

COORDINATED BY  
Guillem Fernández Evangelista

EDITED BY  
Samara Jones

# MEAN STREETS

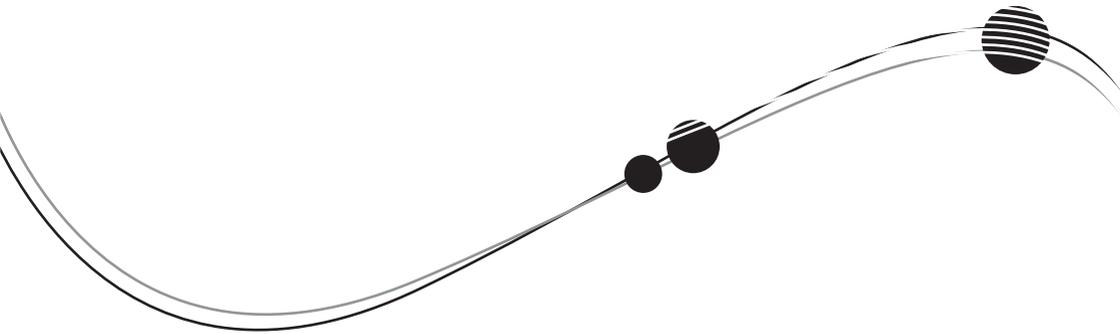
A REPORT ON THE CRIMINALISATION  
OF HOMELESSNESS IN EUROPE

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



# EPILOGUE

Late Modernity,  
Structural Violence and the Collective  
Memory: Tools for Understanding  
the “Social Harm” of Homelessness



**Iñaki RIVERA BEIRAS**

Observatory on the Penal System and Human Rights  
University of Barcelona



One of the most important tasks being carried out by the University of Barcelona's Observatory on the Penal System and Human Rights has been to try to open cracks in the orthodox theoretical and epistemological pillars of criminology that have characterised most studies on the "criminal question". Historically, criminology has placed actions institutionally defined as "bad" and violating legal rights squarely in its sights as the focus of study. In this regard, the epilogue of this book wishes to invite criminology to focus its attention not necessarily on actions "officially" defined as crimes, but on actions that cause real harm to society, like violating human rights.

It can be said that the people who sleep outdoors in different European capitals are the visible signs of a systematic violation of human rights, and as a result these situations cause "social harm". We propose the use of concepts like "late modernity", "structural violence" and "collective memory" in order to explain what the "social harm" caused by homelessness is, from a criminological standpoint. We will provide a brief description of these concepts, as they will be the instruments that will allow us to show "criminal control" and require us to place the violation of human rights, "state violence" and other forms of production of "social harm" at the centre of criminological concerns.

## **I. WHO SHAPES THE PUNITIVE SUBJECTIVITIES OF LATE MODERNITY?**

I pointed out several years ago that the study of the so-called "prison question and criminal question" has traditionally been monopolised by legal experts who, generally, have only examined legal rules that seldom penetrate social reality. For instance, the fact that 80% of the prison population is incarcerated for drug- or theft-related crimes is overlooked. The remaining 20% is incarcerated for other crimes. In Spain, for example, European Union statistics showed that currently 94% of people in jail have never killed, raped, injured or hurt anyone. Only 6% of prisoners were incarcerated for such serious crimes. This breaks with the traditional thinking that prisons are full of murderers and rapists, when in fact they are full of prisoners who fit a specific profile: young, immigrant, sick, poor, and having been convicted of crimes against property or drug-related crimes. Doubtless work with these people could be different before, during and after their prison stay. That is the subjectivity on which the criminal justice systems of the so-called late modernity are focused.

In 2004, I also had the pleasure of coordinating the book “Mitologías y discursos sobre el castigo. Historia del presente y posibles escenarios” by the publishers Anthropos, in which we pointed out clear trends for the future as a result of the cross between criminal policy based on the “criminology of intolerance” and the “culture of emergency” or “punitive exceptionality”: punitive management of poverty, increasing criminalisation of dissent, the economic market’s orientation toward deregulation and “flexibilisation”, and the shrinking Welfare State.<sup>1</sup>

Ten years later, unfortunately, the consolidation of these trends can be clearly seen in this book on the penalisation of homelessness in Europe. The criminalisation of the everyday activities performed by homeless people precisely because of the fact that they do not have a home or adapted housing solutions, the pressure against, and discrimination of, the Roma population, and the persecution of immigrants show the cruellest side of the neoliberal state that seeks a new space for attraction and expansion of capital in the “public space”. Moreover, penalising access to public services, and particularly housing, spurs the creation of a dual, discriminating and segregatory housing system. Finally, prison, internment centres and group expulsions (deportations) conceal the extent to which a new “barbarism” is being committed in Europe, and how quickly we have forgotten the principles of “social constitutionalism” in the wake of World War II, which no doubt in a not very far future will force us to once again raise the banner of “Never Again”. But these assertions make it necessary to delve deeper into the foundations of such consequences. So let’s take a look at the second concept, the paradigm of the so-called “structural violence”.

## 2. STRUCTURAL VIOLENCE – AS A FRAME OF REFERENCE

After the barbaric acts of the Shoa and of World War II, studies on peace, war and violence abounded. In 1958, Johan Galtung founded the Institute for Peace Research in Oslo, becoming the world’s highest authority in the aforementioned studies. Galtung described various typologies of violence; here I would like to highlight the one in which he pointed out the existence of various forms. The first, which he called “direct violence”, and which may be either physical or verbal, has visible effects and usually consists of an event. A second, which he called “structural violence”, is verified when “political-economic structures prevent individuals or groups from achieving their actual somatic and mental realisations”. There is a third form of violence, which he termed “cultural”, and which may be exemplified by “(aspects of) religion, public opinion, ideology, language... that can be used to justify or legitimize direct or structural violence”.

Galtung, expanding on the foregoing, and in specific studies about peace, always distinguished the so-called “negative peace”, which is ascertained in the absence of

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1. Literal translation: Myths and Discourses on Punishment. History of the Present and Possible Scenarios.

direct violence, as well as "positive peace", a situation that can only be achieved when the most important needs of people can be developed and exercised effectively, that is, when their fundamental rights can be exercised. Hence the assertion that there will not be a situation of complete (or "positive") peace when people are denied access, for instance, to vaccinations, food, housing, health care, education, etc. If, as Galtung said, the political-economic structures prevent individuals or groups from realising their full potential, it is the very structures that are acting violently, in what has come to be known as structural violence.

As we can read throughout the book, homeless people can be confronted with the different expressions of violence defined by Galtung. Direct and structural violence is perpetrated against homeless people through public or private security forces, extreme right-wing groups or bureaucratic barriers to hamper access to public services in an increasingly restricted Welfare State. In this regard, we can assert that homelessness is the visible result of other forms of violence that are not visible.

### 3. MEMORY AS ANTIDOTE - THE FRANKFURT SCHOOL

The critical theory that emerged from the "Frankfurt School" is based on a painful experience (1944).<sup>2</sup> Humankind not only no longer progresses on the road to freedom, toward the plenitude of the illustration, it retreats and sinks into a new barbaric genre. The discovery of the first Lager and then, ultimately, the Holocaust, showed the indicated dialect. Understanding the reasons for this drama involves immersing oneself in the "dialect of the Illustration". Retracing the steps down the path that led toward calamity means looking at history through another lens: memory's lens. And, from the Benjaminian (Walter Benjamin) view of the "Angelus Novus", progress as the accumulation of corpses and destruction has above all, meant the spread of oblivion the victims, the great victimisation processes.<sup>3</sup> Criminal scholars paid no heed to such processes. The "civilisation" the illustrated project spoke so much about was not for all humankind -- it would only affect certain subjects (male, white, adult, and homeowners) in the Western part of the world (Costa, 1974). The new social contract thus excluded the "others" or "opposites":

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2. It is often pointed out that the illustrated tradition gave birth to modernity like the moment at which "the lights" showed a new era that inaugurated a rationality of progress that was destined to guide humanity toward higher levels of well-being and development. But in opposition to that interpretation there was another, sometimes less well-known view, based on works like "Dialect of the Illustration", in which authors like Horkheimer and Adorno explained the shortcomings and falsehoods of the illustrated project.
  3. [http://en.wikipedia.org/wiki/Angelus\\_Novus](http://en.wikipedia.org/wiki/Angelus_Novus) - "A Klee painting named Angelus Novus shows an angel looking as though he is about to move away from something he is fixedly contemplating. His eyes are staring, his mouth is open, his wings are spread. This is how one pictures the angel of history. His face is turned toward the past. Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise; it has got caught in his wings with such violence that the angel can no longer close them. The storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress." □

women and girls, people of other races, and the dispossessed. Theorisation about otherness, racism and the enemy also surged in early modern times, so does not constitute what is sometimes (mis)interpreted as an event only of the present; rather, social exclusion was designed in that hegemonic and discriminatory legal project that was so well described by Costa (op.cit.).

As noted by Reyes Mate, Benjamin's thesis addresses the opposite face of progress, a rationale that until then (we are speaking of the 1930s and 1940s) had been so unquestionable. Progress was unable to avert catastrophe; what's more, progress has been built on corpses and ruins in its unstoppable march -- progress has been achieved largely through the use of violence. For many people, the ruins, the rubble and the casualties are episodic. They are collateral damage, events with which the fabric of history is woven. For Benjamin, such a way of conceiving history, of thinking in such big terms, is tantamount to trivialising the suffering of those who pay the price of history, that which they call progress.

The first part of this book briefly explains the origin and the struggle for Human Rights. There are some who identify History with what has taken place, as a sum of events, obviously told by those who made it. But there is another way of looking at the past, which pertains to Memory. History and Memory -- both occupy themselves with the past, but the difference can (and should) be radical: the examination must go beyond what happened to include what did not happen. For those who lean toward the first outlook (Benjamin would call them "historicists"), the conquered at most represent the spoils, or the collateral damage, or the price to pay for the victory of the conquerors. But for the latter, the issue goes far beyond and does not limit itself to others' memories. It involves a reconstructive, active task; it means viewing things through the lens of the oppressed and unveiling the permanent state of emergency that constrains the everyday way of life of so many people, where the absence of the minimum requirements for surviving decently is a permanent reality. In this regard, that state of emergency, under this prism, is much more than a temporary, passing or circumstantial suspension of a set of laws. It is truly constitutional, and Memory -- that is, the active presence of its memory -- should be the lens through which reality must be examined. In effect, Benjamin proposes a view of history that finds its constitutional element in Memory: looking at history from the prism of the conquered. Then history would no doubt be written differently -- it would follow another screenplay, have other actors, describe other projects, narrate other dreams... it would thus become clear that "there was" another way.

But I think it is crucial to note that this proposed view is not only useful for contemplating the past, but also for examining the present in its totality, where there "can also be" another way. As for expressions like "state of emergency" and "suspension of a set of laws", I am adopting the type of study proposed by Agamben, who states that, in fact, the "state of emergency" is not a special set of laws (like the laws of war), but rather, by a suspension of the legal order itself, it defines its conceptual threshold or limit. However, this work seeks to go even a bit farther beyond such a conceptualisation. Agamben, as is known, rebuilds history from this concept and links it to the right to resistance (which we will come back

to later). For now, it suffice to say that, as the author states, both in the right to resist and in a state of emergency what is ultimately at play is the problem of the legal meaning "of a sphere of action that in itself is extralegal". But if Agamben's idea is connected to Benjamin's thesis, then, in actuality, the latter's mention of the "tradition of the oppressed" describes a far longer (in time) and more painful (in quality) trajectory that describes an entire social group for which there has never been, *de facto*, a true acknowledgement of rights. The idea of "suspending law", from the point of view of legal and political philosophy, can be understood even better using Benjamin's theses. According to the Benjaminian view, it was clear that for the state of emergency to work or for part of society to be left in a "lawless space" or a "no-law zone" (Pietro Costa), the presence of law is always necessary and indispensable. Like Mate said, "if everything were exceptional, we would be in chaos. And here we're not dealing with a legal system that can be a permanent state of emergency for the oppressed" (Mate, 2003). This is achieved, as Estevez, Capella, Madrid or Gordillo point out, when the "homework" that should be required (both of the state and of the big transnational corporations) is so weak, so light, that it is virtually nonexistent. "There is a correlation between rights and duties, so that they are two faces of the same coin (...). The right of one involves the duty of another. It is the duty of others to satisfy the content of a right" (Estévez Araújo, J. (ed.), Capella, J., Gordillo, J., Campderrich, J., Bravo, A., Giménez Merino, Mercado, P., Cambrón, A. Madrid, A. 2013).

It is the rule of law itself that has left so many people without the protection of laws. Progress is being built on the backs of a large part of humankind, and if there is no law for all, then obviously law itself is negated. I would like to, then, exceedingly important frameworks for analysis, like the one being discussed, whose structural existence I sustain to be far-reaching, should not be so quickly left by the wayside. Of course, we are aware that frameworks for analysis require tweaks and possible updates. We are also aware that this epistemology comes from a long time ago. Indeed, it was the Frankfurters who understood the role of memory very well at the time. Horkheimer himself points out that it allows past injustice to remain alive, to the point that without such remembrance, the past is no longer, and the injustice dissolves. This power of memory is of such magnitude that it should be the central question of philosophy. Perhaps, as Mate points out, the return of and to so much barbarism may be due precisely to the fact that we have neglected to take Memory seriously.

Adorno was perhaps the one who most clearly pointed to the future of the sciences and of political-cultural practice following the Holocaust. Indeed, in Adorno's view, after the Shoa, the categorical Kantian imperative has crumbled. Kant was possibly one of the most lucid philosophers of the Illustration, and, as Tafalla indicates, one of the philosophers who could most afford to be optimistic in affirming universality, rationality, autonomy and humanity as the pillars of civilisation. Adorno's new categorical imperative -- "orienting thinking and action so that Auschwitz can never be repeated, so that nothing like it can ever happen again" -- has clear differences with the one formulated by Kant.

If we wish to use such categories in the present, we should consider, as Estévez Araújo recently pointed out, although without citing Adorno’s categorical imperative, that “for us, the starting point in the struggle against injustice is not a formally rigorous theory of justice. The starting point is indignation against justice. This indignant reaction is as emotional as it is rational. It does not nurture itself of arguments alone. It is necessary for people feeling it to have developed a sensitivity toward injustice that make them rebel against it”.

This is not an easy task when profound social exclusion problems exist, but it is not impossible.

It is known that different analyses fail to contemplate poverty or social exclusion as the object of study. But extending and rescuing the concept of “solidarity” of a society that has encouraged egotistical individualism allows discussion of fundamental values and rights, of social duty. Solidarity, together with liberty, equality and justice, has become a key concept for social progress and for the structural change of society and of international relations. Therefore, solidarity is the key to breaking down the difficulty in raising awareness and mobilising people who are experiencing injustice and human rights violations intrinsic to settings of poverty and social exclusion.

#### **4. THE SOCIAL HARM PARADIGM: TOWARDS (OR BEYOND) A “NEW” CRIMINOLOGY?**

Not long ago, Ferrajoli (Ferrajoli, L. 2013) asked what criminology had to say about the innumerable genocides of the last century -- not only about the Holocaust, but also about other innumerable mass murders: about the eight million people exterminated in 1884 by the Belgian colonisation of the Congo, about the million and a half Armenians massacred between 1915 and 1922, about the two or three million exterminated by the Pakistani government in Bangladesh in 1971, about the two million in Cambodia between 1975 and 1979, and then the massacres in the 1990s of the Kurds in Iraq, the Muslims of Bosnia and of the Tutsis in Rwanda. And furthermore, what does criminology have to say about the “humanitarian wars” and the war crimes committed by NATO and the United States in the last twenty years, and more generally about the more than one hundred million dead in the 250 wars fought in the last century? In short, what does criminology have to say about state-sponsored genocide?

We can add that next to these “crimes of state”, the concept of “crimes of market” or “crimes of the system” are finding their way more and more into studies of an overall critical criminology that refers to the “social harmfulness” of the present turmoil, in which people are losing more and more rights, their homes, their jobs, their savings, their life expectancies... unquestionably, if we fail to extend the object of study, a restricted criminology can never deal with these phenomena. That is why we maintain here that social harm is an idea that has been strongly advocated by some scholars in recent years, including Paddy Hillyard (Hillyard, P. with C. Pantazis, S. Tombs and D. Gordon, 2004), developing the idea of *zemiology* (from the Greek

“zemia”, which means harm) to give a final push to that need to transgress the rigid confines of criminological theory and stop talking about crime and punishment, and to focus on study from a perspective of social harm. Its concept of social harm is broader than that of criminology: while the latter measures the harm caused by crimes, it ignores the harm caused by wars, by economic speculation, by the decadent labour system in Europe, by medical errors, by the lack of resources for the subsistence of people with physical or mental disabilities, or by the poisoning of our food. The fact that it favours the social harm perspective does not seek to reform or improve criminological theory, but rather to move beyond it, as it is incapable of breaking the bonds of the definitions of crime and criminality, and must necessarily be developed beyond criminology.

There seems to be little room for doubt that we are governed by powers that, combine the public and private spheres, and the full range of greys that fit between the two extremes under the shelter of economic globalisation. The perverse symbiosis represented, for instance in Spain, by the flow of state money to a banking industry that invests more and more in the business that produces and traffics weapons, at the same time that it has carried on with an eviction policy that affects hundreds of thousands of families, is just one example of how governing the economy comes before the language and practice of politics, rights and needs. How long and how far will this economic-political-military rhetoric go?

## 5. THE NECESSARY (AND INDISPENSABLE) SOCIAL MOBILISATION

All that has been mentioned makes it inevitable for so many authors' calls for “active vigilance” and a “right to resist”, or claims for “civil disobedience” formulas, or the indispensable discussion among the populace to invent new social practices or similar expressions.

Talking about a policy and a culture of resistance leads us to rethink its origins, like the culture that sought to raise definitive barriers against the “extreme evil” of post-war European social constitutionalism, but nurtured by a tradition that in fact is far older.

The current demonstrations in cities across Europe (e.g. in Spain, Portugal, Greece, Hungary, etc.), which are being described as collective expressions, taking stances, civil disobedience and similar actions, are nothing new; rather, they come from the (old) category known as “the right to resist”. We are dealing, in fact, with a tradition of profound reassessment of democracy, a constitutionalism that is continually “in progress”, and a feeling amongst some people that the repressive measures the public authorities are currently seeking to implement cannot be allowed.

The theme of resistance, which in the past was related to a “right” that could be exercised individually, has changed and broadened to the point of being understood as one more manifestation of collective action. Estévez Araújo, and particularly Roberto Gargarella (Gargarella, R. 2011), clearly stress that subjecting people

to severe deprivation is a form of tyranny, and that this can also occur within a formally democratic regime. The latter thus recognised a right to resist against extreme deprivation, a resistance that can be passive but also active, as in numerous countries (e.g. in Latin America or Africa) where changes have been promoted over the last two decades. Ultimately, resistance represents the most important sociological substantiation of human rights.

In effect, the development of sociological theory had given new substantiation to the process whereby human rights appear and are transformed — that which no longer observes the human being as an abstract and ahistoric entity (perspective of natural law and ethical theories) to perceive it according to the category or social sector to which it belongs: as an old person, a sick person, a child, a woman, a foreigner, an ethnic or religious minority, etc. This process has been called a “specification and multiplication of human rights” (cfr. Ferrari 1989). As a result, international rules and standards addressing the fundamental rights of children, women, the mentally impaired, prisoners, the elderly, etc. came into being. But would legal systems have recognised the social right to work, to housing, education and health if a worker’s movement struggling to conquer such rights had not arisen? Would women’s right to vote, first, and to abortion, later, have been recognised if a feminist movement demanding such rights had not coalesced? Would the right to conscientious objection have been recognised if there had been no anti-militarist movement fighting for such a right? What might be said about the environmental movements and calls for more protection of nature? Clearly, it is the claim-bearing social subjects who have fought for (and achieved) recognition of greater fundamental rights. And these claim-bearing social subjects are the social movements: the true social root of human rights. For this reason, to connect NGOs that are helping homeless people, social movements and the Human Rights-Based Approach is a key issue for the present and the future.

But this establishment of rights as a result of collective struggle (and not of gracious granting by the political powers that be) also shows “the other side of the coin”: when the struggle subsides, the rights can be eroded and lost. This is what has been happening in recent decades, and as a result of so-called globalisation (privatisation, deregulation, etc.), these rights have been severely curtailed without effective opposition and mobilisation coming to the rescue. As indicated by Estévez Araújo (2013), rights are worth as much as their guarantees. In other words, one’s rights involve duties for the other party. And if that other party is fundamentally represented by the state and the transnational corporations that have flagrantly violated their duties, the correlative rights, gained through struggle, are either in serious jeopardy or have been lost for the most part. Only a true “culture of resistance” can legitimately defend fundamental rights. Thus, against the structural violence we face, and in the context of a Welfare State and democratic rule of law, the resurgence of a right to resist, using the proper legal and constitutional channels of the state, to channel the search for effective legal protection of fundamental rights and to promote real and effective roadmaps to such end, is entirely legitimate. Ferrajoli (2001) accurately notes that “the idea that the right to resist is incompatible with the rule of law is a regulatory fallacy, because under the rule of law, power is linked to law and the violation of laws by public bodies are in turn punished by laws.

This idea changes and mistakes what is for what should be the effective operation of the legal system with its regulatory and ideal model". As this book rightly points out, the situation of extreme social exclusion of homeless people sometimes hampers their social mobilization. But solidarity, collective empowerment and the experiences of disobedience and struggle like those taking place with the "City for All" movement in Hungary, or the "Plataforma de Afectados por las Hipotecas" in Spain, shows that Lhering's "fight for the right" is alive and well.

In conclusion, the issue dealt with in this work, no less than the problem of homelessness, should be understood not only as an acute problem of the present, which the author describes brilliantly, but also as a measure of hope, providing us with an action approach when confronted with the violation of human rights that we witness every day in our streets, or that which is concealed from us. The considerations made in this epilogue seek to at least contextualise one of the great dramas of (not only) contemporary social harm from a broader theoretical political perspective.

**Iñaki RIVERA BEIRAS** ■  
Barcelona, May 2013

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# MEAN STREETS

A REPORT ON THE CRIMINALISATION  
OF HOMELESSNESS IN EUROPE

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

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

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European Federation of National Associations Working with the Homeless AISBL  
*Fédération Européenne d'Associations Nationales Travaillant avec les Sans-Abris AISBL*  
194 Chaussée de Louvain - 1210 Brussels - Belgium  
Tél. +32 2 538 66 69 - Fax +32 2 539 41 79 - office@feantsa.org - www.feantsa.org



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