COMMENTARY

ARE STATE PRISONS *UNDER*CROWDED?

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Attorney General Barr's core complaint is that state prisons in the United States are undercrowded because state facilities currently experience less congestion by one measure than is tolerated in the federal prison system. This contrast between state and federal levels of crowding suggests to the Attorney General that space is available for a great deal of extra imprisonment in most state systems, and he argues that expanding levels of imprisonment will lead to reduced rates of violent crime.

But it turns out that there is little to support either the undercrowding hypothesis or the notion that the expansion of state prison populations would produce significant reductions in violent crime. On inspection, the evidence for state-level prison undercrowding is nil; the factual basis for expecting significant reductions in violent crime from the next added wave of imprisonment is only slightly less disappointing.

The evidence offered for space availability in state prisons is the fact that the federal prison system is currently operating at 165 percent of its rated capacity, while the number of prisoners currently incarcerated in the aggregate of American states represents only 115 percent of the aggregate of rated capacities for those state systems. From this, the Attorney General concludes that "if the states could operate at the level of federal prison systems, that would mean an additional 286,000 inmate beds which translates into a savings of $13 billion in construction costs."

The problem with this argument is that rated capacity is a notoriously unreliable indicator of prison crowding. Each prison system is empowered to rate and re-rate the capacity of its prison systems at will. For example, when the Stateville Penitentiary in Illinois was built in 1925, its "rated capacity" was 1,392. By 1978, the rated capacity for the same facility had almost doubled to 2,700, and there is nothing to prohibit the State Department of Corrections from doubling the announced 2,700 capacity if it suits administrative purposes.[1] Rated capacity is arbitrarily within the discretion of correctional administrators.

There is also evidence available that capacity ratings vary systematically with the nature of political incentives. In a setting like the federal system with substantial available resources for prison construction, correctional administrators have an incentive to report high degrees of crowding in order to encourage construction. By contrast, in a state system unwilling to expand prison facilities and under the threat of an overcrowding lawsuit, the incentive would be to rate the capacity of facilities at or near the current population confined in those facilities. Thus, it is by no means clear that a system such as the federal prisons that announces a population at 165 percent of its notion of appropriate capacity has more crowding than state systems that report 115 percent populations. The opposite may be the case.

The only way to get a credible measure of overcrowding is to use objective indicators such as the amount of double or triple bunking of persons in the same cell, or the amount of square footage per inmate available in living space in comparable institutions. The last time this was done was in a study funded by the federal Department of Justice. According to that study, the federal prisons acknowledged much more of their objectively measured crowding than did state systems. In that study, conducted in 1987 by Abt Associates, objective measures estimated a capacity shortfall of 8000 prisoners. The federal prison system acknowledged 86 percent of that shortfall. By contrast, the state systems reported that they had a deficiency in capacity of only 4,300 prisoners nationwide while the objective measures used by the Abt Associates team estimated a capacity shortfall at more than ten times that figure or 45,000.[2]

If the state systems are continuing to underreport in the 1987 pattern, the statistics cited by the Attorney General could actually indicate that the state systems are on average twice as crowded as the federal one if objectively measured. We get this two-to-one ratio if we multiply the 15 percent by which the Attorney General says state prisons are overcrowded by the Abt study's state level "correction factor" of ten, to yield actual state overcrowding of 150 percent; multiply the 65 percent by which the AG says the federal system is over capacity by the Abt study's 1.16 correction factor, to find that the federal system today is actually at 75 percent over capacity.

Has the analysis proved that state prisons are more crowded than federal prisons? Of course not. But those readers who find this kind of compound arithmetical manipulation suspicious are invited to re-read and re-evaluate Mr. Barr's argument on space availability and cost savings in the third paragraph of this comment. With this sort of arbitrary data, it is far from prudent to rely on deviations from rated capacity as a basis for concluding anything about what space is currently available in American state prisons.

The Attorney General's plea for sharp expansion in prisoners at the state level is based on the hope that further increases in imprisonment will result in reductions in violent crime. "The choice is clear: more prison space or more crime." This argument assumes that more prison space is a guarantee against increased crime. What is the factual basis of this assumption?

We are currently in the middle of the largest experiment on the effects of increasing imprisonment in

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American history. The number of Americans behind prison bars has quadrupled in two decades' time. Yet there is scant evidence that the doubling and redoubling of prison populations in recent years has made a palpable dent in violent crime rates.[3] Since the residual populations that would be eligible for the next wave of imprisonment are presumably less dangerous than those that have already been swept up, there will be diminishing marginal returns from more intensive regimes of imprisonment yet to be tried. Under these circumstances, it would be appropriate for the Justice Department to study in some detail the impact of our hugely expanded rate of imprisonment on rates of crime before bellying up to the bar to order yet another round of the same medicine.

FOOTNOTES

[1] Michael Sherman and Gordon Hawkins, *Imprisonment in America: Choosing the Future*, University of Chicago Press, 1981, p. 31.

[2] See id. at Table 2.2, p. 37.

[3] See Franklin Zimring and Gordon Hawkins, *The Scale of Imprisonment*, University of Chicago Press, 1991, Chapter 4.

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for his offense by taking, in a timely fashion, one or more of the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by using one or more of the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.

§4B1.1 Career Offender

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has a least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

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If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by ~~2 levels~~ **the number of levels corresponding to that adjustment.**

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§4B1.4 Armed Career Criminal

(a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. §924(e) is an armed career criminal.

(b) The offense level for an armed career criminal is the greatest of:

(1) the offense level applicable from Chapters Two and Three; or

(2) the offense level from §4B1.1 (Career Offender) if applicable; or

(3) (A) 34, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in §4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. §5845(a)*; or

(B) 33, otherwise.*

***If an adjustment from** §3E1.1 (Acceptance of Responsibility) applies, ~~reduce by 2 levels~~ **decrease the offense level by the number of levels corresponding to that adjustment.**

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