Alessandro Corda


ABSTRACT

Significant changes in Italian political, socioeconomic, and institutional contexts since 1985 have led to markedly harsher policies and laws. Sentencing law and penal policies have changed substantially. In the late 1980s, the legislature embraced rehabilitation in corrections and enacted a new Code of Criminal Procedure modeled on principles and values typical of adversarial legal systems. The demise in the early 1990s of the so-called First Republic due to the massive bribery scandal known as Mani Pulite (“Clean Hands”) profoundly affected the structure and functioning of the political system, perceptions of crime, and shaping of penal policies. Despite stable and declining crime rates, over time governments have enacted policies overrelying on criminal sanctions. Particular categories of offenders, undocumented immigrants and drug offenders, have been hit especially hard. Rapidly growing imprisonment rates produced overcrowding that was tackled mostly with alternatives to implementation of custodial sentences and pretrial detention. Persisting signs of punitive moderation for the most part are attributable to the inherent inefficiency of the criminal justice system, the “disintegration” of punishment at different stages of the process, and realpolitik policies adopted to address supranational concerns.

“All happy families resemble one another, each unhappy family is unhappy in its own way.” The opening words of Tolstoy’s Anna Karenina
vividly capture the current situation of the Italian criminal justice system after nearly three decades of substantial changes. In the second half of the 1980s, Italy embarked on a seemingly never-ending series of changes that oscillated between emphasis on rehabilitation and reintegration of ex-offenders and adoption of increasingly punitive policies.

Between 1985 and 1990 the Italian Parliament passed important pieces of legislation to put an end to domestic political terrorism and fight more effectively against organized crime. In the same period, the legislature endorsed rehabilitation in corrections, redesigning rules to reward inmates’ good behavior with an array of early release schemes. In 1989, 1 year after enactment in 1988, a new Code of Criminal Procedure inspired by and modeled on due process principles typical of adversarial legal systems came into force, in stark contrast with a long-standing inquisitorial tradition. Enactment of collective clemency measures in 1986 and 1990 reinforced the image of a period of penal moderation.¹

During the early 1990s, the collapse of the “First Republic” transformed the structure and functioning of the Italian political system but also perceptions of crime and the shaping of penal policies. The transition to the “Second Republic” witnessed an increasing politicization of penal institutions and criminal justice actors. The most visible result was a transformation of the traditionally moderate Italian penal culture into a more punitive one, especially with regard to some categories of offenders.

Italy’s postwar political system was not a paradigmatic instance of consensus-based—or consociational—democracy in which destabilizing effects of cultural segmentation and social cleavage are neutralized by cooperative mechanisms like coalition governments and corporatist political traditions (Lijphart 1969, 1999). Rather, in Italy, “adversarial electoral competition and polarized pluralism went together with patterns of elite collusion that were largely hidden from view” (Bogaards 2005, p. 516). Italy therefore represented a peculiar case of consensus democracy: in a climate of Cold War ideological polarization, the Christian Democratic Party (DC) dominated the government from 1948 through the early 1990s with strong opposition from the largest Communist party

¹ Although I focus here on the adult system, it is important to note that in 1988 the Parliament enacted a substantial reform of the Italian juvenile justice system that emphasizes a marked preference for diversion mechanisms, with custodial sentences as a last resort (Gatti and Verde 2002; Scalia 2005; Nelken 2006).
(PCI) in the Western world. However, systemic elite cooperation in all levels of government and society was regarded as necessary to help the system function and the country flourish. This arrangement bore high costs such as pervasive clientelism and excessive power of political parties in all aspects but also throughout all strata and sectors of society and economy. This phenomenon became known as “rule by parties,” or “particracy” (partitocrazia). The parties that contributed to drafting, and were committed to, the Constitution took control of almost every institution and powerful position; they became the system (Guzzini 1995). The lack of alternation in power, insufficient turnover of the political class, and “crystallization of relationships between members of government and interest groups” led in the long run to systemic corruption (Mershon and Pasquino 1995, p. 48). Beginning in the late 1960s, corruption “lost its elite character” and became commonplace at any level of society. Paoli (2001, p. 165) offers an effective summary:

First, kickbacks were paid by the suppliers of goods and services to the government. . . . Companies paid off officials at different stages of the bidding process in order to be included in the list of qualified bidders, to be selected as the winning contractor, to get an inflated price for the job, or to be able to cut corners on quality. In some cases, long-term agreements were reached between companies and the representatives of political parties to manipulate bids and keep potential competitors from winning access to the market. At the same time, kickbacks were also paid by the demanders of political favors or subsidies. Licenses, authorizations, credits, tax reductions, and state enterprises about to be sold became the object of bribery. Third, kickbacks were routinely paid by those who could be called avoiders, i.e., individuals and firms seeking to escape taxes or to get a favorable interpretation of the law. Many examples could be quoted to illustrate these two types of corruption, ranging from petty bribes to obtain a passport, a driver’s license, or a cemetery plot to billion-lira kickbacks to avoid taxes or sanctions. In particular, illegal payments to Guardia di Finanza officials in charge of revising companies’ tax declarations became very frequent and systematic in the 1980s.

2 The DC and the PCI (together controlling almost 70 percent of the votes) often found themselves in electoral dead heats, but no real alternation in power took place between 1948 and 1994. Italy experienced a period of “blocked democracy,” with the Christian Democrats being the cornerstone of every government.
Beginning in 1992, the “Clean Hands” (Mani Pulite) investigations (also commonly known as Tangentopoli, literally Bribeville) conducted by Milan magistrates attacked the First Republic’s systemic bribery and illegal funding of the major political parties (Della Porta 1996; Nelken 1996; Rhodes 1997, 2015). The scandal detonated with unprecedented effect and resulted in the disappearance of all the main parties, in particular the Christian Democrats and the Socialists. Meanwhile the fall of the Berlin Wall resulted in dissolution of the Communist Party in 1991 (Sassoon 1995; Mack 2010, pp. 251–56). Popular referendums in 1991 and 1993 led to reform of the electoral law: a long-lived proportional representation voting system was replaced with a largely majoritarian winner-take-all system (Donovan 1996). These events completely reshaped the political landscape. The general elections of 1994—the first of the Second Republic—led to formation of two new party coalitions, the center-left and the center-right, that dominated Italian politics for almost two decades (Waters 1994; Carter 1998; Fabbrini 2009, pp. 35–36).

The collapse of the First Republic left a profound popular distrust of political parties, including their ability to respond to crime. The Clean Hands investigations did not trigger a moral regeneration of the Italian party system (Della Porta and Vannucci 2007). It had “a short-term impact on corruption” and led to “an escalation of institutional tensions between political powers—especially the coalition headed by Silvio Berlusconi—and the judiciary.” Its legacy has been “a deep-rooted pessimism concerning the integrity of political and economic elites” (Vannucci 2009, p. 258).

Such a widespread lack of legitimacy undermined previous perceptions of a strong state able to show penal moderation (Whitman 2003, p. 143). This, and the effects of an economic downturn and increased immigration from non-EU countries in the early 1990s, favored the rise of attitudes that were “more rigid towards deviance, more punitive and favorably disposed towards ‘law and order’ campaigns” (De Giorgi 2006, p. 37), especially with respect to offenders regarded as social outsiders (Melossi 2000, 2013). The discourse on crime and penal policy reached a level of politicization never before experienced in Italy.

Explicit law-and-order campaigns were not prominent until the early 2000s, but the new and unstable party coalitions soon embraced this new public sentiment. Right-wing political entrepreneurs had an easy target (Tarchi 2002; Fella and Ruzza 2013). The center-left coalitions were un-
able to offer compelling alternative narratives and often accepted right-wing proposals for fear of losing elections by appearing soft on crime. Despite stable or dropping crime rates in recent years, “tough on crime” slogans have become deeply embedded: the promise of being harsh with street criminals, drug and sex offenders, and undocumented immigrants became familiar at national and local levels.

In earlier times, use of clemency measures was a recurring, deeply rooted feature of the Italian criminal justice system. Repudiation of that tradition and the enactment, especially after the 2001 general elections, of stiffer penalties targeting specific offenders led to rapid growth of imprisonment and overrepresentation in prisons of undocumented immigrants, street criminals, and drug offenders.

The Italian prison population grew steadily after 1990, recently declining only in reaction to critical judgments of the European Court of Human Rights. The population of 39,594 at year-end 1985 fell as a result of an amnesty for nonfinancial offenses punishable by up to 4 years and a collective pardon up to 2 years. As figure 1 shows, after another amnesty and collective pardon in 1990, there were 24,844 prisoners

![Graph showing imprisonment rates at year-end per 100,000 of the general population, 1985–2015.](image)

**Fig. 1.**—Imprisonment rates at year-end per 100,000 of the general population, 1985–2015. Source: ISTAT and Ministry of Justice (multiple years).
at year-end and an imprisonment rate of 43.8 per 100,000 inhabitants. Things changed quickly: 3 years later there were 50,348 prisoners, the highest figure since the early 1950s. Since the late 1990s, the trend has been upward with one major break represented by a highly contested 2006 collective pardon. In 2005, for the first time Italy had an imprisonment rate above 100 (102.5). The threshold of 60,000 inmates was passed in 2009 (64,791). The all-time high was 114.5 per 100,000 at year-end 2010 (67,961).

Over the past 5 years, the upward trend reversed because of European Court of Human Rights judgments that in 2009 and 2013 declared conditions in Italian prisons to be degrading and inhuman by reason of overcrowding. To preempt additional lawsuits, the government enacted laws to reduce inmate numbers and prevent recurrence of similar future situations.

The new laws boosted existing schemes of early release and administration of custodial sentences outside prison and curbed overreliance on pretrial detention. In addition, the Constitutional Court in early 2014 struck down a 2006 law that eliminated distinctions in sentencing between soft and hard drugs and introduced stiff penalties for possession. As a result, the inmate population of 53,623 in 2014, after 5 consecutive years above 60,000, was at a level comparable to that of the mid-1990s and early 2000s. The imprisonment rate fell below 100 per 100,000 (88.2) compared with a 2013 Council of Europe member state average of 140 (Aebi and Delgrande 2015) and an EU member state average of 128.2. Italy had the lowest rate in southern Europe (Spain, 139; Portugal, 138; Greece, 111; and France, 100; World Prison Brief 2015). The most recent figures confirm the downward trend: at year-end 2015, the rate was 85.3 per 100,000 (52,164 inmates).

Compared with common law jurisdictions, the Italian penal system defies the traditional categorization between civil law and common law countries. Among the most salient features:

*Hybrid Criminal Proceedings.* Since enactment of the 1989 Code of Criminal Procedure, the Italian criminal process has been characterized by core traits of inquisitorial civil law jurisdictions and selected borrowings from common law adversarial systems. No other civil law country has undertaken so massive a transplant of adversarial system principles and rules. Italy broadened the rights of defendants and in various ways increased the state’s burden to obtain a conviction. However, inconsistencies and structural ambiguities persist.
Multiple Appeals. Unlike common law jurisdictions, in which appeals focus on legal errors, both defendants and prosecutors may request a new trial on the facts before a court of appeals. Following the appellate trial, decisions may be reviewed solely on matters of law by the Court of Cassation, the court of last resort. It may confirm or nullify the court of appeals' judgment; it may also nullify the verdict and order either a new trial or resentencing before a different court of appeals, which must apply the Court of Cassation's interpretation of the contested legal issues.

Statutes of Limitations. Statutes of limitations run even after formal charges are filed, with the exception of offenses punishable with life sentences. For all other offenses the statute of limitations expires when the passage of time since the commission of the crime equals the maximum penalty provided for by law, even when a criminal proceeding is ongoing. In 2004–13, a total of 1,552,435 cases were dropped because of statutes of limitations (Ministry of Justice 2015b).

Mandatory Prosecution. Article 112 of the Italian Constitution obligates the prosecutor to file charges whenever there is sufficient evidence to prosecute. Known as the principle of mandatory prosecution, or the legality principle, it signifies that prosecuting authorities have no power to choose whether to bring criminal charges or what charges to bring.

Independence of the Judiciary. The 1948 Constitution, enacted after the dark times of the fascist dictatorship, placed both judges and prosecutors within the judiciary, in order to insulate them from political pressures, promote impartiality, and assure the equality of all citizens before the law. For decades members of the judiciary were part of the culture of systemic elite collusion, but both prosecutors and judges have gradually become less sensitive to political expectations and have begun to perceive themselves as charged with a civic responsibility toward society at large. Since the 1970s, the fights against political terrorism, organized crime, and systemic corruption have shaped the new role of the judiciary, whose members have become engaged and vocal concerning criminal justice policy. While in the United States concern is expressed about politicization of the criminal justice system, Italian commentators often criticize the excessive activism of members of the judiciary.

\[3\] In any case, it cannot be less than 6 years for felonies and 4 years for misdemeanors. Some specific events may partly prolong the deadline (see arts. 157–161 of the Penal Code).
This essay recounts the evolution of Italian sentencing policies and practices over the past three decades, describing in particular the path that since the early 1990s led to the abandonment of practices and conventions that characterized the criminal justice system for most of the twentieth century, namely, an inquisitorial system, comparatively low imprisonment rates, recurring use of clemency measures, and relatively low politicization of policies and institutions.

The transition from the First to the Second Republic was characterized by a decisive trend toward increased punitiveness in public discourse and legislation. Both center-right and center-left governments have been unable to promote and enact comprehensive reforms aimed at achieving an enlightened Beccarian system of punishment predicated on promptness and moderation. Instead they have reacted to and sometimes fed emotional demands of the public, often based on notorious crimes and more or less justified alarms, fears, and scandals. The response has usually been more punishment. Most responses were mainly symbolic, aimed at public reassurance, but some hit selected targets harder. The growth of the incarceration rate has been the most visible outcome of this change.

Two major factors contributed to resisting increased punitiveness and functioned as forces of moderation. The first involves the structure of the judiciary: despite the principle of mandatory prosecution, prosecutors routinely filter public fear and emotions in exercising their powers and prerogatives; judges possess significant power to reduce the potential overharshness of penal statutes when determining sentences. Second, the inefficiency of the criminal justice system makes it unable to meet the demands of increasing caseloads. Put differently, inadequate resources significantly undermine implementation of legal changes designed to send more people to prison, and for longer. Recent emergency overcrowding legislation, although it provided substantial relief to the penitentiary system, did not create much-needed bipartisan momentum toward criminal justice and sentencing reform. Italian penal policies and practices can be described as a congeries of contradictions, mixing elements of undue severity, symbolic penal welfarism, and “deflation mechanisms” in order to manage heavy caseloads.

The essay proceeds as follows: Section I provides an overview of the Italian sentencing process, focusing on its hybrid nature between inquisitorial and adversarial systems; I analyze the roles, functions, and organizational cultures of prosecutors, police, and courts. Section II focuses on
I. The Criminal Process
In October 1989, the new Code of Criminal Procedure (CCP) came into force, completely reshaping the machinery of Italian criminal justice. The new code abandoned features of the inquisitorial civil law tradition that had characterized criminal proceedings for more than a century. From a comparative perspective, the new CCP represented “the most serious attempt to transfer adversarial criminal procedures into an inquisitorial jurisdiction since 1791, when the French attempted to import the English system during the heat of the Revolution” (Langer 2004, p. 47). This shift radically transformed the institutional infrastructure and internal dynamics of the criminal justice system.

A. The Prosecutor
The Italian public prosecutor enjoys a distinctive status among Western jurisdictions. Quintessential features of the civil law tradition such as effective hierarchical organization, strong top-down guidelines, and internal controls (Damaška 1986, pp. 19–23) are gone. However, prosecutors retain the status of judicial figures. They are part of the same professional category as pretrial, trial, and appellate judges (the word “magistrate” is commonly used to refer to both judges and prosecutors). Members of the judicial profession are characterized by a strong sense of solidarity; usually they refer to one another as “colleagues.” Like judges, prosecutors are neither appointed nor elected; they are career civil servants chosen on the basis of the results of a public examination typically taken a few years after finishing law school. Prosecutors may switch roles and become judges (and vice versa) upon request with only minimal requirements to satisfy. Judges and prosecutors have the same salary structure, receive the same salary increases, and have equivalent career advancement opportunities (Grande 2000, p. 236). Prosecutors and judges see themselves as branches of one professional body and are widely regarded as very effective in promoting and lobbying for the interests of their professional association. This has been criticized as inspired by a “corporatist logic” insofar as it sometimes prioritizes professional interests over achievement of law reform goals (Alberti 1996, p. 285).
1. The Prosecutor’s Independence. Italian prosecutors have very strong external independence, that is, independence from external political pressures. In this regard, the prosecutor’s role was radically transformed over time. From Italy’s unification in 1861 until the end of World War II, the prosecutor represented the executive branch of government within the judiciary, operating under the direction of the Ministry of Justice. With the enactment of the post-fascist period Constitution, the prosecutor was located within the judiciary and vested by the legality principle with the duty to file charges whenever sufficient evidence exists to prosecute a case. The only significant outside control pertains to the disciplinary power of the Ministry of Justice (shared with the chief prosecutor of the Cassation Court) to bring action for possible misconduct. However, the merits of these actions and possible sanctions (ranging from censure to dismissal) are decided by the High Council for the Judiciary (HCJ), the “self-governing body” of the judiciary established in 1958 and two-thirds composed of judges and prosecutors elected by their peers. Thus, even within this body, members of the judiciary exercise significant power. The High Council’s constitutional mandate, besides deciding on disciplinary measures, is to ensure the autonomy and independence of the judiciary. It also decides on magistrates’ assignments, transfers, and career advancement.

Prosecutors and judges are institutionally insulated from political pressure, but they are not immune from politics. First, members of the judiciary are organized in factions defined by more or less progressive values that play a critical role in determining elections to the High Council (Guarnieri 1994, pp. 251–53; 2015, p. 122). Second, relations between the judiciary and the political system were historically strong at least until the 1970s because of the collusion between elite classes that long characterized the Italian political system (Alberti 1996, pp. 285–86; Della Porta 2001, p. 4). This situation has changed greatly since then.

Evolution in understanding of their role led prosecutors to adopt a more visible judicial activism in the 1970s, particularly in their fights against environmental crimes, political terrorism, and organized crime (Sberna and Vannucci 2013, p. 582). In the early 1990s, the massive brib-
ery scandal known as *Mani Pulite* (Clean Hands) strengthened the credibility and autonomy of the judiciary, especially prosecutors, who came to be perceived by large strata of the public as the only upright and trustworthy component of government. Critics have argued that the judiciary attempted to fill the void left by politics by “actively seek[ing] the support of the public opinion,” prioritizing “civic involvement over institutional neutrality” (Della Porta 2001, p. 18).

In any case, the enduring legacy of that period and the fall of the First Republic has been an ongoing tension between the judiciary—prosecutors in particular—and the political system (Guarnieri and Pedezoli 1997). Starting in the mid-1990s, particularly under center-right coalition governments, the legislature and the executive have repeatedly attacked the legitimacy of judicial action and attempted by statute to curb prosecutors’ institutional independence and investigative powers. The recurring refrain is of a threat of the “rule of judges” over the rule of law (Bruti Liberati, Ceretti, and Giasanti 1996; Gallo 2014). For years, Silvio Berlusconi, leader of the center-right coalition and several times prime minister, has claimed to be the victim of a “crusade” by left-wing prosecutors and judges (*New York Times* 2011).

Italian prosecutors also possess remarkable internal independence. In carrying out their duties and functions, they are not obliged to comply with guidelines, orders, or instructions from a supervisor (Alberti 1996, pp. 284–85; Nelken 2013, p. 244). Even within the offices where they work, prosecutors enjoy vast autonomy despite the formal hierarchical structure. Substantive professional evaluations of prosecutorial activity are considered per se to be “a threat to judicial independence.” Accordingly, except in cases of patent and serious violations of their duties, the HCJ exercises strong self-restraint in assessing prosecutors’ performance. The supervisory powers of the heads of prosecutors’ offices are very limited and are closely monitored by the HCJ to prevent the establishment of top-down organizational culture that might limit the operational independence of individual prosecutors; this is a professional feature that is to be “protected and encouraged” (Di Federico 2008, p. 308). Critics have argued that so much independence, coupled with the legality principle, leads de facto to a system of discretionary prosecution in which unaccountable individuals shape penal policies (Di Federico 1998).

2. *The Prosecutor’s Role in the Proceedings.* The constitutional redesign of the prosecutor’s role was intended to shield him or her from undue
political pressures and promote independent exercise of his powers. In drafting the new CCP, the legislature sought to structure a system of criminal proceedings grounded in adversarial principles and rules, focusing on the impartiality of the decision maker and parity of arms between the contending sides. Nonetheless, the institutional closeness between judges and prosecutors was left untouched. The fact that the adversarial changes in criminal procedure were not matched by reform of the judiciary created ambiguity as to whether prosecutors should be considered parties to the proceedings or impartial figures “helping the judge” in truth-finding.

The tension is between the prosecutor’s “inquisitorial quasi-judicial status” and his or her functions as the accuser in a largely adversarial process (Panzavolta 2005, pp. 606–7; Montana 2012, p. 102). One major ongoing debate concerning the judiciary, not surprisingly, revolves around the need to better delineate the prosecutor’s role in a system that has embraced core values of adversarial proceedings. Some advocate a clear separation of career paths of prosecutors and judges that would create two separate tracks in recruitment, career advancement, and disciplinary systems. Others support a separation of functions that would make it much more difficult for a prosecutor to become a judge, and vice versa, by introducing an additional examination and specifying a time window within which final decisions must be made about career paths within the judiciary (Amodio 2004, p. 499).

Legal provisions and their interpretations are not much help in specifying the “inner identity” of the prosecutor. While some provisions imply a truth-seeking function, others suggest a figure no longer responsible for collecting exculpatory evidence and required only to build a strong case and win in court. Scholars have not been reluctant to criticize. Grande (2000), for instance, rhetorically asks whether the prosecutor—dependent from the executive, free from substantial hierarchical guidance and control, and in charge of the investigation phase—should be seen as a fourth branch of government alongside the legislative, executive, and judicial branches. She describes a structural identity crisis of a modern Minotaur, at the same time a “lawyer without passion, a judge without impartiality” (pp. 234–35; quoting Calamandrei [1936] 1942, p. 20).

Semistructured qualitative studies have attempted to capture and portray the prosecutors’ self-perception and defense attorneys’ perceptions of them. Prosecutors see themselves first and foremost as members of the
judiciary, functionally different from yet culturally equivalent to judges (Montana and Nelken 2011, p. 290; Montana 2012, p. 111). They perceive themselves as a player within the criminal process "who performs a neutral and impartial investigation to find the truth"; prosecutors acknowledge their cultural distance from common law prosecutors who they believe exclusively work to obtain convictions (Montana 2009b, p. 489). Unlike county attorneys in the United States who are often elected on a pledge to fight crime, Italian prosecutors do not have to launch crusades against crime or carry out anyone's agenda. They take a bureaucratic approach to decision making. As members of the judiciary independent from the executive, they need not convey messages but instead can "filter" social emotions and collective fears through an institutional framework insulated from the political level. "Italian prosecutors accept that one of their functions is to provide a response to public fear," but at the same time they translate the public's meaning and understanding of social alarm "using a dictionary that depends on their own legal culture" (p. 487). Accordingly, prosecutors "convert" the amorphous and highly emotional notion of social alarm into more objective and verifiable criteria such as the seriousness of the offense and the risk that a statute of limitation will expire.

From the defense attorneys' perspective, the quasi-judicial role of the prosecutor is a source of major concern. In a recent survey, prosecutors were described as exercising broad discretion while enjoying ready acquiescence from the judges to their requests and motions. That proximity to the decision maker was described as associated not only with shared constitutional standing and common training but also with the final goal—to establish substantive rather than merely evidentiary guilt or innocence. Defense attorneys described, and rued, what in their view are cooperative dynamics in the interplay between prosecutors and judges (Di Federico and Sapignoli 2014).

3. The Relationship of the Prosecutor with the Police. Today's Italian criminal justice system substantially differs from common law systems in which police officers handle investigations with almost complete autonomy (Harris 2012, p. 56). Before 1989, things in Italy were not so different. The police had almost unfettered discretion, which was viewed as potentially subject to interference of the executive branch (Goldstein and Marcus 1977, pp. 258–59). Furthermore, the legality principle underlying mandatory prosecution could be undermined by the police (Caianiello 2012, pp. 257–58). One main goal of the new CCP was to
involve the prosecutor as soon as possible after a crime was reported. The new rules were a long-overdue implementation of article 109 of the Constitution providing that "the judicial authority directly disposes of the judicial police."

No special police forces were created; instead the police were made subject to prosecutorial oversight during the investigation stage (Fassler 1991, pp. 252–53). The judicial police remain part of the executive and belong to its hierarchical structure but are subject to direction and supervision by the prosecutor (Illuminati 2004, p. 308). Thus the Italian system draws a clear line between crime prevention and law enforcement, and crime repression by investigative assistance to the prosecutor (Caianiello 2012, p. 258). The police "without delay" must inform the prosecutor that a crime is alleged to have occurred (notitia criminis). In the meantime, the police at its own initiative may act to ensure that the offense does not produce further consequences, preserve sources of evidence, and gather information that might prove relevant to the prosecution. After the prosecutor takes control, the police should carry out only activities that have been ordered or delegated.

This framework promotes joint and cooperative efforts. The creation of police units linked to, and located in, the prosecutor's offices has been meant to overcome mutual distrust and potential clashes arising from different professional cultures, backgrounds, and institutional aims.

In practice, prosecutors do not and cannot direct every investigation in detail. When misdemeanors and simple felony cases are not prioritized, prosecutors provide very limited supervision and the investigation is conducted almost entirely by the police. The police set the agenda, and the prosecutor is involved only when authorizations are required or acts must be validated (e.g., searches and seizures). During investigations of this type, interactions are not much different from those in common law jurisdictions (Illuminati and Caianiello 2007, pp. 133–34; Montana 2009a, p. 318). When a case is prioritized, the prosecutor prompts, directs, and reviews investigative activities. He or she is in charge formally and practically (p. 325).

4. Prosecutorial Discretion. Prosecutorial discretion remains highly debated and has been since at least the late 1980s, when a few chief prosecutors issued informal guidelines to manage backlogs. They represented a shift toward more proactive, managerial, and efficiency-oriented approaches, in contrast with the "fatalistic" attitude about case flow that characterized most offices (Nelken 2013, pp. 250–51). Initially, the guidelines were intended solely for internal purposes.
When a few offices became more open about adoption of criteria that rejected the "first-come, first-served rule" implied by the principle of mandatory prosecution, the HCJ initially reacted skeptically. By the late 1990s, it acknowledged the practical impossibility of timely investigation of every reported crime and the need to elaborate criteria. The HCJ stressed that priorities should not be products of discretionary choices made by single prosecutors for they lack authority to decide whether or not to investigate a given case. The priority criteria should primarily be based on the magnitude of the social harm caused by the crime. A new statute provided guidance in establishing priority criteria including the seriousness of the offense, the harm caused, the potential prejudice of delayed investigations, and the need to vindicate the interest of the victim. The statute required each prosecutor's office to notify the HCJ of any guidelines issued (art. 227 of the Legislative Decree no. 51 of 1998; Torrente 2007, pp. 244–45).

Efficiency-based criteria have also been adopted. One notable example, issued by the Turin chief prosecutor following the 2006 collective pardon, required prosecutors to put on a "dead track" cases for which the likely sentence would have been fully or mostly covered, hence substantially nullified, by application of the pardon (Maddalena 2007). More recently, in 2014, in light of persisting backlogs and understaffed courts, the Rome chief prosecutor capped the charges his deputies can file every year for crimes that are not classified as "serious" (Corriere della Sera 2014). The adoption of guidelines has become increasingly popular (Verzelloni 2014) and is widely supported by legal scholars (Caianiello 2012, pp. 260–61).

An influential judge has noted two main risks. The first is localism: priority criteria should be adopted by the office of the public prosecutor at the district court of appeals level rather than by individual offices of the public prosecutor at the trial level to avoid emergence of patchworks of different practices within the same judicial district. Second, drafters of priority criteria should reject the temptation to shape penal policies. Guidelines should be based on objective considerations—primarily the seriousness of the offense—and take account of the number of cases that can be properly handled with available human and financial resources (personal communication with Giovanni Canzio [then Milan Court of Appeals president, now first president of the Cassation Court], July 2, 2015).

5. Diversion Tools. Two noteworthy new laws aim at substantially reducing the number of cases being tried by means of prosecutorial di-
version. Law no. 67 of 2014 introduced in the adult system a form of deferred adjudication largely based on a similar juvenile justice proceeding. The defendant is placed on probation (community service) for a fixed period; if probation is successfully completed, the case is dismissed. The special proceeding must be requested by the defendant before the trial and is applicable only to offenses carrying a maximum penalty up to 4 years of imprisonment and to a few specified offenses. Deferred adjudication may not be granted more than once.

The second form of prosecutorial diversion was introduced by Law no. 28 of 2015. It provides for a new reason for dismissal: the charge is not simply dropped, but the offender is legally shielded from punishment when the harm caused by an offense punishable by fine only or imprisonment up to 5 years is "particularly low" and the perpetrator is not a "habitual offender." The request is made by the prosecutor to the preliminary investigation judge or the trial judge; the victim may oppose the dismissal. This special order becomes part of the offender's criminal record, thereby preventing further applications of the same measure if a pattern of habitual recidivism is established.

B. Establishment of a Hybrid System

Although adversarial and inquisitorial models are ideal types that are rarely found in pure versions in real-life legal systems (Langer 2014), the Italian system borrows from both in a way that makes the main goal being pursued unclear and leads to practical inefficiencies. The Italian system is thus "caught between two traditions," and significant legal and cultural resistance toward adversarial principles persists to this day (Pizzi and Marafioti 1992, p. 3; Marafioti 2008).

There are at least four persisting factors of hybridization. First, the new CCP has not clearly redesigned the role of the prosecutor. It is not easy to say whether the prosecutor is an adversary party or a quasi-judicial actor. In practice, the prosecutor commonly behaves as a non-partisan actor who helps the judge establish the truth.

Second, the trial judge retains significant powers that are widely used in the evidence formation process: the judge is seldom reluctant to take over a party's examination or cross-examination. He or she may introduce evidence (e.g., a court-appointed expert witness). While US federal judges tend to act as impartial adjudicator-referees, the activism of Italian trial judges reflects a persisting inquisitorial approach (Pizzi and Montagna 2004, p. 465). Rather than act as a neutral umpire, the judge
plays a role that expresses the system’s implicit primary concern: to ascertain truth and do justice.

Third, in contrast to the adversarial model, the victim reports the crime and serves as a witness but may also bring a civil claim for damages in the criminal trial (the *partie civile* as in the French system). If the victim brings a civil action, he or she participates as an additional party throughout the process. During the investigation the victim can request access to the case file and ask for additional investigation, present evidence and witnesses at trial, and appeal an acquittal and parts of the judgment related to monetary compensation.

Fourth, the reformed Italian system retained broad appellate review on matters of both fact and law: in adversarial criminal law systems a new trial for the same crime violates double jeopardy protection; only rarely are factual decisions reconsidered on their merits. Under Italian law, a ruling is not final until appeal rights are exhausted and double jeopardy protection does not apply to what is viewed as a continuation of the same trial. This represents a further inconsistency: the vertical protection of appellate review of facts has historically characterized inquisitorial systems, which do not afford defendants horizontal protections such as rights to confrontation and cross-examination. The prosecutor may appeal an acquittal; in adversarial systems a not guilty verdict ends the case.\(^5\) This difference was a major source of American consternation concerning Amanda Knox, an American exchange student accused of murdering her British roommate in Italy in 2007, particularly when the Court of Cassation ordered a new trial after she was acquitted by an appeals court following a conviction at trial (Mirabella 2012, p. 253).

C. The Process

For four decades after adoption of the 1948 Constitution, the Italian criminal process was dominated by rules set out in 1930 by the fascist regime. Over time the Constitutional Court and the legislature softened provisions that limited the rights of the accused during the investigation and at trial. Overall the system retained a structure based heavily on the

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\(^5\) Law no. 46 of February 20, 2006, abolished prosecutorial appeals of acquittals delivered by a trial court. The Constitutional Court struck it down because it created undue inequalities between the defense and the prosecutor, disadvantaging the latter.
1808 French Code d’Instruction Criminelle. It provided for a mixed system: a secret investigation followed by a public trial, with the former manifestly dominating the latter (Illuminati 2010, pp. 303–7). Likewise, under the Italian Code of 1930, the criminal process was divided into the pretrial investigation (istruzione) and the trial (dibattimento). The pretrial phase was dominated by an investigating judge modeled on the French juge d'instruction. On paper a public prosecutor worked side by side with the investigating judge but in practice had little power and few substantive functions (Amodio and Selvaggi 1989, p. 1214; Marafioti 2008, pp. 81–82).

The prosecutor began the proceeding, but the investigating judge collected the evidence. The investigating judge was the real “case manager.” He or she was the major player, charged to obtain all relevant information for deciding whether to prosecute. The prosecutor was auxiliary (Panzavolta 2005, p. 579). The criminal proceeding was based on a “single dossier”: the collected evidence and documentation of investigative activities. The judge who conducted the investigation decided whether the case would be sent to trial. In case of indictment, the dossier migrated into the case file of the trial judge.

A public trial was held but represented “a mere formality” (Illuminati 2005, p. 570): the defense lawyer could call witnesses but could neither examine them nor cross-examine prosecution witnesses. The trial judge instead asked questions suggested by the parties or on his or her own initiative. The public trial often merely reiterated investigative activities by reading minutes documenting them. Witnesses interviewed in the earlier stage merely confirmed what they had then said before the trial judge. The dossier and supporting material thus constituted the basis for the prosecution, the verdict, and the sentence (Pizzi and Marafioti 1992, p. 4). In practice a continuum existed, with the investigation phase and the investigating judge performing the truth-seeking crucial for the final outcome.

The 1989 CCP, rooted in symbolic and practical considerations, departed from the past: the criminal proceeding was divided into three stages and strictly separated the trial from the preliminary investigation. The Parliament wanted the criminal justice system to reflect the modernization and democratization of state institutions, breaking any links with an earlier system shaped under the authoritarian fascist regime. The principles of orality and immediacy were embraced with ev-
idence being presented and tested before the trial judge. The single dossier system was rejected. These are the three stages of criminal proceedings:

- the *preliminary investigation*, in which the prosecutor, helped by the judicial police, and under the supervision of a neutral pretrial investigation judge, collects evidence in order to decide whether to prosecute;
- the *pretrial hearing*, in which a judge not previously involved determines whether charges should be brought on the basis of evidence that probable cause exists to believe a crime was committed and the accused committed it;
- the *trial*, in which the prosecutor and the defendant have equal opportunities to present their cases before a trial judge principally charged to ensure observation of the rules of due process.

The 1989 changes sought greater efficiency, thus attempting in part to address persisting backlogs of cases. The goal was to limit the full adversarial trial to about 20 percent of cases while handling the rest by means of newly created “special proceedings” that gave defendants significant sentence reductions for waiving their rights to trial. The aim was to hold full trials only for the most serious cases while providing “fast-track procedures” for cases in which inculpatory evidence was clear (Pizzi and Marafioti 1992, pp. 6, 16ff.; Grande 2000, pp. 252–53).

1. *The “Penalty upon Request of the Parties.”* This is a form of sentence bargaining. If the parties agree on the merits and on the sentence before trial, they may request the judge to review and accept their agreement. This is available for a penalty up to 5 years of imprisonment including a discount of up to one-third (Maffei 2004, pp. 1061ff.). The code does not identify eligible offenses but effectively excludes crimes with sentencing ranges that do not authorize a custodial penalty within the 5-year limit (e.g., the sentencing range for murder is 21 years to life).

2. *The “Summary Trial” Proceeding.* This eliminates the adversarial trial by providing a significant sentence discount (up to one-third of what would be imposed at trial or 30 years in case of a life sentence) in exchange for enabling the pretrial hearing judge or the trial judge to resolve the case on the basis of information collected during the pretrial investigation.
3. The “Penal Decree.” In misdemeanor cases punishable with a fine only (in the first place or as a substitute for short custodial sentences up to 6 months), this proceeding allows early imposition of the sentence by the judge supervising the investigation upon request of the prosecutor. The main benefit for the defendant is the reduction of the sentence up to half of the statutory minimum. Such a decree may be opposed by a petition to the trial court, in which case a full adversarial trial is held unless the defendant opts for one of the available special proceedings.

Two additional special proceedings provided for by the new CCP do not reward the defendant but speed the process. The pretrial hearing can be eliminated when the merits of the decision to prosecute are clear (the “immediate trial” procedure) or when the accused was caught in commission of a crime and lawfully arrested or has confessed (the “direct trial” procedure).

Thus, the Italian criminal process resulting from the 1989 changes retained the principle of mandatory prosecution (the abandonment of which would have required an amendment to the Constitution) and created special proceedings to achieve greater efficiency. More than 25 years later, it is fair to say the alternative “simplified” procedures did not achieve the goal for which they were intended. Figure 2 shows the most recent comprehensive data available. At year-end 2013, the full “ordinary proceeding” encompassing investigation, pretrial hearing, and trial was the standard process (63.9 percent of cases). When the new immediate and direct trial procedures that provide for a full trial are added, the percentage of fully adversarial cases argued before a trial judge reaches more than 67 percent (182,850 proceedings out of 271,602). Summary trials requested by the defendant after the pretrial hearing and reviews of proposed sentence bargains do not trigger a full adversarial proceeding.

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6 This includes verdicts of guilt or innocence and trials ending with declarations of expiration of statutes of limitations that, as previously noted, run regardless of whether a decision to prosecute has been made. Some courts did not report broken-down figures and thus have not been counted, leading to the 271,602 dispositions considered in the chart, which include cases tried before first-instance tribunals (sitting as a single judge or panel of three judges) and courts of assize, where summary trial is exceptional. Dispositions in appeal proceedings against decisions of the justice of the peace before first-instance trial judges (4,483) are not counted. The National Institute of Statistics (ISTAT 2015) estimates that overall 359,840 cases were decided at the trial stage. The Ministry of Justice, DG-Stat (2015d) estimates 359,865.
Many dispositions do not involve trials, as figure 3 shows for the pre-
trial stages (preliminary investigation and pretrial hearing): 70.5 percent
of cases involving a known accused in which an investigation was for-
mally initiated were eventually dismissed (563,983 cases); 11.7 percent
(93,327 cases) were indicted and sent to trial; and 17.8 percent were han-
dled by summary trial, penalty on request of the parties, or nonopposed
penal decree (143,181 cases).

The following description discusses the ordinary three-stage proceed-
ning, which, in theory and practice, is the paradigmatic case-processing
method. The 1989 CCP abolished the investigating judge and assigned
the investigation to the prosecutor, with police assistance.

A new official, the preliminary investigation judge (giudice per le in-
dagini preliminari [GIP]), was created to supervise the prosecutor. Un-
like the former investigating judge, the GIP is “a judge without a file.”

7 Some pretrial judges did not report broken-down figures. The figure refers to 800,491
reported cases. ISTAT (2015) reports that 897,791 cases involving a known accused were
conclusively handled at the preliminary investigation and pretrial hearing stages.
He or she plays no active role in the investigation and is not a party to the proceeding, but is a neutral supervisor. The main duty is to assure that the prosecutor fully complies with rules provided by the CCP and with the rights of the accused. The GIP also decides prosecutorial requests for pretrial custodial and noncustodial measures to prevent the accused from fleeing, reoffending, or interfering with the investigation. Also at the prosecutor’s request, the GIP can authorize wiretapping and validate arrests. Finally, he or she also exceptionally authorizes and presides over the gathering of evidence to be used at trial when it might otherwise be unavailable (e.g., a critical witness diagnosed with a terminal disease or perishable evidence that must be examined promptly; Amodio 2004, p. 491).\(^8\)

The pretrial investigation is now purely instrumental to the decision of whether charges should be pressed (Del Duca 1991, pp. 82–83). When the prosecutor decides to proceed on the basis of the gathered evidence,

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\(^8\) In this case the defense counsel has the right to participate in the proceeding and may cross-examine the witness or appoint an expert. This is for evidence that will be included in the trial dossier; hence the proceeding (named *incidente probatorio*) must fully comply with all adversarial rules that would be applicable at trial.
the decision on the indictment is made at the pretrial hearing. Before this, the prosecutor must notify the accused, the defense counsel, and the victim that the investigation is complete. Before the pretrial hearing, the investigative file must be disclosed to the accused and defense counsel with opportunity to inspect it. The pretrial hearing is chaired by a single pretrial hearing judge (giudice dell'udienza preliminare [GUP]) who was not previously involved in the investigation. This is a “trial before the trial.” Its aim is to establish probable cause. The prosecutor and defense counsel present their cases and the GUP decides either to dismiss the case or to indict the accused.

The trial follows. The main goal of CCP drafters was to separate investigation from adjudication by breaking the chain that previously connected them. Accordingly, the trial court cannot have access to or use evidence other than that produced and admitted at trial. The new code fully embraced the Hearsay Evidence Rule: with minor exceptions, and in contrast to the past, out-of-court statements cannot be introduced to prove the truth of the matter asserted. They can be used only for witness impeachment purposes.

Hence, there is now the “double-dossier” principle (Ruggieri and Marcolini 2012, p. 395). When the trial begins, a new dossier is assembled “in order to avoid bias to the trial judge’s ‘virgin mind’—meaning a totally unbiased approach, guaranteeing that the judge would acknowledge only the evidence produced in court and decide only on that basis” (Illuminati 2005, p. 572). Evidence is presented orally in court; in principle, nothing documenting acts performed during the investigation may become part of the trial dossier. Key principles of the adversarial model, such as orality, confrontation, and direct cross-examination, are honored. The limited material from the investigation dossier that migrates into the trial dossier includes records of activities that cannot be reproduced at trial, documents from foreign authorities, and the defendant’s criminal record. Statements or evidence contained in the prosecutor’s files (e.g., a police interrogation record) and the defense counsel’s files (e.g., an affidavit of testimony) may also be added to the trial dossier if the parties mutually agree.

The current framework is the result of a decade-long struggle between the legislature and the Constitutional Court that started when

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9 If the prosecutor believes that no probable cause exists, he asks the GIP to dismiss the case. The GIP has authority to compel the prosecutor to request the indictment.
many judges challenged key provisions of the 1989 code. In 1992, Constitutional Court judgments openly challenged the legislative decision to shift the focus of the criminal process from the investigation to the trial and grant the defendant the full panoply of adversarial guarantees. The Court struck down provisions concerning the hearsay evidence rule by announcing a new principle of the “nondispersion of evidence” under which “no available information should be wasted, regardless of how it has been collected” (Panzavolta 2005, p. 599). The Court linked this to the goal of establishing the “material truth” as a main aim of the criminal process. From that perspective, allowing migration to the trial dossier of statements given to the prosecutor and the police was not only necessary but consistent with the quintessential task of seeking the truth in the most effective way possible (Amodio 2004, pp. 493–94).

These cases gave prosecutors carte blanche to introduce at trial out-of-court statements obtained in nonadversarial proceedings and highlighted judicial resistance to the adversarial values set out in the new CCP. The demarcation between the investigation and trial stages was deemed an unacceptable limitation on their ability to seek the truth (Pizzi and Montagna 2004, pp. 449ff.; Illuminati 2005, p. 574). When the Parliament reenacted the original rules, the Constitutional Court signaled its disapproval by granting certiorari to new challenges to the adversarial provisions of the CCP. Parliament in 1999 permanently secured the adversarial system by amending article 111 of the Constitution: the core principle of a right to adversarial proceedings stated in article 6 of the European Convention of Human Rights was incorporated into the Italian Constitution. This granted criminal defendants the rights to examine witnesses or have them examined and to obtain attendance and examination of witnesses under the same conditions as the prosecution.

The Italian system is still in search of its true identity. As an influential judge, notoriously fond of the inquisitorial tradition of the 1930 CCP, noted, the essential problem is whether the Parliament wants a continental inquisitorial system or a common law adversarial system. There can be no middle ground since the criminal process cannot simultaneously be “a device to ascertain the historical truth of the facts” and “a device to resolve a dispute between two parties,” in which the more capable and persuasive party prevails in a fair competition. Opting for a truly adversarial system implies that “the truth does not matter anymore” (Davigo 1999, p. 209).
D. The Court System

The criminal courts for adults (ages 18 and up) are divided into three instances (see fig. 4). The first two, trial and appeal courts, are triers of facts. The highest-level judges of the Court of Cassation review only matters of law. In contrast to common law systems, there is no bifurcation into guilt and sentencing phases: courts of first instance and courts of appeal determine both guilt and the sentence to be imposed following the closing arguments.

1. Courts of First Instance. Justices of the peace—introduced in 2000—try minor offenses, typically misdemeanors and felonies for which the victim must file a formal complaint for the prosecutor to press charges. The justice of the peace represents "a mixed model that combines retributive and reparative aspects" with primary aims of "lightening the workload of the system of ordinary justice, minimizing recourse to criminal sanctions, and favoring reparative conduct and reconciliation between the parties to a dispute" (Henham and Mannozzi 2003, p. 300). If mediation fails, fines, home custody, and community service may be imposed.11

Tribunals are courts of first instance with jurisdiction over all criminal matters outside the jurisdictions of the justices of the peace and the assize courts. Tribunals usually consist of a single judge but in designated cases operate as a three-judge panel.

The assize courts try the most serious offenses (punishable with life imprisonment or carrying a maximum custodial sentence of 24 or more years, plus intentional crimes resulting in deaths). They are composed of eight members, two professional judges and six randomly selected members of the public: a mixed deliberation takes place. Except for the justices of the peace, the only active involvement of laypersons in adjudicating guilt or innocence is in the assize courts of first and second

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10 Article 97 of the Italian Penal Code establishes 14 as the age of criminal responsibility. Article 98(1) provides that a person 14 or older but under 18 who commits an offense and is deemed to have "the capacity to understand and to will" shall be punished, but the sentence must be reduced. These cases are handled in the juvenile justice system. Waiver to the adult system is not possible.

11 Justices of the peace are honorary judges selected on the basis of their titles and professional experience. Usually they are defense lawyers who cannot thereafter practice law before the courts of the city in which they sit. They are appointed for 4 years but can be confirmed for an additional 4-year term.
The activism of Italian judges, particularly of first-instance courts, is often explained from a behavioral perspective as based on their

12 According to the Ministry of Justice, DG-Stat (2015d), justices of the peace at year-end 2013 had 147,464 pending cases, courts of first instance had 540,203 (as single- or three-judge panels), and assize courts had 359.
sense of responsibility as fact-finders unlike judges in common law jurisdictions who merely direct lay fact-finders. This makes judges feel particularly responsible for the accuracy of the adjudication, playing “a very active role instead of simply responding to what the parties present and accepting that a weak prosecution case should lead to a ‘not guilty’ verdict” (Marafioti 2008, p. 94).

2. **Courts of Second Instance.** Courts of appeals and assize courts of appeals, respectively, hear appeals from tribunals and assize courts. Judgments of the justices of the peace are appealed before tribunals, which then operate as an appellate court. Courts of appeals sit as three-judge panels. Assize courts of appeals consist of two professional judges and six laypersons. Appeals courts do not merely review the merits of appealed cases but are vested with significant powers of fact-finding and are not shy of using them. In particular, the court may decide, inter alia, to reopen the presentation of evidence. With only a few exceptions, both the prosecutor and the defendant may appeal purported errors made at trial. When only the defendant appeals, appellate courts are bound by the prohibition of *reformatio in peius* (literally, “change for the worse”). Even if the initial conviction is affirmed, an altered sentence may not be more severe than the original: defendants have nothing to lose. This is one reason defendants customarily appeal both the conviction and the sentence. Prosecutors rarely file appeals solely to neutralize the prohibition of *reformatio in peius*, but usually only if the sentence was substantially lower than they requested. The reasons for this include lack of incentives (the trial prosecutor will not litigate the appeal) and ethical concerns (prosecutors tend to appeal sentences only if they think a substantial injustice has occurred). Only in a few trial courts do prosecutors systematically appeal sentences in order to prevent operation of the prohibition of *reformatio in peius*.

3. **Court of Third Instance.** The Court of Cassation is the highest appellate authority for criminal courts. It reviews judgments only on matters of law. In some cases it may remand cases to a new appellate court for retrial (regarding the merits, the sentence, or both) after formulating a binding principle to be followed (e.g., regarding a clear methodologi-

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13 At year-end 2013, courts of appeals had 263,932 pending cases, courts of first instance had 5,136 pending cases as appellate courts for judgments of the justice of the peace, and assize courts of appeals had 580 (Ministry of Justice, DG-Stat 2015d).
metrical mistake in evaluation of evidence or overlooking a particular aggravating circumstance). The court has seven criminal divisions; allocation of cases is based on the subject matter. When particularly complex and important issues are regularly resolved differently by different divisions, it may resolve the split in a plenary session. Although no *stare decisis* principle formally exists, plenary judgments usually prove highly influential in subsequent decisions by lower courts.

4. Sentence Implementation Courts. When a conviction becomes final, a surveillance judge (*magistrato di sorveglianza*) is in charge of supervising implementation of the sentence. For custodial sentences, he or she supervises by means of visits and inmate audits to assure that correctional treatments are carried out consistently with principles set out in the Constitution and that prisoners’ rights are observed. A sentence implementation court, the surveillance court (*tribunale di sorveglianza*), decides applications filed by inmates for parole release and applications concerning access to alternatives to incarceration. It also has authority to revoke such measures in case of violations. The surveillance court also serves as an appellate court concerning decisions of the surveillance judge. It sits as a mixed panel of two professional and two lay judges who are experts in fields such as psychology, clinical criminology, social work, and psychiatry. Its decisions may be appealed to the Court of Cassation.

II. Sanctions and Sentencing Patterns

The Italian system provides an interesting comparative case study. Italy is where both the Classical (Beccaria [1764] 1995; Harcourt 2014) and the Positivist schools (Ferri 1968; Sellin 1972) of criminological theory originated in the eighteenth and nineteenth centuries. The influence of both remains visible in almost all penal systems on either sides of the Atlantic. The Classical school emphasis on having the punishment fit the crime was foundational to the development of “just deserts” theories (von Hirsch 1976). The legacy of the Positivist school includes the “dual-track” systems of sanctions and measures in much of Europe. They provide for traditional penal sanctions (mainly imprisonment and fines) for blameworthy offenders and custodial and noncustodial measures (formally “non-punitive”) for incapacitating individuals deemed unacceptably dangerous to society (Simon 2006; de Keijser 2011; von Hirsch 2011).

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14 At year-end 2013, the Court of Cassation had 31,871 pending cases.
In this section, I describe the framework and main characteristics of the Italian sentencing system concerning rules and guiding principles for sentencing and currently available penal sanctions. Alternative modes of implementation of custodial sentences are considered and analyzed, and recent sentencing patterns are described.

A. Sentencing: Rules and Principles

The Penal Code and other statutes usually set forth statutory minimums and maximums for each offense. Only rarely is the statutory maximum exclusively indicated. The ranges embody the principles of proportionality and legality (*nulla poena sine lege*). A sentencing range between, say, a month and 20 years would not be constitutionally permissible for it would undermine the foreseeability of the sentence and permit exceedingly harsh or lenient sentences resulting from the judge’s subjective evaluation of the case. The same scheme applies to both custodial sentences and fines. Within this range the judge exercises discretion.

1. The Guiding Criteria. The Italian Penal Code, adopted in 1930 to take effect in 1931 (Skinner 2011, pp. 425–28), constitutes a middle ground between Montesquieu’s position that judges should be “no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour” ([1748] 2000, p. 113) and schemes that allow too much unfettered discretion. The legislature opted for a sentencing scheme based on “limited discretion.” Article 132 of the Penal Code provides that “within the limits provided for by law, the judge shall have discretion in applying punishment; he shall be required to specify the grounds which justify the use of such discretionary power. In increasing or reducing punishment the limits prescribed for each type of punishment shall not be exceeded, except in cases expressly defined by the law.” Unlike the numerical guidelines in one-third of US states, the Italian system provides statutory sentencing principles that indicate primary and secondary rationale categories plus lists of aggravating and mitigating circumstances and rules for weighing previous convictions (Ashworth 2009, p. 249).

Article 133 sets forth the main factors the court must take into account: (a) the seriousness of the current offense, as inferred from the nature, type, means used, and any other aspect of the conduct; the seriousness of the harm caused or the danger threatened; and the scope of intent or degree of negligence; and (b) the offender’s propensity to commit crime, which may be inferred from the offender’s motives, his or her
criminal record, and his or her behavior before and after the offense. Ideas of the Classical and Positivist schools are recognizable. The first category of factors focuses on proportionality: the nature of the conduct and the culpability of the defendant. The second is clearly concerned with prediction of future recidivism (Henham 2012, p. 266). A 1981 amendment to the Penal Code introduced article 133-bis, which enables the judge to adjust fines (increase up to three times or reduce up to a third) depending on the economic conditions and assets of the convicted offender.

The sentencing judge determines the length of the sentence within the statutory minimum and maximum, following criteria set out in article 133. Upward and downward departures from the indicated range may be made on the basis of statutory aggravating and mitigating circumstances. No mandatory minimums exist. Fixed penalties, extremely rare and limited mostly to fines for some misdemeanors, are generally deemed to contravene the principle of individualization of punishment.

2. Statutory Harshness and Judicial Moderation. The sentencing provisions of the Penal Code were, and are, characterized by a distinctive harshness that reflects the ideology of the authoritarian regime that promulgated them. The code provides comparatively high minimum and maximum penalties for every offense and provides a long list of aggravating circumstances that make it hard not to increase the punishment. In order to ameliorate the code’s harshness, judges generally impose sentences close to the statutory minimum (Ruggiero 1995, p. 51; Grande 2000, p. 2; Mannozzi 2002, p. 111).

After the fall of the fascist regime, a “generic mitigating circumstance” was introduced that allows judges to take into account other mitigating circumstances not listed in the code or other statutes to justify a reduction of punishment. The provision was modified in 2005 to provide that the mere absence of previous convictions does not justify a reduction. This was an attempt by the center-right government then in power to end the judicial practice of almost invariably granting sentence reductions to first-time offenders. Leaving aside sentence enhancements for recidivists, the severity of the code is shown by the rule regarding multiple offenses: a single custodial sentence should be ordered with a term equal to the cumulative duration of the punishments for each individual offense. The code thus rejects practices of imposing concurrent sentences or applying a policy that adds modest increments to the base sentence imposed for the most serious crime.
Two postfascist limiting mechanisms mitigate the scheme's severity: in case of multiple current offenses, the aggregate punishment may not exceed the most severe single punishment by more than five times. Furthermore, the overall punishment may not exceed 30 years of imprisonment for felonies and 6 for misdemeanors. Anyone who commits more than one offense as part of a common plan (even at different times) may not receive an aggregate punishment more than three times what would be imposed for the most serious offense (Vassalli 1974, pp. 1040–41).

3. The Rationale(s) behind Punishment. Article 27(3) of the Constitution asserts that “punishment must aim at rehabilitating the offender.” Such a mandate is absent from common law jurisdictions. The US Supreme Court, for example, defers to legislatures’ policy choices: “The Constitution does not mandate adoption of any one penological theory” (Ewing v. California, 538 U.S. 11, 25 [2003]). Federal and state laws and guidelines accommodate retributive values alongside other goals including deterrence, incapacitation, and rehabilitation.

The traditionally conservative Italian Constitutional Court has been reluctant to confirm rehabilitation as the primary rationale justifying criminal penalties. At first, the Court adopted a “multifunctional” approach: rehabilitation was portrayed as one among many legitimate objectives (Cavadino and Dignan 2006b, p. 140). Rehabilitation should inform sentence implementation but not be central to establishment of sentencing ranges by the legislature or setting of the sentence at trial. The Court observed that deterrence should be the primary aim in drafting sentencing statutes and retribution the main goal in determination of the sentence.

The Constitutional Court thus refused to establish a static and generally valid hierarchy of punishment goals but endorsed an approach differentiating dominant rationales for each major stage within an overall framework primarily shaped by “just deserts” considerations (see, e.g., Judgment of February 12, 1966 no. 12; Judgment of February 17, 1971 no. 22; Judgment of May 25, 1989 no. 282; Judgment of August 7, 1993 no. 1993). More recently, the Court has seemed more open to acknowledging social reintegration as primary throughout, including during legislative decision making, determination of sentences, and implementation of punishments. Although alluding to a framework in which more than one rationale is relevant, the Court noted that “were the aim of rehabilitation limited to the sentence implementation phase, it would run the risk of being greatly compromised any time the type
and length of the penalty are not calibrated (neither at the legislative nor at the sentencing stage) on the offender's need for social reintegration" (Judgment of July 2 1990 no. 313, my translation; see also Judgment of April 30, 2008 no. 129).

B. Authorized Penalties and Their Implementation

The 1930 Penal Code attempted to reach a viable compromise between the Classical and Positivist schools. Classicists wanted penalties and sentencing provisions to focus on harm caused by the offense and the culpability of the offender. Positivists were highly skeptical of the concept of culpability and insisted that the primary aim must be to address and neutralize threats posed by dangerous individuals.

1. The Dual-Track System. The code still reflects this compromise especially concerning sanctions, providing a dual track (doppio binario) of criminal sanctions for competent offenders and safety (or preventive) measures for individuals deemed dangerous. This proved particularly harsh for dangerous individuals with full or diminished criminal capacity: in such cases both types of sanctions may be jointly applied, usually with the safety measures being served after completion of the criminal sanctions (Pellissero 2013, p. 107). Safety measures are based on a prognosis of dangerousness irrespective of whether an individual has committed a crime. Article 202 of the Penal Code includes commission of an offense or a “quasi offense” (only in enumerated cases) with social dangerousness as preconditions for an “administrative safety measure.” The code engages in mislabeling when it refers to “administrative” measures that are clearly punitive in substance and goal. Safety measures may be custodial or noncustodial. The former are counted in official statistics as part of the total number of incarcerated individuals as they involve restrictions on freedom of movement and constant monitoring (e.g., in mental hospitals for offenders, treatment and custody centers, working penal colonies, and labor facilities). On September 1, 2013, the reported number of people confined under security measures was 1,204 (Aebi and Delgrande 2015, p. 101, table 5.2).

2. Main and Supplementary Criminal Penalties. Criminal penalties are divided into main and ancillary penalties (see table 1). Main penalties (pene principali) consist of custodial sentences and fines. Ancillary penalties (pene accessorie) automatically supplement the main sentence and are explicitly provided for as penal consequences of conviction. They in-
TABLE 1

Authorized Sanctions for Felonies and Misdemeanors

Available Penal Sanctions

Felonies:
  a. Principal sanctions:
    a.1. Life imprisonment
    a.2. Imprisonment (*reclusione*) from 15 days to 24 years
    a.3. Fine (*multa*) from €50 to €50,000
  b. Ancillary sanctions:
    b.1. Disqualification from running for and holding public offices
    b.2. Disqualification from the exercise of a profession or trade
    b.3. Legal disqualification
    b.4. Disqualification for managerial and executive positions of private legal persons
        and corporations
    b.5. Inability to bargain with governmental entities
    b.6. Termination of employment
    b.7. Loss or suspension of the exercise of paternal authority
    b.8. Publication of the judgment of conviction (for both felonies and misdemeanors)

Misdemeanors:
  a. Principal sanctions:
    a.1. Detention (*arresto*) from 5 days to 3 years
    a.2. Monetary penalty (*ammenda*) from €20 to €10,000
  b. Ancillary sanctions:
    b.1. Suspension from the practice of a profession or trade
    b.2. Suspension from managerial and executive positions of private legal persons
        and corporations

include various forms of disqualification (e.g., from holding public office or practicing a profession). When the law does not specify a duration, it is the length of the main sentence. The death penalty for peacetime offenses was abolished after the fascist regime was overthrown. The 1948 Constitution allowed capital punishment only in cases provided for by the military law of war. The death penalty in military law was abolished in 1994 and replaced with life imprisonment. An amendment to article 27(4) of the Constitution, implementing Protocol 13 of May 3,

Whenever the law prescribes that a conviction shall entail a temporary collateral punishment and the duration thereof is not expressly specified, the period of the ancillary sanction shall be equal to that of the principal punishment imposed or that which would have to be served in the case of a conversion due to the inability to pay of the convicted person. In no case, however, may it exceed the minimum and maximum limits prescribed for the particular type of ancillary sanction punishment (art. 37 of the Penal Code).

Life imprisonment with the possibility of parole is the most severe authorized penalty. Life prisoners become eligible for parole release after serving 26 years. The most commonly applied penalties are imprisonment for a term and fines. For main penalties, the code distinguishes different types of custodial sentences and fines for felonies and misdemeanors. Prison terms for felonies (reclusione) can range from 15 days to 24 years; for misdemeanors, detention (arresto) can vary from 5 days to 3 years. These are outer limits: a specific range is specified for every offense. Fines can range from €50 to €50,000 for felonies (multa) and from €20 to €10,000 for misdemeanors (ammenda). Terms of imprisonment and fines may be imposed alone or together depending on provisions for each offense. If an offender cannot afford to pay the fine, this is replaced with supervision or community work with a conversion rate of 1 day of work for every €250 outstanding.

3. Fully Suspended Custodial Sentences. Fully suspended custodial sentences were introduced in 1904 on the basis of reformers’ rejection of short terms of incarceration for deterrent purposes followed by community supervision. It was widely believed that sending first offenders to serve short prison terms would cause more crime because of criminal associations made during imprisonment and stigma. Suspended custodial sentences are hard to classify as custodial or noncustodial. They are a legal fiction. The offender, unless he or she commits a new offense, serves time in the community without spending a day in prison. The code provides that the sentencing judge, after imposing a prison term up to 2 years (2 years and 6 months for 18–21-year-olds and people over 70), may suspend it for 5 years (2 for misdemeanors). If the defendant does not reoffend and complies with conditions, the judge will dismiss the sentence and declare the original offense extinguished. No trace will remain on the person’s criminal record.

On paper nothing happens automatically. The judge is to make decisions case by case after evaluating the offender’s capacity to abstain from further crimes. In practice, the suspended sentence’s original character and purpose have been lost. It is routinely used to alleviate strain on overcrowded prisons or as an incentive to defendants to agree to
the special sentence bargaining proceeding described earlier and consequently to waive trial. At year-end 2013, 5,123 offenders were serving a fully suspended custodial sentence with conditions (Aebi and Chopin 2015, p. 17, table 1.1).

4. Alternatives to Incarceration. Over four decades, a wide range of alternatives to incarceration have been introduced. They are applied by the sentence implementation court immediately after sentencing (in which case the offender will spend no time in prison unless the measure is revoked) or after partial service of the prison sentence. These are not “intermediate punishments” but are substitute ways to implement prison sentences. They were first introduced by Law no. 354 of 1975 as part of a fundamental overhaul of custodial sentences. The goal was to implement the rehabilitative aim of punishment declared in article 27(3) of the Constitution. Later on, Law no. 663 of 1986 put Italy at the forefront internationally by its emphasis on resocialization and treatment (Grande 2002, pp. 3ff.).

The most commonly used alternatives include probation (affidamento in prova ai servizi sociali), home custody (detenzione domiciliare), and semiliberty (semilibertà).

Probation is the most frequently used alternative implementation of a custodial sentence. It may be used when an offender has received a custodial sentence of no more than 3 years or has less than 3 years to serve. The supervision period corresponds to the original length of a sentence or the balance yet to be served. When probation is granted, the probation service supervises compliance with treatment and other conditions and assists in resocialization.

Home custody may be granted to offenders with up to 2 years’ custodial sentence to serve, either as an original sentence or as the remainder of one when the requirements for probation are not met. For some categories of individuals (e.g., pregnant women, mothers of children under age 10, people over 60 or under 21, seriously ill offenders) the time to be served must not exceed 4 years. Offenders 70 or older may request home custody at any time.

Semiliberty allows prisoners who have served at least half of their sentence (two-thirds for a few sentences and 20 years for lifers) to spend part of the day in the community to work or participate in training programs or other activities deemed useful for reintegration. Semiliberty usually represents the step before becoming eligible for parole release.
Decisions concerning such measures are made by the sentence implementation court (tribunale di sorveglianza) discussed above. These dispositions trigger imposition of tailored conditions and requirements. A violation may result in more burdensome conditions or revocation (Gualazzi and Mancuso 2010, pp. 284–91).

Statutory limitations preclude use of alternatives to implementation of incarceration for offenders who committed particularly serious offenses or for recidivists. Automatic suspensions of penalties up to 3 years allow offenders to apply for an alternative before starting to serve the sentence. Beyond these boundaries, sentence implementation courts enjoy wide discretion in granting, denying, revoking, or rescinding such measures. In the absence of specific rules or guiding criteria, “back-door” judges in practice exercise a resentencing power (Gualazzi, Mancuso, and Mangiaracina 2012, pp. 80–81), focused on the offender’s postconviction behavior aimed at rehabilitation and, in case of nonparticipation in programs, incapacitation. The Italian sentencing system thus shifted from a rigid mostly desert-based approach to a more flexible “correctional model” (Pavarini 2001, pp. 416–19).

Legislation permitted the progressive shift from institutional control toward community supervision. Influential scholars stressed that alternatives must be handled with care. Bricola (1977) asserted that alternatives must be implemented in a way conducive to social reintegration and not simply create new modes of formal social control. Pavarini (1994, p. 55) pointed out that the multiplication of “soft” modes of social control would “curb not so much the room for segregation, but the field controlled by informal social control.” In other words, this literature was concerned that community supervision would become a strategy of “social discipline,” ultimately resulting in net-widening. This hypothesis was validated in the 1990s when the proliferation of alternatives did not lead to lower imprisonment rates in Europe, including Italy. Both imprisonment and community supervision rates increased across the continent (Aebi, Delgrande, and Marguet 2015). However, in responding to two recent European Court of Human Rights’ judgments condemning prison overcrowding, the government mostly relied on alternatives.

C. Sentencing Patterns

Tables 2 and 3 show types of sentence imposed in felony and misdemeanor cases, including prison sentences by length for the 2000–2014 time series for which most reliable data are available. Lengths are per
TABLE 2
Sentences for Felonies

<table>
<thead>
<tr>
<th>Year</th>
<th>Fine (Multa)</th>
<th>Imprisonment (Reclusione)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Only</td>
<td>Up to 1 Year</td>
</tr>
<tr>
<td>2000</td>
<td>19.40</td>
<td>63.30</td>
</tr>
<tr>
<td>2001</td>
<td>20.52</td>
<td>61.97</td>
</tr>
<tr>
<td>2002</td>
<td>20.71</td>
<td>61.33</td>
</tr>
<tr>
<td>2003</td>
<td>20.34</td>
<td>62.09</td>
</tr>
<tr>
<td>2004</td>
<td>19.16</td>
<td>62.66</td>
</tr>
<tr>
<td>2005</td>
<td>16.94</td>
<td>65.22</td>
</tr>
<tr>
<td>2006</td>
<td>16.36</td>
<td>65.29</td>
</tr>
<tr>
<td>2007</td>
<td>17.40</td>
<td>62.74</td>
</tr>
<tr>
<td>2008</td>
<td>18.10</td>
<td>60.15</td>
</tr>
<tr>
<td>2009</td>
<td>18.01</td>
<td>58.39</td>
</tr>
<tr>
<td>2010</td>
<td>18.82</td>
<td>57.57</td>
</tr>
<tr>
<td>2011</td>
<td>18.06</td>
<td>57.80</td>
</tr>
<tr>
<td>2012</td>
<td>21.52</td>
<td>57.84</td>
</tr>
<tr>
<td>2013</td>
<td>21.26</td>
<td>57.20</td>
</tr>
<tr>
<td>2014</td>
<td>21.75</td>
<td>57.33</td>
</tr>
</tbody>
</table>


case, whether for a single offense or multiple offenses. Table 2 presents sentences for felonies and table 3 for misdemeanors.

Imprisonment (reclusione) up to a year is the most frequently imposed felony sentence; over the last 6 years, less than 60 percent were above that threshold, although for 9 consecutive years after 2000 more than 60 percent were above it. Percentages of sentences between 5 and 10 years and above 10 years (which include life sentences) have been stable. Those between 1 and 2 years and especially those between 2 and 5 years have grown. These increases seem not to be attributable to more punitive attitudes of the courts but to numerous upward adjustments of statutory ranges for high-volume felonies, especially property crimes, and introduction of new aggravating circumstances.

Both center-right (2001–6; 2008–11) and center-left (2000–2001; 2006–8) governments embraced enhancement of statutory penalties as a prompt, seemingly cheap, and psychologically reassuring strategy to address increased public concerns about crime. Misdemeanor convictions followed a similar pattern, with a significant reduction of sentences to custody up to a year particularly since 2008 and a noticeable increase in
TABLE 3

Sentences for Misdemeanors

<table>
<thead>
<tr>
<th>Year</th>
<th>Fine (Ammenda)</th>
<th>Custody (Arresto)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Only</td>
<td>Up to 1 Month</td>
</tr>
<tr>
<td>2000</td>
<td>50.53</td>
<td>34.08</td>
</tr>
<tr>
<td>2001</td>
<td>43.87</td>
<td>47.11</td>
</tr>
<tr>
<td>2002</td>
<td>58.47</td>
<td>32.13</td>
</tr>
<tr>
<td>2003</td>
<td>67.39</td>
<td>20.24</td>
</tr>
<tr>
<td>2004</td>
<td>58.87</td>
<td>31.54</td>
</tr>
<tr>
<td>2005</td>
<td>48.90</td>
<td>42.47</td>
</tr>
<tr>
<td>2006</td>
<td>47.00</td>
<td>45.12</td>
</tr>
<tr>
<td>2007</td>
<td>50.15</td>
<td>41.45</td>
</tr>
<tr>
<td>2008</td>
<td>55.07</td>
<td>35.26</td>
</tr>
<tr>
<td>2009</td>
<td>55.49</td>
<td>28.99</td>
</tr>
<tr>
<td>2010</td>
<td>53.26</td>
<td>26.07</td>
</tr>
<tr>
<td>2011</td>
<td>51.22</td>
<td>22.83</td>
</tr>
<tr>
<td>2012</td>
<td>57.47</td>
<td>24.50</td>
</tr>
<tr>
<td>2013</td>
<td>49.00</td>
<td>23.82</td>
</tr>
<tr>
<td>2014</td>
<td>50.16</td>
<td>22.94</td>
</tr>
</tbody>
</table>


sentences ranging from 1 to 3 months, and even more in those between 3 and 6 months.

III. Major Developments in Italian Penal Policy

The First Republic’s political system was largely consensual, peaking in the “Historic Compromise,” an accommodation between the Christian Democrats and the Communist Party from 1973 through 1980 (Ginsborg 1990, pp. 354–70). This softened demands for overly punitive policies. Debate about crime and penal policy was concentrated at elite levels. “Collective feelings of insecurity” were expressed “as a political demand for change” (Pavarini 2001, p. 145). Crime and responses to it were treated as political but not politicized matters.

When harsh laws were enacted, they seldom symbolically aimed at “going to war” with vast categories of nonserious offenders. Laws against political terrorism were enacted during the 1970s and 1980s (Della Porta 1992; Cento Bull and Cooke 2013, pp. 30ff.). They, and anti-
mafia legislation in the early 1980s and 1990s, provided good examples of “emergency” provisions regarding pretrial detention, sentence enhancements, cooperation agreements, and sentence implementation based on policy rationales separate from those underlying the rest of the criminal justice system (La Spina 2004, 2014; Paoli 2007). The social alarm caused by those phenomena did not extend to “other less serious forms of crime, nor give rise to a widespread feeling of lack of safety” (Selmini 2011, p. 166).

Melossi (2001, p. 413) provides a cultural explanation of the low levels of punitiveness through the 1990s. Low levels of penal repression were linked, he argues, to the “soft authoritarianism” typical of Italian history and tradition, resulting from the vast presence and influence of the Catholic Church. Political parties with different ideological backgrounds shared the same policy of mildness. During the second half of the 1980s, Italy’s imprisonment rate never exceeded 70 per 100,000. A crucial role was played by recurring amnesties and general pardons, alone or combined. Clemency measures in 1986 and 1990 were not the only noteworthy efforts. Following the prison law reform of 1975, the Parliament in 1986 further embraced rehabilitation in corrections, redesigning the rules governing sentence implementation. The new law rewarded inmates’ good behavior with an array of early release schemes, including greater access to alternatives to incarceration. The focus on treatment was favored by the Christian Democrats, “who saw corrections as a synonym for redemption,” and the Communists, “who believed in re-education in a social and moral sense” (Gonnella 2013, p. 228). The demise of the First Republic in the early 1990s and the advent of a new political system gradually led to radical changes.

In this section, I focus on the changes in penal policies since the early 1990s. These include rejection of clemency measures, the development of an increasingly punitive approach to crime and punishment, the Italian version of the “war on drugs,” and recent measures of decarceration adopted in response to two European Court of Human Rights judgments.

A. Harsher Policies and the Abandonment of Clemency

The rejection of clemency measures by means of a constitutional amendment was the first visible marker of change. Until 1992, amnesties and pardons were granted by the head of state upon the enactment of legislation delegating authority to do so; only a simple majority was
required for such bills. As judicial inquiries related to the Clean Hands investigation spread, concerns emerged that the Parliament could pass an amnesty bill to stop the investigations and prevent trials. To address public anxiety, the Parliament passed a constitutional amendment setting a very high threshold for amnesties and general pardons. Super-majorities were required: two-thirds of the members of Parliament must vote in favor of each section of the bill and then of the entire bill.

Once a recurring feature of Italian penal policy, measures of collective clemency have become hard to pass and are widely perceived as "politically unacceptable" (Nelken 2009, p. 303). This can be seen concerning the 2006 collective pardon proposed by the center-left government. Primarily justified as an emergency measure to reduce prison overcrowding, the bill was harshly criticized in the media as a threat to public safety. It is still commonly cited as a main reason for defeat of the center-left coalition in the 2008 general elections. The 2006 general pardon was an extraordinary event and not a prelude to a general shift toward more lenient policies generally. During the 2008 campaign, the center-right coalition—which in part supported and voted for the general pardon—repeatedly criticized its opponents for being "soft on crime" and returned to power with a "zero tolerance" agenda (Shea 2009, p. 89).

The difference with the past could not be starker. Until 1992, 20 clemency bills had been passed since 1948. With few exceptions, they granted both amnesty and collective pardons, usually containing provisions specifying the maximum statutory penalty of crimes covered by the amnesty, specifying the number of years of the sentence to be pardoned, and designating certain types of ineligible offenses or offenders (usually recidivists; Piraino 2007). Historically, such measures were meant to reduce the overall severity of a penal system inherited from an authoritarian regime and to prevent prison overcrowding. The recurrent use of amnesty and pardon bills has been described as a distinctive feature of Italian penality, whose "governing through tolerance" policies were influenced by the Catholic "tendency to be extremely tolerant in

\[\text{In Italian law, amnesty is a collective measure that extinguishes criminal liability and removes all effects of a conviction, including a criminal record; it erases the offense, not only the penalty imposed. Unlike individual pardons, collective pardons apply to designated categories of offenders rather than being issued on an individual basis. Collective pardons mitigate punishment but neither speak to the criminality of the underlying offense nor expunge the conviction from the offender's rap sheet.}\]
individual and social issues” including crime, in contrast to the Protestant, and mostly North American, “preoccupation with law and order” (Melossi 1994, p. 213). Amnesties and pardons also functioned as short-term solutions that postponed long overdue debates on structural reforms (Gonnella 2013, pp. 226–27; Barbarino and Mastrobuoni 2014).

B. The Second Republic and the “Politics of Fear”

The fall of the Berlin Wall and the demise of the First Republic radically changed the social and political environments in which penal policies were shaped. The advent of a new (mostly) majoritarian political system set the stage for a new understanding of crime and criminal justice as “political” issues. The rise of new populist parties made it easier to appeal directly to discontent, for example, concerning the moral panic surrounding the first massive wave of immigration from non-EU countries and the growing sense of insecurity caused by the early 1990s recession (Pavarini 1997). At the same time, the disappearance of strong ideologies and movements made the general public more receptive to messages and slogans that previously would have been dismissed as oversimplifications or misrepresentations.

Of course, the political lexicon, and penal policies, did not change overnight. Until the latter 1990s, for example, media commonly referred to property and street crimes as forms of “micro-criminality.” The prefix was not meant to underestimate the seriousness of such offenses. Rather, it signified that problems should be dealt with by police and prosecutors in a “neutral” way without being exploited by political parties for electoral reasons. Property crimes had low visibility and were not portrayed as fundamental threats that required exceptional responses. There was still room for an approach to safety inspired by liberal values and community participation (Selmini 2005).

In the late 1990s, it became evident that the country no longer considered safety a matter simply of “external security” or “public order” but an “internal” challenge in which criminals and “outsiders,” especially street criminals and undocumented immigrants, were viewed as “common enemies” (Melossi and Selmini 2009, p. 160). Italy “was a late-comer to a political realization that had come to many developed Western countries over the preceding decades” (Zedner 2003, p. 153). Until the late 1990s, populist “law and order” campaigns mostly failed (Nelken 2005, p. 225). Yet it is no surprise that the “zero tolerance” mantra was first

The 2001 general election campaign was a turning point. The mediatization of crime was systematically used by the center-right coalition led by Silvio Berlusconi to foster moral panics for electoral goals (Altheide 2003; Ceretti and Cornelli 2013, p. 44). The presence in the coalition of the Northern League (Lega Nord), a populist anti-immigration party, contributed to making tough-on-crime measures a top campaign priority (Ruzza and Fella 2009, pp. 91-92). One of Italy’s leading contemporary historians, Paul Ginsborg (2004, pp. 94–95), recounted that “[Berlusconi’s coalition] program was a strong and simple one: decrease taxation, streamline the state administration, provide public works for the southern un- and under-employed; establish greater security in the cities, stamp out illegal immigration and its high co-relation with petty and not-so-petty crimes; reform the judicial system and put an end to the prying and punitive actions of excessively independent magistrates.”

The victory of the center-right coalition (in power from 2001 to 2006 and again from 2008 to 2011) inaugurated the shift from a corporatist penal ideology focused on rehabilitation (Cavadino and Dignan 2006a, pp. 441, 443–44) to one in which explicitly exclusionary policies became common (Cavadino and Dignan 2006b, pp. 139–40). The right-wing parties effectively spoke to and incited what sociologist Zygmunt Bauman calls “derivative fear,” “a steady frame of mind that is best described as the sentiment of being susceptible to danger; a feeling of insecurity . . . and vulnerability” that acquires “a self-propelling capacity” (2006, p. 3).

The radical change was not justified by changes in crime rates. Despite the center-right parties’ narrative of a “dramatic increase” in crime, data tell a different story. As figure 5 shows, crime per 100,000 inhabitants reported by the police, after climbing until 1991, has since fluctuated, being overall substantially stable.17

In the mid-1970s, Italy, like other Western nations, shifted from being a low-crime society toward being a high-crime one (Garland 2001), although with distinctive characteristics (Ceretti and Cornelli 2013, p. 27).

17 Throughout this essay the expression “crimes reported by the police to judicial authorities” refers to crimes known to the police from their own activities and from citizens' reports and complaints. The data provided do not refer to prosecuted cases.
Rapid increases in thefts and robberies that characterized much of Europe in the early 1960s became visible in Italy only a decade later and peaked in the early 1990s. For a long time, homicide rates were high compared with those of most European peers, reaching 3.4 per 100,000 inhabitants in 1991 largely because of “mafia wars” in southern Italy in the 1980s and early 1990s (Barbagli 2004, pp. 144–48). Since then, rates have plummeted, reaching 0.78 per 100,000 in 2014. Recent increases in theft and robbery rates produced levels comparable to those observed during the second half of the 1990s. Before the recent increase, property crimes followed an erratic path (Barbagli and Colombo 2011).

Figure 6 shows historical trends in rates of homicide (multiplied by 10 to match the figure’s scale), total violent crimes (murder, attempted murder, and physical assault), and three common property crimes (larceny/snatch thefts, robberies, and household burglaries).18 The property crime data confirm recent upward trends, especially for household burglaries (250.6 in 2009 to 416.6 in 2013). The upward trend in violence is

18 Unlike the FBI’s Uniform Crime Reporting definition of violent crime, in Italy the crime of robbery is usually listed among property offenses following the categorization adopted in the Penal Code.
mainly due to physical assaults, which steadily grew from rates below 40 per 100,000 inhabitants in the late 1980s to above 100 as of 2005. This seems largely attributable to a shift over time in the social meaning of assault, leading to “rising thresholds of intolerance to violence” and patterns of increased reporting (Tonry 2013, p. 311; 2014, pp. 38–48). Sexual assault has been excluded from the data on violent crime because of a significant statutory change in 1996 that combined into one two formerly separate offenses (sexual harassment, including unwanted touching and kissing, and rape). With various forms of sexual harassment counted as sexual assault, overall rates inevitably went up (from 1.2 per 100,000 in 1985 to a mean of 7.8 since 2006), portraying a pattern that would be misleading when compared with pre-1996 data trends (Selmini and McElrath 2014, p. 404).

C. “Double Standard” in Penal Policy Making

Penal policies of the center-right governments were enacted in the shadow of conflict between the political branches of government and the judiciary. The government repeatedly attempted to curb the independence of judicial authorities and shield Prime Minister Berlusconi from prosecution in multiple trials and investigations (Nelken 2002; Quigley 2011).
The policies of Berlusconi’s second government (previously he served as prime minister for a short period after the 1994 general elections) from 2001 to 2006 were markedly ambivalent: soft on white-collar criminals and first-time offenders and tough on low-level and career criminals and immigrants. The preceding center-left government in 2000 had greatly relaxed penal provisions related to tax frauds, but also in 2001 it introduced the first model of corporate criminal liability in the country’s history. The center-right government was characterized by an almost blatant “double standard” (Forti and Visconti 2007, pp. 495–96): lenient toward economic offenders and tough on stereotypical street offenders. A 2002 statute substantially weakened penal provisions against accounting frauds, false claims, and slush funds partly by decriminalizing behavior and by reducing the severity of applicable sentences. This has recently been partly offset by top-down harmonization of white-collar offenses affecting EU financial interests and changes to related sentencing provisions.

In 2002 Berlusconi’s government strengthened the 1998 immigration law enacted by the center-left government. The maximum period of administrative detention of undocumented aliens awaiting deportation was extended and penalties for illegally reentering the country were increased. The law increased efficiency in tracking illegal immigration and related criminal activities (especially compared with previous underregulation; Barbagli 2004, p. 153) but racialized immigration discourse by treating undocumented aliens as scapegoats and enemy outsiders (Totah 2002). Since 1998, many non-EU immigrants have had the status of guests on “probation” in terms of papers and permits they need to be considered legal residents; they are constantly at risk of breaking rules. On December 31, 2014, inmates from non-EU countries constituted 13,797 of the 53,623 people held in Italian prisons (25.72 percent).

Following a short-lived center-left government led by Romano Prodi (2006–8), which enacted the 2006 collective pardon, the center-right coalition won the 2008 elections, this time on a clear law-and-order platform primarily targeting transient communities, such as Roma people, and non-EU citizens from developing countries (Shea 2009). “Security packages” of 2008 and 2009, called “urgent measures for public security,” criminalized, among other conduct, illegal immigration and “making use of minors to beg for money,” the latter an offense punishable with imprisonment up to 3 years and clearly aimed at Roma people (Ambrosini 2013).
Overall, new policies enacted by the center-right government were mostly symbolic, concerned more with showing that the executive branch was “doing something” and “reassuring” the general public than with pursuing or producing tangible results (Massetti 2015, p. 498). The crime of illegally entering the country enacted in 2009 provides a telling example. The government initially planned to make illegal immigration a felony punishable by imprisonment. However, concerns expressed by the international community and the risk of exacerbating prison overcrowding soon led it to change course. Illegal entrance or residence was made a misdemeanor punishable with a fine. The aim was not actually to collect fines from needy undocumented immigrants but to speed up deportations. However, the many appeals provided by the Italian judicial process made deportation harder than before—a clear example of a more punitive policy on paper that proved self-defeating if not counterproductive. Not surprisingly, the law creating the offense soon became unenforced. The center-left government in power since 2014 has repeatedly expressed willingness to repeal it.

The real punitive turn in immigration policy, irrespective of the government in power, has been in “administrative” detention of undocumented aliens for screening or pending deportation. Over time, this “has evolved into a de facto punishment” and “has become an instrument of deterrence used by the police to try to wear down the resistance of those who do not cooperate with their removal” (Campesi 2015, p. 449). The “security packages” enacted in 2008 and 2009 also critically contributed to expansion of a more hidden but not less pervasive facet of “administrative penalty” at the local level. Local authorities used new powers to promulgate a vast array of municipal measures and orders to fight such forms of urban disorder as minor drug dealing, begging, prostitution, illegal sale of goods, and illegal occupation of public spaces. As noted by Selmini (2016, p. 6), “the widespread use of these orders, especially in the biggest cities, remarkably reshape[d] urban policing at the local level, with municipal police becoming heavily involved in zero-tolerance type strategies.”

D. Sentence Enhancements for Repeat Offenders

A 2005 tough-on-crime law recast the rules governing sentence enhancements for repeat offenders. The government sought to address the media and general public complaint that even habitual offenders “stay in prison for too little and end up being released too soon.” The drafters
focused on judicial nullification of sentence enhancements (often disregarded or counterbalanced by use of mitigating circumstances) and on rehabilitative elements of the implementation phase of custodial sentences that allowed offenders to leave prison early. The bark of the new law outweighed its bite: under the new rules, sentence enhancements remained discretionary.\textsuperscript{19} They were also applicable only to intentional felonies. Judicial discretion was radically curbed mainly with regard to the magnitude of sentence increases if enhancement was deemed appropriate.\textsuperscript{20} The recidivist premium was made mandatory only for particularly serious charges, including organized crime offenses, drug trafficking, murder, aggravated sexual assault, and kidnapping for ransom (Pavarini 2006; Torrente 2009, pp. 5–8).

Nonetheless, a 2015 decision of the Constitutional Court (Judgment no. 185 of July 23, 2015) struck down the provision making sentence enhancement mandatory for certain offenses, ruling against any irrebuttable presumptions of increased dangerousness as a result of a new offense, even a particularly serious one. Sentence enhancements based on criminal history must be determined case by case following assessment of the threat to society the offender poses. A presumptive incapacitative sentence would unduly frustrate the rehabilitative aim of punishment set forth in the Constitution.

The 2005 law represents an example, according to Dolcini (2007), of the “selective approach” to penal policy making adopted by the center-right cabinet. While making penalties for repeat offenders potentially much harsher, at the same time the 2005 bill introduced a new regulation of statutes of limitations, now equivalent to the statutory maximum pro-

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\textsuperscript{19} The judge shall examine the criminal record of the offender and assess whether or not—on the basis of, e.g., the temporal distance between the crimes and their nature—increased culpability, dangerousness, or both exist. Guidance shall be provided by criteria set forth in art. 133 of the Penal Code.

\textsuperscript{20} The 2005 law distinguishes among three different types of recidivism: (a) “simple recidivism” (i.e., committing an intentional felony having another one on record), triggering a fixed enhancement of a third of the sentence to be imposed for the current crime; (b) “aggravated recidivism,” allowing the court to increase the sentence from a third up to a half when the new offense is of the same character as the one on record, it has been committed within a 5-year window since the previous conviction, or it has been committed during the execution of the prior sentence; and (c) “multi-aggravated recidivism,” if more than one aggravating factor applies. In such cases, if the court decides to impose the recidivist premium, the enhancement shall be by a half, thus determined in a fixed amount. In case a recidivist reoffends (reiterated recidivism), the penalty may be enhanced by a half or two-thirds in case one or more of the aggravating factors listed at point b above applies.
vided for by the law for each offense. The various reforms of white-collar crimes passed over the years and characterized by a generalized lowering of statutory minimums and maximums in practice have restricted the potential applicability of recidivist premiums to certain types of offender only (street criminals, drug dealers, undocumented aliens in particular), who in fact now consistently represent more than a half of the sentenced recidivists (pp. 540–41).

E. War on Drugs Italian Style

Since the early 1990s, supply-side law enforcement has been nearly the only response to drugs. Law no. 162 of 1990 harshened legal system responses to production and distribution of drugs and possession for personal consumption. However, a clear line was drawn between hard and soft drugs: production and distribution of hard drugs were to be punished within a statutory range of 8–20 years’ imprisonment; for soft drugs, the range was 2–6 years. In 1993 a successful ballot initiative abolished imprisonment for personal consumption of hard or soft drugs. Italian drug policy was thus characterized by tolerance of personal consumption and a clear distinction in punishment between types of drugs, largely driven by a late-1980s heroin epidemic (Rezza et al. 1992). A major policy concern was that drug smuggling was the largest income source for organized crime (Paoli 2003).

A major change of direction occurred in 2006, a few months before general elections. The center-right coalition changed the 1990 drug law. At the 2003 annual meeting of the UN Commission on Narcotic Drugs held in Vienna, Deputy Prime Minister Gianfranco Fini called for a zero-tolerance drug policy eliminating the distinction between soft and hard drugs and penalizing possession of illegal drugs for personal use. “The attitude of the state must change,” Fini said. “It cannot remain indifferent to illegal drugs, even when they are for personal consumption” (The Independent 2003).

Law no. 49 of 2006 (the Fini-Giovanardi Law after its two main sponsors) followed suit. It embraced an openly moralistic prohibitionist approach that equated soft and hard drugs for punishment purposes. The new version of article 73 of Law no. 162 provided 6–20 years’ imprisonment for production and distribution of any type of drug, regardless of addictive effects. This is draconian in comparison, for example, with the 10–18 range for reckless murder and the 6–12 range for aggravated sexual assault.
The new law reinstated personal drug use as a criminal offense. Above a specified quantity threshold, a presumption of possession for distribution applies. For possession of an amount slightly above the threshold, the range is 1–5 years. The new policy was largely based on the gateway theory that use of less dangerous drugs leads to use of more addictive and destructive ones. The early report on the draft of the bill dismissed the libertarian notion of drug use as harmless wrongdoing: “Taking drugs is not a harmless exercise of freedom that does not tolerate interference, but rather it is an act of rejection of the most fundamental duties of individuals towards the communities in which they live.... The state has the duty to respond to such behavior with a complex framework of measures” (quoted in L'Unità 2003).

The center-left governments in power from 2006 to 2008 and, more recently, since 2013 have not changed the Fini-Giovanardi Law. The opposition came, surprisingly, from a Constitutional Court ruling in early 2014 (Judgment no. 32 of February 25, 2014) that struck down the provision eliminating the distinction between soft and hard drugs and thus reinstating the previous, less severe penalty regime. The provisions were found to violate the delegation of powers by the Parliament to the government, which promulgated the drug reform under a legislative decree that was originally aimed solely at dealing with matters related to the Turin Winter Olympic Games of 2006.

The 2006 changes quickly and visibly affected admissions to prison and the incarceration rate. Table 4 shows trends in prison admissions. Previously, many newly incarcerated persons each year were not affected by drug-related penal provisions as they were personal consumers or distributors of soft drugs and thus were immediately eligible for probation as a prison alternative, sometimes coupled with mandatory drug treatment. The increases in statutory minimum penalties made it much harder for many drug offenders to avoid prison, at least in part.

In 2006, of 90,714 people admitted to prison, 25,399 were article 73 related; in 2008 they were 28,865 of 92,800 total admissions. Numbers have recently declined, as a result of enactment of various decarceration measures in the aftermath of the European Court of Human Rights prison overcrowding decisions and the Constitutional Court judgment reintroducing the distinction between hard and soft drugs. The percentage of admissions in 2014 under article 73 was the lowest since 2007.

Table 5 shows the effects of drug offenders on the composition of the prison population at year-end. On December 31, 2014, convicted or
remanded drug offenders were 33.56 percent of the total, down from 37.33 percent in 2013. The peak under the zero-tolerance statute occurred in 2009, when 40.21 percent of prisoners were drug offenders. The effects of the Constitutional Court judgment are clear: There were 8,913 fewer people in custody in 2014 compared with 2013; the year-to-year reduction in article 73-related inmates was 5,351.

The effects of the Fini-Giovanardi Law are further evidenced by comparison of police and prison data related to article 73 in 2006–13. Figure 7 shows that the rate of reported drug offenses per 100,000 population has been substantially stable since enactment of the 2006 law but that the imprisonment rate for those crimes greatly increased. Many more people were in pretrial detention or serving a custodial sentence for drug-related offenses.

F. California Calling: Addressing Prison Overcrowding

The Italian prison population rose substantially after the early 1990s for three main reasons. First, new laws increased lengths of sentences for particular crimes (e.g., drugs), and other changes limited eligibility of some offenders for early release. Second, enactment of clemency measures became much more difficult politically. Third, no efforts were made to increase the capacity of the prison system despite clear popula-

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**TABLE 4**

Trends in Prison Admissions

<table>
<thead>
<tr>
<th>Year</th>
<th>Italians</th>
<th>Foreigners</th>
<th>Total</th>
<th>Italians</th>
<th>Foreigners</th>
<th>Total</th>
<th>Prison Admissions for a Violation of Article 73 (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>47,426</td>
<td>43,288</td>
<td>90,714</td>
<td>15,074</td>
<td>10,325</td>
<td>25,399</td>
<td>28.00</td>
</tr>
<tr>
<td>2007</td>
<td>46,581</td>
<td>43,860</td>
<td>90,441</td>
<td>15,392</td>
<td>11,593</td>
<td>26,985</td>
<td>29.84</td>
</tr>
<tr>
<td>2008</td>
<td>49,701</td>
<td>43,099</td>
<td>92,800</td>
<td>16,564</td>
<td>12,301</td>
<td>28,865</td>
<td>31.10</td>
</tr>
<tr>
<td>2009</td>
<td>47,993</td>
<td>40,073</td>
<td>88,066</td>
<td>15,909</td>
<td>12,460</td>
<td>28,369</td>
<td>32.21</td>
</tr>
<tr>
<td>2010</td>
<td>47,343</td>
<td>37,298</td>
<td>84,641</td>
<td>15,695</td>
<td>10,446</td>
<td>26,141</td>
<td>30.88</td>
</tr>
<tr>
<td>2011</td>
<td>43,677</td>
<td>33,305</td>
<td>76,982</td>
<td>14,226</td>
<td>10,226</td>
<td>24,452</td>
<td>31.76</td>
</tr>
<tr>
<td>2012</td>
<td>36,014</td>
<td>27,006</td>
<td>63,020</td>
<td>11,376</td>
<td>9,088</td>
<td>20,465</td>
<td>32.47</td>
</tr>
<tr>
<td>2013</td>
<td>33,572</td>
<td>25,818</td>
<td>59,390</td>
<td>10,042</td>
<td>8,109</td>
<td>18,151</td>
<td>30.56</td>
</tr>
<tr>
<td>2014</td>
<td>27,470</td>
<td>22,747</td>
<td>50,217</td>
<td>7,225</td>
<td>6,747</td>
<td>13,972</td>
<td>28.38</td>
</tr>
</tbody>
</table>

**SOURCE.**—Anastasia and Cianchella (2015, p. 5, table 1).
TABLE 5
Drug Offenders in Prison

<table>
<thead>
<tr>
<th>Date</th>
<th>Total Number of Inmates (Sentenced and Pretrial)</th>
<th>Incarcerated Individuals for a Violation of Article 73</th>
<th>Incarcerated Individuals for a Violation of Article 73 (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>12/31/2006</td>
<td>39,005</td>
<td>14,640</td>
<td>37.53</td>
</tr>
<tr>
<td>12/31/2007</td>
<td>48,693</td>
<td>18,222</td>
<td>37.42</td>
</tr>
<tr>
<td>12/31/2008</td>
<td>58,127</td>
<td>22,727</td>
<td>39.10</td>
</tr>
<tr>
<td>12/31/2009</td>
<td>64,791</td>
<td>26,052</td>
<td>40.21</td>
</tr>
<tr>
<td>12/31/2010</td>
<td>67,961</td>
<td>27,294</td>
<td>40.16</td>
</tr>
<tr>
<td>12/31/2011</td>
<td>66,897</td>
<td>26,559</td>
<td>39.70</td>
</tr>
<tr>
<td>12/31/2012</td>
<td>65,701</td>
<td>25,269</td>
<td>38.46</td>
</tr>
<tr>
<td>12/31/2013</td>
<td>62,536</td>
<td>23,346</td>
<td>37.33</td>
</tr>
<tr>
<td>12/31/2014</td>
<td>53,623</td>
<td>17,995</td>
<td>33.56</td>
</tr>
</tbody>
</table>

Source.—Anastasia and Cianchella (2015, p. 6, table 2).

This led to the European Court of Human Rights (ECHR) decisions I have mentioned several times.

*Sulejmanovic v. Italy* (application no. 22635/03) put the Italian government on notice in 2009. The applicant complained about overcrowding and insufficient daily exercise outside his cell. He shared a cell with six people, each thus having approximately 29 square feet of personal space. This is much less than the minimum standard of 75.3 square feet per prisoner recommended by the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The Court agreed, finding that the personal space allotted Sulejmanovic constituted inhuman or degrading treatment in violation of article 3 of the Convention.

Following this judgment, the Italian government failed to tackle the problem effectively; the most consequential measure adopted was to allow home custody for execution of prison sentences not exceeding 1 year. The government announced a new master plan to increase prison capacity (which was never acted on). At year-end 2010, Italian prisons held 67,961 prisoners in facilities designed for 45,022. That constituted 151 percent overcrowding.

Following *Sulejmanovic*, numerous applications were submitted by inmates to the ECHR alleging violations of article 3 due to overcrowding. In 2013, in *Torreggiani and Others v. Italy* (application no. 43517/09), the ECHR unanimously found a violation of article 3 and gave Italy 1 year
to provide "redress in respect of violations of the Convention resulting from overcrowding in prison." In early June 2012, when the ECHR notified the Italian government of its willingness to issue a "pilot judgment," there were 66,487 inmates against a design capacity of 45,558. The prisons were operating at 145.9 percent of capacity. Italy was required to adopt a combination of remedies aimed at addressing large numbers of individual cases. Overcrowding was acknowledged to be a structural problem.

The Torreggiani judgment will probably call to American readers' minds the US Supreme Court decision in Brown v. Plata, 131 S. Ct. 1910 (2011). The Court ruled 5–4 that overcrowding in California's prisons violated prisoners' Eighth Amendment rights to adequate health care; the California system was operating at nearly double its design capacity. The Court asserted that dealing with constitutionally inadequate health care required a population limit and ordered California to reduce its inmate population to 137.5 percent of design capacity within 2 years. California adopted a realignment plan that is under way (Simon 2014).

In Europe, where the culture of human rights in relation to criminal penalties is deep-seated, the ECHR may not directly require a national
government to free incarcerated offenders for failing to take adequate measures to solve a certain problem within a designated period. The main remedy available is to award compensatory damages to successful applicants after a Convention violation is established (Heyns and Killander 2013, p. 684).

In the first half of 2014, the Italian Parliament enacted several measures aimed at reducing the overcrowding rate. No sentencing provisions in a narrow sense were modified; rather the focus was on sentence implementation. These are the main changes:

- Good time credit (sentence remission) has been increased from 45 to 75 days per half year except for a specific list of offenses.
- Home custody has been authorized for prison sentences up to 18 months.
- Substitution of probation for a prison term has been extended to cover sentences up to 4 years imposed in court or already partly served.
- New provisions make custody before trial the last resort to which the pretrial investigation judge may resort on request of the prosecutor. Pretrial detention is applicable only when less intrusive options are insufficient. Except for offenses such as organized crime, terrorism, domestic violence, and stalking, pretrial detention was banned when the pretrial investigation judge estimates that the sentence imposed at trial will not exceed 3 years.

Figure 8 shows the pattern of decarceration since 2006, when the last collective clemency measure took effect. Changes since 2010 had the primary goal to increase the proportion of custodial sentences served outside a prison by diverting some offenders and accelerating eligibility for release into alternatives for prisoners who have partly served their prison term.

Since the ECHR cases were decided, the number of sentenced individuals serving custodial sentences in an alternative regime outside prison has continuously grown. The decrease in inmate numbers is also partly attributable to earlier eligibility of many prisoners for release on parole due to increased good time credits. The number of detainees in pretrial detention is the lowest since the early 1990s.

At year-end 2015, the decarceration measures had had substantial effect. There were 52,164 inmates in Italian prisons designed to accommo-
date 49,592 (thus “only” 5.2 percent over capacity). Prison admissions have plummeted. Admissions in 2015 were 45,823, compared with 92,800 in 2008 during the peak of “zero tolerance.”

My impression is that the policy changes were enacted merely as emergency measures to avoid unfreezing of nearly 3,000 applications pending before the ECHR that alleged degrading conditions and to stop the filing of new ones. Italy potentially faced massive compensatory damages (each Torreggiani applicant case received between €10,000 and €20,000 depending on length of confinement). The ECHR’s rulings have not sparked a genuine debate on reform of Italy’s criminal justice system generally and sentencing policies and practices in particular. The new initiatives are a reactive response to what Aviram dubbed “humanetarianism,” the short-term “tendency to view criminal justice and correctional policies primarily through a prism of cost” (2015, p. 6).

IV. Conclusions

Italian penal culture has experienced a substantial transformation since the mid-1980s. In 1986 Italy embraced penal welfarism at a time when in common law countries and elsewhere it had been dismantled since
the 1970s in favor of harsher penalties and enhanced social control. This choice together with expanded procedural protections in the 1989 Code of Criminal Procedure seemed to express a tradition of penal moderation based on the legitimacy of the state and consensual approaches to penal policy.

In retrospect, those changes were the swan song of a political system that was about to succumb because of its structural inability to reform itself (Briquet 2009). The Clean Hands investigation initiated what appears to be still a never-ending political transition that increasingly affected penal policy making.

Since at least the late 1990s, governments of different orientation have enacted policies that overrely on criminal sanctions, by creating new offenses or specifying harsher sentences. The shift from a consensual to an openly conflictive majoritarian political system has led to much higher sensitivity to populist arguments concerning penal policies. The appeal of tough-on-crime policies for short-term electoral gains has not been a monopoly of the center-right parties. The center-left governments also embraced them, although to a lesser extent and according to a different ideological platform.

In the past two decades, massive immigration and large cuts in public spending on welfare and law enforcement heightened public concerns about security of individual property and personal safety. Crime-related anxieties have consistently ranked first among the public’s top fears, being only recently surpassed by unemployment and financial instability (Demos et al. 2015). Overall, the slow but constant substitution of highly individualized self-responsibility for collective solidarity has led to a widespread “sentiment of vulnerability” that has triggered demands for harsher penalties (Bauman 2009, p. 110). At the same time, the justice system has been expected to address issues that should have been handled by other institutions and different social policies.

At least three factors, however, reduce the “punitive potential” of the developments discussed in this essay. First, an independent judiciary strongly insulated from political directives and pressures has played, and likely will continue to play, a crucial role. Prosecutors “filter” social fears and excessive penal demands by performing their functions in neutral yet sensitive ways. Judges use their discretionary powers in determining sentences to reduce the effects of severe statutory ranges. The Constitutional Court struck down laws that contributed to the shift toward greater severity.
Second, the pendulum has swung multiple times over the past three decades between increased punitiveness and greater procedural fairness. The outcome has been a criminal justice system sometimes at war with itself. In contrast to the United States, where the adversarial system over time has become an efficient assembly line of guilty pleas (Bibas 2012), the Italian adversarial initiatives of the 1980s and 1990s overlooked foreseeable effects on efficiency. The Italian infrastructure includes long pretrial investigations and gives defendants and their lawyers incentives to abuse guarantees “which are seen by some as measures pretending to protect the accused’s rights” but slow down and often prevent the final adjudication of cases (Nelken 2009, p. 306). No real incentives exist to opt for a simplified “fast-track” alternative proceeding: the incentive (a reduced sentence) is not balanced by any kind of disincentive (a realistic “trial penalty”). The opposite is true: not only does the prohibition of reformatio in peius prevent the appellate courts from increasing sentences imposed at trial but the statutes of limitations run out for a relatively large number of cases—especially low- and medium-level offenses—during the process because of the multiple appeals that are available.

Third, the growth of the prison population and gigantic backlogs of cases persuaded the Parliament to try to tackle those problems. However, despite their tangible outcomes, deferred and nonprosecution schemes and alternatives to implementation of custodial sentences were not inspired by a revamped culture of tolerance. The increased centrality of alternatives is not a manifestation of a comprehensive strategy to abandon imprisonment or reinvigorate constitutional mandates of rehabilitation as the main goal of punishment. To the contrary, those initiatives have largely been impromptu efforts to come to terms with issues at a time when procrastination was no longer viable. Today’s instances of Italian penal welfarism look more declaratory than real, mirroring the progressive structural weakening of social welfare generally.

The current Italian sentencing system is characterized by a high degree of inefficiency. Sentences are largely “disintegrated” at various stages of the process. The excessive length of trials coupled with initiatives widening the range of alternatives further undermines the certainty and predictability of punishment. Selectiveness is another major feature of the Italian sentencing system: for perpetrators of certain offenses (typically members of criminal organizations, drug and sex offenders), extended pretrial detention and disproportionately high statutory maximums make experience with the Italian penal machinery more likely. This is also true of
offenders who commit common crimes but lack knowledge and resources to take full advantage of the existing “devices of moderation.”

During the period covered by this essay, 1985–2015, Italy experienced increased levels of punitiveness. The effects are evident at national and local levels and include newly established policies and ways in which political and media discourse on crime and punishment have changed. In my view, Italy’s recent penal history does not represent, as Gallo (2015) has argued, a distinctive challenge to the narrative on trends of “Western punitiveness.”

The persistent mildness of the criminal justice system results from the combination of inadequate resources, inefficient organization, and inconsistent penal values rather than from considered policy choices. Recent initiatives affecting sentence implementation have been driven by realpolitik policies in reaction to the prison overcrowding crisis. Current proposals for decriminalization of minor crimes and substantial reform of criminal sanctions are embryonic and largely contested. It is too early to tell whether faint signs of change will eventually be seen as early steps in a long overdue comprehensive reconstruction of the sentencing system or simply as tiles soon to be undone or contradicted in the Penelope’s shroud of never-ending reforms of the troubled Italian penal system.

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