Criminal Law*, 2010, p. 214.

¹⁸⁹ J. FEINBERG, *The Moral Limits of the Criminal Law: Harm to Others* 63 (1984), explaining the various meanings of the expression "harm to others"; J. FEINBERG, *The Moral Limits of the Criminal Law: Offense to Others* (1985); J. FEINBERG, *The Moral Limits of the Criminal Law: Harm to Self* (1986) and J. FEINBERG, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* (1990).

¹⁹⁰ D. HUSAK, *Limitations on Criminalization and the General Part of Criminal Law*, in S. SHUTE-A. SIMESTER (eds.), *Criminal Law: Doctrines of the General Part*, Cambridge, 2002, p.13-46.

legitimately criminalize and those it may not. Conduct may not be sanctioned if it merely causes harm to the actor, or if the harm it causes to others is consented to by the others.

FEINBERG'S LIBERTY LIMITING PRINCIPLES

Criminalization is legitimate only if: 1) it would probably be effective in preventing harm to others ("harms to others" principle) or 2) it would probably prevent serious offense to others ("offense to others" principle).

Despite some commentators having pointed out that criminal offences may also be justified even in the absence of harm to a specific person, when the harm is done to society at large (so-called victimless crimes or crimes against the public order can only be justified by this line of argument), the punishment of individuals who harm other individuals is commonly acknowledged as the most obviously legitimate task of the criminal justice system. Therefore, the harm principle remains pivotal for any liberal model of criminalization. Simester and von Hirsch,¹⁹¹ adapting Feinberg, recently set out the harm principle in the following schematic form, which can be a valuable tool for policy makers and legislators to take into account in their criminalization decisions:

THE HARM PRINCIPLE IN SIMESTER & VON HIRSCH SCHEME

Step 1: Consider the gravity of the eventual harm, and its likelihood. The greater the gravity and likelihood, the stronger is the case for criminalization.

Step 2: Weigh against the foregoing, the social value of the conduct, and the degree of intrusion upon actors' choices that criminalization would involve. The more valuable the conduct is, or the more the prohibition would restrict liberty, the stronger the countervailing case would be.

Step 3: Observe certain side-constraints that would preclude criminalization. The prohibition should not, for example, infringe rights of privacy and free expression.

¹⁹¹ A. P. SIMESTER-A. VON HIRSCH, *Crimes, Harms and Wrongs: On the Principles of Criminalization*, Oxford, 2011, p. 55.

2.3. The paradigm of harm plus culpability

The harm principle only sets a necessary condition for criminalization, not a sufficient one.¹⁹² Legal scholars from both the Anglo-American and the European-continental world agree that another fundamental principle in relation to criminalization is the "culpability principle" (*principio di colpevolezza*). This principle requires a degree of blameworthiness in the commission of a crime: it states that a person should not be liable to conviction without proof of "fault, in the form of intention, recklessness or negligence". Criminal liability without fault, in fact, would be to impose state censure undeservedly, failing to respect persons as thinking, planning individuals.¹⁹³

The culpability principle, despite some obvious differences, is recognized as pivotal by criminal law scholars from both the Anglo-American and the European-continental world. In Italy, in particular, this principle was thoroughly analyzed, among others, in the works of Bricola.¹⁹⁴ Today, this principle is interpreted - in Italy and elsewhere - as to include not only a prohibition for criminal liability for acts of others (*divieto di responsabilità penale per fatto altrui* - the minimal core of personal responsibility as it is enshrined in article 27, co. 1 of the Italian Constitution) but also a duty to establish a subjective link between the individual and all most significant elements of his/her conduct, at least in terms of "fault" (*responsabilità per fatto proprio colpevole*).¹⁹⁵

In reality, however, legislators in Europe and the United States often enact provisions that include "strict liability offences", i.e. offences that do not require the prosecution to prove any fault on the part of the defendant in relation to some elements of the

¹⁹² See J. FEINBERG, *The Moral Limits of the Criminal Law: Harm to Others* 63, 1984, at 9-10 (explaining that even when the harm principle is satisfied, other reasons may prevent criminalization). Also See B. E. HARCOURT, *Criminal Law: the Collapse of the Harm Principle*, 90 *Journal. Crim. Law. & Criminology*, 1999, vol. 90, 109, 114 (author claims that the harm principle is a necessary yet insufficient condition for criminalization).

¹⁹³ A. ASHWORTH, *The Unfairness of Risk-Based Possession Offenses*, *supra* note 148 at 243.

¹⁹⁴ F. BRICOLA, *Teoria Generale del Reato*, *supra* note 170 at §8.

¹⁹⁵ See, among others, and for a bibliographic list of the several Italian contributions to the debate on culpability, CADOPPI-P. VENEZIANI, *Elementi di diritto penale. Parte generale*, *supra* note 174, p. 101 ff. Italian criminal law scholars had long anticipated that, there is a need to establish a subjective link, in the form of "intention" or "fault" at a minimum, in relation to all the "most significant elements of the conduct". This was later acknowledged by the Italian Constitutional Court in the well-known decision n. 364 of 1988. This decision formally acknowledged the meaning and the value of the constitutional principle of culpability (*principio di colpevolezza*).

conduct. In the UK, for example, around one-third of all new criminal offences enacted in 2005 contained at least one strict liability element.¹⁹⁶ This is particularly blameworthy, especially when one considers that these were not merely so-called "regulatory offences", penalizing failures to comply with financial or industrial regulations, but also offences carrying a maximum of life imprisonment. For example, sections 5 and 6 of the Sexual Offences Act 2003 now punishes with a maximum of life imprisonment the offences of rape and sexual penetration of a child under 13, imposing strict liability as to age.¹⁹⁷ Strict liability offences in relation to sex crimes are typical of many other European states. In fact, even some jurisdictions that formally reject the constitutionality of strict liability offences, as inconsistent with the principle of "*nullum crimen, nulla poena sine culpa*" (or *Schuldprinzip* in Germany), impose strict liability as to age for some sexual offences where the victim is a minor. It has long been the case, for example, of Italy, which has only recently introduced an excusing condition for the so-called "inevitable ignorance" as to age for a child under 14.¹⁹⁸

¹⁹⁶ A. ASHWORTH, *Ignorance of the Criminal Law, and Duties to Avoid it*, in *Modern Law Review*, vol. 74, Issue 1, 2011, p. 1-26 at 7.

¹⁹⁷ In a 2005 case, (*R v G* [2008] UKHL 37 (18 June 2008)), a 15-year-old boy was convicted of statutory rape under Section 5 of the Sexual Offences Act 2003. The prosecution accepted the boy's claim that he had believed the 12-year-old girl to be 15, but he was nevertheless sentenced to 12 months detention. This was reduced on appeal to a conditional discharge, but, in a 3-2 decision, the House of Lords declined to reverse the conviction. A complaint was filed then in front of the European Court of Human Rights (*G. v The United Kingdom*, App. No. 37334/08, Introduction Date 20/07/2008 Decision Date 30/08/2011) for violation of art. 8 of the European Convention on Human Rights, i.e. the right to private life. The complaint was found inadmissible because the Court did not hold that the national authorities had exceeded the margin of appreciation available to them by creating a criminal offense which is called "rape" and which does not allow for any defence based either on apparent consent by the child or on the accused's mistaken belief about the child's age. Nor did the Court hold that the authorities exceeded their margin of appreciation by deciding to prosecute the applicant for this offense, rather than the lesser offense of sexual activity with a child.

¹⁹⁸ § 602-quater and §609-sexies of the Italian Criminal Code, which have been amended by law 1 October 2012, n.172 (in execution of the Lanzarote Convention) to include as an excusing condition the so-called "inevitable ignorance" as to age of the minor. In this direction, see, also, the 2007 decision of the Italian Constitutional Court, n. 322, according to which: "La norma censurata (§609-sexies) potrebbe ritenersi lesiva del principio di colpevolezza non certo per il mero fatto che essa deroga agli ordinari criteri in tema di imputazione dolosa; ma, semmai, unicamente nella parte in cui neghi rilievo all'ignoranza o all'errore inevitabile sull'età".

Whether strict liability is exceptionally justified in such cases is controversial and will be left for debate elsewhere.¹⁹⁹ The point here is that there is a consensus among legal scholars that there should be a strong presumption against criminalization of strict criminal liability offences, because they are contrary to the principle *nulla poena sine culpa*.²⁰⁰ It should be regarded as exceptional and in need of strong justification, particularly where the offence is serious. Therefore, policy makers and legislators should be guided in their criminalization decision by the following principle:

CULPABILITY PRINCIPLE (*PRINCIPIO DI COLPEVOLEZZA*)

Fault (i.e. *mens rea*) - in the form of intention, recklessness or negligence - is to be required in relation to all the elements of the conduct (i.e. *actus reus*). Only exceptional circumstances, which require strong justification, may allow departure from this principle.

To summarize, although the concept of harm is somehow different from the categories of *beni giuridici* and *offensività* that have been developed in the European-continental literature, "harm plus culpability" can certainly be said to be the paradigm of criminal liability and criminalization.²⁰¹

2.4. "Workable" criteria for criminalization

Nowadays, alive to the inevitable vagueness of concepts such as "harm" and "culpability", criminal law scholars are making important strides in specifying these two principles and developing additional criteria for and against the use of the

¹⁹⁹ See for example, in relation to strict liability sex crimes in the Italian legislation, M. BENINCASA-S. MEDIOLI DEVOTO, *Ignoranza dell'età della persona offesa*, in A. CADOPPI (ed.) *I reati contro la Persona. III. Reati contro la libertà sessuale e lo sviluppo psico-fisico de minori*, Milano, 2006, 195 ff.

²⁰⁰ A. ASHWORTH-L. ZEDNER, *Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions*, in *Crim. Law and Philos* 2008, 21-33; also, D. HUSAK, *Overcriminalization: The Limits of the Criminal Law* Oxford, 2008, p. 73 (claiming that "nearly all theorists regard strict liability offenses as problematic and recognize limits on the state's authority to enact them").

²⁰¹ A. ASHWORTH-L. ZEDNER, *Prevention and Criminalization: Justification and Limits*, in *New Crim. Law Review*, vol. 15, 2012 p. 542-544.

criminal law.²⁰² American legal philosopher Douglas Husak and English criminal law professor Andrew Ashworth, in particular, deserve the most credit for having defended in the recent period "workable" criteria for criminalization, i.e. criteria whose terms may be clearly understood by legislators and policy makers. In light of the importance of their contribution, we will hereby undertake an analysis of their recent work.

In his monograph, Husak argues that the interest in developing criteria for criminalization is a fairly recent phenomenon, and considers the absence of a viable account of criminalization as the "most glaring failure of penal theory as it has developed on both sides of the Atlantic".²⁰³ Thus, he assumes the difficult task of defending a "normative theory of criminalization", i.e. a set of principles that limit the authority of the state to enact and enforce penal offences. According to his theory, which has gained extensive support,²⁰⁴ seven principles should guide the legislator in criminalization decisions. Four of them are "internal" principles, since they can be derived from within the criminal law itself, and three of them are "external" principles, since they emerge from a political view about the conditions under which the rights implicated by punishment may be infringed. The internal principles are: 1) the nontrivial harm or evil constraint,²⁰⁵ according to which criminal liability may not be imposed unless statutes are designed to prohibit a nontrivial harm or evil, or the risk of it; 2) the wrongfulness constraint,²⁰⁶ which states that criminal liability may not be imposed unless the defendant's conduct is wrongful, thus calling into question

²⁰² E.g., D. HUSAK, *Overcriminalization*, *supra* note 200; R. A. DUFF ET AL. (eds.), *The Boundaries of the Criminal Law*, 2010; A. SIMESTER AND A. VON HIRSCH, *Crimes, Harms and Wrongs: On the Principles of Criminalisation*, 2010.

²⁰³ D. HUSAK, *Overcriminalization*, *supra* note 200, p. 58. This point is shared by several other commentators: see N LACEY, *Contingency and Criminalization*, in *Frontiers of Criminal Law* 1, 2 (1987) (the author argues that the phenomenon of criminalization is under-analyzed); C. FINKELSTEIN, *Positivism and the Notion of an Offense*, *Calif. Law. Rev.* 2000, vol. 88, 335, 358 ... at 336 (pointing out that the question "what is crime?" should have been first in line among the questions to be analysed by theoreticians, but only little effort had been invested therein); A. DONOSO M., *Book Review: Douglas Husak, Overcriminalization. The Limits of the Criminal Law*, 3 *Crim Law and Philos* 99 (2010) (the author suggests that also philosophers have not said much about the issue of criminalization).

²⁰⁴ A. ASHWORTH-L. ZEDNER, *Defending the Criminal Law*, *supra* note 200 at 49.

²⁰⁵ D. HUSAK, *Overcriminalization*, *supra* note 200 at 66.

²⁰⁶ *Ibidem*.

those offences that do not provide for a culpability requirement; 3) the desert constraint,²⁰⁷ which holds that punishment is justified only when, and to the extent that, it is deserved, with the result that excusing conditions should place the conduct beyond the reach of the criminal law and excessive punishment should not be tolerated; and 4) the burden of proof constraint,²⁰⁸ according to which the state must provide reason to believe that its criminalization decisions satisfy this normative theory of criminalization, explicitly stating the *ratio legis*. The external principles of Husak's theory, instead, form the framework for a test of "intermediate scrutiny" for criminal legislation, which is derived from American constitutional law theory. They are: 5) the substantial state interest constraint,²⁰⁹ which states that criminal legislation may only be imposed if it fulfills a substantial state interest, i.e. a proper concern of the public; 6) the direct advancement constraint,²¹⁰ according to which criminal legislation must directly advance that interest, and may only be enacted if supported by empirical evidence; and 7) the minimum necessary extent constraint,²¹¹ which states that criminal legislation must be no more extensive than necessary to achieve that interest. The law needs not be necessary to achieve it. All that is required is that no alternative that is equally effective be less extensive than the law in question. Interestingly, Husak notes that criminal theorists tend to be legal philosophers who are unskilled in empirical methodology. Quoting Andrew Ashworth,²¹² he stresses that, as a result, both in the UK and in the US there has never been a thoroughgoing examination of whether some form of non-criminal enforcement could be devised to deal effectively with given kinds of offences.²¹³ In sum, the set of principles that should limit the authority of legislators to enact and enforce criminal offences are the following:

²⁰⁷ *Id* at 82.

²⁰⁸ *Id* at 100.

²⁰⁹ *Id* at 132.

²¹⁰ *Id* at 145.

²¹¹ *Id* at 153.

²¹² A. ASHWORTH, *Principles of Criminal Law*, Oxford, 2004, 4th ed., 2003, p. 50.

²¹³ D. HUSAK, *Overcriminalization*, *supra* note 200 at 154 (claiming that the same observation made by Ashworth with regard to the UK applies to the US).

HUSAK'S NORMATIVE THEORY OF CRIMINALIZATION

- 1) Criminal liability may not be imposed unless the offence is designed to prohibit a nontrivial harm or evil, or the risk of it;
- 2) Criminal liability may not be imposed unless the defendant's conduct is wrongful;
- 3) Punishment is justified only when, and to the extent that, it is deserved;
- 4) The state must provide reason to believe that the principles of this normative theory of criminalization are satisfied;
- 5) Criminal legislation may only be imposed if it fulfills a substantial state interest;
- 6) Criminal legislation must directly advance that interest;
- 7) Criminal legislation must be no more extensive than necessary to achieve that interest.

Husak's main interest is in raising the level and quality of debate about criminal legislation, especially among legislators themselves, rather than in forcing any particular conclusions about any particular criminal laws or legislative purposes. His normative theory of criminalization, based on principled reasoning, is a good antidote to the frenzied approach to law-making and the cynical pandering to public fear that afflict many politicians today.²¹⁴

2.5. In particular: crimes of risk prevention

According to both Andrew Ashworth and Douglas Husak, an area of the law that requires particular attention and is in need of specific criteria for criminalization is that of so-called "crimes of risk prevention".²¹⁵ This is an area of the law that has expanded significantly in the recent years, due to increased emphasis on the state's duty to seek to protect its citizens from suffering harms or wrongs.²¹⁶ Over the years, the state has come to have a responsibility not merely to punish, but also to reduce the incidence of the kinds of conduct that are criminalized. The historic orientation of the

²¹⁴ J. GARDNER, *Book Review: Douglas Husak, Overcriminalization. The Limits of the Criminal Law*, Notre Dame Philosophical Review, available at <http://ndpr.nd.edu/news/23674-overcriminalization-the-limits-of-the-criminal-law/>.

²¹⁵ A. ASHWORTH-L. ZEDNER, *Defending the Criminal Law*, *supra*, note 200 at 40-2

²¹⁶ R. A. DUFF, *Answering for Crime: Responsibility and Liability in the Criminal Law*, Oxford, 2007, at 87.

criminal justice system towards reactive policing and post-hoc punishment²¹⁷ started being overlaid by a proactive, preventive rationale that seeks to avert harms before they occur.²¹⁸ A prime example of this trend is the introduction, in England and Wales, of "Control Orders" under the 2005 Prevention of Terrorism Act, whose heavy restrictions upon the liberty of those suspected of involvement in terrorist activity were said to be justified on the grounds of averting possible catastrophic harm.²¹⁹ Today, these counter-terrorism preventive measures are common in several other jurisdictions, both in Europe and the United States, and they raise many controversial issues.

Crimes of risk prevention diverge from the paradigm of "harm plus culpability" that characterizes the major criminal offenses, such as murder.²²⁰ They represent non-consummate²²¹ and non-constitutive²²² crimes, committed prior to and without anyone being wronged or harmed. Andrew Ashworth and Lucia Zedner, with the purpose of demonstrating the ways in which these crimes diverge from the paradigm of harm plus culpability, have recently provide a useful taxonomy. The taxonomy is based on English offences, but, as the authors note, similar offences can be found in many other jurisdictions. The taxonomy of crimes of risk prevention includes:

A) Inchoate offences. Typically, they are crimes of attempt, conspiracy, and solicitation.

²¹⁷ J. McCULLOCH-S. PICKERING, *Future Threat: Precrime, State Terror, and Dystopia in the 21st Century*, 81 *Crim. Just. Matters*, 2010, p. 32.

²¹⁸ J. HORDER, *Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation*, in G.R. SULLIVAN-I. DENNIS (eds.), *Seeking Security: Pre-Emptying the Commission of Criminal Harms*, 2012, p. 79-102.

²¹⁹ A. ASHWORTH-L. ZEDNER, *Defending the Criminal Law*, *supra*, note 200 at 40.

²²⁰ A. ASHWORTH-L. ZEDNER, *Prevention and Criminalization*, *supra* note 201 at 544.

²²¹ HUSAK, *The Nature and Justification of Non-Consummate Crimes*, in *Arizona Law Review*, 37, 1995, p. 151.

²²² A. SIMESTER-A. VON HIRSCH, *Remote Harms and Non-Constitutive Crimes*, in *Criminal Justice Ethics*, 28, 2009, p. 89. Simester and von Hirsch use the term "non-constitutive" to refer to offenses in which the ultimate harm that justifies such crimes is remote from the crime itself; "constitutive crimes" are those where the very harm that justifies criminalization is part of the definition of the crime (e.g. murder).

B) Substantive offences defined in the inchoate mode. Examples are: burglary, which penalizes entry with intent to steal and fraud, which penalizes making a false representation with intent to cause gain or loss. No loss need have been caused, no harm done.

C) Preparatory and pre-inchoate offences. They penalize conduct at an earlier stage than traditional inchoate offenses. Examples are, under the Terrorism Act 2006: publishing a statement likely to be understood as an encouragement of terrorism (§1) and disseminating terrorist publications with intent to encourage terrorism directly or indirectly (§2).²²³

D) Crimes of possession. There is growing list of articles whose possession is criminalized. Examples are: possession of drugs (allegedly criminalized to suppress the drugs trade); possession of explosives and automatic firearms, as well as other offensive weapons (allegedly criminalized to protect public safety); possession of information likely to be useful to a person preparing an act of terrorism, and possession of any article giving rise to a reasonable suspicion that the possession is for a purpose connected with terrorism (allegedly criminalized to suppress terrorism); and possession of indecent images of children (allegedly criminalized to protect children from exploitation).

E) Crimes of membership. They penalize membership in certain organizations, e.g. organizations that have among their objectives the promotion or encouragement of terrorism.

F) Crimes of endangerment. They include offences of concrete or explicit endangerment, such as endangering the safety of rail passengers and dangerous driving, and offenses of abstract or implicit endangerment, such as drunk driving and speeding.

What criminal law scholars generally emphasize with regard to crimes of risk prevention is that they may end up licensing unrestrained state intervention and may result in an overly extensive and intrusive criminal law.²²⁴ Thus, there is a need to identify specific principles that must form the framework for the justification of, and the limitations on, criminal offenses driven primarily by the preventive rationale.

²²³ Terrorism Act 2006.

²²⁴ A. ASHWORTH-L. ZEDNER, *Prevention and Criminalization*, *supra* note 201, at 553.

With this view, Douglas Husak has devised a special version of his normative theory of criminalization to apply to crimes of risk prevention, arguing that overcriminalization arises in this area if the law does not abide by four basic requirements.²²⁵ As Husak himself acknowledges, these are sophisticated requirements that need further elaboration if they are to provide a working guide to the legislator. However, they can be summarized in the following form, simplified by Andrew Ashworth to provide clearer guidance to the legislator:²²⁶

D. HUSAK'S CRITERIA - CRIMES OF RISK PREVENTION

- 1) Substantial risk requirement: an offence is justified only if it is required to reduce a substantial risk, in the sense that both the harm to be avoided and the degree of risk that it will occur should be not insubstantial;
- 2) Prevention requirement: an offence is justified only if it is likely to be effective in reducing the likelihood of harm occurring;
- 3) Consummate harm requirement: an offence of risk prevention is justified only if it would also be justified to criminalize the consummate offence that intentionally and directly cause that very state of affairs;
- 4) Culpability requirement: an offence is not justified if it criminalizes the mere belonging to a category or group deemed dangerous or risky.

Despite the uncontested significance of Husak's contribution, the most successful effort to develop "workable" criteria for criminalization in the area of preventive measures is probably the one by Andrew Ashworth and Lucia Zedner. The two authors, in "Prevention and criminalization: justifications and limits", identify eleven "workable" principles for policy makers and legislators.²²⁷ These principles, most of which are rather self-explanatory, are the following:

²²⁵ D. HUSAK, *Overcriminalization*, *supra* note 200, at 159 ff.

²²⁶ A. ASHWORTH-L. ZEDNER, *Preventive Orders: A Problem of Undercriminalization*, in R. A. DUFF ET AL. (eds.), *The Boundaries of the Criminal Law*, 2010, p. 80.

²²⁷ A. ASHWORTH-L. ZEDNER, *Prevention and Criminalization*, *supra* note 201 at 547 ss.

A. ASHWORTH & L. ZEDNER'S CRITERIA -

CRIMES OF RISK PREVENTION

- 1) It is a necessary condition of criminalization that the *harm principle* is satisfied, and that causing or risking the harm amounts to a *wrong*.
- 2) In determining whether there are sufficient reasons for criminalizing particular conduct, the *costs and risks* of criminalization should be taken into account, as well as the harm that is sought to be prevented. In particular, any probable and unwarranted erosion of the security of the individual from state interference should be avoided.
- 3) Criminalization should only be resorted to if it is the *least restrictive appropriate* response.
- 4) In principle, preventive offenses may be justifiable on retributive or consequentialist grounds. Where the justification is consequentialist, it must be subject to the satisfactory resolution of *empirical questions* about the calculation of risk and of *normative issues* arising from the remoteness of the harm.
- 5) The more remote the conduct criminalized is from the harm-to-be-prevented, and the less grave that harm, the more compelling the case for higher-level *fault requirements* such as dishonesty, intention, knowledge, or subjective recklessness.
- 6) In principle, a person may be held liable for acts he or she has done, simply on the basis of *what he or she may do at some time in the future*, only if the person has declared an intent to do those acts in a form that satisfies the requirements of an attempt, conspiracy, or solicitation.
- 7) In principle, a person may be held liable for the *future acts of others* only if that person has a sufficient normative involvement in those acts (e.g., that he or she has encouraged, assisted, or facilitated), or where the acts of the other were foreseeable, with respect to which the person has an obligation to prevent a harm that might be caused by the other.
- 8) All offenses, including those enacted on a preventive rationale, ought to comply with *rule-of-law values*, such as *certainty of definition, fair warning, and fair labelling*, so as to identify the wrong that they penalize, for the purpose of guiding conduct and publicly evaluating the wrong done.
- 9) All offenses, including those enacted on a preventive rationale, ought to be so drafted as to *require the court to adjudicate on the particular wrong targeted*, and

not on some broader or prior conduct.

10) *Concrete or explicit endangerment* should only be considered for criminalization where a *significant risk of serious harm* is created by a person's actions, and where those actions were *unreasonable in the circumstances* in the sense that they failed to show appropriate concern for the interests of others.

11) *Abstract or implicit endangerment* may supply a good reason for an offense that specifies a precise limit for conduct of a potentially dangerous nature, but only if it focuses criminalization on those instances where there is a *significant risk of serious harm* and *minimizes the criminalization of people who actually present no danger*.

Ashworth, similarly to Husak, laments the tendency among writings on English criminal law to devote little attention to the rightfulness or wrongfulness of criminalizing certain conduct.²²⁸ Although he considers the prevention of harms and wrongs as one of the state's central functions, he embraces a "minimalist approach" to criminal law.²²⁹ Thus, the eleven principles that he advances through a process of analysis and critique are meant to provide limitations on the pursuit of the preventive rationale in the criminal law. They are necessary to protect citizens from considerable extensions of the criminal law that may occur through the penalization of conduct "remote from" and "independent of" the actual causation of harm.²³⁰

2.6. Final remarks on criteria for criminalization

This chapter has shown that the areas touched by the criminal law have expanded significantly since the beginning of the twenty-first century, primarily as a result of the new "preventive" orientation of criminal justice systems both in Europe and in the United States. It has demonstrated that it was only in the recent period that "workable" criteria for criminalization started being developed by academics, to limit the expansion of the criminal law. Thus, in an effort to bridge the gap between the theory and the practice of the criminal law, it has summarized the most refined versions

²²⁸ A. ASHWORTH, *Principles of Criminal Law*, Oxford, 2003, 4 ed., p. 24.

²²⁹ A. ASHWORTH, *Principles of Criminal Law*, Oxford, 2009, 6 ed., p. 31.

²³⁰ A. ASHWORTH-L. ZEDNER, *supra* note 201 at 562.

of these criminalization principles, both in general and with specific regard to crimes of risk prevention.

In conclusion, although the objective of effectively constraining the legislator in its criminalization decision is far from having been attained, there have been decisive steps in that direction in the recent period. This is because "workable" criteria for criminalization have started being developed by academics, in an effort to bridge the gap between the theory and the practice of the criminal law.²³¹ It is important that the momentum is not lost, but it is rather given visibility so that additional contributions may further improve the quality of the discourse. Also, it is important that legislators both in Europe and the United States pay more attention to these recent contributions from the criminal law literature. In fact, it is only through a more limited use of the criminal law, based on the criminalization principles that have been summarized above, that the problem of overcrowding can successfully be tackled: through a more rational day-to-day legislative activity.

III. ADDRESSING PRISON OVERCROWDING AT THE SOURCE: ALTERNATIVES TO CRIMINALIZATION - IN THEORY

If, on the one side, there is a need for legislators to be more respectful of the criteria for criminalization that have been identified in the previous chapter, on the other side, there is a need for legislators to seriously assess the appropriateness of criminalization in certain areas of the law.

There is a recurring trend, both in the present and in the past, to resort to the criminal law to address longstanding social problems such as homelessness, public

²³¹ The AHRC (Arts and Humanities Research Council) has recently awarded a grant for a four-year project on Criminalization to a consortium led by the University of Stirling. The lead researchers are Antony Duff (Philosophy, Stirling), Lindsay Farmer (Law, Glasgow), Sandra Marshall (Philosophy, Stirling), Massimo Renzo (Law, York) and Victor Tadros (Law, Warwick). See <http://www.philosophy.stir.ac.uk/criminalization/crim-homepage.php>. The AHRC has also awarded a grant for a three-year project on Preventive Justice to a consortium led by the University of Oxford. The project is directed by Prof Andrew Ashworth and Prof. Lucia Zedner. It aims to re-assess the foundations for the range of coercive measures that states now take in the name of crime prevention and public protection.

drunkenness, drugs, gambling, prostitution, immigration etc.²³² Certainly, criminalization is one way to achieve some form of compliance, through the threat of criminal punishment. However, as we have seen in the previous chapter, in some cases the use of the criminal law may be unjustified, inappropriate or unnecessary.

This chapter aims at summarizing the possible "alternatives to criminalization" in theory and identifying those areas of the law that criminal law scholars consider particularly good candidates for decriminalization reforms. In this chapter, our task will be the conceptualization of alternatives to criminalization in the regulation of social problems. First, we will define "decriminalization" and "legalization", which are terms that often lead to misunderstanding in the debate on reforms. Then, we will analyze the role of decriminalization within the framework of the Council of Europe. Finally, we will delineate the direction in which decriminalization reforms should go, identifying both which European legal system could be used as a guide for further developments and which major areas of the law should be particularly considered for decriminalization measures. This chapter will provide the theoretical foundations for the case study that will follow in chapter V.

1. Decriminalization and legalization

As far as the law is concerned, two are the alternatives to the criminalization of a certain conduct: "decriminalization" and "legalization". Confusingly, commentators across the European-continental and the Anglo-American world use these terms with different meanings, or sometimes they are even used as synonyms. Misunderstanding is generated by conflicting interpretations of these terms in a discussion of reforms. Therefore, some initial clarifications are required.

We will use the term "decriminalization" as in the definition provided by English criminologist Mike Hough, to refer to measures that "retain the offence in question as an offence, but avoid criminal prosecution and punishment".²³³ Decriminalization

²³² See e.g. Hungary, that in 2011 introduced new anti-vagrancy laws, which now mean that homeless people sleeping on the street can face police fines of around £384 or even the possibility of jail time.

means that the criminal penalties attributed to the act are no longer in effect. Some European commentators tend to refer to decriminalization as "depenalization".²³⁴ This reflects the fact that penal law and criminal law are synonyms in many European systems.

In essence, according to Mike Hough, decriminalization occurs in different European and Anglo-American jurisdictions either by: (1) downgrading the legal status of offences, so that they are administrative rather than criminal offences, subject to fixed penalty fines along the lines of parking tickets, or by (2) retaining the status of criminal offence on the books while avoiding the imposition of criminal penalties.²³⁵ The latter approach operates (2a) allowing for administrative sanctions to be imposed or (2b) issuing guidance to police or prosecutors to avoid enforcement in specified circumstances.²³⁶ Decriminalization through the downgrading of criminal offences to administrative offences has the advantage of sending a clear message: certain forms of conduct are not so heinous as to require criminal punishment. However, it also requires a major effort from the legislator. As it is well known, indeed, criminal law offences are easy to enact but rather hard to repeal.

We will use the term "legalization", instead, to refer to the "removal of an offence from both the administrative and the criminal law". Legalization makes an act completely acceptable in the eyes of the law. The act is, therefore, not subject to any penalties. In a certain way, it is a more profound change in the law than decriminalization. Typically, however, legalization is coupled with a system of governmental regulation and supervision (e.g. legalization of alcohol is generally subject to licensing laws and the prohibition to sell to minors, legalization of prostitution may be coupled with licensing, taxing and zoning measures, and legalization of drug possession for personal use may be subject to a limit in the maximum amount allowed for personal use).

²³³ M. HOUGH ET AL (eds.), *A Growing Market: The Domestic Cultivation of Cannabis*, York, 2003, available at www.jrf.org.uk, p. 2.

²³⁴ However, we will use "depenalization" with a different meaning than "decriminalization", as it will be better explained in chapter V, section 2.1.

²³⁵ *Ibidem*.

²³⁶ *Ibidem*.

2. The framework of the Council of Europe

The topic of decriminalization has long been central within the framework of the Council of Europe, which has recognized the importance for states to adopt decriminalization measures in order to reduce the problem of prison overcrowding. The the Committee of Ministers of the Council of Europe acknowledges that the criminal law is the most intrusive of all social control institutions and must be used minimally. Also, it acknowledges that "the efficient management of the prison population is contingent on such matters as the overall crime situation, priorities in crime control, *the range of penalties available on the law books*, the severity of the sentences imposed, the frequency of use of community sanctions and measures, the use of pre-trial detention, the effectiveness and efficiency of criminal justice agencies and *not least public attitudes towards crime and punishment*".²³⁷ We hereby provide a selection of the most relevant Council of Europe Recommendations in relation to decriminalization and prison overcrowding.

In 1987 already, Recommendation No. R (87) 18 on "The Simplification of Criminal Justice" emphasized the need for European states to increase the use of (and one could imply also move toward the adoption of, for Countries, like the UK, that still don't have such a system) administrative sanctions to deal with minor offences.²³⁸

- 1) Legal systems which make a distinction between administrative offences and criminal offences *should take steps to decriminalise offences, particularly mass offences in the field of road traffic, tax and customs laws under the condition that they are inherently minor.*
- 2) In dealing with such offences, (...) all states should make use of summary procedures or written procedures not calling, in the first place, for the services of a judge.
- 3) No physical coercive measure - especially detention on remand - should be ordered.

²³⁷ COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, Recommendation No. (99) 22 on "Prison Overcrowding and Prison Population Inflation", p. 1 (emphasis added).

²³⁸ COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, Recommendation No. (87) 18 on "The Simplification of Criminal Justice", Paragraph II a), p. 3.

Then, Recommendation No. R (95) 12 on "The Management of Criminal Justice" also recalled that crime policies such as "decriminalization, depenalization or diversion, mediation and the simplification of criminal procedure" can "contribute to addressing the difficulties of increase in the number and the complexity of cases, unwarranted delays, budgetary constraints and increased expectations from public and staff".²³⁹

More recently, Recommendation No. R (99) 22 concerning "Prison Overcrowding and Prison Population Inflation" also generally urged states to consider decriminalization measures.²⁴⁰

- 1) Deprivation of liberty should be regarded as a sanction or measure of last resort and should therefore be provided for only, where the seriousness of the offence would make any other sanction or measure clearly inadequate (...).
- 4) *Member states should consider the possibility of decriminalising certain types of offence or reclassifying them so that they do not attract penalties entailing the deprivation of liberty.*
- 5) In order to devise a coherent strategy against prison overcrowding and prison population inflation a detailed analysis of the main contributing factors should be carried out, addressing in particular such matters as the types of offence which carry long prison sentences, priorities in crime control, *public attitudes* and concerns and existing sentencing practices.

As it emerges from these Recommendations, decriminalization and the use of an administrative system to deal with minor offences are highly favored at the European level. This is because of the benefits that decriminalization brings to both the functioning of the criminal justice system, which can focus on more serious crimes, and the problem of prison overcrowding, through the diversion of low-level offenders to less stigmatizing sanctions.

²³⁹ COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, Recommendation No. R (95) 12 on "The Management of Criminal Justice", p. 1.

²⁴⁰ COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, Recommendation No. R (99), *supra* note 3 *prima di questa*, Appendix, Paragraph I, p. 22.

3. The German model: *Ordnungswidrigkeiten*

In line with the Council of Europe Recommendations, several scholars have argued in favor of the adoption, by European states that still have not done so, of a system of administrative sanctions similar to the one developed in Germany.²⁴¹ They have argued that both the German administrative system itself, which is clearly distinct from the criminal justice system and establishes penalties through a slim and cost-effective procedure, and the wide range of offences to which it applies should be considered as a useful guide for decriminalization reforms across Europe. Let us briefly analyze the German model.

German law provides for three degrees of infractions: 1) felonies (*Verbrechen*), i.e. criminal offenses punishable with at least one year of imprisonment; 2) misdemeanors (*Vergehen*), i.e. all other criminal offenses, punishable with either a fine or with imprisonment and 3) petty infractions (*Ordnungswidrigkeiten*), i.e. administrative offences. *Ordnungswidrigkeiten* are not deemed to be criminal - in the sense of carrying moral blame or stigma - and only punished with a fine and the temporary loss of certain privileges.²⁴² They are determined, often on a strict liability basis, by an administrative agency after a rather informal hearing. The agency determines the amount of the penalty, primarily based on the seriousness of the violation. Then the defendant may appeal the decision, after which there is an expedited trial where an ordinary court undertakes an independent review of the facts.²⁴³

²⁴¹ See, in particular, A. ASHWORTH-L. ZEDNER, *Prevention and Criminalization*, *supra* note 201 at 567-570. See also R. S. FRASE-T. WEIGEND, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 *B.C. Int'l & Comp. Law Review*, vol 18, 1995, 317; and R. S. FRASE, *Comparative Criminal justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, in 78 *Cal. Law Review*, 1990, 567-73.

²⁴² E.g. driving privileges (see, for example, 13 Gesetz über Ordnungswidrigkeiten (Petty Infractions Act), I Bundesgesetzblatt 1987, 602, §1(1).

²⁴³ The Italian system, very similarly, differentiates between *delitti* (more serious offenses punishable with the criminal sanctions of *ergastolo*, *reclusione* or *multa*), *contravvenzioni* (offenses punishable with the criminal sanctions of *arresto* or *ammenda*) and *illeciti amministrativi* (administrative offenses only punishable with administrative sanctions, i.e. fines). French criminal law, similarly to the German model, differentiates three types of criminal offense: *crimes*, which correspond to felonies; *délits*, which come close to the German concept of *Verbrechen*; and *contraventions*, which correspond to the German concept of administrative offenses (*Ordnungswidrigkeiten*). For certain types of traffic offense

The first comprehensive statute providing for *Ordnungswidrigkeiten* was passed in 1952. Then, in the early 60s, German criminal policy focused on the decriminalization of a wide range of minor criminal offences. In 1975, the category of minor criminal offences (*Übertretungen*) was abolished altogether, mainly through the downgrading of these offences to mere *Ordnungswidrigkeiten* - as in the case of dangerous animals, noise control and environmental regulation - and partly through the complete abandonment of punishment - as in the cases of begging and vagrancy.²⁴⁴ A brief excursus on how the German system deals with some longstanding social problems may be of interest. As to prostitution, in 2002 the German Prostitution Act²⁴⁵ made prostitution a legal profession expressively stating that prostitution should not be considered immoral anymore. This allowed prostitutes to obtain regular work contracts and access the welfare system. Today, prostitution is legal and regulated in Germany. Also, as to drug policy, in 1994 the Federal Constitutional Court ruled that the law prohibiting cannabis was in accordance with the constitution, not infringing on the principles of proportionality, of equality and personal freedom, but it asked the legislator to proof research results and experiences of foreign countries to consider if prohibition is the only solution. More importantly, the Court pointed out that prosecution authorities of the Federal Länder should observe the "ban on excessive punishment" of the German Constitution and, as a rule, refrain from prosecution in case of minor offences involving the personal use of cannabis. Also, in 2000 the German Narcotic Act²⁴⁶ was changed to allow for supervised drug-injection rooms. And the positive results of a study on the effects of heroin-assisted treatment on addicts led to the inclusion of heroin-assisted treatment into the services of the mandatory health insurance in 2009.

a system of tariffs applies with fixed amounts of administrative fines imposed by the police. In such cases, the defendant may either consent by paying the fine, which in turn finalizes the procedure, or appeal to the public prosecutor, which then decides whether to dismiss the case unconditionally or take the case to court, with the consequence of ordinary trial procedures. A system of administrative sanctions that is separate from the criminal law system, in terms of procedure, is also available in Italy.

²⁴⁴ A. ESER, *A Century of German Penal Legislation. Developments and Trends*, in A. ESER-J. THORMUNDSSON, *Old Ways and New Needs in Criminal Legislation*, Freiburg, 1989, p. 17 ff. See also A. ESER, § 12 *annot.* 19, in A. SCHOENKE-H. SCHROEDER, *StGB*, 1988, 23rd ed.

²⁴⁵ Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten (Prostitutionsgesetz – ProstG) 20 Dec 2001, Bundesgesetzblatt (BGBl.) I, 2001, p. 3983.

²⁴⁶ BtMG (*Betäubungsmittelgesetz*).

As it emerges from this brief overview, some of the longstanding social problems around which the continuing decriminalization debate revolves have been regulated, in Germany, through complete legalization, a streamlined administrative procedure (so-called "decriminalization in the books") or guidelines to prosecutors that mandate not to enforce minor offences (so-called "decriminalization in practice"). It is for this reason that legal scholars around the world who support a minimal model of the criminal law often point to Germany to indicate an exemplary system of law.

4. Possible areas of decriminalization

In an effort to conceptualize some areas of the law where other states might want to "borrow" from Germany the narrower scope of the criminal law, we will now turn to a brief analysis of "victimless crimes" and "crimes of risk prevention". Although these are very broad areas, which overlap to a certain extent (e.g. possession offences belong to both categories), they are used here merely with the purpose of identifying two major areas where decriminalization reforms would be welcome. In fact, criminal law scholars consider the use of criminal sanctions in these areas highly contestable.

4.1 An old challenge: victimless crimes

Victimless crimes have long been at the core of the debate on decriminalization.²⁴⁷ They criminalize controversial social problems, lacking a definite victim. Although all authors do not use the term in the same way, the following offenses have been included in the victimless crime category: public drunkenness; vagrancy; various sexual acts involving consenting adults (fornication, adultery, bigamy, incest, sodomy, homosexuality, and prostitution), obscenity, pornography, drug offenses, abortion, gambling and juvenile status offenses. Crimes of border crossing are

²⁴⁷ See, e.g., E. M. SCHUR, *Crimes without Victims: Deviant Behavior and Public Policy - Abortion, Homosexuality, Drug Addiction*, Englewood Cliffs, 1965; H. L. PACKER, *The Limits of the Criminal Sanction*, Stanford, 1968; N. MORRIS-G. J. HAWKINS, *The Honest Politician's Guide to Crime Control*, Chicago, 1970.

similarly considered victimless crimes: to the extent the harm is done at all, it is to the integrity of the state's border and immigration policy.²⁴⁸

The arguments for the repeal or substantial restriction of criminal laws against victimless crimes fall into two categories. Some argue that, as a matter of principle, society may not legitimately prohibit conduct that harms only the actor.²⁴⁹ This is in line with Feinberg's argument that "harm to self" should not be sanctioned by the criminal law, as we have seen in the previous chapters.²⁵⁰ Others argue that, even if it might be legitimate to punish victimless crimes since they may be considered to harm "society at large", there are certain practical reasons why it is unwise to do so.²⁵¹ These practical reasons derive from three attributes of victimless crimes. First of all, most of them involve no complaining parties other than police officers. Thus, these offences are harder to detect and prosecute than crimes with victims, and the police are forced to engage in a number of practices (e.g. surveillance and entrapment) that are subject to serious abuse. Police misbehaviour in these practices further reduces public respect for, and cooperation with, the institutions of criminal justice, particularly among social groups already alienated from society, i.e. the poor, ethnic minorities, and the young. And this exacerbates the adverse effects of overcriminalization on public trust in justice. Secondly, many of them involve the exchange of prohibited goods or services that are strongly desired by the participants. Thus, criminal penalties tend to limit the supply more than the demand, driving up the black-market price and creating monopoly profits for those criminals who remain in business (the so-called crime tariff). Thirdly, all seek to prevent individual or social harms that are believed to be less serious and/or less likely to occur than the harms involved in crimes with victims. This aspect is said to further reduce respect for law

²⁴⁸ M. HOUGH ET AL (eds.), *A Growing Market: The Domestic Cultivation of Cannabis*, *supra* note 233, at 8.

²⁴⁹ See, among others, N. MORRIS-G. J. HAWKINS, *The Honest Politician's*, *supra* note 247, applying Stuart Mill's principle of harm to others.

²⁵⁰ *Supra*, chapter III section 2.2.

²⁵¹ E. M. SCHUR-H. A. BEDAU, *Victimless Crimes: Two Sides of a Controversy*, Englewood Cliffs, 1974.

on the part of citizens, who believe that these acts are criminalized despite not being considered particularly wrong.

Critics of the victimless crime criterion point out that the concept lacks a clear definition, fails to cover some of the offenses to which it has been applied (e.g. the consensual nature of the transactions and the fact that they are strongly desired applies in only the broadest sense to incest), and applies equally well to other offenses that have not been generally proposed for repeal or substantial restriction (e.g. receiving stolen property, most traffic law violations and health, safety, environmental, and regulatory offenses). In addition, critics argue, the victimless crime concept says very little about the difficult choices between alternatives to current criminal laws: partial decriminalization through a reduction in penalties, downgrading to administrative offences, or complete legalization. Thus, critics argue, the term is only a cover for subjective value judgments about the wisdom of specific criminal statutes, and fails to provide an objective criminalization standard that could be easily applied and would be deserving of broad acceptance.

The point here is that labelling a crime as victimless only begins what is, in most cases, a very difficult process of assessing complex empirical facts and fundamental value choices.²⁵² In chapter V we will make an effort to go into the details of that assessment process in relation to drug legislation. At this stage, it is enough to note that several scholars, among whom German Professor Thomas Weigend and American Professor Richard Frase, claim that other states may want to borrow from Germany the complete decriminalization of most of these victimless offences.²⁵³

4.2. A new challenge: crimes of risk prevention

Preventive measures have become part of the debate on decriminalization only since the beginning of the twentieth century, as a result of the more demarcated "preventive

²⁵² R. S. FRASE, *Encyclopedia of Crime and Justice*, 2002 available at http://www.encyclopedia.com/topic/Victimless_Crime.aspx.

²⁵³ R. S. FRASE-T. WEIGEND, *German Criminal Justice as a Guide*, *supra* note 241. See also R. S. FRASE, *Comparative Criminal Justice as a Guide*, *supra* note 241.

function" that has come to characterize modern systems of criminal justice since the terrorist attacks of 9/11.

As we have seen, according to Ashworth and Zedner's taxonomy, preventive measures include the following: inchoate offences, substantive offenses defined in the inchoate mode, preparatory and pre-inchoate offences, crimes of possession, crimes of membership and crimes of endangerment.²⁵⁴

Ashworth is among those scholars that support the use of a system of administrative sanctions in the area of preventive measures, particularly when the risk of harm is remote from the conduct in question. He claims that if the limiting principles that he identifies were applied conscientiously,²⁵⁵ many of the recent preventive extensions of the criminal law, and in particular "membership" and "endangerment" offenses, might appear to lie at the very limits of justifiability, such as to call in to question their criminalization. He favors the introduction of a system of "prevention through regulation" for these offences. As he notes, the key element of the systems of administrative offenses adopted in many continental European jurisdictions, such as Germany, is that the penalties are set at a low level.²⁵⁶ The purpose of these systems is to subject minor infractions to a lower-level system of sanctions that is efficient enough to ensure no resulting loss of preventive efficacy.

Thus, according to Ashworth, there should be, in principle, an initial decision about whether the conduct constitutes a serious wrong that merits criminalization, with public censure and punishment to follow, or whether the conduct is a minor wrong that can properly be dealt with in this non-stigmatic way by a relatively low penalty.²⁵⁷ If the conduct falls into the former category, consideration should be given to defining and criminalizing the behavior, in accordance with a proper normative

²⁵⁴ See *supra* chapter III, section 2.5.

²⁵⁵ *Ibidem*.

²⁵⁶ R. A. DUFF, *Crimes, Regulatory Offenses and Criminal Trials*, in H. MULLER-DIETZ ET AL. (eds.), *Festschrift für Heike Jung*, 2007, p. 87.

²⁵⁷ R. A. DUFF, *Perversions and Subversions of Criminal Law*, in R. A. DUFF ET AL. (eds.), *The Boundaries of the Criminal Law*, 2010, p. 104.

theory of criminalization and with all the safeguards of a fair criminal procedure. If the conduct falls into the latter category, then a system such as Germany's *Ordnungswidrigkeiten* should be applied. This system should provide that: a) the decision to impose a sanction may be taken by administrators or regulators, i.e. personnel less highly trained; b) the financial penalty would not require formal court proceedings unless the citizen wishes to contest liability, in which case a relatively informal hearing, without the full range of criminal safeguards, would take place; and c) sanctions should be financial and set at a modest level. In cases of non-payment of administrative fines, coercive detention should be kept as the very last resort measure. Such regulatory system would need to comply with the European Convention of Human Rights, but one way of ensuring that would be to provide for an avenue of appeal to a criminal court with full Convention safeguards: a defendant should be offered a fixed penalty or administrative fine, but given the opportunity to opt for court proceedings if he/she contests the charge.²⁵⁸

To conclude, as Ashworth notes, the aim of prevention should chiefly be pursued through the use of administrative sanctions and educational, family, housing and town planning policies. In particular, this can be achieved through i) social crime prevention (e.g. by organising activities to take young people away from crime) and ii) situational crime prevention (by making the commission of crime more difficult - through target hardening and opportunity reduction - and observable - through design of buildings, urban planning, surveillance mechanisms and security cameras).²⁵⁹

5. Final remarks on alternatives to criminalization

This chapter has shown that there is a recurring trend, both in the present and in the past, to resort to the criminal law to address longstanding social problems such as homelessness, public drunkenness, drugs, gambling, prostitution, immigration etc. Yet, in some cases the use of the criminal law may be inappropriate in light of the criminalization principles that have been developed by scholars in the European-continental and the Anglo-American literature.

²⁵⁸ A. ASHWORTH-L. ZEDNER, *Prevention and Criminalization*, *supra* note 201 at 568.

²⁵⁹ A. ASHWORTH-L. ZEDNER, *Preventive Orders*, *supra* note 226 at 74.

Alternatives to criminalization, i.e. "decriminalization" and "legalization" reforms, should seriously be considered by legislators, especially in relation to so-called "victimless crimes" and "crimes of risk prevention". These areas have been identified by criminal law scholars as particularly critical and in need of reassessment.

Also, we believe that community's views about decriminalization/legalization reforms in the areas of "victimless crimes" and "crimes of risk prevention" should be solicited. In fact, no defect in the criminal law is likely to erode confidence among citizens more rapidly than the perception that the wrong acts are punished or unpunished.²⁶⁰ As it has been emphasized by criminal law scholars, "society will lose faith in the penal law if it is perceived as criminalizing conduct unjustly".²⁶¹

V. ALTERNATIVES TO CRIMINALIZATION - IN PRACTICE: DRUG LEGISLATION

This chapter aims at analyzing some "alternatives to criminalization" in practice. In particular, we will conduct a comparative study of the most recent decriminalization reforms that have been adopted by Italy and Portugal in the field of drug legislation.

We decided to focus our analysis on drug legislation for several reasons. First of all, because drug legislation, as we have seen in chapter I, severely impacts on prison overcrowding both in Europe and in the United states. Reforms in this area - though politically difficult - are very much needed to solve the problem of prison overcrowding at the source. Secondly, because one of the most controversial forms of conduct criminalized in the field of drug legislation in Europe and the United States, i.e. drug use and possession, lies at the intersection of the two major areas of the law that have just been identified as in need of serious reassessment, i.e. "victimless crimes" and "crimes of risk prevention". Finally, and perhaps even more importantly, because what emerges from the most recent social surveys conducted in the United

²⁶⁰ D. HUSAK, *Overcriminalization*, *supra* note 200 at 89.

²⁶¹ See P. ROBINSON-J. DARLEY, *Justice, Liability And Blame: Community Views And The Criminal Law*, Boulder, 1995. For a more detailed analysis of communities views in relation to drug legislation see *infra* chapter VI.

States and in Europe in the field of drug regulation is that public attitudes are less and less favorable to the use of the criminal law to address drug use, particularly for cannabis. Therefore, if the criminal law is to be in line with the so-called *Kulturnormen*, there seems to be a compelling reason to reassess cannabis legislation.

1. The drug phenomenon in Europe: most recent statistical data

This section will offer an overview of the drug phenomenon in Europe, to lay down the contextual framework for the case study that will follow. In particular, it will provide some statistical data on drug use among the European population, with specific regard to cannabis use, and drug law enforcement in Europe. This overview will be primarily based on the data of the ECMDDA - European Monitoring Centre for Drugs and Drug Addiction, which is the central agency of the European Union for coordinating drug policy data.

On a preliminary note, it may be useful to stress that the EMCDDA's purpose in collecting data on the drug phenomenon in Europe has never been to offer an ultimate judgment on the best policy style for European countries. Rather, its role is a scientific one: information is collected and analyzed and the results are presented. It is then up to individual Member States to draw their own conclusions from the data that are made available.

The first issue to be dealt in the analysis of the statistical data offered by the EMCDDA, with a view to develop evidence-based policy proposals, is the extreme difficulty of cross-national comparative research conducted on the scale achieved by the EMCDDA.²⁶² Galtung summarizes the problems associated with research depending on the collation of data from many different countries as trying to create a universal social science, "a social science transcending geography and history with all that implies of structural and cultural diversity".²⁶³ There are many difficulties with creating this "universal social science" that are relevant to comparative, statistical-based, studies in the drug policy field. Hakim highlights the difficulties in drawing

²⁶² C. CHATWIN, *Drug Policy Harmonization and the European Union*, Palgrave Macmillan, 2011, p. 47.

²⁶³ J. GALTUNG, *Theory Formation in Social Research: a Plea for Pluralism*, in E. OYEN (ed.) *Comparative Methodology*, London, 1990 p. 107.

reliable conclusions from studies where there may be hidden agendas subscribed to by the institution undertaking the research, where there are cultural differences in styles of work (although these can also exist at a national level), or where scholars from different countries involved in the research may come from different disciplinary perspectives.²⁶⁴ All these problems are encountered in the drugs field. Flynn has raised a further obstacle to the interpretation of statistics gathered by the EU: "Measuring the comparative success of drug policies is, of course problematic. There are no universally accepted criteria for success, for example, by which competing drug policies can be assessed".²⁶⁵

The EMCDDA is working towards overcoming these obstacles. In the historical tables of data, as the years go by, greater numbers of member states have consistently provided information. Additionally, the EMCDDA has worked towards instituting standard age categories and standard definitions for terms such as "drug-related death". Increasing numbers of countries are adopting these standard definitions, although not all have done so as yet. Over the coming years, practices of data collection should continue to become even more standardized.

Also, some interesting suggestions are coming from the stakeholders. The European Coalition for Just and Effective Drug Policies (ENCOD) highlighted in 2001 some important factors that could improve the quality of statistical data for the development of sound evidence-based drug policy proposals. The ENCOD made the point that, in order to be evaluated, policies first of all need to state a clear objective. Once the objective of the policy is agreed upon, indicators to evaluate the success of the policy can be developed. For example, the effectiveness of a drugs policy aimed at attaining a drug free society can be measured by prevalence of drugs use amongst the population. But for policies that accept drugs as a part of life and intend to reduce the harm related to them, prevalence of drugs use as such is of less importance. It is more relevant to measure the effectiveness of those policies through a combination of

²⁶⁴ C. HAKIM, *Research Design: Successful Designs for Social and Economic Research*, 2nd edition, London, 2000.

²⁶⁵ P. FLYNN, *Social Consequences of and Responses to Drug Misuse in Member States*, Luxembourg, 2001.

statistical measures. Thus, according to the ENCOD guidelines,²⁶⁶ statistics should include measures on 1) the proportion of "problematic use" among the totality of use and 2) the "price/quality ratio" of substances, together with more sociological measures such as 3) the "integration of drug users in society" and 4) the "participation of citizens in the design and implementation of drug policies". In line with this proposal, we also argue for a more significant involvement of European citizens in the design and implementation of drug policies. Community's views should be solicited and gathered in order to add a significant factor for the analysis of the success/lack of success of drug policies in Europe. If not, the risk is that policies that do not correspond to the attitudes of society toward certain drugs will lead to very limited compliance, based not on "normative" but only on "instrumental" acceptance²⁶⁷.

Despite the above-mentioned limitations, the statistics collected by the EMCDDA are a useful starting point in exposing some facts on drug use and drug law enforcement.

1.1. Drug use among the European population

According to the 2012 EMCDDA report²⁶⁸ around a quarter of Europe's 15- to 64-year-old population has used an illicit drug at some point in their life ("lifetime

²⁶⁶ EUROPEAN COALITION FOR JUST AND EFFECTIVE DRUG POLICIES (ENCOD), *Guidelines for Just and Effective Drug Policies*, available at <http://www.encod.de/info/GUIDELINES-FOR-DRUG-POLICIES-IN.html> (accessed 01 September 2013).

²⁶⁷ For an analysis of "normative" and "instrumental" compliance see P. CAMPANA-M. HOUGH-E.VACCARI-S. MAFFEI, *The Intended and Unintended Consequences of Deterrence and Inclusive Crime Control Strategies*, in S. MAFFE-L. MARKOPOULOU (eds.), *FIDUCIA - Justice Needs Trust*, vol. 1, Athens, 2013, p. 49 ff. Instrumental and normative strategies are two distinct ways of fostering compliance with the law. Instrumental strategies assume that individuals comply with the law out of self-interest. Citizens respond to a structure of disincentives created by the law through threats and penalties. Therefore, changing the likelihood of sanctions or the length of prison sentences will make offending more costly and, therefore, less prevalent. Deterrence and instrumental compliance appear to have an impact on relatively minor forms of illegal behaviour such as illegal parking, fast driving or littering, while their impact on other types of crime has been widely disputed. Instrumental compliance often yields to short-term reduction in crime rate with no or very limited impact in the long run. Normative strategies shift the focus from why people break the law to why people comply with the law. Normative compliance occurs when people feel a moral or ethical obligation or commitment to do so. The perceived legitimacy of the authority has a greater impact on the individual decision as to whether to take an unlawful course of action than does the perceived threat of sanctions and the level of punishment it presents. People will voluntarily comply with the rules even if this goes against their own pure self-interest if the law and the state are regarded as legitimate. Instead of focusing on the individual structure of incentives, the normative approach looks at the internalised norms and values of a given individual. *Ibidem*.

²⁶⁸ EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION (HEREINAFTER EMCDDA), *Annual Report - The State of the Drugs Problem in Europe*, Luxembourg: Publications Office of the European Union, 2012, p. 15.

prevalence"). More importantly, the great majority of people report having used cannabis (80.5 million), with much lower estimates for "lifetime use" of other drugs: 15.5 million for cocaine, 13 million for amphetamines and 11.5 million for ecstasy. Also, cannabis is by far the most widespread drug in relation to the other two indicators of drug diffusion, i.e. "last year use" and "last month use". Considerable differences exist between countries with regard to cannabis use among the general population (15- to 64-year-old), with national "lifetime prevalence" figures varying from 1.6% (Romania) to 32.5% (Denmark). For the purpose of our study, it is worth noting that the highest "lifetime prevalence" countries following Denmark are Spain and France (32.1 %), Italy (32.0 %) and the United Kingdom (30.7 %).²⁶⁹ Moreover, as to "last year use" of cannabis, which is probably a better indicator of frequency of use, Italy (14.3 %) Spain (10.6 %) the Czech Republic (10.4 %) and France (8.4 %) are the countries with the highest rate. Finally, as to "last month use" of cannabis", Spain (7.6 %) Italy (6.9 %) France (4.6 %) and the Czech Republic and the Netherlands (4.2 %) appear as highest-prevalence countries. Generally, according to the EMCDDA report, cannabis use in Europe increased during the 1990s and early 2000s. Today, the EMCDDA claims that Europe may be moving into a new phase, as data from general population surveys and a new round of data from the ESPAD school survey points to relatively stable trends in cannabis use in many countries. In any case, as the report emphasizes, levels of cannabis use in Europe continue to remain high by historical standards.²⁷⁰

One important fact that emerges from the 2012 EMCDDA report²⁷¹ is that cannabis use is largely concentrated among young people (15–34), with the highest prevalence of "last year use" generally being reported among 15- to 24-year-olds. Population survey data suggest that, on average, 32.5% of young European adults (15–34) have used cannabis at some time, while 12.4 % have used the drug in the last year and 6.6 % have used it in the last month. A comparison with figures from Australia, Canada and the U.S. on "lifetime" and "last year use" of cannabis among young adults shows that extra-European averages are all above the European averages, which are 32.5 %

²⁶⁹ *Id.* at 41. For data on all the European Member States see the "General population surveys" in the 2012 EMCDDA *Statistical Bulletin*, available at <http://www.emcdda.europa.eu/stats12#display:/stats12/gpstab1b>

²⁷⁰ EMCDDA, *Annual Report*, *supra* note 268, at 39.

²⁷¹ *Id.* at 41.

and 12.4 % respectively. For example, in Canada (2010) "lifetime prevalence" of cannabis use among young adults was 50.4% and "last year prevalence" 21.1%. In the United States, the Substance Abuse and Mental Health Services Administration (SAMHSA) (2010) estimated a "lifetime prevalence" of cannabis use of 52.1% (16–34, recalculated by the EMCDDA) and a "last year prevalence" of 24.5%, while in Australia (2010) the figures are 43.3% and 19.3% for young adults.

Also, according to the 2013 EMCDDA report,²⁷² school students' cannabis use increased between 1995 and 2003, dropped slightly in 2007 and since then has remained stable. During this period, a noticeable trend has been a reduction in cannabis use in many of the countries that reported high levels of prevalence in early surveys. Over the same period, levels of cannabis use among school students increased in many of the countries in central and Eastern Europe, showing a degree of convergence across Europe as a whole. In the six countries that reported national school surveys undertaken after the ESPAD study (2011/12), prevalence of cannabis use among students remains stable or is slightly decreasing. Longer-term trends among young adults are broadly in line with those for students, with gradual increases in use among lower-prevalence countries, alongside decreases among higher-prevalence countries.

Finally, only a significant minority of cannabis users consumes the substance intensively.²⁷³ Daily or almost daily cannabis use is defined by the EMCDDA as use on 20 or more days in the month preceding survey. Data from 22 countries suggest that around 1% of adults report using the drug in this way. Over two-thirds of these are aged between 15 and 34 years, and in this age group, over three-quarters are male. In Italy, which as we have seen is the country with the highest "last year use" of cannabis and the second highest "last month use" of cannabis, 63.9% of last month users reported having used cannabis 1 to 3 days in the month preceding survey, 16.7%

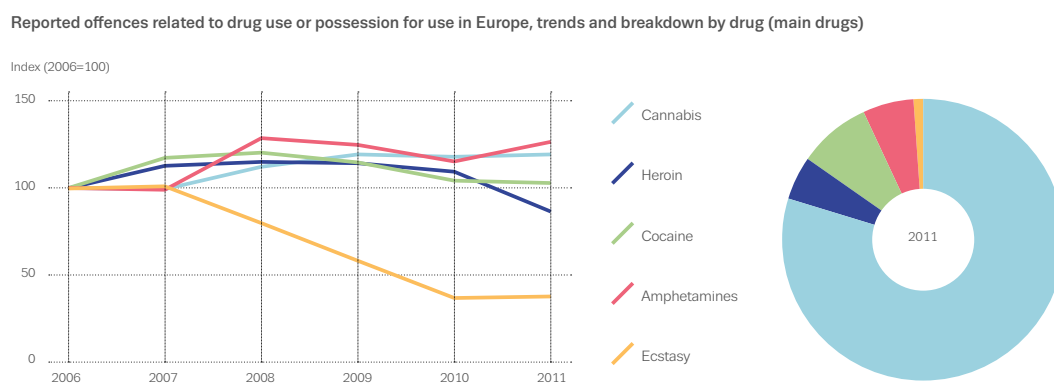
²⁷² EMCDDA, *Annual Report - The State of the Drugs Problem in Europe*, Luxembourg: Publications Office of the European Union, 2013, p. 30.

²⁷³ *Id* at 31.

reported having used it 10 to 19 days and 19.4 reported having used it on 20 or more days in the month preceding survey.²⁷⁴

1.2. Drug law enforcement in Europe

As to data on drug law enforcement in Europe, the first fact that emerges from the 2013 EMCDDA annual statistics is that the majority of reports of drug law offences in Europe relates to drug use or possession for use; overall in Europe, these totaled more than a million in 2011, a 15% increase compared to 2006. More importantly, as the figures below show, more than three-quarters of these offences involve cannabis.²⁷⁵

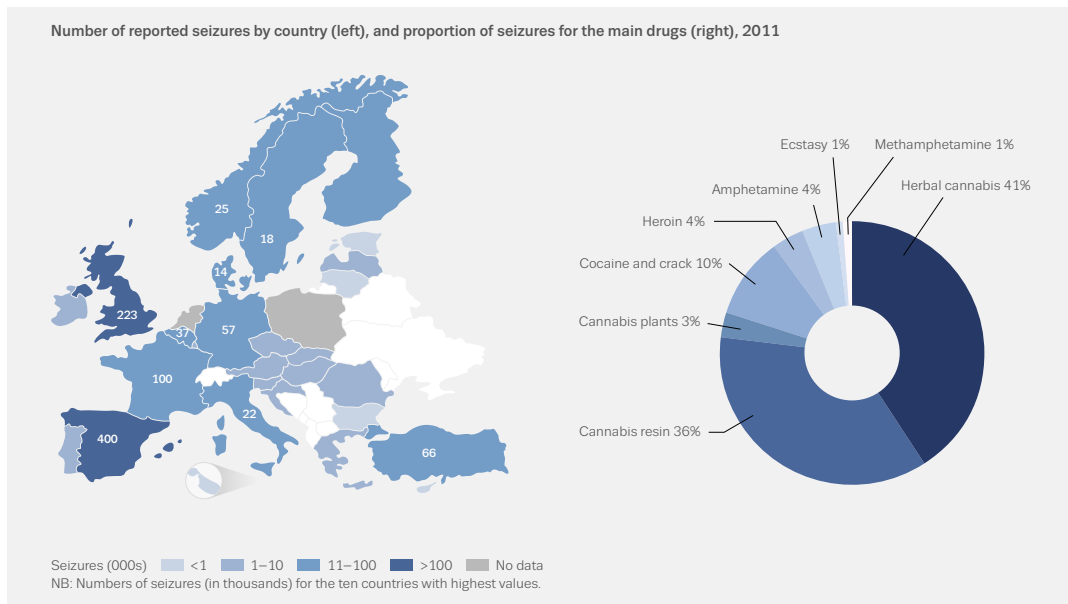


Reflecting its high prevalence of use, cannabis is also by far the most seized drug in Europe. Figures from the 2013 EMCDDA annual report are available below,²⁷⁶ showing seizures of cannabis in the amounts of 41% for herbal cannabis, 36% for cannabis resin and 3% for cannabis plants, for a total of 80% of overall drug seizures. Cocaine ranks second overall, with about double the number of seizures reported for either amphetamines or heroin. The number of ecstasy seizures is lower, and declined considerably in recent years.

²⁷⁴ See EMCDDA, *Table GPS-10: Frequency of use of cannabis amongst users in the last 30 days in national general population surveys. Year of survey: 2012*, available at <http://www.emcdda.europa.eu/stats13#display:/stats13/gpstab10a>.

²⁷⁵ EMCDDA, *Annual Report*, *supra* note 272 at 60.

²⁷⁶ *Id* at 16.



2. Drug policies in Europe

The debate on drug policy reforms in Europe is often represented as a polarized choice between two options, "prohibition" and "legalization". The reality, however, is that in the field of drug regulation a multiplicity of policy options exists, which is in no way reducible to a simple dichotomy between these two extremes. This section will offer an overview of current drug policies in Europe. In particular, it will clarify which policy options are generally available in the field of drug regulation and it will analyze the most recent trends in legal approaches to use and possession of drugs for personal use in Europe. Thus, it will provide the background against which the policy options adopted by Italy and Portugal will be evaluated, in the case studies that will follow.

2.1. Criminalization, legalization, decriminalization, depenalization

The multiplicity of policy options in the field of drug regulation can be divided into four broad categories, which we will analyze in line with the definitions that have been provided in chapter IV: they are "criminalization", "legalization", "decriminalization" and "depenalization".

On the one side of the spectrum, "criminalization" generally refers to the use of the criminal law to sanction both the production (manufacture and distribution) and the consumption (use and possession for personal use) of drugs. The criminalization framework, as we will see in the next section of this paper, continues to predominate in the EU for most drug offences. Sweden, with its aim of a drug-free society and its strategy of targeting users as much as dealers, provides an example of a relatively restrictive criminalization policy.²⁷⁷

On the other side of the spectrum, "legalization" generally refers to the removal of drug-related offences from both the administrative and the criminal law. Prior to the 20th century, most European countries had legalized regimes for drugs, because neither the supply nor the demand sides of the drug market were criminalized and drugs could be legally manufactured and sold to consumers. Then, several criminalization policies were adopted in Europe, in the wake of the so-called U.S. "war on drugs". To date, no European country has implemented a policy of complete drug legalization. This is also because a legalized regime would allegedly not be in line with the United Nations Single Convention on Narcotic Drugs of 1961²⁷⁸ and the United Nations Convention Against Illicit Traffic in Drugs and Psychotropic Substances of 1988,²⁷⁹ which have been ratified by several European States. The 1988

²⁷⁷ For a detailed analysis of the Swedish drug control policy see C. CHATWIN, *Drug Policy Harmonization and the European Union*, Palgrave Macmillan, 2011, p. 89-104.

²⁷⁸ The United Nations 1961 Single Convention on Narcotics (as amended by the 1972 Protocol) lays the foundations of the current UN approach of control of drugs through prohibition. It was concerned mainly with drug cultivation, production and trafficking, though Article 28(3) imposes a duty on countries to prevent the use of cannabis and other drugs (or at least misuse). Section 36 requires signatory countries to ensure that, subject to constitutional limitations in individual countries, the 'cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery (...) shall be *punishable offenses* (...) and that *serious offenses shall be liable to adequate punishment, particularly by imprisonment*'. Significantly, the 1961 Convention did not require that the offenses should be punishable under the criminal law. Although the 1961 Convention explicitly refers to possession, it has often been assumed from the context and from the overall tone of the document that regulation of supply rather than demand was its main target. It was not explicit about criminal sanctions except for serious offenses, though it provided for alternatives to conviction and punishment where the offenders were "abusers of drugs".

²⁷⁹ The United Nations 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances is tougher than the 1961 Convention, and it is framed to tackle both supply and demand. It is more binding than the 1961 Convention, obliging signatories to share intelligence and co-operate with one another against international drug trafficking and to make efforts to eradicate narcotic plants grown on their territory and to eliminate demand for illicit drugs (Article 14, para. 1). It is also explicit that offenses should be punishable under criminal law. Article 3 para. 1 requires that *criminal offenses should be established under domestic law to cover "production, (...), "sale" (...) and more in general possession with intent to supply for a wide range of drugs including cannabis*. It states that the possession, purchase or cultivation of illicit drugs for personal use should be criminal offenses encompassed under the criminal legislation of each country in the following terms: "*Subject to its*

Convention, in particular, obliges each country to treat "production, supply and possession with intent to supply" of a wide range of drugs, including cannabis, as a "criminal offence".²⁸⁰ The same is required for "possession, purchase or cultivation for personal consumption", but subject to a country's "constitutional principles and the basic concepts of its legal system".²⁸¹ European countries have not uniformly interpreted this clause, which seems to leave some flexibility as to the regulation of personal consumption of drug. This is reflected in the different legal approaches adopted in Europe in the area of use and possession of drugs for personal use.²⁸²

Drug "decriminalization" represents a level intermediate between strict prohibition and legalization. It does not really identify a legal framework model, but rather a

constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offense under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption" (Article 3, para. 2). As did the 1961 Convention, the 1988 Convention allows for considerable discretion in the disposal of minor cases. In the first place, decisions about appropriate sanctions are clearly left to signatory countries, and are expected to be in accordance with the constitutional principles of that country. Furthermore, two sections are explicit about non-punitive options in relation to minor cases generally and in cases involving possession, purchase or consumption for personal use: "...in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare. The Parties may provide, as an alternative to conviction or punishment, or in addition to conviction or punishment of an offense established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender". (Article 3, paras 4c and 4d).

²⁸⁰ Article 3 para. 1, see *supra*, note prima di questa.

²⁸¹ Article 3, para. 2, see *supra*, note prima di questa. In particular, the requirement of "proportionality" in the official response to infractions of the criminal law is the constitutional principle to which states have often referred to justify the use of mere administrative sanctions against drug users.

²⁸² See *infra*, section 2.2 of this paper. As many authors note, the UN conventions set some clear limits to the range of reform options, while leaving individual countries considerable room for manoeuvre. If, on the one side, they oblige each country to treat unauthorized supply as a criminal offense, on the other they allow for some forms of decriminalization in relation to possession and cultivation for personal use. For a detailed discussion, see N. DORN (ET AL.), *European Drug Laws: The Room for Manoeuvre*, London, 2001 and B. DE RUYVER (ET AL.), *Multidisciplinary Drug Policies and the UN Drug Treaties*, Antwerpen, 2002. With specific regard to cannabis cultivation, the legality of which is particularly controversial in many European states at the moment, see M. HOUGH ET AL (eds.), *A Growing Market: The Domestic Cultivation of Cannabis*, *supra* note 233. According to M. Hough, the UN conventions require signatory countries to prohibit under the criminal law cultivation of cannabis. However, they clearly permit (possession and) cultivation for personal use to be dealt with by means other than punishment – such as treatment, counselling and education, and simply through warnings. Though they are less explicit on this point, they do not appear to rule out dealing with cultivation for personal use as a minor offense, dealt with by administrative penalties (such as "ticketing" or fixed fines)". *Id.*, at 32. For an analysis, in Italian, of the duties to criminalize drug production/sale/trafficking (versus the possibility of adopting non-punitive measure for personal use) deriving from the UN Conventions see F.C. PALAZZO, *Consumo e Traffico degli Stupefacenti*, II ed., Padova, 1994, 27 ff. According to the author: "la soluzione proibizionistica è oggi imposta dagli accordi internazionali in materia di stupefacenti, che obbligano gli stati contraenti a reprimere come illecito penale i fatti di produzione e commercio illegali, mentre per quanto riguarda la posizione di chi sia anche consumatore lasciano ai singoli stati la possibilità di scegliere fra la repressione penale e le misure trattamentali". *Id.* at 27.

movement in relation to a previous situation. In general terms, "decriminalization" is used to refer to measures that retain a certain conduct as an offence, but avoid criminal prosecution and punishment. As we have seen in chapter IV, decriminalization may occur in different European jurisdictions through either of the following: (1) downgrading the legal status of offences, so that they are administrative rather than criminal offences (i.e. decriminalization in the books) or (2) retaining the status of criminal offence on the books while avoiding the imposition of criminal penalties (i.e. decriminalization in practice). In particular, the latter approach may occur by (2a) allowing for administrative sanctions to be imposed or (2b) issuing guidance to police or prosecutors to avoid enforcement in specified circumstance. With specific regard to drug policies, the concept of "decriminalization" is particularly relevant for the conduct of "use" and "possession for personal use" of illicit drugs.²⁸³

Different from drug "decriminalization" is drug "depenalization". According to the distinction promulgated in 2005 by the EMCDDA, in fact: "decriminalization" comprises removal of a conduct or activity from the sphere of criminal law. Prohibition remains the rule, but sanctions for use (and its preparatory acts) no longer fall within the framework of the criminal law (administrative sanctions without the establishment of a police record). By contrast, "depenalization" means relaxation of the penal sanction provided for by law. In the case of drugs, depenalization generally signifies the elimination of custodial penalties. Prohibition remains the rule, but imprisonment is no longer provided for, even if other penal sanctions may be retained (fines, establishment of a police record, or other penal sanctions).²⁸⁴

2.2. Legal approaches to use and possession of drugs

In most European countries, the possession of drugs for personal use (and sometimes drug use) is a criminal offence punishable by a prison sentence.²⁸⁵ For example, in France,²⁸⁶ Hungary,²⁸⁷ Greece,²⁸⁸ Finland,²⁸⁹ Norway²⁹⁰ and Sweden,²⁹¹ both use and

²⁸³ See *infra* chapter V section 2.3.

²⁸⁴ EMCDDA, *Thematic Papers - Illicit Drug Use in the EU: Legislative Approaches*, 2005, p. 4.

²⁸⁵ EMCDDA, *Annual Report...* 2013, *supra* note 11 at 60.

²⁸⁶ In France, the Law of 1970 (Article L-3421-1 of the public health code) makes public or private use punishable by one year in prison and a fine of €3,000. Possession of illegal drugs is also a criminal

offense. See *infra*, note 29, for the application in practice of these provisions. Prohibition and punishment of mere drug use and possession for personal use has provoked a strong debate in France for decades. See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries>.

²⁸⁷ In Hungary, according to section 282 of the Hungarian Criminal Code, "whoever without official authorization produces, manufactures, acquires, possesses, imports, exports, or transports through the country drugs, can be sentenced to up to 5 years in prison". If only a small quantity is involved, the punishment is up to 2 years in prison or a fine. Since the 2003 reform of the Hungarian Criminal Code, the word "use" or "consume" does not appear in the text anymore, but standard case law has established that the notion of "acquiring" or "possessing" includes use and consumption; consequently consumption itself is implicitly criminalized and subject to a prison sentence. Users who enter treatment before punishment may be exempted from punishment. See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries>.

²⁸⁸ In Greece, Law 1987 (Article 12) and amendments establish that "any person who for his own exclusive use, obtains or possess whatsoever drugs in small quantity, or makes use of them (...) is punished with imprisonment." In 2003, the maximum penalty for use or possession of small amounts for own use by a non-dependent user was reduced from five years to one year in prison. This offense will not be entered in the criminal record if there is no re-offending during a five-year period. Drug addicts receive a more lenient treatment due to the fact that the Greek legal system considers the addiction as the dominant cause of the drug related offense. See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries>.

²⁸⁹ Finland was the first Nordic country to criminalize drug use. This was done in 1966, after a lively debate. The parliament's argument was that the purpose of the legislation was not to punish drug users, but to enforce negative attitudes against drugs among the population. However, a study in 1986 showed that two thirds of all drug offenses involved the use or possession of relatively small amount of drugs for one's own use. Drug legislation was revised in 1994 and again in 2001 (654/2001). The use of drugs was maintained as a criminal offense. The central provisions of drug legislation are laid down in chapter 50 of the Penal Code (1993/1304). According to the first section of the chapter, drug offenses include the possession, the manufacturing, growing, smuggling, selling and dealing of drugs. Use of drugs as well as possession for own use constitutes a drug-user offense, punishable by a fine or maximum six months' imprisonment (Penal Code 50:2a§). The maximum penalty for an ordinary drug offense is two years of imprisonment and for an aggravated drug offense ten years of imprisonment. In order to encourage non-prosecution of drug use and possession of small amounts of drugs, a new section (50:7) was introduced in 1994 and revised in 2001 (654/2001). Prosecution and punishment could be waived if the offense is to be considered insignificant or if the suspect has sought treatment (290/2002).

²⁹⁰ In Norway, the legal status of use and possession of small amounts of drugs changed from misdemeanor to crime in 1984. Use and possession of such small amounts do not, however, fall under § 162 of the General Civil Penal Code, but under the more lenient provisions of the Act on Medicinal Products of 4. December 1992, no 132, § 31, second paragraph, cf. § 24. The punishment is fines or imprisonment for up to 6 months. It must be explained that the law divides between storage, which comes under § 162 of the Civil Penal Code, and possession which falls under § 31 of the Act on Medicinal Products, cf. § 24. The purely temporary possession required for a person to use certain illegal drugs is covered by the Act on Medicinal Products, § 31, second paragraph. However, if possession has been going on for some time it will be considered as storage and punished more severely according to § 162 of the Civil Penal Code. In cases where a person is apprehended with a considerable quantity of drugs, it is likely that such possession will be regarded as storing regardless of whether the drugs were intended for sale or just stored for personal consumption

²⁹¹ In Sweden, the Narcotic Drugs Punishments Act (1968/64) lists the behaviors and practices which constitute drug crimes: "to pass on narcotic drugs; manufacture narcotic drugs intended for abuse; acquire drugs for the purpose of passing them on; procure, process, package, transport, store or in any other way, handle narcotic drugs not intended for personal use; offer narcotic drugs for sale, keep or mediate payment for narcotic drugs, arrange contacts between vendors and purchasers or take any other such action if the conduct is conducive to the furtherance of trade in narcotics; possess, use or have any other involvement with narcotic drugs". Each of these actions can constitute a drug crime, which is punished according to three degrees of penalties for drug offenses: minor, ordinary and serious. Penalties for minor drug offenses consist of fines or up to six months' imprisonment, for ordinary drug offenses up to three years, and for serious offenses two to ten years imprisonment. The penalties for drug trafficking offenses, regulated in the Law on Penalties for Smuggling (2000/1225), are identical

possession for personal use of drugs are a criminal offence punishable by a prison sentence. In Cyprus possession of drugs, even for personal use, is viewed as a serious criminal offence attracting the same range of penalties as trafficking.²⁹²

However, one trend that has swept around Europe since the late 1990s/early 2000s is the removal of custodial penalties for the use and possession of drugs for personal use (so-called "depenalization"). In the EU Member States, notwithstanding different positions and attitudes, according to the EMCDDA²⁹³ we can see a trend to conceive the illicit use of drugs as a relatively "minor" offence, to which it is not adequate to apply "sanctions involving deprivation of liberty." Some countries have changed their legislation to remove prison penalties (for example Slovenia²⁹⁴) while others have issued national directives to police or prosecutors to use sanctions other than prison (for example, France²⁹⁵ and Germany, the latter of which has written the possibility of

with the penalties provided in the Narcotic Drugs Punishments Act. See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries>.

²⁹² In Cyprus, use of controlled drugs is criminalized under section 10 of Law 1977, which originally prohibited the use of prepared opium, cannabis or cannabis resin and in 1992 was extended to apply to all controlled drugs listed. The 1992 amendment (s.15) also changed the sentencing provisions of the Third Schedule of the 1977 Law. Use or possession of a class A or B drug is now punishable, similarly to trafficking, with a maximum of a life sentence. The maximum sentence for use or possession of class C drugs, similarly to trafficking, is 8 years. See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries>.

²⁹³ EMCDDA, *Thematic Papers - Illicit Drug Use in the EU: Legislative Approaches*, 2005, p. 22.

²⁹⁴ In Slovenia, the Misdemeanors Act from January 2005 removed prison penalties for all misdemeanors, one of which is possession of drugs for personal use. In this way, the maximum penalty was reduced from 30 days in prison, or five days for a small quantity, to a fine. See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries>.

²⁹⁵ In France, in June 1999, the Directive of the Ministry of Justice asked prosecutors to prioritize treatment approaches for small offenders both related to drug use or to other small crimes. Particularly concerning problematic drug users, the recommendation of the Directive is to apply to the largest extent possible therapeutic alternatives to prisons, while "the imprisonment of drug users not having committed other related offenses must be the last resort". In practice, mere users are mainly dealt with by therapeutic alternatives. However, the "therapeutic order" to avoid penal action is not the only one to be applied. In most cases, mere drug users receive a warning which may be accompanied by a request to contact a social or health service, without obliging the person to undergo treatment or counseling ("no further action" with orientation). The new law of 23 June 1999 provides a legal base to the alternatives to prosecutions (art.41-1 penal procedural code). A new instrument, the "penal agreement", increases the possibility of waiving prosecution in case of certain minor offenses, particularly related to mere drug use. The prosecutors have now a various range of measures by which, if accepted and duly accomplished, they can end prosecution. These measures include the voluntary payment of a fine or the execution of non-remunerated work useful to society. It appears that, concerning prosecution of drug use, the number of legal cases against drug users is diminishing. One survey shows that only 10% of all persons arrested by the police for drug use are actually prosecuted,

waiving prosecution in the case of possession of small amounts of any drug into its Narcotic Act).²⁹⁶

With specific regard to cannabis, a *de facto* move away from criminalization is particularly evident. Here, the trend seems to be not only "depenalization", but rather "decriminalization" (i.e. removal of criminal sanctions). In fact, in addition to all those countries that have decriminalized possession of all drugs (including cannabis) for personal use (such as Italy,²⁹⁷ Spain,²⁹⁸ Portugal,²⁹⁹ the Czech Republic³⁰⁰,

and prison sentences just for drug use exist, but remain a minority. See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries>.

²⁹⁶ German law does not define narcotic drug consumption as such as a criminal offense. However, anyone who possesses narcotic drugs and does not have a written authorization for their acquisition, shall be considered to commit an offense pursuant to section 29 subs 1 of the Narcotics Act as shall be anyone who cultivates, produces, acquires, trades in narcotics or otherwise places them on the market without any official authorization. There is a scope of discretion in prosecuting personal use offenses that has been further extended since 1992. Since then, the public prosecutor may, on the strength of section 31a of the Narcotics Act, refrain from prosecution even without consent of the court if 1) he/she considers the offender's guilt to be minor, if 2) there is no public interest in the offense and 3) the narcotics were only intended for the offender's own use in small quantities. The decision by the Federal Constitutional Court of 9 March 1994 set new standards for the prosecution of personal use offenses. The Court affirmed that the penalty-enforced prohibition of cannabis is constitutional. It stated that, while the Narcotics Act did not infringe the principles of proportionality, of equality and personal freedom, the prosecution authorities of the Federal Laender should observe the "ban on excessive punishment" enshrined in the German Basic Law in case of minor offenses involving the personal use of cannabis; furthermore, it requested the Federal Laender to ensure a "basically uniform practice of application" and, as a rule, to refrain from prosecution if the conditions set out in section 31a of the Narcotics Act apply. With its decisions of 29 June 2004 (file no: Az: BVerfG, 2 BvL 8/02) and 30 June 2005 (Az: BVerfG, 2 BvR 1772/02), the Federal Constitutional Court reaffirmed its earlier decisions on criminal liability. In general, the meaning of "small quantity" of drug is still very controversial in Germany: there are federal guidelines to be followed by prosecutors but judges are not bound by the principles set in those guidelines when deciding the cases. See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries>.

²⁹⁷ See *infra*, chapter V, section 3.1.1.

²⁹⁸ In Spain, according to Law 17/1967, drug use and possession for personal use do not constitute a criminal offense. Nevertheless, in 1992 the Organic Law 1/1992 of 21 February on the Protection of Citizens' Security, currently in force, considered drug consumption in public – as well as illicit possession, even if not intended for trafficking - as a serious order offense punishable by administrative sanctions. Fines are the usual punishment ranging from €300 to €30 000. The law foresees that the execution of the fine can be suspended if the person freely attends an official drug treatment program, in accordance with the procedure regulated in the Royal Decree 1079/1993. See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries>.

²⁹⁹ See *infra*, chaoter V, section 3.2.1.

³⁰⁰ In the Czech Republic, drug use is not regarded as a criminal offense but only as an administrative offense. If anyone is caught with a small quantity of drugs (less than about 10 doses) on him/her without intention to supply, the police/prosecutors will deliver the case to the specialized local Police units that are competent to impose a non-criminal sanction to the offender (a fine or warning) under

Estonia³⁰¹, Latvia³⁰² and, more recently, Croatia³⁰³), Luxembourg and Belgium have effectively recently removed criminal sanctions for the possession for personal use of cannabis. In Luxembourg, in May 2001, personal possession of cannabis was newly established as a separate offence with a lesser punishment, incurring only a fine for the first offence, without aggravating circumstances. At the same time, maximum penalties for personal possession of all drugs other than cannabis were reduced from three years in prison to six months.³⁰⁴ A similar change took place in May 2003 in Belgium. The possession of a small amount of cannabis for personal use, without

the Act on Violations. Prosecutorial guidelines define the limit quantities. Since 1998 (Act No. 112/1998), possession of an amount "greater than small" is a criminal offense with the possibility of up to two years' imprisonment. (This quantification of amount "greater than small" is obligatory for police and public prosecutors but not for courts and the judicial practice requires expert opinions in order to make a decision, and the opinions are drawn up for both the quantity and the quality of the substance). From January 2010, however, the new Penal Code applied a lower maximum punishment for cannabis (one year in prison) than for other drugs (unchanged at two years) for personal possession of a quantity "greater than small" See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries> and <http://www.emcdda.europa.eu/online/annual-report/2011/policies-law/5>

³⁰¹ In Estonia, possession of a small amount of illicit drugs for personal use (except use of drugs in correctional institutions and arrest houses) is decriminalized since the new Penal Code entered into force in September 2002. For such an offense, criminal punishment (fine, custodial arrest or imprisonment) no longer exists, and the only sanctions available are administrative fines. These fines, however, include the so-called "administrative house-arrest" (for a maximum of 30 days). See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries>.

³⁰² In Latvia, drug use itself is not criminalized. Since 1 April 1999, when the new Criminal Law entered into force, administrative sanctions are applied for use of narcotic and psychotropic substances without medical prescription, or unauthorized acquisition and storage of small amounts of narcotic and psychotropic substances, according to the Code on Administrative Offenses, paragraph Nr 46. Usually the police start an administrative case according to this paragraph. Sanctions available, however, include not only a fine (max 75LVL, approximately €130) but also the so-called "administrative detention" (for a maximum of 15 days). The Cabinet of Ministers' "Regulations on Graduation of Narcotic and Psychotropic Substances and Medicines Being in Illicit Trafficking, per Quantity", passed on 19 September 2000, determines precisely the amount of drugs which is considered large enough to open a criminal investigation. If the amount found is less than this, it will be only an administrative offense. See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries>.

³⁰³ In Croatia, the Law on Combating Drugs Abuse prohibits unauthorized drug possession as an administrative offense, punishable by a fine from 140 to 14,000 euros. See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries>.

³⁰⁴ In Luxembourg, prior to Law of 27 April 2001, the illicit use of all nationally controlled substances was considered a criminal offense. The 2001 law decriminalized cannabis consumption (as well as transportation, possession and acquisition for personal use). This means that the use of cannabis continues to be regarded as an illicit activity but the punishment will no longer include criminal sanctions. In particular, a user of cannabis may be sentenced to pay a fine from 250 to 2,500 euros. Prison sentences from 8 days to 6 months remain applicable if cannabis use happens in front of minors, in schools or at the workplace. Also, penalties increase up to 2 years of imprisonment in case of adults using cannabis with minors and up to 5 years in case of medical doctors or pharmacists using cannabis in specific settings (e.g. prison, school, social services). Intermediary acts to the consumption of cannabis such as acquisition, transport and possession of personal use (small quantity) are decriminalized. For other drugs, possession, acquisition, and transport for personal use can lead to penalties of imprisonment between 8 days and 6 months and/or a fine. See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries>.

aggravating circumstances, was previously punishable by up to five years in prison, but it now attracts the lowest prosecution priority, leading to a police fine.³⁰⁵ The EMCDDA's 2007 annual report put it this way: "A general trend in Europe has been to move away from criminal justice responses to the possession and use of small amounts of cannabis and towards approaches oriented towards prevention or treatment".³⁰⁶

However, some developments in the most recent years, roughly from 2005 onward, seem to tip the balance back towards more restrictive measures against cannabis.³⁰⁷ International and European calls for awareness on the presumed cannabis leniency and the danger that such a "soft line" on cannabis could provoke were probably some of the factors that led to this move. The UN control system has taken a position on cannabis in several instances: the International Narcotics Control Board (INCB) has repeatedly raised objections to the way some EU countries deal with cannabis offences, in particular where personal use is concerned. For example, the Netherlands has often been criticized by the INCB for its "coffee shop" policy,³⁰⁸ and also

³⁰⁵ In Belgium, a Policy Note (programmatic policy document) was adopted by the federal government in January 2001. This note expressed the intention to modify the law in order to reduce the penalty for non-problematic use of cannabis. Since 2 June 2003, Belgian law punishes possession of up to 3 grams of cannabis or cannabis resin with a police fine of 75-125 euros. The same applies for possession of one cannabis plant in cultivation. Should the offender be found with cannabis again within one year, there will be a fine of 130-250 euros, and a third offense within a year of the second may result in imprisonment for 8 days - 1 month and a fine of 250-500 euros. Cannabis oil or cake cannot be interpreted as for personal use, no matter how small the amount. If there is an element of public nuisance, such as smoking in the presence of minors, near schools or army barracks, the penalty will be from 3 months to 1 year in prison and/or a fine of 5000 - 500 000 euros. If there is evidence of problematic use, the offender will be assigned a case manager by the prosecutor to receive appropriate therapeutic counseling. Belgian law punishes possession of drugs other than cannabis by imprisonment for between three months and five years, and/or a fine. The term of imprisonment may be increased to fifteen or even twenty years in the event of specified aggravating circumstances (drug offenses in relation to minors aged less than twelve, or committed in the course of a criminal organization such as manager of a criminal organization). Possession for personal use can give rise to a suspended sentence, either with a probation order or not. The practical application of the law, especially concerning drug use and possession, has been the object of revision by the Federal Ministry of Justice that issued two policy guidelines (in 1993 and 1998) in order to harmonize the practical enforcement of the law. See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries>.

³⁰⁶ EMCDDA, *Annual Report - The State of the Drugs Problem in Europe*, 2007, p. 12.

³⁰⁷ D. BALLOTTA-H. BERGERON-B. HUGHES, *Cannabis Control in Europe*, in *A Cannabis Reader: Global Issues and Local Experiences*, Monograph series 8, vol. 1, EMCDDA, Lisbon, 2008, 113.

³⁰⁸ The Netherlands, with its strategies of normalization of drug use and separation of the markets, represents a country with a relatively liberal drug policy. The expediency principle is applied in Dutch policy in the investigation and prosecution of Opium Act cases and is formalized in a prosecutor's guideline. The public prosecutor may decide not to institute prosecution proceedings if it is in the public interest. The possession of small quantities of drugs for personal use is accorded the lowest priority in the Opium Act guidelines. Anyone found in possession of less than 0.5 grams of hard drugs

Luxembourg, Portugal and the United Kingdom have been the object of scrutiny for their new laws on cannabis, allegedly because of their non-alignment with international drug control treaties.³⁰⁹ This message was again made clear in a chapter on "the new [high potency] cannabis" in the UN Office on Drugs and Crime (UNODC) World Drugs Report of 2006, which stated that "It is essential (...) that consensus be regained, and that what is truly a global issue is again approached with consistency on a global level. After all, it is for precisely this that the multilateral drug control system was designed".³¹⁰ Without suggesting a direct link, some acknowledgement may also be detected in the 2004 EU Council Resolution on cannabis,³¹¹ and increased scrutiny of cannabis in some EU countries. Thus, some countries have abandoned their strategy of leniency towards cannabis users and have introduced a raft of new measures directed against them. In Denmark, where since the 1970s people caught for possession of cannabis for personal use were just warned, a new directive of 2004 advises prosecutors that a fine should now be the norm and in 2007 this was established in the law.³¹² In Italy, where drug use was decriminalized in 1975 and ever since cannabis use and supply were treated more leniently than other drugs, a 2006 law eliminated the distinction between "hard" and "soft" drugs, on the assumption that all drugs are dangerous.³¹³ In France, in 2005, a new campaign was launched on the risks of cannabis for young people after the government turned down the possibility of substituting penal sanctions with administrative fines for cannabis consumption, adducing that such a modification could have been interpreted as recognition of the "weak dangerousness" of cannabis and could lead to an increase in consumption.³¹⁴ The situation in the UK is also of interest: in 2004 cannabis was made a class C drug, attracting significantly lower penalties than other illicit drugs. However, in 2009, this decision was reversed and cannabis was re-included in class

will generally not be prosecuted, though the police will confiscate the drugs and consult a care agency. See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries>

³⁰⁹ See INTERNATIONAL NARCOTICS CONTROL BOARD (INCB), *Annual Reports* 1999, p. 2001-2002.

³¹⁰ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC), *2006 World Drugs Report*, p. 186.

³¹¹ THE COUNCIL OF THE EUROPEAN UNION, *Council Resolution on Cannabis*, Brussels, 7 July 2004, 11267/04 CORDROGUE 59.

³¹² In Denmark, the main law regulating narcotic drugs offenses is the Euphoriant Act of 1955, with subsequent amendments. Pursuant to sections 1 and 2 of the Act, it is a criminal offense to import, export, sell, purchase, supply, receive, manufacture, process or possess euphoriant. In such cases special permission is required. The substances defined as Euphoriant under the Act are contained in 5 lists in an annex to an Executive Order issued pursuant to the Act. The Executive Order is regularly revised. See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries>

³¹³ See *infra*, section 3.1.1 of this chapter.

³¹⁴ See *Plan Gouvernemental de Lutte Contre les Drogues Illicites, le Tabac et l'Alcool 2004-2008*, available at www.drogues.gouv.fr.

B, which meant that users of cannabis would once again be subject to the same penalties as users of drugs such as amphetamines.³¹⁵

To conclude, there is sufficient evidence to confirm that the legal approach to personal use of drugs in general, and personal use of cannabis in particular, is far from homogeneous across the European countries. Nevertheless, depenalization (i.e. avoiding imprisonment) seems to be the trend for personal use of all drugs and decriminalization (i.e. avoiding criminal sanctions) seems to be the trend for personal use of cannabis, which can be applied more or less openly, through the law or through prosecution powers. However, there are some efforts to limit these trends in the most recent years. A rise in concern is visible at international and national level.³¹⁶ The UN system openly condemns "lenient policies" and recent policy shifts in some Member States suggest a renewed attention towards cannabis. Overall, it is interesting to note that while drug policies which appeared in the 1990s/early 2000s suggested a non-criminal approach to personal use of cannabis, more recent policies are moving back to using more restrictive measures.³¹⁷

³¹⁵ In the UK, the Misuse of Drugs Act 1971 (MDA) is the main law regulating drug control. In general, drug use or consumption is not in itself an offense under the MDA - it is the possession of the drug that constitutes an offense. However, article 9 of the MDA of 1971 does prohibit the smoking of opium, although prosecutions are rare, reflecting contemporary patterns of drug misuse. Article 5 of the MDA makes a distinction between possession of a controlled drug (art. 5.2) and possession of controlled drugs with intent to supply to another (art.5.3). Maximum penalties vary not only according to the class of substance but also whether the conviction is a "summary" one made at a Magistrates court or one made "on indictment" following trial at a Crown Court. Summary convictions for the unlawful possession of class A drugs such as heroin or cocaine involve penalties of up to 6 months imprisonment and/or a fine of up to £5 000 (€7,500); on indictment penalties may reach 7 years imprisonment and/or an unlimited fine. Class B drugs, e.g. cannabis or amphetamines, attract penalties at magistrates level of up to 3 months imprisonment and/or a fine of up to £2,500 (€3,800), on indictment up to 5 years imprisonment and/or an unlimited fine. Finally, possession of class C drugs, such as barbiturates, attracts softer penalties: up to 3 months imprisonment and/or a fine of up to £1,000 (€1,500) at magistrates level, or up to 2 years imprisonment and/or an unlimited fine on indictment. There are a number of alternative sanctions in addition to those listed above for having possession of a controlled drug. These may include an Informal warning; a Formal warning, where the person is officially warned not to commit the offense again to avoid stronger consequences (no entry being made in the criminal record although a local record may be retained); and a Caution, where an entry is made in the Police National Computer. See EMCDDA country profiles: <http://www.emcdda.europa.eu/countries>. For the evaluation of the UK Advisory Council on the Misuse of Drugs on cannabis, which recommended the UK Government in 2005 to maintain cannabis as a class C drug, see *infra*, conclusions.

³¹⁶ An alleged increase of THC content and increased demand for treatment with cannabis being the primary drug may have contributed to this concern, see L. KING, *Understanding Cannabis Potency and Monitoring Cannabis Products in Europe*, in *A cannabis reader: global issues and local experiences*, Monograph series 8, vol. 1, EMCDDA, Lisbon, 2008, 239-259.

³¹⁷ D. BALLOTTA-H. BERGERON-B. HUGHES, *Cannabis Control in Europe*, *supra* note 307.

This, we would like to add, is happening despite statistical data on cannabis, as we have seen, suggest the following: a historically high but now generally stable trend in use, particularly concentrated among the young population (with stable trends there as well, or even slightly decreasing), a significantly minor percentage of cannabis users who consumes the substance intensively (1%) and an already conspicuous use of law enforcement energies in this area.

3. Case study on drug decriminalization in Europe

This section aims: 1) to describe the Italian and Portuguese decriminalization reforms in the field of drugs, 2) to provide an overview of the criminal justice and health impacts of these reforms and 3) to discuss the significance of these reforms to the existing state of knowledge on drug decriminalization and prison overcrowding.

Italy and Portugal have been chosen as the focus of this study for two main reasons. First of all, because they reflect the tendency among some European countries to change drug policy direction in recent years. Italy has long been a country with a rather liberal national drug policy. Despite some "ups and downs" in the severity of the administrative sanctions against drug users, one of the characteristics of the Italian system since decriminalization is that cannabis users have always been treated relatively leniently in respect to others. Since 2006, however, Italy has abandoned this strategy of leniency towards cannabis users and has introduced a raft of new measures directed against them. Portugal, instead, introduced a radical new law in 2001 based firmly on the principle of harm reduction and decriminalization of possession of all drugs for personal use. Thus, Italy and Portugal evidence movement towards either more liberal or more repressive approaches to drug policy in Europe. Secondly, the cases of Italy and Portugal are particularly interesting to compare because both these countries have essentially enacted the same legal framework to deal with the issue of drug possession, i.e. "decriminalization". This study aims at highlighting how laws that are apparently similar, because both based on the decriminalization policy, can produce diametrically different results, depending on the importance given by those policies to some aspects such as prevention, treatment, social reintegration and harm reduction.

3.1. THE CASE OF ITALY - A FAIRLY UNSUCCESSFUL CASE

3.1.1. The Italian decriminalization reforms

Italy's position on the international drug policy scene is in some respects unique: Italy was the first country in the Western world, in contemporary times, to formally decriminalized personal use of all drugs.³¹⁸ This happened in 1975, when law 685/1975³¹⁹ decriminalized the holding for personal use of a "limited amount" of "any illegal drug". The key provision on personal use was found in Article 80, where the possession of a limited amount of psychoactive substances was established as "not punishable". The peculiar term "not punishable" is worth noting: it was meant to stress that drug use was still not "allowed", least of all "legalized". Nevertheless, drug use and addiction as such were considered a health problem, deserving treatment and/or education rather than punishment. Other countries, differently from Italy, tended at that time to change the previous policy of strict repression by adopting the decriminalization of only the use of "soft" drugs, or by the reduction of the sanctions for personal use of any drug, or by tacitly allowing the police to turn a blind eye to the use of drug and the holding of small amount of it for personal use. Thus, the Italian reform was much more explicit in this regard. The Italian 1975 law, moreover, while maintaining a tough policy against drug trafficking, introduced a differentiation between "soft" drugs (i.e. cannabis - Schedule II drugs) and "hard" drugs (i.e. heroin, cocaine, amphetamines - Schedule I drugs), providing much milder sanctions for the trafficking in the former. Also, one point worth mentioning is that no defined quantity for "personal use" was set in the law, so it was up to the judge to determine whether possession was intended for personal use or not, depending on an all-of-the-circumstances evaluation of the case. In sum, Italy adopted in 1975 a very liberal approach toward drug use in general and cannabis use in particular.

³¹⁸ L. M. SOLIVETTI, *Drug Use Criminalization v. Decriminalization: an Analysis in the Light of the Italian Experience*, 2001, available online at <http://w3.uniroma1.it/DCNAPS/solivetti/swissho.pdf#search=%22italy%20decriminalization%20drugs%22> (accessed 19 September 2013). The author provides a detailed analysis of the Italian decriminalization reforms and their impact from 1975 to 1998.

³¹⁹ Legge 22 dicembre 1975, n. 685, "Disciplina degli stupefacenti e sostanze psicotrope. Prevenzione, cura e riabilitazione dei relativi stati di tossicodipendenza" (GU n. 342 del 30-12-1975).

The 1975 law was effective until 1990. However, at the end of the 1980s the diffusion of drug use had reached high levels in Italy, by comparison with other European countries.³²⁰ The government of Bettino Craxi called for a prohibitionist shift, after the premier visited the United States (where the "Just Say No" slogan of Nancy Reagan was particularly popular). The shift also followed the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which established the possession of drugs for personal use as a criminal offence (although the issue of complying with this international treaty was hardly raised in the political debate). The Craxi government formulated a revision of the 1975 law, which was approved by the parliament in June 1990. Among its main innovations, there was the reintroduction of sanctions for the possession of drugs for personal use. The 1990 law (D.P.R. 309/90),³²¹ in fact, introduced a long list of *administrative* sanctions for those holding drugs for personal use (e.g. warning, withdrawal of passport, or of driving license, or in the case of a foreigner, suspension of the touristic residence permit). Also, the addict who failed to undertake treatment at a public or private structure was subject to heavier, though non-custodial, sanctions applied by the judiciary (terms of probation, community service, prohibition to leave the commune of residence without authorization, seizure of the vehicle used to carry drugs, obligation to report to the police station at least twice a week). And the same sanctions were applied to the addict repeatedly caught in possession of drugs. Ultimately, there was the *possibility for repeatedly recalcitrant addicts of a heavy fine or arrest up to 3 months*. Another important innovation of the 1990 law was the definition of a "daily average dose" to establish possession for personal use. The daily average doses were identified by the Health Ministry a few months after the new law became effective: 100 mg for heroin, 150 mg for cocaine, and 500 mg for cannabis. Finally, in an effort to avoid that users in possession of an amount of drug slightly above the threshold would be punished with the heavy sanctions provided for dealers³²², a new provision, for crimes of "minor relevance" (*lieve entità*) was also introduced. According to that provision,

³²⁰ L. M. SOLIVETTI, *Drug Use Criminalization v. Decriminalization: an Analysis in the Light of the Italian Experience*, *supra* note 318 at 34.

³²¹ Decreto del presidente della Repubblica 9 ottobre 1990, n. 309, also known as "Testo Unico delle norme in materia di disciplina degli stupefacenti e sostanze psicotrope, prevenzione, cura e riabilitazione dei relativi stati di tossicodipendenza". For a detailed analysis, in Italian, of the 1990 legislation and its most critical profiles, see F. BRICOLA-G. INSOLERA, *La Riforma della Legislazione Penale in Materia di Stupefacenti*, Padova, 1991.

³²² Sanctions for dealers were imprisonment from 8 to 20 years for substances in Schedule I, from 1 to 6 years for substances in Schedule II.

possession of amounts slightly above the threshold could be punished with penalties reduced by one third. But this had limited impact because the law also provided for the mandatory provisional arrest of people caught in possession of quantities above the threshold. In sum, the harsher administrative sanctions, with the possibility of custodial measures, for drug users (who went back to be considered as dangerous) and the introduction of the criterion of the "daily average dose" had a severe impact on the Italian criminal justice system, particularly in terms of the number of people imprisoned for drug law violations, while not affecting the upward trend in drug diffusion and in drug-related deaths.³²³ Thus, the effects of the 1990 Law seemed to largely anticipate and mimic the effects of the 2006 Law, which will be analyzed below.³²⁴

In April 1993, following a period of considerable criticism against the innovations of the 1990 law and its effect,³²⁵ a national referendum requested by the Radical Party led to the *abrogation of the prohibition of personal use of drugs* and the *abrogation of any provision of custodial measure or fine for the addict who failed to undertake treatment or who was repeatedly caught in possession of drug for personal use*. This meant that only the other non-custodial administrative measure would be available. Also, the referendum *abolished the criterion of a "daily average dose"* to establish possession for personal use, leaving it to judges to consider if the amount of drug, together with other circumstantial evidence, would be proof of the aim of personal use or the aim of dealing.

³²³ See L. M. SOLIVETTI, *Drug Use Criminalization v. Decriminalization: an Analysis in the Light of the Italian Experience*, *supra* note 318 at 41. See also G. ZUFFA 's article *How to Determine Personal Use in Drug Legislation - The "Threshold Controversy" in the Light of the Italian Experience*, in TRANSNATIONAL INSTITUTE, *Series on Legislative Reform of Drug Policies*, August 2011, p. 4, where the author claims that: "The indiscriminate criminalization led to a sharp rise in imprisonment. On December 31, 1990, 7,299 citizens charged with drug crimes were in jail (including addicts charged with drug or drug related crimes) By the end of June 1991, this had risen to 9,623 and to 14,818 by the end of 1992".

³²⁴ See *infra*, section 3.1.2. of this chapter.

³²⁵ On the symbolic value of Article 72 D.P.R. 309/90 prohibition of personal use (abrogated by the D.P.R. 171/93 following the referendum) see L. STORTONI, *La Legge sulla Droga, Profili Storici e Valutazioni di Politica Criminale*, in F. BRICOLA-G. INSOLERA, *La Riforma della Legislazione Penale in Materia di Stupefacenti*, Padova, 1991, 17. More in general, on the symbolic nature of the 1990 legislation, see A. MANNA, *Legislazione "Simbolica" e Diritto Penale: A Proposito della Recente Riforma Legislativa*, in F. BRICOLA-G. INSOLERA, *La Riforma della Legislazione Penale in Materia di Stupefacenti*, Padova, 1991, 19-58. Also, for a critical analysis of the 1990 legislation, see L. PEPINO, *Droga e Legge*, Milano, 1991.

About 10 years later, however, the Berlusconi government once again launched a renewed "tough on drugs" campaign. The vice-premier Gianfranco Fini, who was the leader of this campaign, speaking at a UN meeting in Vienna in 2002, on the international day against drugs, announced a government bill to address more harshly the problem of drug use. The bill, in particular, would upgrade cannabis on the schedules (eliminating the previous distinction between "soft" and "hard" drugs). Also, the bill would fill the legislative breach following the abrogation of the "daily average dose" as a boundary line between personal use and dealing. In Fini's opinion, in fact, the abrogation allowing judges to determine whether the drug found in possession of the defendant was for personal use or for dealing had given judges too many "discretionary powers": as a consequence, quantitative thresholds were to be restored in the form of "maximum quantity allowed", to be determined by the Ministry of Health.³²⁶ The so-called "Fini-Giovanardi bill" was approved by the parliament at the beginning of 2006.³²⁷

The "tough on drugs" approach of the 2006 reform is particularly relevant for our discussion. It can be summarized in the following terms, which represent the current state of the law in Italy in the field of drugs (D.P.R. 309/90, as amended by law 49/2006):³²⁸

- The criminal penalties set by Article 73 (production, dealing and possession of drugs above the "maximum quantity allowed") and Article 74 (criminal association for trafficking of drugs) of the D.P.R. 309/90 are now much more severe. They range from 6 to 20 years of imprisonment for all substances. While the 1990 law (previous Article 73/74 D.P.R. 309/90) provided for different penalties for production, dealing, trafficking and possession above the threshold depending on the

³²⁶ The maximum amounts were set as 500 mg (active psychoactive principle) for cannabis; 250 mg for heroin; 750 mg for cocaine.

³²⁷ Legge 21 febbraio 2006 n. 49. For an analysis, in Italian, of the 2006 reform see, among many others, V. MANNA, *Il Commento*, in *Dir. pen. e proc.*, 2006, 829 ff; V. MANES, *La Riforma della Disciplina Penale*, in G. INSOLERA (ed.), *La Riforma della Legislazione Penale in Materia di Stupefacenti*, Padova, 2006, 115 ff; C. RUGA RIVA, *La Nuova Legge Sulla Droga: Una Legge "Stupefacente" in Nome della Sicurezza Pubblica*, in *Riv. it. dir. proc. pen.*, 2006, 234 ff.

³²⁸ For the most relevant provisions on Italian drug legislation, as amended by the 2006 reform, see *Testo Unico sulla Droga, Titolo VIII - Della Repressione delle Attività Illecite* (artt. 72-103), available at http://www.interno.gov.it/mininterno/site/it/sezioni/servizi/legislazione/droga/Testo_unico_sulla_droga.html

Schedules (from 1 to 6 years for cannabis in Schedule II; from 8 to 20 years for “hard drugs” in Schedule I), the 2006 law (current Article 73/74 D.P.R. 309/90) now sets the same penalties for all substances (6 to 20 years). Several criminal law scholars in Italy have argued that these penalties infringe on the constitutional principle of proportionality and should be reassessed.³²⁹

- Cannabis has been upgraded to Schedule I. This means that there has been a substantial rise in criminal penalties for production, dealing, trafficking and possession of cannabis above the threshold (from the previous range of 1 to 6 years imprisonment to the current range of 6 to 20 years imprisonment: what used to be the maximum penalty for cannabis sale is now the minimum penalty). One point to be noted with regard to the threshold is that it has different wording from the "daily average dose" in the 1990 law. The "daily average dose" still made reference to the amount, which presumably would be consumed by the addict in 24 hours. In other words, there was a sort of subjective reference, which allowed some (though small) flexibility in the interpretation of the norms. This subjective reference is totally absent in the "maximum quantity allowed". As a result, the person found in possession of an amount of substance above the threshold will be a "virtual" dealer.³³⁰

- Harsher administrative sanctions may now be imposed for possession for personal use of all drugs, including cannabis. The previous administrative sanctions for personal possession were provided by Article 75 of the 1990 law, as amended by the 1993 referendum. They included warning, withdrawal of passport, or of driving

³²⁹ See, among others, C. RUGA RIVA, *Droga e Immigrazione: il Diritto Penale Ingiusto, i suoi Giudici e i suoi Studiosi*, in *Critica del diritto*, 2006, 222. More in general, and for a list of Italian sources on the constitutional screening of criminal penalties, see S. CORBETTA, *La cornice editale della pena e il sindacato di legittimità costituzionale*, in *Riv. it. dir e proc. pen.*, 1997, 134 ff.

³³⁰ L. PEPINO, *Delinquenti virtuali. Le tabelle della Fini Giovanardi*, in *Fuoriluogo*, 2006, p. 8, available at <http://www.fuoriluogo.it/sito/home/archivio/arretrati/2006/aprile/delinquenti-virtuali> (accessed 30 September 2013). See, however, C. RUGA RIVA, *Droga: Il Superamento dei Limiti Tabellari Non Costituisce Prova della Finalità di Spaccio*, in *Corriere del Merito*, 2007, 1173 ff. The author claims that possession of a greater amount of drug than the "maximum quantity allowed" should have, according to an interpretation of art. 73 paragraph 1-bis that is in line with the Italian Constitution, only limited procedural consequences. It should not establish a *de iure* nor a rebuttable presumption of "intent to sell". Rather, it should be a so-called *indice probatorio* of "intent to sell", which imposes a duty on the judge to give a specific motivation in case he/she decides that the drug is not "for sale" in the specific case at issue (and viceversa, if he/she decides that the drug is "for sale" despite being the amount of drug possessed inferior to the "maximum quantity allowed"). The author explains that this is the only interpretation of art. 73 paragraph 1-bis that does not conflict with the principle of "independent evaluation by the judge" (*libero convincimento del giudice*) and with the constitutional principles enshrined in art. 13 paragraph 2 of the Italian Constitution (e.g. presumption of innocence).

license, or in the case of a foreigner, suspension of the touristic residence permit. According to the new Article 75 and Article 75-bis, sanctions for possession for personal use (below the threshold) now include prohibition to leave the place of residence during some hours, a prohibition to drive cars and mandatory checking in at local police stations at least twice a week. Also, these measures may be enforced for longer periods.³³¹ More importantly, therapeutic programs are no longer alternative to administrative sanctions but are provided in addition to them.

- As to the penalties for drug crimes of "minor relevance" (*lieve entità*), paragraph 5 of Article 73 of the 2006 law still maintains the provisions of the 1990 law for less severe penalties in case the person is found in possession of quantities slightly above the "maximum quantity allowed", with penalties ranging from 1 to 6 years of imprisonment. Nevertheless, this is not a specific provision, but only a mitigating circumstance. For quantities above the threshold, the charge always refers to Article 73 as a whole (and the mitigating circumstance would be taken into account by the judge only in the final verdict). Thus, people caught in possession of quantities above the threshold are more likely to be subjected to provisional arrest than they would be if paragraph 5 of Article 73 were a specific provision. Furthermore the mitigating circumstance may not be applied in the presence of aggravating circumstances, such as recidivism. For example, a person found in possession even of limited amounts above the threshold may be sentenced to the full sanction of six years in prison.

- With the aim of mitigating the impact of harsher penalties, drug addicts sentenced to less than 6 years imprisonment (or with 6 years remaining in prison) may now be sent to alternative therapeutic programmes (the limit was 4 years in the previous legislation).³³² Also, according to paragraph 5-bis Article 73, drug addicts sentenced for drug crimes of "minor relevance" may now be sent to community service (*lavoro di pubblica utilità*), rather than prison.³³³

³³¹ For the full Italian text of Article 75 and Article 75-bis Testo Unico, *supra* note 328.

³³² According to Article 656 c.p.p.: "Se la pena detentiva, anche se costituente residuo di maggiore pena, non è superiore a tre anni o sei anni nei casi di cui agli articoli 90 e 94 del testo unico approvato con decreto del Presidente della Repubblica 9 ottobre 1990, n. 309, e successive modificazioni, il pubblico ministero, salvo quanto previsto dai commi 7 e 9, ne sospende l'esecuzione".

³³³ In 2013, with L. 9 August 2013, n. 94, a new paragraph was also added to art. 73 in an effort to further limit the incarceration of drug addicts. However, amendments that were made to the original version of this provision during the conversion into law of the law decree 78/2013 largely reduced its application. According to the newly introduced paragraph 5-ter, community service, which was already

One final point should be stressed. The constitutionality of both the tightening of sanctions for "soft drugs" (in relation to the proportionality principle and the *principio di offensività*, being now "soft drugs" and "hard drugs" treated in the same way as to criminal penalties) and the parliamentary procedure through which this tightening of sanctions occurred (i.e. the adoption of alleged "unnecessary and unrelated" measures in the context of a decree law³³⁴ that was originally adopted to face public security's threat during the Turin Olympics) have been the subject of harsh debate in Italy, and they are currently under the scrutiny of the Italian *Corte Costituzionale*.³³⁵

listed by art 73 paragraph 5-bis as an alternative sanction to incarceration for drug addicts that committed art. 73 drug crimes (i.e. production, dealing and possession of drugs above the "maximum quantity allowed") when of "minor level" (*lieve entità*), has now been extended as an available alternative to incarceration for any drug-related crimes committed by drug addicts (with some exceptions as to major crimes), when the sentence is less than one year imprisonment and when the drug-related crime has been committed only once. Scholars have criticized these limited conditions of applicability: see, for a brief comment, A. DELLA BELLA, *Convertito in Legge il Decreto Carceri 78/2003: Un Primo Timido Passo per Sconfiggere il Sovraffollamento*, 2013, available at <http://www.penalecontemporaneo.it> (accessed 30 October 2013).

³³⁴ Decreto legge 30 dicembre 2005, n. 272.

³³⁵ The Italian *Corte di Cassazione* has raised the issue of the unconstitutionality of the *Fini-Giovanardi* legislation in relation to the points that have been mentioned (Cass., Sez. III pen., ord. 9 maggio 2013). The issue originated from the case of a defendant, Maniscalco Vincenzo, who was convicted by the Trento Court of Appeal for drug trafficking under art. 73 D.P.R. 309/90. The defendant was sentenced to 4 years in prison and a 20,000-euro fine for possession of 3,860 kg hashish. The decision by the Italian *Corte di Cassazione*, which on 9 May 2013 suspended its judgment waiting for the decision of the *Corte Costituzionale*, is available at www.penalecontemporaneo.it (accessed 30 September 2013): "La terza sezione della Cassazione ha sollevato questione di legittimità costituzionale: 1) dell'art. 4-bis d.l. 272/2005, introdotto in sede di conversione dalla legge n. 49/2006, nella parte in cui ha modificato l'art. 73 t.u. stup. (d.P.R. 309/1990), segnatamente nella parte in cui, sostituendo i commi 1 e 4 di tale norma, ha parificato ai fini sanzionatori le sostanze stupefacenti previste dalle tabelle II e IV previste dal previgente art. 14 a quelle di cui alle tabelle I e III, elevando conseguentemente le relative sanzioni dalla pena della reclusione da due a sei anni e della multa da euro 5.164 a euro 77.468 alla pena della reclusione da sei a venti anni e della multa da euro 26.000 a euro 260.000; e 2) dell'art. 4-vicies-ter comma 2, lett. a) e comma 3 lett. a) n. 6 del medesimo decreto legge, nella parte in cui sostituisce gli artt. 13 e 14 del d.P.R. 309/1990, unificando le tabelle che identificano le sostanze stupefacenti, e in particolare includendo la cannabis e i suoi derivati nella prima di tali tabelle. La Cassazione assume, in proposito, la rilevanza e la non manifesta infondatezza della questione, sotto il profilo della contrarietà delle norme impugnate all'art. 77 co. 2 Cost.". For an analysis, in Italian, of the arguments that support the unconstitutionality of the 2006 reform (also with regard to the uniform penalties that have been set for "hard drugs" and "soft drugs"), see: L. SARACENI, *Perché la Legge Fini-Giovanardi è Incostituzionale*, in *4 Libro Bianco sulla Legge Fini-Giovanardi*, 2013, p. 23 available at <http://www.fuoriluogo.it/blog/2013/06/25/on-line-il-4-libro-bianco-sulla-fini-giovanardi/> (accessed 30 September 2013). For an analysis of similar issues raised by the Court of Appeal of Rome in a previous case (Corte d'appello di Roma, Sez. III, ord. 28 gennaio 2013), see: L. ROMANO, *Art. 73 del d.P.R. n. 309 del 1990: la Parola alla Corte Costituzionale*, in *Dir. pen. cont.*, 28 maggio 2013 (accessed 20 November 2013). The issues raised by both the *Corte di Cassazione* and, previously, the Court of Appeal of Rome, are currently pending in front of the Italian Constitutional Court. If the Court decides to deal with the merit of the concerns that have been raised in relation to the severity of criminal sanctions for "soft drugs", the decision may have important consequences. See *infra* conclusions of this thesis.

3.1.2 Evaluating the Effects of the 2006 Reform (2006-2013)

In 2009, a study was carried out by Forum Droghe, an Italian NGO, and by the Fondazione Michelucci to evaluate the 2006 law and its impact on imprisonment and the use of therapeutic programs.³³⁶ The study, while focusing on an in-depth analysis of the four main prisons in the region of Tuscany, also offered an overview of the national situation from 2006 to 2008. In 2011, Grazia Zuffa updated to 2010 the results of this study.³³⁷ Below, we provide a list of the main effects of the 2006 reform, as they have been identified in the above-mentioned studies, which we updated, when possible, to 2012. In order to update the results of these studies to 2012, we adopted the information provided in the 2013 article by Grazia Zuffa, "Sette anni di Applicazione della Legge Antidroga (2006-2012): Uno Sguardo d'Insieme sugli Effetti Penali e Sanzionatori".³³⁸

1) Increase in anti-drug police operations. In 2006, 20,775 anti-drug police operations were reported; this rose to 22,064, in 2010 and 22,748 in 2012, with a top figure of 23,262 in 2009 (the highest in the last ten years).

2) Despite drug seizures being generally stable, increase in cannabis seizures (with a peak in 2012). The amount of drug seizures in the period 2006-2010 appeared to be generally stable, around 32,000 kilos per year, apart from a boom of 42,740 kilos in 2008. In 2011, overall seizures increased to 39,000 kilos, and in 2012 there was a boom of 50,156 kilos overall seizures. It is worth noting, though, that cannabis seizures make up by far the majority of overall seizures and have increased in numbers and proportion. In 2006, cannabis seizures equaled 24,672 kilos (74% of overall drug seizures); in 2009, 28,400 kilos (83,2%); in 2010, 25,487 kilos (82,2%). In 2012, there were more than 40,000 kilos of cannabis seizures out of the overall number of seizures (50,156 kilos, +308.85% with respect to 2011): the quantity of

³³⁶ The study is available, in Italian, at <http://www.michelucci.it/node/155> (accessed on 30 October 2013).

³³⁷ G. ZUFFA, *How to Determine Personal Use in Drug Legislation - The "Threshold Controversy" in the Light of the Italian Experience*, *supra* note 323.

³³⁸ G. ZUFFA, *Sette anni di Applicazione della Legge Antidroga (2006-2012): Uno Sguardo d'Insieme sugli Effetti Penali e Sanzionatori*, in *4 Libro Bianco sulla Legge Fini-Giovanardi*, 2013, available at <http://www.fuoriluogo.it/blog/2013/06/25/on-line-il-4-libro-bianco-sulla-fini-giovanardi/> (accessed 30 September 2013).

marijuana seizures almost doubled (+96.73% with respect to 2011) and there was a significant increase in the number of cannabis plants.³³⁹ Thus, **cannabis seizures have more than doubled since 2006.**

3) Increase in drug law offences, particularly for cannabis. As to the offences reported by the police for violation of Article 73 (production, dealing, possession above the threshold) and Article 74 (criminal association for trafficking) of the drug legislation, they rose from 33,056 in 2006 to 35,427 in 2008, to 36,458 in 2009 and 39,053 in 2010. With regard to the different substances, **most police activity for violation of Article 73/74 is against cannabis offenders and has steadily increased** (12,805 cannabis offences in 2008, 13,344 in 2009, 16,030 in 2010). Also, as to the offences against Article 75 (possession of drugs for personal use) of the drug legislation, **78,56% of the 2012 reports by the police to the public office in charge of applying the administrative sanctions (*Prefettura*) for violation of Article 75 concerned cannabis.**³⁴⁰

4) Increase in the yearly imprisonment rate for violation of Article 73 (production, dealing and possession of drugs above the threshold) In the period 2006-2012 there has been an increase in the proportion of people who are imprisoned each year, i.e. entered prison, for violation of Article 73. In yearend 2006, 25,399 people were imprisoned out of an overall of 90,774, i.e. 28,03%. This rose to 29,84% in 2007, 31,10% in 2008, 32,21% in 2009, 30,88% in 2010, 31,76% in 2011 and reached the peak of 32,47% in 2012. Thus, **one detainee out of three is imprisoned each year for violation of Article 73.**³⁴¹

5) Increase in the number of detainees who were in prison each year for violation of Article 73 (production, dealing and possession of drugs above the threshold) out of the total number of detainees. On December 31 2006, 14,640 people were in

³³⁹ In 2012, with respect to the previous year, increases of seizures of heroin (+17.27%), hashish (+7.70%), marijuana (+96.73%), amphetamines in doses (+26.52%), LSD (+13.99%) and of the number of cannabis plants were recorded, totaling a remarkable increase of 308.85%. See ITALIAN MINISTRY OF HOME AFFAIRS, DIREZIONE CENTRALE PER I SERVIZI ANTIDROGA, *2012 Annual Report*, available, in English, at <http://www.poliziadistato.it/articolo/view/29541/>

³⁴⁰ This increased from 73% in 2009 and 74% in 2010 to the most recent percentage of 78,56% in 2012. See G. ZUFFA, *Sette anni di Applicazione della Legge Antidroga*, *supra* note 338.

³⁴¹ *Ibidem*.

jail for violation of Article 73 (37.53%). This rose to 37,42% in 2007, 39,10% in 2008, 40,21% in 2009, 40,16% in 2010, then decreased to 39,70% in 2011 and 38,26% in 2012 (i.e. 25,269 people). Overall, and to have a better understanding of the impact of the 2006 reform on the problem of **prison overcrowding, with particular regard to the incarceration of users³⁴²/small dealers**, we should note that **detainees for violation of Article 73 have almost doubled from 2006 to 2012**: they went from 14,640 by yearend 2006 to 25,269 by yearend 2012. By contrast, people in prison by yearend 2012 for violation of Article 74 (criminal association for trafficking in drugs) were much less, 761.

6) Increase in the yearly imprisonment rate of drug addicts. In 2006, 24,637 addicts were imprisoned, i.e. entered prison (27,16% of the overall figure). The number rose to 29,52 (33%) in 2008, the highest figure since 2001, and then decreased in the following years and stabilized to 18,225 (28,92%) in 2012. Thus, **around one out of three detainees who enter prison each year is a drug addict.**³⁴³

7) Increase in the proportion of drug addicts in prison. In relation to the number of drug addicts in prison, in 2006 all prisoners benefited from a pardon law so interpretation of statistics may result complicated. A large number of drug offenders were released from jail, which may explain the sharp decrease in the number of addicts in prison: they went from 16,145 (26,4%) before the pardon law to half that figure after the pardon law, i.e. 8,363 (21,44%). However, this decrease last very short: already in 2007 the number of addicts in prison had risen back to 13,424 (27,57%) and this number stabilized to 23,84% in 2012. Thus, **around one out of four detainees who are in prison is an addict.**³⁴⁴

8) Steady increase in the application of administrative sanctions for personal use and dramatic drop in the use of therapeutic programs (*programmi terapeutici*) by sanctioned users. In 2006, before the reform, 7,229 administrative sanctions were applied. They increased to 16,205 in 2012.³⁴⁵ While the **number of sanctions more**

³⁴² who are found in possession of more drugs than the "maximum quantity allowed".

³⁴³ G. ZUFFA, *Sette anni di Applicazione della Legge Antidroga*, *supra* note 338.

³⁴⁴ *Ibidem*.

³⁴⁵ ITALIAN MINISTRY FOR HOME AFFAIRS, *Analisi dei Mutamenti del Consumo tra le Persone Segnalate ai Prefetti per uso Personale di Sostanze Stupefacenti dal 1991 al 2006* (updated to 2012).

than doubled from 2006 to 2012, in the same period there was a dramatic drop in use of therapeutic programs by sanctioned users, **from 6,713 therapeutic programs in 2006 to 340 in 2012**. As it was previously noted, therapeutic programs after the reform are no longer alternative to administrative sanctions but are provided *in addition* to them. The choice to participate in the programs does not, as it used to, suspend the application of the administrative sanctions. Thus, users who are invited to participate in the programs according to Article 75 may have no real incentive to attend them, because they appear to them simply as an additional burden, almost a punitive measure against them.³⁴⁶

9) Decrease in the use of therapeutic programs (*affidamento in prova*) as alternatives to imprisonment. In the years 2006-2012 there was an overall decrease in the use of therapeutic programs as alternative sanctions to imprisonment. This happened despite the milder provisions in the 2006 law in favor of alternatives to incarceration (i.e. the possibility to use alternative therapeutic programs for drug addicts sentenced to less than 6 years imprisonment, instead than sentenced to less than 4 years imprisonment).³⁴⁷ As Grazia Zuffa notes, it is difficult to analyze the trend, because in 2006 all prisoners benefited from a pardon law of three years: a large number of drug offenders were released from jail, which may explain the sharp decrease of participants in alternative programs to prison. On 1 January 2006, 3,852 drug offenders (diagnosed as addicts) were in a therapeutic program. This dropped to 708 after the pardon law. Thereafter the figure started slowly to increase, but did not reach the rate that preceded the pardon law: on 1 January 2012, the figure had only risen to 2,777. More importantly, there has been a significant decrease in the number of addicts directly sentenced to therapeutic programs (without spending any time in jail). In 2006, out of the 3,852 drug offenders that entered therapeutic programs 2,901 were directly sentenced to therapeutic programs, without having spent any time in jail. To the contrary, in 2012 **out of the 2,777 drug offenders that entered therapeutic programs, the great majority, 1,811 people, was released and sent to alternative treatments after having previously spent some time in jail**. This is a major change in trends, as addicts directly sentenced to alternative programs have

³⁴⁶ G. ZUFFA, *Sette anni di Applicazione della Legge Antidroga*, supra note 338.

³⁴⁷ Article 656 c.p.p., see G. ZUFFA, *Sette anni di Applicazione della Legge Antidroga*, supra note 338.

consistently outnumbered people released from prison since the 1990s.³⁴⁸ And it **further exacerbates the problem of prison overcrowding.**

In short, these figures show the striking impact of the 2006 drug legislation on: (a) the law enforcement system - in terms of increased anti-drug police operations and drug seizures; and (b) the criminal justice and prison systems - in terms of increased rates of imprisonment for drug crimes, particularly for small dealers/users, and imprisonment of addicts.

Notably, there is a strong argument that minor drug crimes may be the target of law enforcement. One important point that was made by Grazia Zuffa, in fact, is that **there is a lack of official data on the number of crimes of "minor relevance" in relation to the overall number of drug-related offences.** Data on this would allow an assessment of whether law enforcement is focused on major or minor drug crimes. Also, a large prevalence of these crimes may indicate a disproportionate punishment of drug possession for personal use, due to the inflexibility of the threshold (the so-called criminalization of users as dealers)³⁴⁹. Grazia Zuffa points to the in-depth qualitative research in Tuscany as a valuable effort to fill the void. Notably, what emerges from that study is that, **in the Florence prison of Sollicciano, the rate of prisoners (sentenced or charged) for drug crimes of "minor relevance" made up 40% of the overall drug crimes, suggesting that law enforcement is mainly focused on punishment of users/small dealers.**³⁵⁰

³⁴⁸ For a detailed analysis, in Italian, of the decrease in use of alternative measures to imprisonment for addicts, see A. SCANDURRA, *Le Misure Alternative e la Legge sulle Droghe*, in *4 Libro Bianco sulla Legge Fini-Giovanardi*, 2013, available at <http://www.fuoriluogo.it/blog/2013/06/25/on-line-il-4-libro-bianco-sulla-fini-giovanardi/> (accessed 15 October 2013).

³⁴⁹ The main reason for possessing amounts of drugs above the threshold is that many users may prefer to buy larger quantities of drugs, simply to avoid too frequent contact with the illegal market.

³⁵⁰ G. ZUFFA, *How to Determine Personal Use in Drug Legislation - The "Threshold Controversy" in the Light of the Italian Experience*, *supra* note 323 at 8. As Grazia Zuffa notes, the researchers of the study in the region of Tuscany stress that this rate is probably underestimated, as the mitigating circumstance of "minor relevance" can only be acknowledged for sentenced prisoners, while for prisoners in provisional arrest the records only mention the charges for Article 73. Moreover, the study found that the rates of imprisonment for drug crimes were higher in Tuscany than the average figures in Italy: for example, in the Florence prison (Sollicciano), in 2008, of a total figure of 777 people entering prison, the rate of people imprisoned for drug crimes was 43%, while the rate of addicts (imprisoned for drug or drug related crimes) was as high as 61.4%. Similar rates could probably be found in many other big cities, such as Turin, Milan, Bologna.

Also, these figures show the unintended consequences of a punishment-oriented approach for the health of those people who make use of drugs. In fact, (c) the rise in sanctions for personal use of drugs and (d) the dramatic drop in therapeutic programs for sanctioned users are evidence that less people (who might have needed them) benefited from treatment programs.

A lesson may be learnt from the decrease in the number of addicts directly sentenced to therapeutic programs in alternative to prison (without spending any time in jail): the milder provisions in the 2006 law in favor of alternatives to incarceration (i.e. the possibility to use alternative therapeutic programs for drug addicts sentenced to less than 6 years imprisonment, instead than sentenced to less than 4 years imprisonment) have been totally ineffective. This probably happened because they were not consistent with the overall "tough on drugs" approach of the reform, so they were not able to counteract the rise in imprisonment due to the higher penalties and the harsher law enforcement.³⁵¹

With specific regard to cannabis, the upgrading of cannabis on the schedules and the related emphasis on the "cannabis threat" seem to have led to an **indiscriminate enforcement and punishment of cannabis-related offences**, evidenced by the overwhelming rise in police operations and seizures of this substance and in the notable increase in cannabis offences (both criminal and administrative).³⁵² To this, we would like to add an important consideration. As is was shown in this chapter, Italy is among the highest prevalence countries for lifetime use, last year use and last month use of cannabis.³⁵³ **The harsher measures of the 2006 drug legislation did not lead to a decrease in drug use, cannabis in particular.** To the contrary, as it is evidences by the tables below, the upward trends in prevalence use among the population were confirmed for all indicators of cannabis use after the enactment of the new law. Thus, if the effectiveness of this "tough on drug" policy - primarily directed

³⁵¹ G. ZUFFA, *How to Determine Personal Use in Drug Legislation - The "Threshold Controversy" in the Light of the Italian Experience*, *supra* note 323 at 8.

³⁵² *Ibidem*.

³⁵³ *Supra* section 1.1.

against cannabis users - was to be measured by prevalence of cannabis use amongst the population, it could fairly be said that the policy was not a success.³⁵⁴

Table 1 Lifetime prevalence of cannabis use among all adults (aged 15 to 64 years old) in nationwide surveys among the general population - Italy

Lifetime prevalence	2001	15-44	21.9%
Lifetime prevalence	2003	15-54	22.4%
Lifetime prevalence	2005	15-64	29.3%
Lifetime prevalence	2008	15-64	32.0%

Table GPS-3. Last year prevalence of cannabis use among all adults (aged 15 to 64 years old) in nationwide surveys among the general population - Italy

Last 12 months prevalence	2001	15-44	6.2%
Last 12 months prevalence	2003	15-54	7.1%
Last 12 months prevalence	2005	15-64	11.2%
Last 12 months prevalence	2008	15-64	14.3%

Table GPS-5. Last month prevalence of cannabis use among all adults (aged 15 to 64 years old) in nationwide surveys among the general population - Italy

Last month prevalence	2001	15-44	4.4%
Last month prevalence	2003	15-54	4.6%
Last month prevalence	2005	15-64	5.8%
Last month prevalence	2008	15-64	7.2%

³⁵⁴ Data are taken from the *Annual Statistical Bulletins* of the EMCDDA, available at <http://www.emcdda.europa.eu/stats/archive>. Significant differences in the methodology of the most recent surveys conducted in Italy make them not comparable with previous surveys, and this is why we decided not include those data in our analysis. In the words of the EMCDDA, "the most recent general population survey reported by Italy (i.e. 2012 data) display a wide variation in results compared with the previous surveys, which may reflect methodological differences. The data is provided for information, but given the lack of comparability between surveys, they should be treated with caution". See, for example, note 4 at <http://www.emcdda.europa.eu/stats13#display:/stats13/gpstab1b>.

One final point should be emphasized: several NGOs³⁵⁵ note that the more punitive measures that were introduced in 2006 are at odds with the more recent European strategy towards drugs. This strategy, in fact, currently focuses on the four pillars of "prevention", "treatment", "social reintegration" and "harm reduction" rather than on criminal punishment.³⁵⁶ Italy has only in the very last years adopted two new national drug policy documents. The national plan of action 2010–2013,³⁵⁷ in particular, developed after the 5th National Conference on Drugs, now covers two main areas (demand and supply reduction) and five specific pillars: prevention; treatment and prevention of the related pathologies; rehabilitation and reintegration; evaluation and monitoring; and legislation (counter narcotics/crime). Ironically, this plan was introduced by Carlo Giovanardi, who was one of the two main supporters of the 2006 drug reform together with Gianfranco Fini. It will be interesting to see the impact of this national plan at the end of the trimester 2010-2013. However, it can safely be predicted that if more profound legislative measures on drug regulation are not adopted (such as the reintroduction of a distinction between cannabis and other more harmful drugs) the impact of the Fini-Giovanardi reform on prison overcrowding in Italy is not likely to be reduced in any appreciable way.

3.2. THE CASE OF PORTUGAL - A FAIRLY SUCCESSFUL CASE

3.2.1. The Portuguese decriminalization reform

Portugal, differently from Italy, provides an example of a country that has, in terms of illegal drug policy, relatively recently made a bold move from a rather central position along the liberal-repressive continuum to a much more liberal one.³⁵⁸ In July 2001, a radically new law (Law 30/ 2000) went into effect that removed criminal sanctions from the personal use and possession of all illegal drugs. The law was part of a structured national plan to reduce health problems associated with drug use

³⁵⁵ See e.g. *4 Libro Bianco sulla Legge Fini-Giovanardi*, 2013, available at <http://www.fuoriluogo.it/blog/2013/06/25/on-line-il-4-libro-bianco-sulla-fini-giovanardi/> (accessed 30 September 2013), p. 18.

³⁵⁶ EMCDDA, *Annual Report - The State of the Drugs Problem in Europe*, supra note 268, p. 28-37.

³⁵⁷ Piano di Azione Nazionale Antidroga 2010–2013, available at http://www.interno.gov.it/mininterno/export/sites/default/it/sezioni/sala_stampa/documenti/droga/0093_2011_02_28_Piano_nazionale_antidroga_2010-2013.html_8783074.html.

³⁵⁸ C. CHATWIN, *Drug Policy Harmonization and the European Union*, Basingstoke, 2011, p. 130.

(heroin in particular), and it was enacted in the framework of an increasing emphasis on treatment and harm reduction principles.

The 2001 reform can be summarized in the following terms, which represent the current state of the law in Portugal in the field of drugs:

- Drug use and possession for personal use are now merely administrative offences. According to Article 2(1) of Law 30/2000: "The consumption, acquisition and possession for one's own consumption of plants, substances or preparations" of illicit drugs "constitute an administrative offence". Previously, these forms of conduct were criminal offences punishable with up to 1 year's imprisonment (Decree Law 15/93).³⁵⁹ The 2001 reforms applies to use and possession for personal use of all illicit drugs, but it is restricted, according to Article 2(2), to the threshold of "the quantity required for an average individual consumption during a period of 10 days".³⁶⁰

- Central to the 2001 reform is the role of the Commissions for the Dissuasion of Drug Addiction (CDTs), which are in charge of sanctioning drug users. The CDTs are regional panels made up of three people, including a lawyer, a social workers and a medical professional. If individuals are found in possession of modest amounts of drugs for personal use, the drug will be confiscated and the case referred by the police to the CDTs, who then discuss with the individuals the motivations for and circumstances surrounding their offence and are able to provide a range of sanctions, including community service, fines, suspensions on professional licenses and bans on attending designated places. However, their primary aim is to dissuade drug use and to encourage dependent drug users into treatment. Towards this end, they determine whether individuals are dependent or not. For dependent users, they can recommend that a person enters a treatment or education program instead of receiving a sanction. For non-dependent users, they can order a provisional suspension of proceedings, attendance at a police station, psychological or educational service, or impose a fine. The panel members of the CDTs are supported by staff employed by the Instituto da

³⁵⁹ In practice, it was rare that people were imprisoned for drug use/possession alone, but criminal convictions were the norm.

³⁶⁰ This amounts, in practice, to 0.1 g heroin, 0.1 g ecstasy, 0.1 g amphetamines, 0.2 g cocaine or 2.5 g cannabis.

Droga e da Toxicodependencia (IDT - Institute for Drugs and Drug Addiction), which is the central government agency on drugs.

- Individuals found with more than the quantity allowed for personal use will be charged and referred to the courts, where they may face charges for trafficking or trafficking/consumption (where the offender is found in possession of more than the consumer amount, but deemed to have obtained the plants, substances or preparations for personal use only).

- Despite the drastic changes to the treatment of drug users in Portugal, hefty sanctions are still in place against drug dealers and traffickers.

3.2.2. Evaluating the Effects of the 2001 Reform (2001-2009)

The Portuguese reform has been in force for more than 12 years and there have since been several studies to evaluate its effect. We will hereby analyze the most influential ones.

The report published by Greenwald for the think-tank Cato Institute in 2009 is one of the most quoted studies on the impact of drug decriminalization in Portugal.³⁶¹ Despite the criticism that this report has received from some conservative commentators in Portugal, allegedly due to its overstatements and lack of conclusive evidence,³⁶² several commentators have used it as the primary base for claiming the success of the Portuguese reform in tackling the problem of drug use. Thus, its findings are certainly worth reporting. In its analysis, Greenwald claims that the change in law, initially surrounded by doubt and uncertainty, has eventually been "a resounding success judged by virtually every metric".³⁶³ According to Greenwald,

³⁶¹ G. GREENWALD, *Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies*. Washington DC, 2009.

³⁶² Cohelo Pinto is certainly the most popular opposer to the Portuguese decriminalization reform: for an overview of his position see C. M. PINTO, *Decriminalization of drugs in Portugal - the real facts!* Stockholm, 2 February 2010, available at: <http://www.wfad.se/latest-news/1-articles/123-decriminalization-of-drugs-in-portugal-the-real-facts> (accessed 24 September 2013) and C. M. PINTO, *Britain should not make the same mistakes as Portugal*, Stockholm, 2 October 2010, available at: <http://www.wfad.se/latest-news/1-articles/365-britain-should-not-make-the-same-mistakes-as-portugal> (accessed 24 September 2013).

³⁶³ G. GREENWALD, *Drug Decriminalization in Portugal*, supra note 361 at 1.

none of the "nightmare scenarios" touted by pre-enactment decriminalization opponents have occurred. First of all, the statistical data indicate that decriminalization has had no adverse effect on drug usage rates in Portugal, which, in numerous categories, are now among the lowest in the EU, particularly when compared with states with stringent criminalization regimes. Moreover, although post-decriminalization usage rates have remained roughly the same or have even decreased slightly, drug-related pathologies - such as sexually transmitted diseases and deaths due to drug usage - have decreased dramatically. Drug policy experts attributed those positive trends to the enhanced ability of the Portuguese government to offer treatment programs to its citizens - enhancements made possible, for numerous reasons, by decriminalization. Finally, fears of drug tourism have turned out to be unfounded. Before the enactment of the decriminalization law, Greenwald notes that opponents insisted that the proposed change in law would make Portugal a center of drug tourism.³⁶⁴ To the contrary, data show that roughly 95% of those cited for drug offenses every year since decriminalization has been Portuguese.³⁶⁵ Close to zero have been citizens of other EU states.³⁶⁶ Therefore, Greenwald concludes that the overwhelmingly positive results of the Portuguese experiment, confirmed by the fact that there is currently no real debate about whether drugs should once again be criminalized, "should guide drug policy debates around the world".³⁶⁷

A more objective - and the most comprehensive as of today - peer-reviewed, evidence-based study of the Portuguese reform was conducted by Caitlin Elizabeth Hughes and Alex Stevens in 2010.³⁶⁸ Drawing upon independent evaluations and interviews conducted with 13 key stakeholders in 2007 and 2009, their study critically analyzed the criminal justice and health impacts of the Portuguese reform against trends from neighboring Spain and Italy. These are the some of the main effects of the decriminalization reform that were identified and are relevant to our analysis:

³⁶⁴ Paulo Portas, leader of the conservative Popular Party, said: "There will be planeloads of students heading for [Portugal] to smoke marijuana and take a lot worse, knowing we won't put them in jail. We promise sun, beaches and any drug you like".

³⁶⁵ INSTITUTO DA DROGA E DA TOXICODPENDÊNCIA DE PORTUGAL (Institute on Drugs and Drug Addiction of Portugal), *The National Situation Relating to Drugs and Dependency*, Annual Report, 2006, p. 39.

³⁶⁶ *Id* at 99.

³⁶⁷ G. GREENWALD, *Drug Decriminalization in Portugal*, *supra* note 361 at 1.

³⁶⁸ C. E. HUGHES-A. STEVENS, *What Can We Learn from the Portuguese Decriminalisation of Illicit Drugs?* in *British Journal of Criminology*, 50, 2010, p. 999–1022.

1) No major increase in drug use: small increases in illicit drug use amongst adults were counterbalanced by reduced illicit drug use among problematic drug users and adolescents, at least since 2003. According to the study, while trends in Portugal suggest slight increases in lifetime and last year illicit drug use among the general population, studies of young and problematic drug users suggest that use has declined. The similarity in general population and youth trends in Portugal, Italy and Spain adds support for the argument that reported increases in general population use in Portugal reflect regional trends and are thus not solely attributable to the decriminalization. Moreover, the fact that Portugal is the only of these nations to have exhibited declines in problematic drug users provides strong evidence that the Portuguese decriminalization has not increased the most harmful forms of drug use.³⁶⁹

2) Reduced burden of drug offenders on the criminal justice system: decrease in the number of people arrested for drug related offences and no major increase in the number of people detected for administrative offences. First of all, following decriminalization there was a substantial reduction in the number of alleged drug offenders being arrested and sent to the criminal courts. Indeed, the number of **people arrested for criminal offences related to drug decreased from over 14,000 offenders in 2000 to an average of 5,000–5,500 offenders per year.**³⁷⁰ Secondly, and equally importantly, the number of **people detected under the new law for administrative drug use/possession offences has remained fairly constant at about 6,000 per year**, thereby indicating no overall increase in the amount of formal contact that drug offenders are having with Portuguese police and so no net-widening. This is a notable finding in light of the data from Spain and Italy, where the burden on the police has grown as a result of increases in the number of offenders detected through the administrative system for drug use/possession and through the criminal system for drug trafficking.³⁷¹ Thus, data suggest that the Portuguese reform may have increased efficiency of police or court operations as they became less crowded with drug offenders.³⁷²

³⁶⁹ *Id* at 1005.

³⁷⁰ *Id* at 1008.

³⁷¹ *Id* at 1009.

³⁷² *Id* at 1011.

3) Decrease in the number of drug-related offenders in prison and in prison overcrowding. According to Portuguese national reports, there has been a continued decrease in the number of individuals imprisoned for drug law offences. The proportion of drug-related offenders in the Portuguese prison population, that is offences committed under the influence of drugs and/or to fund drug consumption, has **dropped from 44% in 1999 to 21% in 2008**. This has been very welcome, due to the historic overcrowding of Portuguese prisons. The **prison density** (i.e. the number of prisoners per 100 prison places) **fell from 119% in 2001 to 101.5% in 2005**.³⁷³

4) Increases in the amounts of drugs seized by the authorities, particularly those destined for external markets. The study notes that between 1995–1999 and 2000–2004, the amount of drugs seized increased by 499%: 116% for cocaine, 134% for hashish, 219% for heroin and 1,526% for ecstasy. Annual data from the Instituto da Droga e da Toxicodependencia (IDT) provide further insight into the nature of the increases. In particular, they reveal that in Portugal, there has not been a linear or constant increase in the amounts seized.³⁷⁴ Instead, there have been spikes in seizures of a number of different substances with large seizures of ecstasy between 2001 and 2003, hashish between 2003 and 2006, cocaine between 2004 and 2006 and even larger quantities of hashish between 2007 and 2008. This is remarkably different from trends in Spain, where there has been an almost linear growth in cocaine and hashish seizure amounts. It is also different from Italy, where there had been relatively flat trends with no discernable spikes in hashish or ecstasy seizure quantities since 1999/2000. As suggested by the study, the absence in Portugal of a consistent growth, in one product, and instead seizures of a number of different products is more in line with evidence of increased law enforcement intervention as opposed to domestic growth in the market.³⁷⁵

5) Reduction in opiate-related deaths and infectious diseases. Since the Portuguese introduction of its drug strategy and decriminalization reform, all three nations

³⁷³ *Id* at 1010.

³⁷⁴ INSTITUTO DA DROGA E DA TOXICODPENDENCIA, (Institute on Drugs and Drug Addiction of Portugal), *The National Situation Relating to Drugs and Dependency*, Annual Report, 2009.

³⁷⁵ C. HUGHES-A. STEVENS, *What Can We Learn from the Portuguese Decriminalisation of Illicit Drugs?*, *supra* note 368, at 1011.

showed declines in drug-related deaths. However, declines in drug-related deaths were more pronounced in Portugal and Italy than in Spain. The number of new drug users who were diagnosed with HIV and AIDS also declined. For example, between 2000 and 2008, the number of cases of HIV reduced among drug users from 907 to 267 and the number of cases of AIDS reduced from 506 to 108. This is a highly significant trend that has been attributed primarily to the expansion of harm-reduction services. Given that heroin problems were the major driver of the reform, these reductions in overdose and opiate-related death were deemed by key informants in the study as a considerable achievement of both the decriminalization and the broader drug strategy of the Portuguese reform.³⁷⁶

6) Increased uptake of drug treatment. The overall numbers of drug users in treatment expanded in Portugal **from 23,654 to 38,532 between 1998 and 2008**. As it is noted in the study, the reductions in opiate-related deaths are likely to reflect the large increase in the provision and uptake of treatment, particularly low-threshold opiate substitution treatments. The data on treatment clients - outpatient, inpatient and prescribed - all indicate that the population of drug users has aged. For example, in 2000, only 23% of treatment clients admitted for the first time were aged over 34, but this rate has increased steadily to a rate of 46% in 2008. Together with the data on the decline in the prevalence of problematic drug use, this suggests an encouraging trend of reductions in the number of young people who are becoming dependent on illicit drugs.³⁷⁷

In short, the analysis of Hughes and Stevens shows the striking impact of the 2001 decriminalization reform on: (a) the law enforcement system - in terms of increased efficiency of police and court operations as they became less crowded with drug offenders; (b) the criminal justice and prison systems - in terms of decrease in the number of people arrested for drug-related offences, decrease in the number of drug-related offenders in prison and in prison overcrowding; and (c) the social system - in terms of reduction in opiate-related deaths and infectious diseases, together with the increase in uptake of drug treatment by users.

³⁷⁶ *Id* at 1014.

³⁷⁷ *Id* at 1015.

Hughes and Stevens note that, by comparing the trends in Portugal and neighboring Spain and Italy, while some trends clearly reflect regional shifts (e.g. the increase in use amongst adults) and/or the expansion of services throughout Portugal, some effects do appear to be specific to Portugal. Indeed, the reduction in burden of drug offenders on the criminal justice system and the reduction in problematic drug users were in direct contrast to those trends observed in neighboring Spain and Italy. Also, Hughes and Stevens argue that the small increases in drug use reported by Portuguese adults are far less important than the major reductions in opiate-related deaths and infections, as well as the reductions in problematic drug users and drug use among adolescents.³⁷⁸

4. The significance of these reforms to the existing state of knowledge on drug decriminalization and prison overcrowding

A comparative analysis between the decriminalization reforms adopted by Italy and Portugal shows how limited a strategy merely based on decriminalization measures can be in addressing the problems related to drug use. Two apparently similar regimes (both based on the use of administrative sanctions against drug users) can achieve diametrically different outcomes, depending on the global drug strategy to which these policies attach. In particular, many possible positive outcomes are "left on the table" by a decriminalization policy that only provides for the elimination of criminal sanctions for drug use without emphasizing the role of social measures such as "prevention", "treatment", "social reintegration" and "harm reduction".

In fact, whereas the case of Portugal is evidence that - contrary to some predictions - decriminalization measures coupled with effective social measures: 1) do not inevitably lead to rises in drug use; 2) can significantly reduce the burden upon the criminal justice system and the problem of prison overcrowding and 3) can further contribute to social and health benefits for drug users, which more often approach therapeutic programs, the case of Italy, with its 1) lack of impact on drug use (cannabis in particular), 2) significant increase in drug-related offenders in prison and in prison overcrowding, and 3) dramatic drop in the use of therapeutic programs by

³⁷⁸ *Id* at 1017.

drug users, is evidence that decriminalization measures alone, and particularly when part of a global repressive strategy, are much less effective in addressing drug use.

As it has been seen in this chapter, the stated objective of Portugal's policy of decriminalization, i.e. "to lower the incidence and related harms of dependent drug use", has undoubtedly been achieved. To the contrary, Italy's "tough on crime" reform, aimed at reducing drug use and targeting cannabis users and dealers particularly, has had significantly negative consequences and few (if any) positive results. Thus, Portugal offers a much more successful model of decriminalization than Italy for other nations that wish to provide, in Hughes and Stevens' words, "less punitive, more integrated and effective responses to drug use". Ultimately, the success of the Portuguese reform lies in the consistent application of a decriminalization policy within the framework of a health-oriented drug strategy. Also, the Portuguese Commissions for the Dissuasion of Drug Addiction seems to have been empowered to provide much more tailor-made responses than the Italian *Prefetto* to the problems of drug use, focusing on the concept of "dissuasion" rather than "sanctioning". The evidence presented in this case study shows that this is the way to go, rather than the many "ups and down" of Italy - with its recent, counterproductive, punitive setbacks.³⁷⁹

To conclude, Italy was a pioneer in the decriminalization of personal use of all drugs and this should be praised. However, as it will be better explained in the next chapter, we believe that current Italian drug legislation should be amended to reintroduce a distinction between cannabis and more harmful drugs. Ideally, not only should cannabis be included in a different schedule for which less severe custodial measures are provided, as it was before the 2006 reform, but depenalization (i.e. the removal of

³⁷⁹ Interestingly, the Committee that has been put in charge of analyzing prison conditions in Italy in 2012 by the Italian Senate made the recommendation of adopting decriminalization measures similar to the ones that have been adopted in Portugal in the field of drug: "Una delle risposte più interessanti al problema del sovraffollamento arriva dal Portogallo. Nei primi anni del 2000 è stata cambiata la legge sulla custodia cautelare. In seguito alla riforma è stato stabilito che questa possa essere applicata solo per i reati che prevedono una pena superiore ai cinque anni di detenzione. Inoltre nel 2001 è stato depenalizzato il consumo di droga e le persone trovate a farne uso sono obbligate a comparire davanti a speciali commissioni anti-droga e non davanti a un tribunale. La popolazione carceraria è fortemente diminuita in seguito all'entrata in vigore delle due norme e il Portogallo ha registrato una diminuzione del numero dei detenuti del 16% dal 2002 al 2007". COMMISSIONE STRAORDINARIA PER LA TUTELA E LA PROMOZIONE DEI DIRITTI UMANI DEL SENATO, *Rapporto Sullo Stato dei Diritti Umani negli Istituti Penitenziari e nei Centri di Accoglienza e Trattenimento per i Migranti*, 2012, available at http://leg16.senato.it/1383?documento=2501&voce_sommario=90. *Id*, at 37.

custodial measures) should be adopted for all cannabis-related offences³⁸⁰ At a minimum, there should be a reduction in the severity of custodial measures provided for cannabis-related offences, as it is argued by several criminal law scholars and NGOs.³⁸¹ Based on the data that have been provided in this chapter (that show that cannabis is widely used among the population, cannabis seizures have more than doubled since 2006, detainees for violation of Article 73 have almost doubled from

³⁸⁰ Depenalization (i.e. the removal of custodial measures) for all cannabis-related offenses, while desirable for many reasons, may not be, at the moment, a feasible option. This, in light of the Council of the European Union Framework Decision 2004/757/JHA "laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking", that require states to adopt custodial measures for several forms of conduct linked to trafficking in drugs. In particular, Article 2 of the Framework Decision (Crimes linked to trafficking in drugs and precursors) lists the conduct that should be "punishable". According to Article 2(1), they are: (a), the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs; (b) the cultivation of opium poppy, coca bush or cannabis plant; (c) the possession or purchase of drugs with a view to conducting one of the activities listed in (a); and (d) the manufacture, transport or distribution of precursors, knowing that they are to be used in or for the illicit production or manufacture of drugs. According to Article 2(2), the conduct described in Article 2(1) shall not be included in the scope of this Framework Decision "when it is committed by its perpetrators exclusively for their own personal consumption as defined by national law". Thus, States remain free not to punish those acts that are committed with the intent to obtain drugs for personal use. Also, according to Article 3, states are required to punish "incitement to commit, aiding and abetting or attempting" one of the offenses referred to in Article 2. As to the minimum penalties, the Framework Decision, in Article 4, provides the following: "1. Each Member State shall take the measures necessary to ensure that the offenses defined in Articles 2 and 3 are punishable by effective, proportionate and dissuasive criminal penalties. Each Member State shall take the necessary measures to ensure that the offenses referred to in Article 2 are punishable by criminal penalties of a maximum of at least between one and three years of imprisonment. 2. Each Member State shall take the necessary measures to ensure that the offenses referred to in Article 2(1)(a), (b) and (c) are punishable by criminal penalties of a maximum of at least between 5 and 10 years of imprisonment in each of the following circumstances: (a) the offense involves large quantities of drugs; (b) the offense either involves those drugs which cause the most harm to health, or has resulted in significant damage to the health of a number of persons." Thus, there seems to be a duty, deriving from the Framework Decision 2004/757/JHA, to establish penalties between a minimum of x and a maximum of at least 1 year-inprisonment for Article 2 offenses and penalties between a minimum of x and a maximum of at least 5 years-inprisonment for (a) large quantities of any drugs and (b) offense that either involves those drugs which cause the most harm to health, or has resulted in significant damage to the health of a number of persons. The Framework Decision, making reference to "drugs which cause the most harm to health", seems to mandate a distinction in the severity of penalties for "soft drugs" and "hard drugs", despite mandating that custodial measures be provided in both cases.

³⁸¹ This view is shared by several criminal law scholars and NGOs, such as Open Society, La Società della Ragione, Forum Droghe and Antigone, who have recently proposed an amendment to the current Italian drug legislation that would: 1) fully legalize drug use and possession for personal use, eliminating the administrative sanctions that are now provided; 2) reduce the criminal penalties for possession with intent to supply, which would only lead to prison time from 6 months to 6 years, plus a fine, for all drugs but cannabis (new art. 73 co. 1), and prison time from 3 months to 3 years, plus a fine, for cannabis (new art. 73 co 2); 3) make non-punishable the cultivation for personal use of cannabis and the delivery to third people of small amounts of cannabis, except when the third person is less than 16 years (new art. 73 co. 3); 4) establish less severe penalties (3-month to 2-year imprisonment plus a fine) for crimes of "minor entity", which would become a separate provision; 5) make possible the substitution of prison time with community service for drug addicts; 6) reduce criminal penalties for promoters and participants to associations aimed at committing the above-mentioned drug crimes. For the full text of the proposal, see *4 Libro Bianco sulla Legge Fini-Giovanardi*, *supra* note 355, p. 99-100.

2006 to 2012 and most police activity for violation of Article 73/74 is against cannabis offenders and has steadily increased) this could have a significant impact on the urgent problem of prison overcrowding.

VI. POLICY PROPOSALS IN THE FIELD OF DRUG LEGISLATION

This chapter will make two policy proposals in the field of drug legislation, in light of the analysis and case study that have been conducted so far. The first proposal will support "decriminalization" (i.e. the elimination of criminal sanctions) for use and possession for personal use of any kind of drug. The second proposal will support "depenalization" (i.e. the elimination of custodial sanctions) or, at a minimum, a reduction in the severity of custodial measures, for any cannabis-related conduct. Thus, the first proposal will be addressed to those legislators in Europe and the United States that at the moment still criminalize drug use and possession for personal use, while the second proposal will be specifically addressed to the Italian legislator, being drug use and possession for personal use in Italy decriminalized already but having the Italian legislator eliminated the distinction between cannabis and other more harmful drugs since the 2006 reform.

1. Why drug use and possession should be decriminalized

Legislators in Europe and the United States that at the moment still criminalize drug "use" and "possession" - and as we have seen they are still quite a few³⁸² - should seriously consider decriminalization reforms. Core criminal law doctrines require decriminalization.

First of all, the paradigm of "harm plus culpability", which has been analyzed in chapter III as the fundamental principle for any criminalization decision, is not satisfied in the crime of using or possessing drugs for personal use. Scholars from both the Anglo-American and the European-continental world have consistently stressed this.

³⁸² See *supra*, chapter V, section 2.2.

Several Anglo-American legal scholars have taken this position. Andrew Ashworth, in his recent article "The unfairness of risk-based possession offences", reiterates that no "harm to others" is present in risk-based possession offences,³⁸³ among which is the conduct of possessing an illegal substance for one's own personal use (and, *a fortiori*, the conduct of using it). Douglas Husak, also, has recently tried to apply the core liberal doctrines elaborated by Joel Feinberg to the "recreational use of illicit drugs", in order to assess whether drug prohibitions may be justified within the liberal theory of law defended by Feinberg. Feinberg's theory provides an excellent framework for critically examining the several rationales that might be employed to defend the justifiability of criminal laws against the use and possession of illicit drugs. The principles elaborate by Feinberg can help us understand whether and under what conditions the government is justified in criminalizing the use of drugs. Husak, in his article "Illegal drugs: a test case of the 'Moral limits of the criminal law' by Joel Feinberg"³⁸⁴, concludes that none of the principles identified by Feinberg as legitimate reasons for the use of the criminal law are applicable in the case of recreational use of illicit drugs. Moreover, he claims that drug use has some positive value that a defense of criminalization must rebut.³⁸⁵

Several scholars from the European-continental tradition have also pointed out that legislation on drug use appears to be based on purely paternalistic grounds and should therefore be reassessed.³⁸⁶

³⁸³ The author states "possession offenses are one of the most ubiquitous form of crime in modern systems of criminal law. They comply, much more fully than many other crimes, with rule-of-law requirements such as fair warnings and certainty of definition. However, I will argue that some of the current forms of possession offense fall so far outside normal criminal law paradigms as to require serious re-assessment". A. ASHWORTH, *The Unfairness of Risk-Based Possession Offenses*, *supra* note 148, p. 238. While Ashworth's analysis focus on possession of illicit weapons, rather than possession of illicit drugs, most of the arguments that he puts forward also apply to drug use. For a recent critic of possession offenses see also M. D. DUBBER, *Policing Possession: The War on Crime and the End of Criminal Law*, in *Journal of Criminal Law and Criminology*, 91, 2001, p. 829-996; ID, *The Possession Paradigm: the Special Part and the Police Power Model of the Criminal Process*, in R. A. DUFF-S. P. GREEN (eds.), *Defining Crimes*, Oxford, 2005.

³⁸⁴ D. HUSAK, *Illicit Drugs: A Test Case of Joel Feinberg's "The Moral Limits of the Criminal Law"*, 10 *Libertaria*, 2008, p. 39-59. See also ID, *Predicting the Future: A Bad Reason to Criminalize Drug Use*, in *Utah Law Review*, 2009, pp.105-115.

³⁸⁵ D. HUSAK, *Illicit Drugs: A Test Case of Joel Feinberg's "The Moral Limits of the Criminal Law"*, *supra* note 384.

³⁸⁶ See, among others, A. CADOPPI, *Liberalismo, Paternalismo e Diritto Penale*, in G. FIANDACA-G. FRANCOLINI (eds.), *Sulla Legittimazione del Diritto Penale. Culture Europeo-Continentale e Anglo-Americana a Confronto*, Torino, 2008, 102, mentioning drug legislation as one of the areas of the law where criminalization seems to be based on purely paternalistic grounds and is thus in need of serious reassessment. Similarly, G. FORTI, *Per Una Discussione sui Limiti Morali del Diritto Penale*, *tra*

Secondly, criminalization of drug use and possession appears to infringe on the principle of *ultima ratio*, i.e. the idea of using the criminal law only as a last resort measure. This principle is at the basis of any liberal model of the criminal law and requires making use of the criminal sanctions only for most heinous behaviors, those that cannot effectively be deterred without the stigma of criminal punishment. The *ultima ratio* principle has mainly been discussed in German and Italian legal literature.³⁸⁷ Nevertheless, scholars from the Anglo-American tradition, such as Andrew Ashworth, have also made reference to the principle of "minimum criminalization".³⁸⁸

Visioni "Liberali" e Paternalismi Giuridici, in E. DOLCINI-C. E. PALIERO (eds.), *Studi in Onore di Giorgio Marinucci*, Milano, 2006, 283 ff. With specific regard to the criminalization of personal use of "soft drugs" see, recently, C. ROXIN, *Was Darf der Staat unter Strafe stellen? Zur Legitimation von Strafdrohungen*, in *Studi in Onore di Giorgio Marinucci, supra*, 715 ff. Finally, for a recent summary of the debate on drug prohibition in Italy, G. VERGA, *La droga espiatoria. Un'analisi critica del proibizionismo*, Milano, 2004; and, for a critic on prohibitionism to combat drug use and drug trafficking, ID., *Gli Effetti Collaterali del Proibizionismo*, in *Cass. pen.*, 2005, 2787 ff.

³⁸⁷ As to German literature, see, also for a useful bibliography, YOUNG-CHEOL YOON, *Strafrecht als Ultima Ratio und Bestrafung von Unternehmen*, Frankfurt am Mein, 2001, 22-58. As to Italian literature, see, among many other university manuals, S. CANESTRARI-L. CORNACCHIA-G. DE SIMONE, *Manuale di Diritto Penale. Parte Generale*, Bologna, 2007, 142 ff.; F. MANTOVANI, *Diritto Penale. Parte Generale*, 7 ed., Padova, 2011, XLII ff.; D. PULITANÒ, *Diritto Penale*, 4 ed., Torino, 2011, 48 ff.; A. MANNA, *Corso di Diritto Penale. Parte Generale*, 2 ed., Padova, 2012, 26 ff.; In general, there is a consensus among criminal law scholars in Italy that the criminal law should be used "minimally". See E. MUSCO, *L'illusione penalistica*, Milano, 2004. According to the author: "il diritto penale di uno Stato di diritto dovrebbe, insomma, essere razionale, minimo ed effettivo: l'*extrema ratio* dell'intervento statale sui diritti di libertà, costituzionalmente garantiti, dei singoli". *Id.* at 3. See also, arguing for the need to reduce the area touched by the criminal law, L. FERRAJOLI, *Il Diritto Penale Minimo*, in *Dei delitti e delle pene*, 1985, 463 ff.; ID., *Per un Programma di Diritto Penale Minimo*, in L. PEPINO (ed.), *La Riforma del Diritto Penale. Garanzie ed Effettività delle Tecniche di Tutela*, Milano, 1993, 57 ff.; ID., *Sul Diritto Penale Minimo (Risposta a Emilio Dolcini e Giorgio Marinucci)*, in *Foro it.*, 2000, V, 125 ff.; ID., *Crisi della Legalità e Diritto Penale Minimo*, in U. CURI-G. PALOMBARINI (eds.), *Diritto Penale Minimo*, Roma, 2002, 9 ff.; ID., *Diritto e Ragione. Teoria del Garantismo Penale*, 10 ed., Roma-Bari, 2009; A. BARATTA, *Principi del Diritto Penale Minimo. Per una Teoria dei Diritti Umani come Oggetti e Limiti della Legge Penale*, *supra* note 175.; M. PAVARINI, *Per un Diritto Penale Minimo: "in the Books" o "in the Facts"?* *Discutendo con Luigi Ferrajoli*, in *Dei delitti e delle pene*, 1998, 3, 125 ff.; ID., *La Penalistica Civile e la Criminologia, ovvero Discutendo di Diritto Penale Minimo*, in *Studi in ricordo di Giandomenico Pisapia, III, La criminologia*, Milano, 2000, 563 ff.; G. MARINUCCI-E. DOLCINI, *Diritto Penale Minimo e Nuove Forme di Criminalità*, in *Riv. it. dir. proc. pen.*, 1999, 802 ff.; F. MANTOVANI, *Il Vero "Diritto Penale Minimo": La Riduzione della Criminalità?*, in *Riv. it. dir. proc. pen.*, 2005, 864 ff. See also, very recently, G.P. DE MURO, *Ultima Ratio: Alla Ricerca di Limiti all'Espansione del Diritto Penale*, in *Riv. it. dir. proc. pen.*, 2013.

³⁸⁸ See A. ASHWORTH, *Principles of Criminal Law*, 3 ed., 1999, 67-68. Ashworth puts forward a principle of minimum criminalization in the following terms: "This principle (...) is that the ambit of the criminal law should be kept to a minimum. (...) [T]he point is not so much to reduce criminal law to its absolute minimum, as to ensure that resort is only had to the criminalization in order to protect individual autonomy or to protect those social arrangements necessary to ensure that individuals have the capacity and facilities to exercise their autonomy. (...) [E]ven if it appears to be justifiable in theory to criminalize certain conduct, the decision should not be taken without an assessment of (...) the possibility of tackling the problem by other forms of regulation and control". *Id.* See also A. P. SIMESTER-G.R. SULLIVAN, *Criminal Law: Theory and Doctrine*, 2001, 6-11. They write: "[Criminal

In general, the state may seek to change the behavior of its citizens by many other means than criminalizing the conduct. As Gerald Dworkin has recently noted, the state may influence people's behaviors by any of the following: by providing incentives for people to act one way rather than another (e.g. if you have children you get a break on your income taxes), by making it costly to engage in certain conduct (e.g. if you smoke you will have to pay a very large tax on each pack of cigarettes), by using the law of torts to make it the case that if you act in certain ways you are open to civil suits which may cost you lots of money (e.g. you can be held liable for the torts of those to whom you serve alcoholic beverages), it can make it more difficult for you to enter into contracts, (e.g. minors may not be sued for breach of contract, gambling debts are not enforceable), it can provide warnings and information about dangerous products, it can tie the receipt of federal funds to state's adopting certain laws (e.g. only states that require cyclists to wear helmets may get federal highway funds)".³⁸⁹ In Dworkin's words, "those who think that when the state cannot legitimately criminalize conduct it is helpless to try and change behavior are as mistaken as those who think that because Mill argues the state cannot punish people for self-destructive behavior we are left without resources of criticism, social pressure, and ostracism to use on those who act foolishly, irrationally or imprudently".³⁹⁰ In the context of drug use, other forms of dissuasion (such as prevention campaigns and warnings on the health effects of drug use similar to the ones that have been recently adopted for smoking and drinking) could prove effective in shaping people's behavior without resorting to the "expressing censure" of the criminal law.³⁹¹

Finally, criminalization of drug use and possession lies at the intersection of two major areas of the law where the adoption of criminal sanctions seems highly contestable, i.e. "preventive measures" and "victimless crimes". A long list of scholars, on both sides of the Atlantic, has argued that the adoption of criminal

censures] should not be deployed merely as a tool of convenience, and where possible other forms of social control ought to be used in their stead". *Id.* at 11.

³⁸⁹ G. B. DWORKIN, *Harm and the Volenti Principle*, in *Social Philosophy and Policy*, 29, 2012, p. 309.

³⁹⁰ *Ibidem*.

³⁹¹ However, arguing that *ultima ratio* may not be an appropriate principle to suggest avoiding criminal sanctions in relation to drug use, see D. HUSAK, *Applying Ultima Ratio: A Skeptical Assessment*, in *Ohio State Journal of Criminal Law*, 2, 2005, p. 535-545.

sanctions is not justified in these areas. We very firmly add to that list, and hope that legislators that still have not done so will start taking these views more into account.

2. Why cannabis should be treated differently

In relation to cannabis, not only "decriminalization" of use and possession but also "depenalization" (or at a minimum a reduction in the severity of custodial measures) for cannabis-related offences seems to be desirable. There are several reasons to support this claim, the most important of which will be analyzed below.

2.1. Social sciences: the normalization of cannabis use among young adults

First of all, cannabis use has become increasingly normalized among the population, in a way that certainly is not true for other drugs. According to a UK sociological study conducted by Parker in 2002, "sensible, recreational use of cannabis" is becoming increasingly "normalized" among conventional young adults.³⁹² The term "normalization" refers to the process through which stigmatized or deviant individuals and groups become included in as many features of normal life as possible. The concept initially emerged from studies and politics of disabilities and learning difficulties, but it was adapted by Parker to describe why large groups of adolescents in the UK had knowledge of or tried drugs, and why many abstainers seemed to accept illegal drug use.³⁹³ Five key dimensions of "normalization" were identified by Parker: 1) availability/access; 2) drug trying rates; 3) usage rates; 4) accommodating attitudes to "sensible" recreational drug use especially by non users; and 5) degree of cultural accommodation of illegal drug use. The 2002 study by Parker, after having analyzed recent UK research for each measure, concluded that all the normalization criteria had been adequately satisfied in relation with the recreational use of cannabis.³⁹⁴

³⁹² H. PARKER-L. WILLIAMS-J. ALDRIDGE, *The Normalization of 'Sensible' Recreational Drug Use: Further Evidence from the North West England Longitudinal Study*, in *Sociology*, 36, 2002, p. 941 ff. The online version of this article can be found at <http://soc.sagepub.com/content/36/4/941>.

³⁹³ H. PARKER-J. ALDRIDGE-F. MEASHAM, *Illegal Leisure: The Normalization of Adolescent Recreational Drug Use*, London, 1998.

³⁹⁴ H. PARKER-L. WILLIAMS-J. ALDRIDGE, *The Normalization of 'Sensible' Recreational Drug Use*, *supra* note 392, p. 961.

More recent studies have also confirmed the normalization of cannabis use among young people.³⁹⁵ Essentially, cannabis has turned into a normal drug - not normal in the sense that everybody uses it but normal in the sense that cannabis use is seen as legitimate by both users and non-users.

Normalization theory is the most important development in contemporary sociology of drug use and dominates recent interpretations of illegal drug use.³⁹⁶ The normalization concept has been acquisitioned by official and academic drugs discourses. For societies which maintain and enforce blanket prohibition of all popular illicit drugs and refuse any review of their drugs laws, the notion of normalization to explain the growth of recreational drug use is anathema because it highlights the loss of moral and social authority of the law and, by implication, the government and enforcement agencies. However, for societies that are committed to social inclusion and a pro-active approach to recognizing that social policy and laws must adapt to social and cultural change, the concept is positively helpful.³⁹⁷

2.2. Public attitudes: increasing support for cannabis legalization

Secondly, public attitudes show an increasing support for cannabis legalization in recent years. Public surveys on citizens' attitudes on drug regulation are more often conducted in the United States than in Europe. What emerges from the most recent U.S. surveys conducted on the issue is that there has been a significant increase in the number of people who support cannabis legalization. In 2005, for example, only 36% of Americans said they believed that the use of marijuana should be made legal.³⁹⁸ A Pew Research Center poll released on 4 April 2013, instead, showed that, for the first time in more than four decades of polling on the issue, a majority of Americans (52%) favored legalizing the use of marijuana.³⁹⁹ This survey, conducted March 13-17

³⁹⁵ See, among many, M. JÄRVINEN-J. DEMANT, *The Normalization of Cannabis Use among Young People - Symbolic Boundary Work in Focus Groups*, in *Health, Risk and Society*, 13, 2011, p.165-182.

³⁹⁶ F. MEASHAM-M. SHINER, *The Legacy of Normalisation: The Role of Classical and Contemporary Criminological Theory in Understanding Young People's Drug Use*, in *International Journal of Drug Policy*, 20, 2009, p. 502-508.

³⁹⁷ H. PARKER-L. WILLIAMS-J. ALDRIDGE, *The Normalization of 'Sensible' Recreational Drug Use*, *supra* note 392, p. 943.

³⁹⁸ U.S. DEPARTMENT OF JUSTICE, *Sourcebook of Criminal Justice Statistics (2005)* - Table 2.67, available at <http://www.albany.edu/sourcebook/ind/PUBLIC%20OPINION.Drugs.Legalization.2.html>.

³⁹⁹ PEW RESEARCH CENTER, *Majority Now Supports Legalizing Marijuana*, 4 April 2013, available at <http://www.people-press.org/2013/04/04/majority-now-supports-legalizing-marijuana/> (accessed 18

among 1,501 adults, found that young people are the most supportive of marijuana legalization. Fully 65% of Millennials - born since 1980 and now between 18 and 32 years old - favor legalizing the use of marijuana, up from just 36% in 2008. Yet there also has been a striking change in long-term attitudes among older generations, particularly Baby Boomers - born between 1946 and 1964.⁴⁰⁰ The long-term shift in favor of legalizing marijuana has accelerated in the past three years: while support has generally tracked upward over time, it has spiked 11 percentage points since 2010. About half of adults (52%) today support legalizing the use of marijuana, up from 41% in 2010. Support for legalization has increased among all demographic and political groups. Nearly two-thirds of those under 30 (64%) favor legalizing marijuana use, as do about half or more of those 30 to 49 (55%) and 50 to 64 (53%). There is far less support for legalization among those 65 and older (33%); still, there has been an 11-point rise in support among older Americans since 2010. Opinions about legalizing marijuana vary little among states that have more permissive marijuana laws and those that do not. A majority (55%) of those in states that have legalized medical marijuana or have decriminalized (or legalized) marijuana for personal use favor legalizing marijuana. Yet 50% of those in states in which marijuana is not decriminalized (or legal for any purpose) also favor its legalization.⁴⁰¹

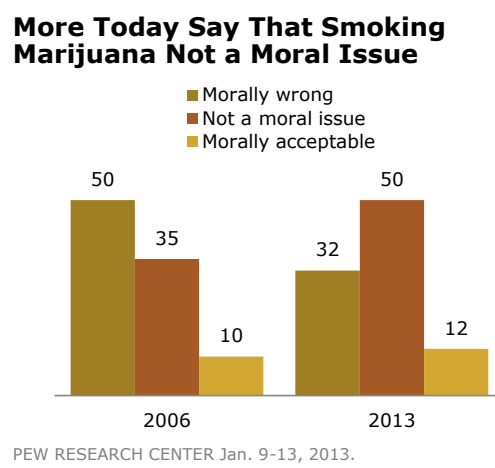
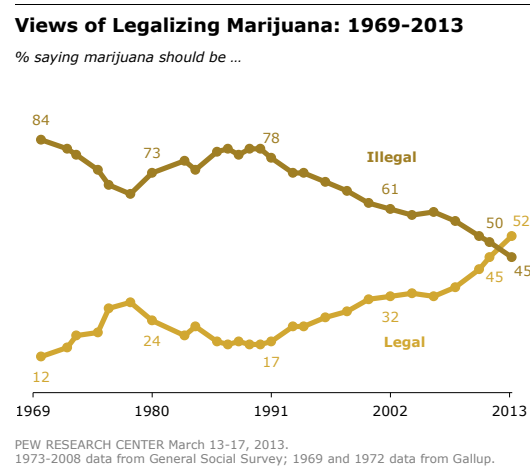
Also, there has been a major shift in attitudes on whether it is immoral to smoke marijuana. Currently, only 32% say that smoking marijuana is morally wrong, an 18-point decline since 2006 (50%). As with many of the changes in opinions about marijuana and its use, the decline has occurred across most demographic and political

November 2013). For a list of other surveys that, despite not showing a majority, found that the number of Americans supporting legalization has increased to 50% in 2012 see H. J. ENTEN, *Make Marijuana Legal Says a New Poll, but Reality is More Smoky Than That*, in *The Guardian*, 5 April 2013, available at <http://www.theguardian.com/commentisfree/2013/apr/05/pew-poll-majority-americans-support-marijuana> (accessed 20 November 2013). The Gallup surveys, that have been conducted since 1969, show the following attitudes to legalization: 12% in 1969, 15% in 1972, 16% in 1973, 28% in 1977, 25% in 1979, 25% in 1980, 23% in 1985, 25% in 1996, 31% in 2000, 34% in 2001, 34% in 2003, 36% in 2005, 44% in 2009, 46% in 2010, 50% in 2011, and 48% in 2012. According to the 2012 Gallup survey, support remained in the mid-20s from the late 1970s to the mid-1990s, but has crept up since, passing 30% in 2000 and 40% in 2009 before reaching the 50% level in 2012 Oct. 6-9 annual Crime survey. See the 2012 Gallup survey available at <http://www.gallup.com/poll/150149/record-high-americans-favor-legalizing-marijuana.aspx>.

⁴⁰⁰ PEW RESEARCH CENTER, *Majority Now Supports Legalizing Marijuana*, *supra* note 399, p. 1-2.

⁴⁰¹ *Id* at 4.

groups.⁴⁰² Graphs from the 2013 Pew Research Center poll on cannabis legalization and the moral implications of smoking are provided below:⁴⁰³



Despite the high profile of drugs policy, little data is available in Europe on public attitudes on drug regulation among the general population, with a particular deficit in data that is comparable over time. Additional research should address this deficit and provide evidence to support or refute the claim of a similar shift in attitudes. At the moment, the only large studies that provide data on public attitudes to cannabis regulation in Europe are the 66 Standard Eurobarometer (conducted by the European Commission among the general population in 2006) and the 233 and 330 Flash Eurobarometers (conducted among the young population in 2008 and 2011).

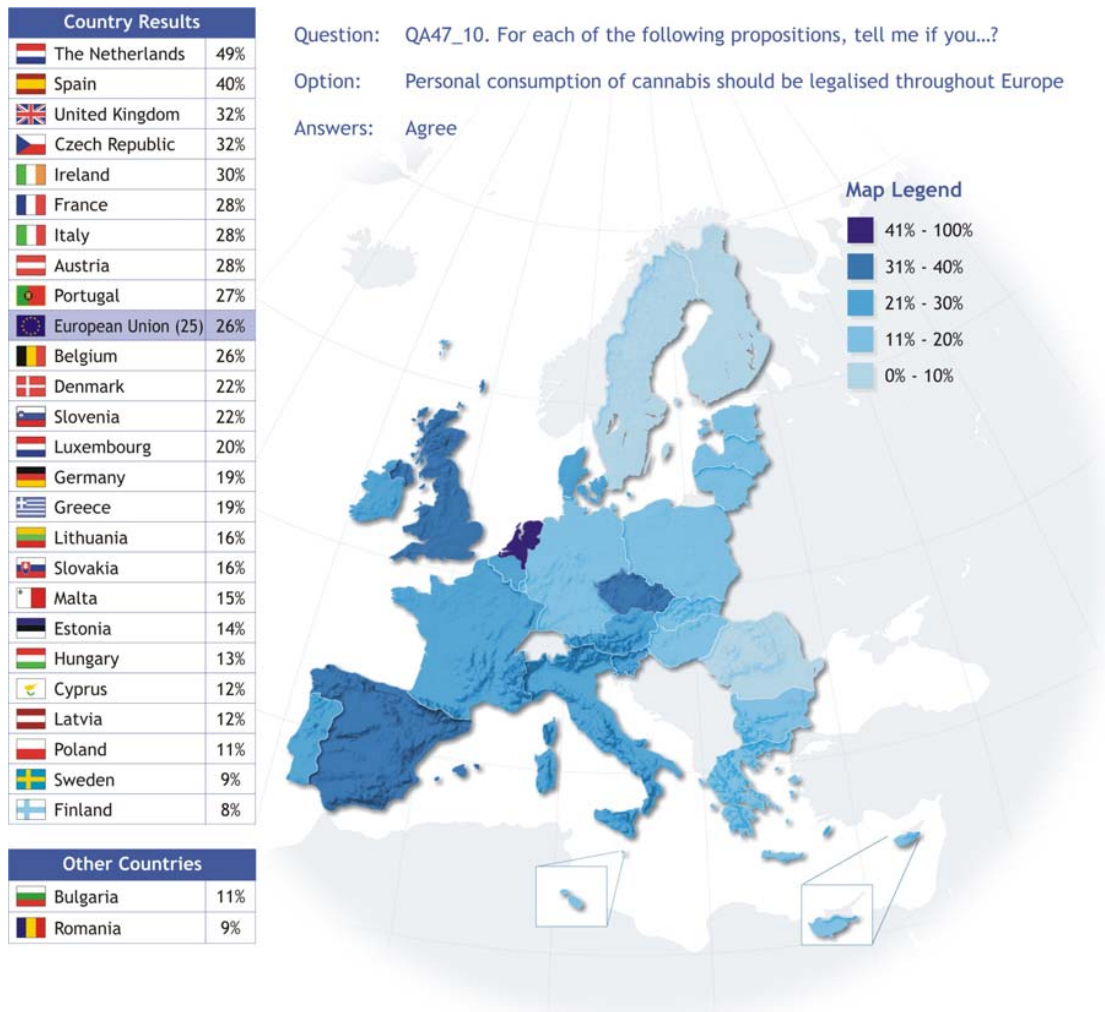
The 66 Standard Eurobarometer⁴⁰⁴ found that only about one quarter of European adults believed marijuana should be legalized for personal use throughout Europe in 2006. In the survey of 29,000 EU residents, pollsters found 26% adults were ready to legalize personal consumption of cannabis while two thirds disagree with this idea (68%). Even young Europeans opposed to the legalization of cannabis use according to the survey (57% of respondents aged 15 to 24 disagreed with the statement). However, opinions varied widely from country to country. In Finland (8%) and

⁴⁰² *Id* at 3.

⁴⁰³ *Id* at 1 and 3.

⁴⁰⁴ EUROPEAN COMMISSION, 66 Standard Eurobarometer, 2006, available at http://ec.europa.eu/public_opinion/archives/eb_arch_en.htm. The graph that we report is available there at p. 44.

Sweden (9%) the idea was rejected outright, whereas in the Netherlands, where the personal consumption of cannabis is decriminalized in practice, almost half of the respondents felt that cannabis should be legalized throughout Europe (49%). A graph from the 66 Standard Eurobarometer is provided below to offer the details of the different European countries:



The 2011 Flash Eurobarometer on "Youth attitudes on drugs" (No 330),⁴⁰⁵ instead, evidenced that young European citizens show less and less support for the prohibition of cannabis use in the most recent period. The European Commission started studying youth attitudes on drugs in 2002 and 2004, when surveys were conducted among young people in the then 15 EU Member States (Special Eurobarometer No 172 and

⁴⁰⁵ EUROPEAN COMMISSION, *330 Flash Eurobarometer - Youth Attitudes on Drugs*, 2011, available at http://ec.europa.eu/public_opinion/archives/flash_arch_en.htm.

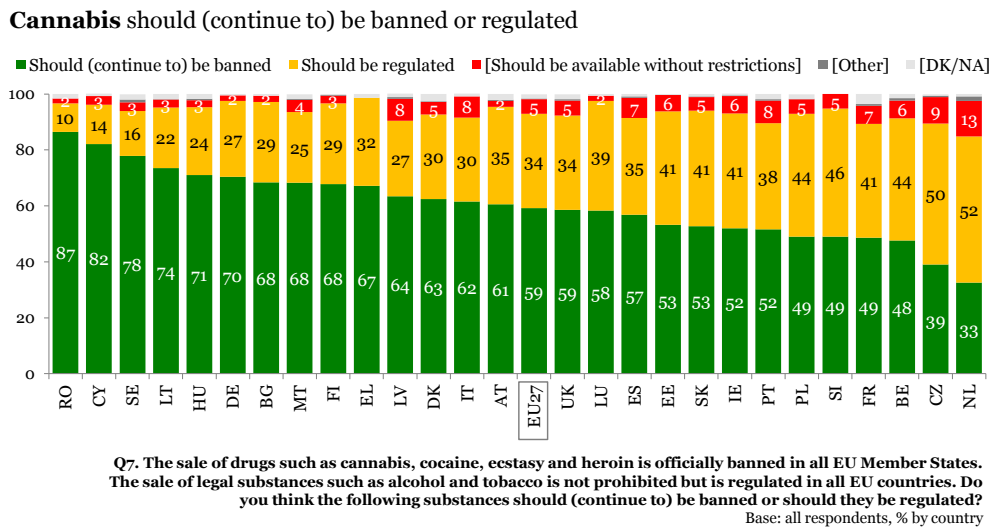
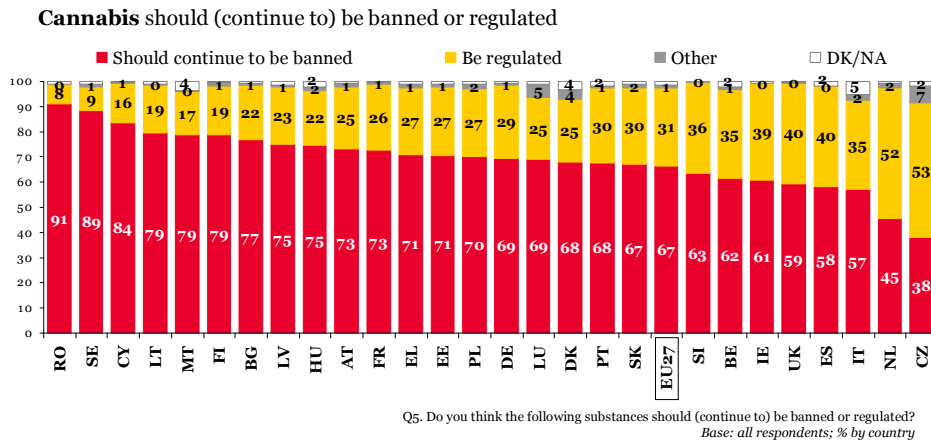
Flash Eurobarometer No 158).⁴⁰⁶ In 2008, a survey was conducted among a similar group in the 27 EU Member States (Flash Eurobarometer No 233).⁴⁰⁷ The 2011 Flash Eurobarometer on "Youth attitudes on drugs" (No 330) built on those earlier surveys in order to measure the trend in attitudes of this target group towards drugs. This survey's fieldwork was carried out between 9 and 13 May 2011. Over 12,000 randomly selected young people (aged 15-24) were interviewed across the 27 EU Member States. What emerges from the 2011 Flash Eurobarometer is that there is a broad consensus among young people that heroin, cocaine and ecstasy should continue to be "banned" in EU Member States – almost all respondents agreed with this: 96% for heroin, 94% for cocaine and 92% for ecstasy.⁴⁰⁸ These opinions did not significantly change compared to the results of the 2008 survey. To the contrary, opinions were more diversified when young people were asked if cannabis should continue to be "banned": the proportion thinking that governments should uphold such a ban ranged from 33% in the Netherlands and 39% in the Czech Republic, to 87% in Romania. A comparison with the 2008 results shows that, in the most recent survey, a significantly lower proportion of young European people thinks cannabis should continue to be "banned": 67% in 2008 vs. 59% in 2011, as shown in the graphs provided below.⁴⁰⁹

⁴⁰⁶ Data from the 2002 Special Eurobarometer No 172 and the 2004 Flash Eurobarometer No 158 will not be specifically analyzed here because no distinction was made, in those surveys, in relation to the different types of drugs, so they are not particularly useful for our discussion. The question that was asked there was only if "people should be punished for using drugs". Already in 2004, only a minority of respondents was in favor of punishing drug consumers at European level: only 47% respondents, in fact, agreed that drug consumers should be punished, while 43% tended to disagree. Nearly 10% of the young respondents did not answer the question. Results differed significantly from one country to another: more than 60% respondents in Scandinavian countries appeared to be in favor of punishing drug users, while only 37% of young people in Spain and the Netherlands agreed with this statement.

⁴⁰⁷ EUROPEAN COMMISSION, *233 Flash Eurobarometer - Young People and Drugs*, 2008, available at http://ec.europa.eu/public_opinion/archives/flash_arch_en.htm.

⁴⁰⁸ EUROPEAN COMMISSION, *330 Flash Eurobarometer - Youth Attitudes on Drugs*, supra note... p. 46.

⁴⁰⁹ *Ibidem*. In the 2001 survey 34% people thought that cannabis should be "regulated" and 5% people thought that it should be "available without restrictions", so a total of 41% agreed with the idea that cannabis should not be "banned". In the 2011 survey, a "spontaneous" response option (i.e. should be "available without restrictions") was added. This option was not read out by the interviewers; only when respondents spontaneously gave this response, interviewers coded their response in this category. In 2008, if respondents spontaneously answered that cannabis (or another substance) "should have been available without restrictions", these responses were coded as "other" responses.



Also, the 2011 Flash Eurobarometer evidenced that young people prefer other measures than prohibition to tackle drug problems, including prevention, information and health care services. About half (49%) of interviewees preferred information and prevention campaigns and almost 4 in 10 (37%) selected the treatment and rehabilitation of drug users, as opposed to a third (33%) who opted for tough measures against drug users. This last-named measure received the lowest support in

Greece (17%), Denmark and Portugal (22%-23%) and the highest support in Romania (50%) and the Czech Republic (47%).⁴¹⁰

Over the long run, the attitudes of American and European citizens with ambivalent views on the question of cannabis legalization will be shaped by whether the various experiments with legalization, decriminalization, and the use of marijuana for medical purposes are deemed successes or failures. It is important to note, in fact, that in January 2013, in a remarkable first, the recreational use of marijuana became legal in Colorado and Washington. Over a dozen other states in the United States have decriminalized possession of small amounts, and Massachusetts recently became the 18th state to allow its use for medicinal purposes. Though federal law still bans both the sale and possession of marijuana, President Obama has said the federal government has more compelling issues to deal with and won't aggressively prosecute cannabis-related offenses in states where use is legal. Colorado repealed alcohol prohibition in 1932, a year before it was repealed nationwide. Some argue that the state is now blazing a trail for the rest of the country. Also the Uruguayan Parliament, on August 1, 2013, voted to pass a Bill that will legalize and regulate the production, sale, use and personal cultivation of cannabis for non-medical use by adults. The Bill passed to the Senate for a vote (and possible amendments) in October 2013, before it will return to the Congress for final approval from the Board of Deputies. Although these are potential stumbling blocks, the Congress vote was the most difficult to obtain and it looks likely that the Bill will now pass into law later in the year. If the legislative procedure is finalized, Uruguay will be the first national government in the world to have voted through a new law to legalize and regulate cannabis - or indeed any drug prohibited by the UN drug conventions. To this extent, the change differs from the groundbreaking developments in Washington and Colorado, where the legalization measures were passed by popular vote (via ballot initiatives), with both local state and federal governments firmly opposed. By contrast, Uruguayan public opinion is not yet behind the legalization move, with Uruguayan politicians tackling drugs by showing something alien to most governments around the world: leadership. More in general, if the current trend on

⁴¹⁰ EUROPEAN COMMISSION, *330 Flash Eurobarometer - Youth Attitudes on Drugs*, *supra* note 405, p. 54 ff.

legalizing marijuana continues, stronger pressure may build to bring laws into compliance with people's attitudes.

2.3. The need to develop more specific surveys on public attitudes on cannabis regulation

Two points emerge from the data that have been analyzed in the previous section. First, there is a compelling need to conduct new surveys on public attitudes on cannabis regulation among the general population in Europe. The 66 Standard Eurobarometer tracks back to 2006. Only additional surveys could provide evidence to support or refute the claim of a shift in attitudes among the general population similar to the one that has occurred in the most recent years (and particularly in the period 2010-2013) in the United States.⁴¹¹ What can be noted from the available data, nevertheless, is that young people's opinions in Europe seem to be in line with the U.S. trend of increasing support for cannabis legalization: as evidenced by the 2011 Flash Eurobarometer, in fact, views supporting cannabis prohibition registered an 8-point decline in the period 2008-2011. Thus, a persuasive predictive argument can be made that a new survey among the general population in Europe would reveal less support for cannabis prohibition than in the past years.

⁴¹¹ Also surveys conducted at the national level in European Member States are scarce and not particularly up-to-date. Some of the most recent surveys on the issue have been conducted in the Netherlands. There, three opinion polls have been conducted on Dutch cannabis policy since 2010. One in February 2010, a second in May 2012 and the most recent in August 2013. The August 2013 survey showed that a majority of the population (54%) are in favor of legalizing cannabis, while 38% oppose it. The survey, which asked "Should the Netherlands adopt the same law as has been adopted on the legalization of marijuana in Uruguay this week?", is available at <http://www.undrugcontrol.info/en/weblog/item/4960-majority-of-the-dutch-favour-cannabis-legalisation>. The 26th British Social Attitudes surveys is also one of the few recent surveys that included questions on public attitudes on drugs. It found that 58% people in Britain thought cannabis should be illegal, 34% believed it should be legalized but only made available from licensed shops and 4% thought it should be legalized without restriction. According to the report published by NatCen Social Research, which analyzed the 26th British Social Attitudes data, views about the legalization of cannabis are more liberal now than they were in 1993, when two thirds (67%) thought it should be illegal. But there has been a hardening of attitudes over the last decade; in 2001, 46% thought cannabis should be illegal, rising to 58% in 2008. According to the report, this reflects increased concern since 2001 about the dangers of cannabis, which have resulted in its reclassification as a Class B drug. A quarter (24%) agreed with the view that cannabis "isn't as damaging as some people think", down from nearly a half (46%) in 2001. This survey analyzed 2008 data. Thus, additional data should be obtained to evaluate the most recent trends in public attitudes on cannabis.

Also, there is a need to develop more specific surveys on public attitudes on cannabis regulation, both in the United States and in Europe. So far, surveys have tried to assess people's attitude on cannabis regulation asking the following questions:

- 1) 2013 Pew Research Center poll (similarly to questions of other U.S. polls in previous years) - Q85: *Do you think the use of marijuana should be made legal, or not? Yes, legal/No, illegal*
- 2) 2006 Standard Eurobarometer - QA47_10: *Personal consumption of cannabis should be legalised throughout Europe? Agree/Disagree*
- 3) 2008 Flash Eurobarometer - Q5A: *Do you think the following substances should (continue to) be banned or regulated? - Cannabis*
- 4) 2011 Flash Eurobarometer - Q7A: *The sale of drugs such as cannabis, cocaine, ecstasy and heroin is officially banned in all EU Member States. The sale of legal substances such as alcohol and tobacco is not prohibited but is regulated in all EU countries. Do you think the following substances should (continue to) be banned or should they be regulated? - Cannabis*

These questions, despite a good start in investigating public opinion on cannabis regulation, have several shortcomings, some of which will be summarized below.

The first two questions only inquire on public attitudes on "legalization" of "use" (2013 Pew Research Center poll) and "personal use" (2006 Standard Eurobarometer) of marijuana/cannabis. Strictly speaking, they do not provide any insights on other cannabis-related offences, such as cultivation or sale. Also, they do not give people the option of choosing among different kinds of sanctions, i.e. less stigmatizing sanctions than those provided by the criminal law. Only being able to answer "Yes, legal" or "No, illegal" underestimates the fact that the term "illegality" has several different meanings: for example, cannabis use may still be considered "illegal" but addressed through administrative sanctions rather than criminal sanctions (so-called "decriminalization"), as it is currently provided by the Italian legal system for possession of all drugs for personal use.

The third question refers to the general status of cannabis as a prohibited or regulated substance, rather than to the specific conduct of personal consumption. However, it puts an emphasis on the "continuance" of a prohibition approach versus the adoption of a new regulatory approach ("cannabis should continue to be banned or regulated"). Stressing the current state of the law, i.e. that cannabis is currently "banned" in all EU Member States, may have an impact on the answers, based on acceptance of the state of the law itself rather than on moral acceptance. Also, this question, similarly to the first two questions, does not give people the option of choosing among different kinds of sanctions, i.e. less stigmatizing sanctions than those provided by the criminal law. Only being able to express support for a "ban" or a "regulation" of cannabis overlooks the possibility of using administrative sanctions for cannabis-related offences.

The fourth question seems to specifically focus on "sale" of cannabis, through the comparison between legal and regulated sale regimes (e.g. tobacco and alcohol) and illegal sales (other drugs). Thus, answers may have been given in relation to the specific conduct of "sale" of cannabis, when people were asked if "continue to ban" or "regulate" cannabis. Also, the same comments that have been previously made as to the concept of "banning" and "regulating" apply here.

In essence, none of these questions investigate the issue of cannabis "decriminalization", i.e. the elimination of criminal prosecution and punishment through, for example, the use of administrative sanctions for cannabis-related offences.⁴¹² Neither do these questions investigate the issue of cannabis "depenalization", i.e. the elimination of custodial penalties for cannabis-related offences.⁴¹³ If questions are framed in the above-mentioned terms they provide limited help in capturing people's sentiment, for example, towards decriminalization/depenalization of cannabis use and cannabis sale. When the alternative is only given between "banning" (i.e. generally prohibiting, with no specification as to whether this is done through the criminal law or through other measures) and "regulating" (i.e. complete "legalization") there is no way of

⁴¹² Decriminalization may occur, as we have seen in chapter III, section 1, through either of the following: (1) downgrading the legal status of offenses, so that they are administrative rather than criminal offenses (i.e. decriminalization in the books) or (2) retaining the status of criminal offense on the books while avoiding the imposition of criminal penalties (i.e. decriminalization in practice). In particular, the latter approach may occur by (2a) allowing for administrative sanctions to be imposed or (2b) issuing guidance to police or prosecutors to avoid enforcement in specified circumstance.

⁴¹³ See *supra* chapter V, section 2.1.

understanding how many people - and we have reasons to believe they are many, in light of the widespread use of cannabis and the limited moral judgment attached to it - would support a system that only provides for non-criminal (and in any case non-custodial) measures for cannabis-related offences.

So, surveys should be framed in a different way to have a better idea of citizens' opinion on the use of the criminal law to address cannabis-related conducts. Rather than asking people, as it was done in the 2006 Standard Eurobarometer and in the 2008 and 2011 Flash Eurobarometer, if they generally agree with the idea of "banning" vs. "regulating" cannabis, citizens should be asked whether they agree or disagree with the idea of "using criminal sanctions" - and "custodial measures" in particular - for cannabis-related offences. The set of questions developed by Giuseppe Di Gennaro and Cesare Pedrazzi to assess attitudes on the use of criminal sanctions for economic crimes⁴¹⁴ have been identified by criminal law scholars as a valuable tool for investigating public opinion on the use of criminal sanctions to regulate social conducts.⁴¹⁵ Thus, they could be used as a model for assessing public attitudes on the use of the criminal law for cannabis-related offences. Adapting that model to the case of cannabis, questions could be framed in the following terms:

"When you get to know that a person... (used cannabis - cultivated cannabis - sold cannabis to another person - ...) you believe that this is:

- 1) something for which that person should be judged in a criminal tribunal and go to prison (if it is proved that that person did it); or
- 2) something for which that person should be judged in a criminal tribunal and be fined, but not go to prison; or
- 3) something that should be disapproved, but not judged in a criminal tribunal; or
- 4) something that should not be disapproved.

⁴¹⁴ G. DI GENNARO-C. PEDRAZZI, *Criminalità Economica e Pubblica Opinione*, Milano, 1982.

⁴¹⁵ See A. CADOPPI, *Il Reato Omissivo Proprio. II. Profili Dogmatici Comparatistici e de Lege Ferenda*, *supra* note 179, p. 703.

2.4. Why public attitudes are relevant for policy proposals - The role of *Kulturnormen*

Obtaining new data - and more specific data - on public attitudes on cannabis regulation is crucial for policy proposals. In particular, it is crucial if one adopts the theory of *Kulturnormen*, according to which the criminal law can legitimately be used only for those forms of conduct, for which there is a consensus, among the majority of the population, that the criminal sanctions are an appropriate measure. More specifically, in the view of Alberto Cadoppi, who deserves the most credit for having defended the theory of *Kulturnormen* in Italy, only if citizens predominantly answer to the above-mentioned questions saying that they would support the use of custodial measures (i.e. only if they give answer number 1) the legislator could legitimately criminalize that act. That is to say, only if the great majority of the population believes that custodial measures should be used to address cannabis use/cannabis sale/etc., the legislator is free to adopt criminal measures against those acts; to the contrary, if no majority is found to support the use of custodial sanctions for such acts, the legislator is considered to have no legitimate grounds for adopting criminal measures.⁴¹⁶

We believe that the theory of *Kulturnormen* should play an important role in criminal policy in general and cannabis regulation in particular.

In general, this theory has the advantage of restraining the use of the criminal law - an approach that should be very much favored in light of the overcriminalization phenomenon that most modern democracies face - depending on public sentiments, which are considered only as a limiting condition for the use of the criminal law and not as a condition that may, by itself alone, justify criminalization.⁴¹⁷ This reflects changes in the moral values of the population and it reduces the divide between *mala in se* and *mala quia prohibita*,⁴¹⁸ bringing the criminal law more in line with public

⁴¹⁶ See A. CADOPPI, *Il Reato Omissivo Proprio. II. Profili Dogmatici Comparatistici e de Lege Ferenda*, *supra* note 179, p. 705.

⁴¹⁷ This is because the legislator should always "filter" the most punitive sentiments of society, which could sometimes support criminal measures based on purely irrational emotions. See A. CADOPPI, *Il reato omissivo proprio*, *supra* note 179, p. 706. See also A. CADOPPI-P. VENEZIANI, *Elementi di diritto penale. Parte generale*, *supra* note 174, p. 94 ff.

⁴¹⁸ The term *mala quia prohibita* is used by criminal law scholars to describe those "non-core" offenses that are largely regulatory in nature and do not directly violate moral norms. See, among many others,

opinion. As a result, the criminal law regains its legitimacy and the general and special preventive functions of criminal punishment are strengthened. In fact, when the criminal law is not too distant from citizens' view of what is "right" and what is "wrong", people comply with the law in light of "normative acceptance" (based on shared moral values) rather than mere "instrumental acceptance" (based on a cost-benefit analysis, aimed at avoiding criminal sanctions). This form of compliance is much more effective, as it has been evidenced in the most recent studies.⁴¹⁹

In particular, there seems to be an increasingly wider disconnect between the law and the public opinion in relation to cannabis regulation. The widespread use of cannabis, even among people who lead healthy, productive lives, shows that the moral blame related to cannabis use is very low. This was evidenced by the 2013 Pew Research Center poll, which showed that only 32% people believed that smoking marijuana is "morally wrong". So, there is a need to better investigate the most current *Kulturnormen* in relation to cannabis-related offences. If drug prohibition has long been enforced on moral basis (as it was the case for alcohol prohibition) and criminal law scholars have long argued against the use of the criminal law in this area,⁴²⁰ cannabis prohibition is today a stand-alone concept in the wider picture of drug prohibition and it should be given particular attention.

D. HUSAK, *Malum Prohibitum and Retributivism* in R. A. DUFF-S. GREEN (eds.), *Defining Crimes. Essays on the Special Part of Criminal Law*, Oxford, 2005, p. 65-90. Such an offense is committed "when the conduct proscribed is not wrongful to or independent of the law that defines it as criminal". *Id.*, at 66.

⁴¹⁹ For an analysis of "normative" and "instrumental" compliance see P. CAMPANA-M. HOUGH-E. VACCARI-S. MAFFEI, *The Intended and Unintended Consequences of Deterrence and Inclusive Crime Control Strategies*, *supra* note 267.

⁴²⁰ See S. A. KADISH, *The Crisis of Overcriminalization*, *supra* note 156, p. 24-25. According to the author, "The irrepressible demand for gambling and drugs, like the demand for alcohol during prohibition days, survives the condemnation of the criminal law. Whether or not the criminal restriction operates paradoxically, as some have thought, to make the conduct more attractive, it is clear that the prohibitions have not substantially eliminated the demand". *Ibidem*. Threats of criminal punishment have proved ineffective in deterring drug consumption. See, among many others, J. FAGAN, *Do Criminal Sanctions Deter Drug Offenders?* in D. MACKENZIE-C. UCHIDA (eds.), *Drugs and Criminal Justice: Evaluating Public Policy Initiatives*, Newbury Park, 1994, p. 188.

Conclusion

Obtaining new and more specific data on public attitudes on cannabis regulation and applying the theory of *Kulturnormen* to those data could have important consequences. If no consensus among the general population emerges on the fact that criminal sanctions, and in particular custodial measures, are an appropriate measure against cannabis-related offences - and we have reasons to believe that this could be the case - "decriminalization" and "depenalization" reforms should seriously be adopted by those legislators in Europe and the United States that still haven't done so.

"Decriminalization", "depenalization" or at a minimum a substantial reduction in the severity of custodial measures for cannabis-related offenses could significantly reduce prison overcrowding. As we have seen, in fact, drug legislation highly impacts on prison overcrowding and cannabis-related offences account for the great majority of reported drug offences. One effective solution to the problem of prison overcrowding, thus, would be the elimination from the realm of the criminal law of (or the elimination of custodial measures for) any cannabis-related conduct (i.e. cannabis use and possession, also above the threshold, and cannabis cultivation/sale/etc.). If this solution may not be feasible at the moment, in light of supra-national obligations,⁴²¹ at a minimum, there is a need to establish more lenient custodial measures for cannabis-related offenses. This is especially true for Italy, where the distinction between cannabis and other drugs has been eliminated since the 2006 reform, that has led to a substantial increase in penalties for cannabis-related offenses.

"Decriminalization", "depenalization" or at a minimum a substantial reduction in the severity of custodial measures for cannabis offences would not only give substantial weight to public attitudes to cannabis, which show an increasingly less moral reprobation towards the use of cannabis than towards the use of other illegal substances, but it would also bring the law more in line with its basic principles. First of all, with the criminalization principles that have been identified in chapter xxx.

⁴²¹ See *supra*, chapter V section 2.1, for the UN Conventions that oblige signatory Countries to prohibit several cannabis-related forms of conduct (such as sale) in order to combat drug trafficking. See, also, the 2004 Council of the European Union Framework Decision 2004/757/JHA "laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking", *supra* chapter V, note 380.

Current Italian legislation on cannabis seems to be a typical case of "overcriminalization", in both meanings of this term.⁴²² Secondly, with the so-called *principio di ragionevolezza*, which is a fundamental principle of the Italian Constitution and requires that different situations be treated differently in terms of punishment.⁴²³ Cannabis is different from other drugs, as all relevant official studies on its health effects have evidenced.⁴²⁴ So, less severe punishment should be provided for cannabis than for other more harmful drugs, in order not to infringe on the constitutional principle of *ragionevolezza*. As criminal law scholars have noted

⁴²² The term "overcriminalization", as we have seen in chapter II, indicates the use of the criminal justice system without adequate justifications. It relates to both 1) the enactment of new criminal offenses and 2) the use of excessive punishment. The most common complaint against drug legislation both in Europe and in the United States is not that criminal sanctions are applied, but that punishments for drug offenders are too severe. See D. HUSAK, *Desert, Proportionality, and the Seriousness of Drug Offenses*, in A. ASHWORTH-M. WASIK (eds.), *Fundamentals of Sentencing Theory*, Oxford, 1998, p. 187.

⁴²³ See, among others, V. MANES, *Produzione, Traffico e Detenzione Illeciti di Sostanze*, in G. INSOLERA (ed.) *La Disciplina Penale degli Stupefacenti*, Milano, 2008, p. 30. The author claims: "I dubbi di ragionevolezza, in effetti, sono immediatamente rilevabili anche limitandosi a richiamare il paradigma più consolidato della ragionevolezza-uguaglianza, registrato sul raffronto con disposizioni che possono essere assunte a *tertium comparationis*". *Ibidem*.

⁴²⁴ The EMCDDA has issued a report specifically dedicated to cannabis in 2008. A summary of the most relevant national studies on cannabis health effects is provided there. See D. BALLOTTA-H. BERGERON-B. HUGHES, *Cannabis Control in Europe*, *supra* note 307, p. 104-113. It may be useful to provide some extracts from the EMCDDA report. According to the report, "At the level of national authorities, evaluations of cannabis and its effect on health have been carried out on a regular cycle (...). Despite their differences in scope, methods and conclusions, the recommendations of several governmental enquiries reveal interesting common patterns: (1) cannabis is not a harmless substance; (2) its dangers, in comparison with other controlled substances, have been overstated; and (3) civil sanctions, fines, or compulsory health assessments should be established in place of criminal penalties for personal use offenses". *Id.* at 106. Also, "The overall picture suggests that cannabis consumption potentially poses risks both to individual health and to society, and on this basis some sort of legal control seems justified. At the same time, it is acknowledged that the dangers of cannabis have in some cases been overstated, that there has been a lack of separation between cannabis and other more dangerous substances and that its consumption does not necessarily lead to crime or other drug use. Alternative forms of criminal sanctions, such as civil sanctions, fines or compulsory health assessments, have been suggested. In a few cases, enquiries have included in their suggested options the regulation of cannabis consumption and sale, while drawing attention to the political impracticability of the option". *Id.* at 109. In line with this report, stressing that the only point of agreement that has been reached so far in the medical field on the issue of drug effects is that "soft drugs" and "hard drugs" should be kept separate because they have very different effects on health, see also, in Italian, V. MANES, *Produzione, Traffico e Detenzione Illeciti di Sostanze*, *supra* note 423, p. 22. The author states: "tornando alla parificazione del trattamento delle diverse droghe (...), è opportuno mettere in rilievo come una tale scelta - che dovrebbe radicarsi in un rigoroso confronto con le valutazioni empiriche ricavabili dagli studi di settore - non sembri confortata da acquisizioni indiscusse della letteratura scientifica, in seno alla quale (...) l'unico punto di convergenza sembra limitarsi a segnalare l'esigenza di mantenere, in linea di principio, una distinzione tra le due categorie". *Ibidem*. One of the most recent authoritative studies on the issue of cannabis effects on health has been conducted in the UK, in 2005, by the Advisory Council on the Misuse of Drugs. The study, that was commissioned by the UK Government, recommended that cannabis be maintained as a class C drug. Despite these recommendations, however, cannabis was reclassified as a (more dangerous) class B drug in 2009, leading to considerable criticism. The study by the Advisory Council on the Misuse of Drugs is available at www.homeoffice.gov.uk.

already, one can find both domestic and "European" *tertia comparationis* on which an assessment of the *principio di ragionevolezza* in relation to current cannabis legislation can be conducted.⁴²⁵ As to "domestic" *tertia comparationis*, it is sufficient to note that the minimum penalties for cannabis sale (6 years imprisonment) corresponds to double the penalty for serious assault (*lesioni personali gravi dolose*, art. 583 co.1 c.p.), 12 times the penalty for negligent homicide (*omicidio colposo*, art. 589 c.p.) and it is greater than the penalty for sexual violence (*violenza sessuale*, art. 609 *bis* c.p.); while the maximum penalty for cannabis sale (20 years imprisonment) is greater than the penalty for attempted murder (*tentato omicidio volontario*, art. 56/575 c.p.) and the penalty for sexual violence (*violenza sessuale* art. 609 *bis* c.p.).⁴²⁶ As to "European" *tertia comparationis*, it has already been underlined that the Council of the European Union Framework Decision 2004/757/JHA, which sets minimum principles for drug legislation in Europe, seems to differentiate between drugs that are "most harmful to health" and others. It provides for differentiated minimum penalties in the maximum (setting a minimum baseline as to the maximum penalties): they are "a maximum of at least between 1 and 3 years of imprisonment", which increases to "a maximum of at least between 5 and 10 years of imprisonment" for "drugs which cause the most harm to health". Obviously, these penalties are much inferior to the penalties currently provided by the Italian legislation in relation to cannabis (or "soft drugs" more in general).

To conclude, that cannabis is different from other drugs is apparent from both the medical studies that have been conducted over the years, which consistently stress the appropriateness of differentiating between "hard drugs" and "soft drugs", and from the most recent public surveys, which show that today no significant moral condemnation is attached by society to the use of cannabis. It is time for the legislator to (re)recognize this.

⁴²⁵ On the possibility of using, as a parameter for the constitutional evaluation of the 2006 legislation in terms of "*ragionevolezza*" (as a *tertium comparationis*), not only domestic law but also the Framework Decision 2004/757/JHA of 25 October 2004 (which sets minimum principles for drug legislation in Europe and seems to differentiate between drugs that are "most harmful to health" and others, providing for differentiated penalties), see, in Italian, C. RUGA RIVA, *Il Ruolo della Decisione Quadro nell'Interpretazione del Diritto Interno, e nel Giudizio di Legittimità Costituzionale: L'Esempio della Legislazione Antidroga*, in F. SGUBBI-V. MANES (eds.), *L'interpretazione Conforme al Diritto Comunitario in Materia Penale*, 2007, Bologna, 128-132. Also, V. MANES, *Produzione, Traffico e Detenzione Illeciti di Sostanze*, *supra* note 423, p. 31-32.

⁴²⁶ V. MANES, *Produzione, Traffico e Detenzione Illeciti di Sostanze*, *supra* note 423, p. 33.