



Harm and governance of prisons' systemic overcrowding

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Abstract

Overcrowding has been on the national policy agendas of many jurisdictions for decades. While many other aspects of punishment are largely investigated as penal policy-related issues, overcrowding has not received the same attention. This article investigates how we may best understand prison congestion by considering it as a widely accepted operational condition for many prison systems. Following a brief introduction on how overcrowding is a structural problem in many jurisdictions, the essay is developed into three independent, but related, parts: an analysis of overcrowding and its definitional issues that includes a discussion of the theoretical and epistemological challenges it poses; a discussion of the impact and legitimacy of congestion on incarceration experience via the notion of “harm”; and, finally, the discussion of the concept of “governance of systemic overcrowding”. By doing so the paper aims to challenge the current knowledge on prison overcrowding and wants to suggest a new analytical standpoint, which, however, is deserving of further research.

Key words

Prison overcrowding; penal policy; punishment; governance of systemic overcrowding; harm of prison experience

Resumen

El hacinamiento ha estado en las agendas políticas nacionales de muchas jurisdicciones durante décadas. Mientras que muchos otros aspectos del castigo se investigan ampliamente como cuestiones relacionadas con la política penal, el hacinamiento no ha recibido la misma atención. Este artículo investiga cómo podemos entender mejor la saturación de las prisiones considerándola como una condición operativa ampliamente aceptada por muchos sistemas penitenciarios. Tras una breve introducción sobre cómo el hacinamiento es un problema estructural en muchas

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jurisdicciones, el ensayo se desarrolla en tres partes independientes, pero relacionadas: un análisis del hacinamiento y sus problemas de definición que incluye un debate sobre los retos teóricos y epistemológicos que plantea; un debate sobre el impacto y la legitimidad de la congestión en la experiencia del encarcelamiento a través de la noción de “daño”; y, por último, el debate sobre el concepto de “gobernanza del hacinamiento sistémico”. Con ello, el artículo pretende cuestionar los conocimientos actuales sobre el hacinamiento en las prisiones y quiere proponer un nuevo punto de vista analítico que, no obstante, merece seguir siendo investigado.

Palabras clave

Hacinamiento en las cárceles; política penal; castigo; gobernanza del hacinamiento sistémico; perjuicios de la experiencia carcelaria

Table of contents

1. Introduction	1188
2. Challenges in defining prison overcrowding.....	1189
3. The harm of prison.....	1192
3.1. The harm of overcrowded prisons	1194
4. Penal policy and systemic overcrowding	1196
4.1. Governmental strategies for addressing prison overcrowding	1197
4.2. The governance of systemic overcrowding	1199
5. Some final considerations	1202
References.....	1204

1. Introduction

The potential detrimental impact of poor prison conditions on incarcerated individuals and social groups is often neglected or even dismissed in public debate, relegating its consideration to “exceptional” situations or contingent emergencies. Generally, prison overcrowding is one of the few circumstances in which inadequate detention standards may be publicly discussed or condemned. Even then, it is typically portrayed as a temporary and extraordinary phenomenon that can be attributed to political negligence or shortsighted policies. Nevertheless, recent studies show how overcrowding has become an integral part of prison and punishment politics (Albrecht 2012, Simon 2015, Guetzkow and Schoon 2015, Santorso 2023).

State punishment is inherently controversial, as it represents a unique form of state power that involves inflicting pain through coercion, thus requiring special validation and control (Zedner 2016). Duff and Garland (1994) note that punishment is morally problematic because it involves actions that would otherwise be considered ethically wrong, highlighting the need for justification. For that reason, scholars have focused on defining legitimate punishment and its boundaries (Hannah-Moffat and Lynch 2012, Zedner 2016). However, prison congestion challenges these definitions. Imprisonment, viewed as a “human” and modern punishment, should inflict proportionate pain to achieve reintegration into society (Hirst 1984). Thus, in theory, punishment is deemed appropriate when it balances the violation of rights with societal benefits, maintaining proportionality between pain inflicted and goals achieved.

Overcrowding disrupts this balance by deteriorating conditions to the point of ill-treatment, as numerous reports and guidelines, such as those from the European Court of Human Rights, indicate (ECtHR 2022). Undoubtedly, any critical reflection on the social context of poor prison conditions, the concreteness of the prison experience, and the connection of that experience with the pains of imprisonment speak to broader questions about the detrimental impact of incarceration on individuals (and communities) and the boundaries of its legitimacy. It also raises concerns about the consequences of increasing the intensity of such punishment as well as more general considerations of the social function of confinement institutions.

In the past years, prisoners and human rights organisations have filed more lawsuits against states for the poor conditions of their prison system than ever before. In analysing the literature and research done on overcrowding, what seems quite clear is that while undoubtedly the intervention of standards-setting bodies has forced states to act, many jurisdictions have not been able to prevent overcrowding from becoming a standard operational condition of the prison system. The question that this paper aims to address is how the state governs prison congestion, addresses its impact, and, above all, whether state intervention is in any way linked to transforming prison congestion into acceptable operational conditions.

First, to fully appreciate the impact of overcrowding, semantic and conceptual clarifications are necessary. The notion of overpopulation is frequently confused with that of overcrowding. Although the two concepts partially overlap, they are far from synonymous, even though they describe different aspects of the same process. Overpopulation is defined as the action of filling a specific space with too many people. In contrast, overcrowding can be defined as a situation in which the volume of people

occupying a space exceeds its carrying capacity. As a result, “prison overpopulation” describes the action of sending an excessive number of people to prison,¹ while “prison overcrowding” is a picture of the final outcome.²

Moving from this premise, the critical argument of this study recognises that both overcrowding and overpopulation are part of the same chain of political decision-making and policy. For analytical purposes, the focus of this study is overcrowding, but it implicitly acknowledges how this notion is entwined with the concept of overpopulation. In other words, although the emphasis of this research is on prison conditions, it acknowledges the relevance of policies and institutional actions that generate these conditions.

It is essential to emphasise that the roots of prison congestion are embedded in a multitude of factors that cannot be comprehensively addressed within this paper. These factors include structural, cultural, and juridical elements, control policies, and media constructions. Nonetheless, the combination of overpopulation and overcrowding gives rise to what is described in this paper as the politics of prison crowding. This concept aims to recognise that the interplay between punishment, political economy, and various socio-cultural factors is shaped by the coordination of diverse decision-making actors (Lacey 2008).

By focusing on this perspective, the paper suggests that a more productive approach to illuminating the intricate relationship between prison congestion and the aforementioned factors lies in analysing the decision-making processes involved. This approach can also facilitate the understanding of how overcrowding shifts into a systemic condition of punishment by imprisonment.

The following pages debate some core issues raised by the literature on prison overcrowding. Initially, there is a discussion of the dispute in its definition and the theoretical challenges it generates. This is followed by an overview of the harm of overcrowding as a threat to the legitimacy of punishment by prison. Finally, the concept of “governance of systemic overcrowding” is introduced to shed light on how prison congestion and its harm are mitigated, rather than addressed, and transformed into a legitimate operational condition for the prison system.

2. Challenges in defining prison overcrowding

Since the late 1980s, a growing number of jurisdictions worldwide have experienced prison crowding, namely, the condition in which the number of prisoners almost matches or even exceeds the prison facilities’ capacity (Cliquennois and Birch 2020). A recent report on prisons (Penal Reform International 2023) shows that overcrowding affects more than 120 countries, with 11 prison systems more than double their capacity. In most jurisdictions, this phenomenon is described as a long-standing issue. It is fundamental to stress that the report considers only active detention facilities that are

¹ Even though related, this needs to be distinguished from mass incarceration which is when imprisonment of individual offenders “becomes systematic incarceration of whole groups of population” (Garland 2001, 6).

² I extend my sincere gratitude to John Moore for his valuable feedback and to Andrew Jefferson for suggesting this distinction during the 2023 European Group for the Study of Deviance and Social Control Annual Conference held in Turku.

above 100% of their official capacity and does not include states with prison systems in borderline conditions (e.g., between 90% and 99% of their capacity). Additionally, the official figures are those provided by detention facilities, which, according to the literature, often overestimate the prison system's capacity (see *inter alia* Santorso 2023). This means that, in reality, overcrowding may affect a larger number of jurisdictions. Many institutions are also inconsistent in their definitions of prison overcrowding, meaning that any presentation of this phenomenon and its extent is likely to be distorted and subject to political and institutional interests. As a result, while the report provides a useful portrayal of the congestion of prison systems worldwide, the overall picture remains blurred.

Policymakers warn that current patterns of prison crowding threaten to overwhelm detention facilities with dire and previously unhealthy living conditions. In this regard, international human rights courts and bodies have ruled that prison overcrowding can be considered a form of torture and inhumane treatment (Favuzza 2017), forcing states to address the problem and establish some national minimum standards for detention.³ Despite that, there are no globally acknowledged objective rules that define the amount and quality of space required per inmate, nor a clear understanding of how the state should define prison overcrowding (Favuzza 2017).⁴ Accordingly, Bleich (1989, p. 1126) argues that “[t]he standards used to define crowding are extremely fluid and often bear little if any relation to our underlying concerns about crowding”. Despite that, many institutional actors have advocated emergency steps to reduce pressure on prisons, and some jurisdictions have also established national guidelines and standards of detention to mitigate this problem, even though they are too often evaded. Following this argument, Simon (2015, p. 1195) claims that prison specialists and practitioners, but not politicians and decision-makers, consider anything more than 90% of the design capacity to constitute overcrowding. Until the end of the 1970s, this was considered a critical threshold also for political actors, and, when reached, urgent measures were implemented. Currently, this mechanism has vanished and warnings over overcrowding mostly come from Rapporteurs or international bodies, while the detrimental effects of overcrowding are relegated by states to the sphere of contingent situations that only marginally affect the prison system's operational capacity (Santorso 2023). In any case, exceeding the threshold of 100% of the capacity remains the decisive factor in considering the potential congestion issues and for governments to intervene.

In general, the political need to juggle the combination of society's desire for punishment and the governance of the prison system with the congestion of detention facilities and the subsequent deterioration of prison conditions affects the understanding of overcrowding. For example, several studies show governments tend to manipulate

³ While overcrowding is an issue that grows over time and affects prisons in the long term, politicians acknowledge its seriousness only when the problem reaches a crisis point. As Haney (2006, 267) argues, “the problems we now face [generated by prison overcrowding] were repeatedly predicted and certainly could have been avoided if the many early warnings had been heeded”.

⁴ For example, the Standard Minimum Rules merely require that prisoners be given enough space to ensure their health and human dignity. More efficient seems to be the ECtHR ruling that establishes the criterion of 4 square meters (spatial density) when defining overcrowding. In both these examples, references to the quality of space are generically drafted and open to instrumental interpretation.

official data⁵ on prison system capacity to make overcrowding look less severe and, above all, to ensure that the prison system remains nominally compliant with legal and functional standards (Haney 2006). This further complicates the attempt to have a clear and reliable definition of what constitutes overcrowding but generates a grey (but functional) area that, as Bleich points out, makes it unclear

(...) at what point does a prison's population become so great that the risks to prisoners' health and safety outweigh society's demand that the prisoners be punished, or that the prisons simply become administratively unmanageable. (Bleich 1989, 1125)

Other scholars, acknowledge the definitional issues affecting overcrowding and suggest a focus on "operational and structural issues" it causes⁶ and use these to read the capacity/prisoners number equilibrium. For example, Steiner and Wooldridge (2009, 215) raised an interesting observation in the debate on prison overcrowding issues: they claim that "crowding effects on facility operations are realised when a facility's population exceeds eighty percent of its design capacity." By this definition, the vast majority of prison systems should be considered in overcrowded conditions, radically changing the perspective on the justificatory narrative of prison as punishment.

To conclude, it is fundamental to stress how on one side, Rapporteurs, Commissions, human rights, and standard-setting bodies are making significant efforts to provide concrete and substantial criteria for defining qualitative standards to frame prison congestion. Undoubtedly, these criteria, even if not shared and biased, can be a starting point to define the proximity of the prison system conditions to a congested situation. However, governments seem to resist addressing overcrowding as a structural issue that needs to be addressed with broad intervention in the penal policy, as better analysed in the following pages.

In summary, while there is agreement that overcrowding has negative consequences for both prisons and prisoners, scholars and institutional actors disagree (or in the best-case scenario are vague) on a tangible definition of the problem, leaving, alongside ambiguous qualitative minimum standards for detention, 100% capacity as a vague and not decisive threshold. The lack of a clear and shared understanding of how to define overcrowding generates some conceptual challenges. In particular, according to the literature, poor material conditions caused by prison congestion can be portrayed as aggravations in the intensity of prison punishment (see, among others, Simon 2018).

⁵ As it has been argued, in a recent work exploring the case in Italy, that the most common initial political response to overcrowding issues is to adjust the physical and concrete category of "prison capacity" by replacing it with a political definition of the number of prisoners each facility can lawfully host (Santorso 2023).

⁶ In that regard, research shows how endemic forms of overcrowding can strain prison resources, possibly increasing already high levels of stress and conflict among convicts and between inmates and staff (Silberman 1995). Overcrowding also affects rehabilitative and reformist programmes, limiting their significance in the equilibrium of prison life. In general, the deterioration of living conditions is often accompanied by issues such as physical and structural violence, poor access to services, lack of intimacy and hygiene, promiscuity, little hope for rehabilitation, detrimental psychological conditions, and restricted access to essentials such as staff supervision and medical care (Chung 2000). Additionally, the consequences of overcrowding not only affect inmates, but also have a negative impact on staff, not only psychologically and physiologically, but also in terms of policy decisions (Haney 2006).

The forthcoming pages aim to tackle these dual challenges and lay the foundation for constructing an analytical framework geared towards understanding not only the impact of overcrowding on the intensity of punishment but also the underlying politics that render it a systemic element of contemporary penalty.

3. The harm of prison

Prison scholars have long been concerned with the “pains of imprisonment”, which Sykes (1958) describes in terms of five forms of deprivation. While the literature often highlights how contemporary penal power, which replaced corporal punishment, is less brutal but more pervasive, it also underscores that the social and psychological suffering caused by imprisonment can be as harmful as physical violence (Sykes 1958, p. 64). In later research, scholars have expanded on Sykes’s concept of the pains of imprisonment, using metaphors such as “breadth” (Cohen 1985), “depth” and “weight” (King and McDermott 1995), and more recently, “tightness” (Crewe 2011).

Researchers note that the overall impact of the prison experience manifests through the combination of these pains and deprivations. This amalgamation goes beyond their individual effects and collectively serves as an instrument for institutional governance, defining social hierarchies and roles within and beyond detention spaces (Dye 2010). Essentially, the notion of pain frames the legitimate action of the prison system as a justified and proportionate violation of rights following the violation of norms.

As Scarry (2020) argues, pain is a uniquely powerful force that fundamentally alters an individual’s relationship with reality. Pain functions in mechanisms of punishment and torture, where it is deliberately inflicted to dominate, control, and dismantle the subject’s world for a purpose. In both contexts, pain serves as a destructive and potentially transformative force that aims to achieve a goal, though punishment is considered legal practice, torture is not. This raises issues regarding the distinction between punishment and torture, and how the justification of prison pains is legally constructed as legitimate and socially acceptable.

According to Dayan (2011), it is possible to critique the implicit connection between the efficacy of the pain of punitive measures and the notion of justice. Dayan argues that the pain of punishment often serves as a tool for reinforcing existing power dynamics rather than achieving genuine justice. In a nutshell, the author illustrates how punishment and its pain disproportionately affect marginalised individuals and communities, perpetuating cycles of oppression and inequality, but without losing its legitimacy. In that sense, it is possible to argue that the punishment legitimacy boundaries are defined according to the interest of power, rather than the notion of justice.

What merits emphasis in this (brief) review is that the notion of the “pains of imprisonment” serves as a potent lens through which to elucidate the operational dynamics of penal authority. This concept encapsulates the imposition of suffering as an inherent aspect of incarceration, serving both punitive and rehabilitative purposes. Nonetheless, it fails to fully capture the long-term detrimental effects that such power can have on individuals and society.

Alongside debates on the prison’s pain and its transformative capacity, there is significant discussion about its detrimental impacts. These include stripping individuals

of their fundamental rights and needs, damaging their physical, mental, and social well-being, and rendering them helpless and institutionalized (Clemmer 1958, Sykes 1958, Goffman 1961, Foucault 1977, Cohen and Taylor 1981, Fitzgerald and Sim 1982, Mathiesen 1990). Negative effects may include severing ties with the community, isolating offenders both physically and symbolically (Sowle 1994, Christian *et al.* 2006), and the loss of civil, political, and social rights (Behan 2022). Frottier *et al.* (2002) noted that factors such as abrupt lifestyle changes, the stigma of imprisonment, distancing from the community, and exposure to a violent environment have harmful impacts on prisoners: potentially, the pains of imprisonment may also compromise their re-entry into society.

To address the pain of imprisonment conceptual limitation, the notion of harm proves useful. This concept is frequently applied to prison experiences involving extreme forms of incarceration. Scholars have examined the notion of harm in relation to penal power to describe the impact of severe punishments, such as solitary confinement (Haney 2020), which exacerbates the harmful effects of detention and amplifies their long-term negative consequences, or life sentences (Mauer and Nellis 2018), which fail to reduce crime, annihilate lives, and disproportionately affect marginalized communities. However, the application of the harm framework to the general prison experience is frequently criticized for being less direct and commonly assimilated into the concept of pain (Johnson *et al.* 2016).

Part of the literature differentiates between the concepts of pain and harm in the context of imprisonment (Clear 1994). Similarly, Hillyard and Tombs (2008, 11) argue that punishment inflicts specific pains that are justified as proportionate and constrained. However, the concreteness of these punitive processes generates broader social and individual harms that may not be directly connected to the initial offense. According to the authors, these harms extend beyond the individual and the immediate experience of incarceration. In that regard, while the pains of imprisonment are perceived as justified aspects of serving a sentence, accepting the idea of harm of imprisonment raises critical ethical questions regarding the broader impact and legitimacy of punitive practices.

Irwin and Owen (2013, p. 98) advocate for using the concept of harm to capture the damages that prisons cause in “obvious and subtle ways”. Although these scholars argue that these harms are not direct and intentional, they contend that they should be considered part of the business of punishment. Irwin and Owen also assert that prison harm appears to be a consolidated and systemic outcome that affects a significant portion of the inmate community.

In conclusion, whereas the pains of imprisonment are immediate and tangible, reflecting the operation of penal power, the concept of harm resulting from imprisonment is broader in scope, requiring a comprehensive grasp of the societal effects of carceral punishment. Furthermore, this paper does not aim to assert that the adverse effects of imprisonment are incorporated into the official narrative of punishment or overtly presented as an intentional consequence of prison procedures. Nonetheless, it is reasonable to argue that the presence of physical, psychological, social, or emotional distress (pain) can potentially result in some degree of injury or harm, even if temporary.

3.1. *The harm of overcrowded prisons*

Part of the literature, which contests the prison harm conceptual framework, acknowledges that prison pains can be envisioned as harmful when they exist in the extreme like overcrowding (Johnson *et al.* 2016, 102). The same scholars also advocate the need to reduce the harshness of incarceration for the legitimacy of punishment by prison and human reasons, but also to prevent the spread and long-term detrimental effects of incarceration that go beyond prisoners' community and prison sentences length (Ward and Stewart 2003, Johnson *et al.* 2016). Controversy, the hope of these scholars is crushed by the rise of chronic overcrowding as a new legitimate operational condition for many prison systems. This indicates that their appeal for reducing the infliction of pain and punishment intensity is largely ignored by governments and decision-makers. Rather, as mentioned in the previous pages, prison overpopulation, and overcrowding are progressively affirming themselves as penal strategies.

The contention of this paragraph, aligning with Haney's idea, is that in the age of prison congestion, "penal policies have crossed the line from inflicting pain to doing real harm" (Haney 2005, xiii). Therefore, this raises the question of what is the harm of overcrowding; by addressing this question it will be then possible to propose and discuss an analytical framework to understand how systemic forms of overcrowding and its harm are managed, justified and transformed into normal operational conditions for the prison system.

The scholarly on prison overcrowding has expanded and deepened during the last decade. In prison studies, there starts to be a well-established body of research that explores the detrimental impact of overcrowding (see *inter alias* Box and Hale 1985, Baggio *et al.* 2020). This scholarship on the effect of prison congestion shows that such conditions may cause a range of negative effects and an overall aggravation of prison harm. This impacts the whole prison community: as van Ginneken *et al.* (2017) argue it both causes staff burnout and affects the prison experience, however, the focus of this paragraph is mostly on prisoners.

Haney (2006, 273) points out in his research on the harm of prison overcrowding, that "resources for already limited programming and other activities were re-allocated to create bed space and maintain basic security", compromising those resources to guarantee prisoners' wellbeing and the overall idea of rehabilitation. This shortage of resources reduces the possibility of rehabilitative programmes working and increases the level of prisoners' inactivity, with detrimental effects on their well-being. Indeed, "chronic idleness in prison produces negative psychological and behavioural effects (...). Idleness-related frustration increases the probability of interpersonal conflict and assaults in prison" (Haney 2006, 275). Similarly, De Viggiani's (2007) research, as well as Brinkley-Rubinstein's 2013 investigation, show the emotional intensification related to endemic overcrowding that impacts prisoners' mental health, such as lack of privacy, exacerbation of antisocial conduct, or the difficulties in coping with the constant noise of prison and the anxiety this causes.

Slade (2018) argues that deteriorating living conditions and increased deprivations in prisons can result in what the author terms as dual harm: harm to oneself and harm to others. Slade emphasizes that self-harm, including suicide, and violence towards others should be viewed as interconnected outcomes of the prison environment and

punishment policies, exacerbated by overcrowding. Similarly, other scholars, such as Haney (2005) and Baggio *et al.* (2020), demonstrate how overcrowding amplifies existing problems and leads to increased violence behind bars, including incidents of suicide and assault.

Other scholars highlight how prison overcrowding negatively impacts the provision of healthcare, exacerbating health issues such as communicable diseases and affecting mental health. Ismail (2020) asserts that degraded living conditions in overcrowded prisons hinder inmates' access to healthcare, leading to increased levels of institutional and structural violence and disproportionately high health-related problems among those detained in congested facilities. Recent events align with findings from prison literature, indicating that while the spread of disease could be controlled under normal conditions by isolating or relocating prisoners, the spatial density and promiscuity of prisons make containment nearly impossible (Garcia-Guerrero and Marco 2012).

Some prison studies acknowledge the existence of solidarity and wealth redistribution among prisoners (Santorso 2015). However, prison overcrowding significantly reduces available resources and increases the number of deprived individuals behind bars, undermining solidarity systems among inmates and making wealth redistribution nearly impossible. Consequently, overcrowded facilities experience a growing divide between prisoners who can provide for their own needs due to their background and others who lack social, economic, cultural or material resources, leading to heightened levels of deprivation and challenges. Guo *et al.* (2019) characterize this as a double standard of punishment, where the prison system exacerbates social divisions rather than alleviating them. Consequently, marginalised and vulnerable individuals in congested prisons endure heightened prison harm and an exacerbated prison experience.

The literature underscores how an overfilled prison system extends its impact beyond prison walls to affect communities. Ginn and Robinson (2012) observe that in congested prisons, inmates may be housed wherever space permits, even if it's distant from their local area, disrupting their ties to community and family. This disconnection is termed an "abyssal divide" by Price (2015), contributing to the concept of "social death" for prisoners, a condition exacerbated by the resource shortages resulting from overcrowding. Accordingly, other scholars highlight that while a person's separation from the community is typically marked by a ritual, the process of re-entry into society is not (*inter alia*, Maruna 2011), it seems plausible to argue that the punishment by overcrowding prison may make this social death a condition that is hard to recover from. Similarly, Farrington and Nuttall's (1980) study shows that prisoners released from overcrowded facilities have a higher likelihood of reoffending. Moreover, the impact of overcapacity extends to community health, as most inmates return with illnesses and mental issues acquired in prison (Warmesley 2005).

Even though the elements present in this overview do not pretend to be complete, they stress the need for a brief discussion on how the harm of prison congestion is addressed by governments, as it seems to affect deeply the principle that legitimate state punishment, and therefore pose several challenges to the prison system.

In conclusion, applying the "harm" paradigm within the context of prison overcrowding reveals how practices of penal power often exceed the justificatory boundaries outlined

by legal frameworks. Consequently, the question arises as to how the harm resulting from systemic overcrowding is justified within the realm of penal power. Essentially, the harm caused by systemic overcrowding, which blurs the line between punishment and torture, should erode and challenge the legitimacy of penal power. However, empirical evidence indicates that chronically overcrowded prison systems operate within the bounds of legitimacy and are portrayed as compliant with human rights standards. A deeper comprehension of the mechanisms governing prison overcrowding can shed light on the true nature of efforts aimed at contrasting overcrowding and their impact on punishment by prison.

4. Penal policy and systemic overcrowding

In the last decades, international, human rights and standard-setting bodies have sought gradually, at a regional level, to monitor and control the power of states to punish (Keller and Sweet 2008). In particular, the problem of prison overcrowding seems to be one of the core topics debated by these bodies. Without getting into too many details (and perhaps simplifying what is a complex issue), these bodies have become relevant penal actors that can potentially shape prison policies and revitalise the foundations of punishment justifications. While it is not among the aims of this paper to debate the tension between international courts and national state prerogative of punishing, a brief overview of their impact in defining and addressing prison overcrowding can help the understanding of how congestion has become a chronic issue without undermining the legitimacy of punishment by prison.

The intervention of international, human rights and Rapporteur on prison congestion impacts the single jurisdictions, supporting reform and fundamental changes, sometimes even at the constitutional level. The suggestions given in circumstances of serious prison overcrowding by Rapporteur or standard-setting bodies include implementing comprehensive structural reforms of the prison system, aimed at reducing the number of detainees, increasing prison capacities and modernising prison facilities, reducing pretrial detention, and increasing the use of non-custodial measures (Albrecht 2012).

When examining cases of serious overcrowding, what seems evident is that it is mostly due to the intervention of external bodies and litigation processes, followed by successful complaints and appeals by prisoners or human rights organisations, that governments have been compelled to take action. In that regard, Albrecht (2012, 65–66) argues:

(...) overcrowding sometimes seems to emerge as a problem which remained hidden for long time until it all of sudden puts policy makers under pressure, be it as a consequence of activities of human rights watchdogs or court decisions which find serious violations of constitutional rights.

Literature on this topic highlights how, for various reasons, governments initially tend to ignore the problem; then, when it is no longer possible to overlook prison overcrowding, they label and manage it as an emergency; however, even when the recommendations and judgments are implemented, governments may struggle or face some challenges in enforcing robust penal reforms that are able to tackle to roots of prison congestion (Mullen 1985, Albrecht 1988, Lappi-Seppala 2005, Guetzkow and

Schoon 2015, Cliquennois *et al.* 2021). Frequently, some of the externally recommended measures can clash with the general request for more security; some other jurisdictions may be subjected to financial impediments or economic restrictions that come with the dilemma of where to direct scarce resources; finally, as mentioned before, even when governments are able to trigger reform processes, the measures put in place are often ineffective or even counterproductive⁷ (Santorso 2023).

These considerations illuminate the paradoxical relationship between litigation concerning detention conditions and governmental intervention in prison overcrowding. This paradox arises from the conflict between the litigation's goal of improving prisoners' conditions and the government's need to address the underlying policies and practices contributing to high incarceration rates. Partially aligning with Schoenfeld's (2010) argument,⁸ it is plausible to emphasise that litigation regarding prison conditions often focuses on immediate, emergency concerns rather than on structural issues like prison overpopulation, as articulated in this paper. Consequently, while litigation aims to alleviate the harms of overcrowding (not to alleviate it), it can inadvertently sustain the system's dependence on overcrowding. Based on these premises, it is plausible to speculate that the measures and reforms enforced in response to litigation are likely to end in improving the governance and sustainability of overcrowded prison systems rather than providing a concrete solution to prison congestion itself, by considering the full politics of prison crowding.

4.1. Governmental strategies for addressing prison overcrowding

Despite the lack of a shared definition and fuzziness of the criteria used to classify overcrowding, the solutions put in place to cope with prison congestion are quite standard, with little to no variance between jurisdictions. Broadly speaking, these measures can be clustered into two groups. On the one hand, some solutions impact prison admission and release. Examples include: strengthening community sentences and adopting other such alternative measures (Bleich 1989); the early release of individual prisoners well before the conclusion of their legally imposed sentences, via parole (Pitts *et al.* 2014); and the mass release of prisoners via general-pardon-like measures (Santorso 2023).

On the other hand, the most common – but also controversial – tool is the expansion of the physical capacity of the prison system through the construction, growth, or renovation of national detention facilities (Simon 2015) or, most recently, by hiring prison spaces in other jurisdictions. In general, scholars stress how these measures seem unable to address prison congestion in the long term.

⁷ For example, the creation of new prison facilities or the attempt to predict prison population trend.

⁸ While Schoenfeld argues that focusing on prison conditions can detract from efforts to challenge the broader system of mass incarceration, the critical argument of this paper is that overcrowding serves to reinforce and sustain systemic issues such as harsh sentencing laws and racial disparities in the criminal justice system, and vice versa. Overcrowding, in this context, fulfills an “extra-penological” function that the prison system has adopted to ensure its symbiotic yet competitive continuity with the ghetto (Wacquant 2001). Thus, prison overpopulation and overcrowding represent a continuum of violence that is functional in strengthening the punitive aspect of incarceration and, consequently, its relevance as a means of social control (White 2008, 739).

According to Bleich (1989, 1125), “many of the programs currently funded by legislatures to combat crowding may be unsuccessful because they are ill-suited to the true underlying problems”. In a similar vein, Pitts *et al.* (2014) argue that demands to resolve prison congestion seem to lead to short-term solutions aimed at producing temporary relief, rather than the enforcement of long-term political projects to combat overcrowding contrasting overpopulation. Such actions may often be able to momentarily reduce pressures on prisons but do not offer a longstanding result.

In this context, Cate (2022), in analysing the Mississippi penal model, argues that within penal reform, the implementation of simplistic solutions to complex issues—prioritising systemic sustainability over justice—frequently risks perpetuating institutional inequalities and fails to address underlying causes, rendering injustice and rights violation structural and accepted. As Guetzkow and Schoon (2015) contend, in exploring the repercussions of prison overcrowding litigation, court-mandated measures to alleviate overcrowding inadvertently lead to further increases in the prison population. According to the authors, the momentary reduction of prison congestion as well as the expansion of detention capacity, creates a feedback loop where increased capacity leads to increased incarceration, rather than addressing the root causes of overcrowding.

Overall, the literature highlights how few serious measures to tackle prison overpopulation and the roots of prison overcrowding have been enforced, transforming overcrowding into a recurrent or even systemic issue. Correspondingly, Strong’s (2022) contention that economic interests intersect with the state’s punitive practices aids in understanding the political rationales and dynamics surrounding prison overcrowding. Delving deeper into this perspective and in line with Cate’s (2020) argument, one can contend that penal reforms within the realm of prison congestion often prioritise immediate social and financial advantages over long-term societal benefits and justice, thereby rendering overcrowding a viable option purportedly conducive to sustaining the prison system and facilitating its administration.

What appears clear is that decision-makers prefer to control and manage prison congestion by proposing short-term answers, and therefore accepting both the subsequent exacerbation of the harm of prison experience (via deterioration of prison living conditions) and expansion of the imprisonment landscape; finally, by establishing this increased severity of punishment as the new standard within the prison system (see, for instance, Feeley and Simon 1992), it will predominantly impact marginalized social groups. This will reinforce the symbolic link between impoverished urban areas and incarceration facilities, thereby significantly contributing to the perpetuation of the continuum of violence that underpins the specific social control function enforced by these confinement sites for these segments of the population (White 2008).

Additionally, in becoming chronic, on one hand, overcrowding establishes a political framework for managing varying degrees of intensity in prison overpopulation (harsh penal policies), often without imposing additional strain on state finances. In other words, it creates conditions that are susceptible to political exploitation: it is leveraged for populist purposes in order to garner political consensus. This can involve either alleviating congestion within the prison system without exacerbating financial burdens or necessitating radical transformations (requiring only minor reforms), or advocating

for the construction of more prisons, thereby enforcing cuts to welfare programs to reallocate funds for expanding prison system capacity.

In summary, prison crowding may come as the outcome of a gradual and steady growth of the prison population that is, for various reasons, not contrasted by the state (Guetzkow and Schoon 2015). Therefore, governments seem to accept the rise of prison crowding, trying to govern rather than stop it, and, often, it is only the intervention of external bodies that forces decision-makers to take action and promote measures to mitigate prison congestion. Consequently, it seems plausible to argue that even when measures and reforms are enforced to tackle prison congestion, they are more likely to aim to improve the governance and sustainability of the prison system, regulating the detention conditions and making them financially and politically manageable, rather than offering concrete solutions to the congestion problem. The mechanisms of administration and legitimation of prisons' chronic overcrowding remain largely a sort of black box, an underexplored area that I believe deserves more attention.

4.2. The governance of systemic overcrowding

Sociologists and punishment theorists require new conceptual and analytic terminology to better understand and critically investigate not only the growth of chronic forms of prison overcrowding but also their administration. I suggest that the apparatus that allows and legitimises enduring prison overcrowding can be better outlined via the notion of the "governance of systemic overcrowding", a notion that can capture the processual nature of prison congestion and shed light on the intertwining between exacerbation of the prison experience's harm and the prison system's management and sustainability. This concept improves the understanding of the processes that transform overcrowding into the new normal operational condition in many jurisdictions.

"Governance" directs to a broad set of mechanisms that allow the function of the prison system. It is crucial to stress that governance must be understood as distinct from management (DiIulio 1990). The latest is a prerogative of prison governors and staff, the first one, instead, should be understood as the combination of a variety of internal and external actors (probation, local government, statutory agencies, policy makers, NGOs, health and education services, etcetera) that would support and reinforce the stability of the prison estate. Hence, "governance" provides a catalyst for our argument because it captures the junction between penal, public and social policy and the administration of prison experience.

"Systemic" points to the codependent and reciprocal attributes of relationships, where penal policies are dependent upon overcrowding and they receive reinforcement from each other. Overcrowding is systemic when it is enmeshed and entwined within the normal operational procedures and policies that allow the functioning of the prison system, without undermining its legitimacy, and thus it is considered normal and acceptable conditions to the point of not being considered a problem for the prison system. Finally, it also can prevent the shift towards the categorisation of overcrowding as an "emergency".

The governance of systemic overcrowding is defined by three key interlinked phases: denial, normalisation, and rationalisation.

Denial:

There are indeed multiple degrees of denial on the side of governments, decision-makers, and practitioners when it comes to accepting overcrowding problems. Although prison congestion impacts can be neither rejected nor intended by the state party and certainly cannot be ignored from a practical point of view, they are hardly officially acknowledged and labelled as overcrowding-related. By allowing the congestion to develop and not taking action unless external bodies intervene states deny overcrowding as a structural problem of the prison system, preferring to categorise it as an ordinary and provisional condition.

It is fundamental to highlight how the notion of “denial” originates from Cohen’s seminal work (2001) on what he calls “states of denial”. This concept involves what Cohen calls a moral paradox of knowing and not knowing at the same time, or in other words turning a blind eye. In the argument of this paper, the concept of “denial” is not merely reduced to the passive action of ignoring the rising issues of prison crowding; this also implies an active role in developing institutional rhetoric and mechanisms that, to avoid the trouble caused by the measures necessary to address the problem, fade the structural issue into a critical, but justified and manageable, irregularity, a condition that remains within the state of law’s boundaries. As I argue elsewhere (Santorso 2023), with the rise of prison congestion, the institutional definition of the prison system “capacity” becomes increasingly an evanescent notion, that is no longer anchored to architectural elements but rather chases the number of prisoners detained. Therefore, it is quite common to see a broad range of adjectives accompanying the notion of capacity, such as regular, operational, tolerable, maximum, and maximum tolerable (Santorso 2023). All of them represent the government’s inclination to ignore the problem but also to disregard the exacerbation of harm it causes to the point of forcing international bodies to intervene. Systemic prison overcrowding seems to blur the moral distinction between doing and allowing harm (Woollard 2012): the government is at the same time responsible for the politics that lead to prison crowding, but it also allows and institutionalise prison congestion and the harm it causes. This means that the rise of systemic overcrowding is the result of a chain of rational decisions and therefore, there is a moral, political and juridical responsibility for its consequences.

To conclude, whereas the intervention of standard-settings bodies unveils state responsibilities in prison congestion, this does not mark the end of “denial” practices: by politically defining overcrowding as an “emergency” or “crisis” its contingent symptoms are addressed by governments, while the systemic nature of the problem remains disregarded. Thus understood, overcrowding allows for the renegotiation of political orders and priorities and requires decisive and contingent action for a swift return to “normality” presented as orderly, urgent, and just. In that sense, the sustainability and reproducibility of the prison system itself are prioritised over concrete rights and justice enforcement, and short/medium-term measures are put in place.

Normalisation:

In this phase, the government takes action to address the prison congestion crisis, mostly as a consequence of external pressures. The range of measures commonly deployed was described before as short-term and emergency-oriented solutions, which seem to have little to no impact on the roots of the problem: prison conditions that fall outside of what

is considered a legitimate level of punishment are first lessened, and but not eradicated, and then they come to be standardised and finally regarded as “normal”. Thus, it is overcrowding, or better a certain level of congestion, that is “normalised” making it the new operating condition for the prison system. By doing so, governments ensure the prison system can operate as efficiently and affordably as possible even when congested (Bryans 2000).

The tension emergency/normality that characterise this phase transposes the general problem of punishment justification into the simplification of the problem: the more complex issue of the harm of prison experience and the quality of the detention conditions are reduced to a mere issue of thinking-boxes exercise. The transition from “emergency” to “normality” is reduced to the administrative and practical tasks of proving compliance with standards and thus, this makes the gap between emergency and normality functional to the sustainability of the prison system. Indeed, the normality/emergency tension makes it hard to frame a political critique of the short-term reforms enforced to tackle overcrowding.

To sum up, the phase of normalisation may lead to a first paradoxical situation. Greater success by prisoners and charities in proving violations of rights based on prison overcapacity may result in an expansion of the prison system or an even harsher level of punishment while leaving the fundamental issues faced by prisoners unresolved – or perhaps only mitigated (Bryans 2000). Similarly, Paulus *et al.* (1975, 90), in their study on the U.S. prison system, claim that “living under relatively crowded housing conditions in a prison produces both negative effects and a lower criterion of what constitutes overcrowding”. This seems to affect both prisoners and prison staff, but also politicians, decision-makers, and more in general the so-called civil society (Bleich 1989).

Bizarrely, the more prison facilities face overcrowding conditions, the greater seems to be both the government’s effort to mitigate and “normalise” it and the level of tolerance to its negative effects, to the extent of creating a concrete risk of blurring the distinction between punishment and inhuman treatment. Clearly, both these paradoxes frustrate any effort to create a precise and shared definition of what constitutes overcrowding conditions. Thus, congested prisons are efficiently able to justify the excess of punishment produced and therefore also maintain their legitimacy even under overcrowding conditions.

Rationalisation:

The normalisation of the “excess of punishment” produced by prison congestion generates some philosophical, conceptual but also political challenges. Although, punishment is justified as having “excess” and “efficacy” (Hirst 1984) as boundaries that should shape its features, the aggravation of pain and harm generated by overcrowding may shake these pillars.

Governments need, therefore, not only to promote measures to “normalise” the emergency, but also to accompany them with a process of rationalisation that includes a renewed justificatory narrative.

In that context, actions to contrast overcrowding, like building new prison modern and technological facilities, temporarily extending alternative measures or mass release of prisoners are presented as a form of progressive and humanitarian approach to

punishment and a concrete enforcement of justice. In the political narrative, this does not undermine the demands increasingly for more security but rather becomes functional to it.

Generally speaking, this phase of reorganisation and renewal legitimization is also constituted by the enforcement of reforms (i.e. open cell regime, dynamic surveillance, reframing alternative measures, etc.) to mitigate the impact of prison congestion, corroborating the (nominal) compliance with standards, and, hence also consolidating the stability and efficiency of punishment by prison. In that context, the government promotes narratives that state the compliance of the prison system with the state of the law. More in general, the rationalisation phase contributes to the long-term sustainability of the prison system even when it goes beyond its moral incompatibility with human dignity.

However, the rationalisation and the renovation of prison system legitimacy built a fertile ground for the revamp of the security orientation of penal policy and punitive responses: it fuels a new phase cycle of prison overpopulation; this can be interpreted also as indicating a first step toward a “pervasive penal populism” on the side of politicians that are interested in maintaining the balance between sending out messages of “law and order” to the public to gain consensus and ensuring the sustainability and legitimacy of the prison system, via justice and rights rhetoric.

To conclude, it is crucial to highlight the phases described above can be considered in a vicious circular relationship. The failure to eradicate the roots of prison congestion, and more, in general, the politics of prison crowding, makes overcrowding a perpetual problem (Pitts *et al.* 2014), it jeopardises the intervention of juridical standard-setting bodies and distorts any chances of long-term decarceration. In that sense, the governance of system overcrowding seems to indicate an (implicit) means to gradually exacerbate punishment intensity, which can endorse longer sentences, more incarceration, and legitimated harsher prison harm. Within this framework, the rise of this governance of systemic crowding seems to indicate a gradual, but steady, penal clampdown and, perhaps, it can be considered as a first signal of the shift toward what Wacquant (2009) has defined as penalfare or, in general, indicates a step towards what Simon (2007) describes as a carceral state. Accordingly, the definition of prison congestion and the notion of governance of systemic overcrowding provide a new perspective on the unaccomplished nature of prison reform and the resilience of the penal system to deinstitutionalisation even in these jurisdictions commonly identified under the “umbrella notion” of Nordic exceptionalism (Pratt and Eriksson 2014).

5. Some final considerations

Overcrowding has been on the national policy agendas of many jurisdictions for decades. It is not surprising that solutions for reducing overcrowding have been thoroughly discussed and widely shared. Research shows how overcrowded prisons have a detrimental impact on almost all detention conditions and the intended outcomes of imprisonment. Restricted living space together with losses of privacy and human dignity, and the reduction of resources may result in a drastic decline in access to services (access to NHS, education, work, and other rehabilitative programs, etcetera). In general, options for dealing with prison congestion indicate the need for forms of

semi-decarceration that include fewer admissions and detentions, as well as shorter stays.⁹ However, despite the existence of a robust body of literature that discusses the need for substantial interventions in what has been defined as the politics of prison crowding, congestion is nominally addressed by short-term measures that mitigate it but are not able to tackle its roots. The ultimate aim is to propose a new conceptual framework and approach that may offer a new and fresh perspective on prison overcrowding. This is not intended to be restrictive, definitive, or to imply that the previous corpus of research is in any way deficient. Nevertheless, I do question part of the framework currently used to analyse prison overcrowding as not being able to capture it as a long-standing and systemic issue for which the state has a political responsibility.

Indeed, the main question raised by the critical argument of this paper is how to conceptualise the onset of a political process that leads to chronic overcrowding. Toward this end, in this study, I have critically discussed the tendency of assessing prison congestion merely on the ratio between capacity and prisoner numbers, making the manipulation of figures a viable pathway to minimise the problem. The need for a shared definition that is able to merge the impact on prison experience with the issue of capacity has then been highlighted. While the capacity/prisoner number issues are consistently analysed in the literature, the impact it has on prison experience is less steadily explored. For this reason, I have built upon a rich and prolific body of past work on prison overcrowding to debate the idea of the harm of prison overcrowding.

Overall, the argument of this paper highlights the need for an alternative analytical framework for prison congestion, a lens that can focus on the multiple decision-making and political processes that underpin overcrowding. In that context, the notion of “governance of systemic overcrowding” offers a fresh and new conceptual framework that can address more precisely the overall onset of policies and institutional practices that culminate within chronic prison congestion, shedding new light on their relationship with social structure. This approach offers significant instruments to revitalise research on punishment and will alert scholars to the importance of exploring and investigating the various dimensions of overcrowding, a complex process that goes beyond the mere numeric definition of the problem or its juridical framework. By establishing the link between the experience of prison, the harms of incarceration in congested facilities and penal politics, the structural problems can be more clearly understood as consequences of government actions rather than labelled as a contingent emergency. This challenges the conventional view of overcrowding as a crisis within the prison system. Instead, this paper conceptualises overcrowding as an intrinsic punitive feature that necessitates effective governance.

Moving from this consideration the idea of “governance of systemic overcrowding” is defined in this paper by three interlinked phases: denial, normalisation and rationalisation. On the side of criminal justice practitioners, overcrowding is acknowledged as a practical problem, however, decision-makers and political stakeholders seem to actively minimise or even hide overcrowding as a structural problem by debating and “juggling” with its formal definitional elements. It is only

⁹ While some generalizations are possible, prison population and overcrowding trends are diverse and reflect peculiarities, demanding a comprehensive examination of individual national penal systems.

when it is unveiled by rapporteurs that governments enforce measures that seem to be oriented to normalise a certain amount of congestion and then rationalise it. In that context, it has been argued that this way of addressing overcrowding, oriented to the symptoms of prison congestion rather than the causes; may result in the extension of the prison system or even increased penalties, while the core issues remain untouched. By normalising and rationalising a certain amount of congestion, the state generates a lower criterion of what can be defined as overcrowding. This may potentially lead to a spiral in which phases of reforms aim to govern systemic overcrowding and prepare the prison system to cope with phases of aggressive penal populism. In this context, prison overcrowding becomes a strategic tool to manipulate the level of punishment according to political and structural needs.¹⁰

In conclusion, this paper positions the politics of prison overcrowding as fundamentally opposed to decarceration process (McLeod 2015, Gilmore 2022). It is a strategy aimed at further consolidating, justifying, and perpetuating the prison system, detached from its connection to justice. Recognising the systemic nature of prison overcrowding can contribute to developing a concrete decarceration strategy to transcend the existing prison system (Davis and Rodriguez 2000).

It is crucial to emphasise that this paper is not intended to be exhaustive or definitive, but rather a preliminary step towards a deeper examination of the role of prison overcrowding in contemporary penal policies. Therefore, there is a pressing need for further research on this topic, particularly concerning the connections between the harm caused by systemic overcrowding and the governance of the prison system

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¹⁰ For example, it is valuable for increasing the intensity of punishment without incurring significant financial or political costs. By framing it as an emergency, resources can be reallocated to the penal system at the expense of other sectors, thereby paving the way for new “law and order” campaigns. Additionally, overcrowding can be leveraged to generate public consensus by portraying mass prisoner releases as evidence of a moderate penal policy and adherence to human rights standards.

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