

## Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From\*

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Mass incarceration distorts society in peculiar ways. Obviously there are individual effects, felt keenly by the 2.1 million people who wake up behind bars every morning.<sup>1</sup> There are social effects, experienced by the approximately two million children with a parent in custody<sup>2</sup> and by neighborhoods where whole segments of the population have been removed.<sup>3</sup> Lastly,

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1. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NO. NCJ 200248, PRISONERS IN 2002 1 (2003), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf> [hereinafter PRISONERS IN 2002].

2. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NO. NCJ 175688, WOMEN OFFENDERS 8 tbl.18 (1999), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf>; *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NO. NCJ 182335, INCARCERATED PARENTS AND THEIR CHILDREN (2000), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>.

3. *See, e.g.*, Todd Clear, *The Problem with "Addition by Subtraction"*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 181 (Marc Mauer & Meda Chesney-Lind eds., 2002).

there are budgetary effects such as states cutting education budgets while prison budgets continue at record highs.<sup>4</sup>

Other effects of mass incarceration are so subtle they pass without notice. Basic tools of democratic society slip out of place and cease to function properly. The census is one of those tools.

Obtaining an accurate count of the population is so fundamental to representative democracy that the framers of the Constitution required it in the opening paragraphs. Article I Section 2 of the U.S. Constitution requires an “actual enumeration” of the population every ten years “in such manner as they [the Congress] shall by law direct.”<sup>5</sup> This enumeration is used to apportion voting representation, draw political boundaries and allocate funds among state and local governments. Taking the 2000 decennial census required “the largest peacetime mobilization in the nation’s history . . . .”<sup>6</sup>

But mass incarceration distorts this fundamental tool. The U.S. Census Bureau counts people in prison where their bodies are confined—in prison—not the communities they come from and where they are genuine members.<sup>7</sup> This would be an item of statistical trivia, but the new numbers give it new meaning. More people now live in prison and jail than in our three least populous states combined.<sup>8</sup> Organized differently, they would

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4. See, e.g., JUSTICE POLICY INST, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and Its Impact on African American Men* (2002), available at <http://www.justicepolicy.org/article.php?list=type&type=20>.

5. U.S. CONST. art. I., § 2; Congress fulfills this function in the Census Act, 13 U.S.C. § 141 (1976).

6. Press Release, U.S. Census Bureau, *Census Workers Ready to Contact Households That Did Not Respond to Census 2000* (Apr. 25, 2000), available at <http://www.census.gov/Press-Release/www/2000/cb00cn37.html>.

7. See U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, *2000 CENSUS OF POPULATION AND HOUSING: SUMMARY FILE 3 TECHNICAL DOCUMENTATION C-2* (2002), available at <http://web.archive.org/web/20030405051219/http://www.census.gov/prod/cen2000/doc/sf3.pdf> [hereinafter SUMMARY FILE 3].

8. According to the Census, the combined population of the three smallest states is 1,729,541 (Wyoming, 493,782; Vermont, 608,827; and Alaska, 626,931). U.S. Census Bureau, *Population Estimates*, at <http://eire.census.gov/popest/data/states/files/ST-EST2003-AS200004.csv> (Apr. 1, 2000). According to PRISONERS IN 2002, the total number people in confinement are 2,166,260 (prisons, 1,440,655; local jails, 665,475; juvenile, military, immigration and other facilities, 139,527). PRISONERS IN 2002, *supra* note 1, at 1.

have six votes in the United States Senate. It is not trivia anymore.

Yet organization is precisely the problem. The high rates of incarceration are not evenly distributed across the population. White men are imprisoned at a rate of 912 per 100,000; black men are imprisoned at a rate of 3,437 per 100,000.<sup>9</sup> Moreover, imprisonment moves people in predictable patterns—typically out of large urban centers and into rural communities. Whether these differences reflect different involvement in criminal behavior or selective enforcement is actually beside the point. From the point of view of the Census Bureau, it does not matter. If people are in prison, that's where their bodies count.

This article discusses the primary consequences of the way the Census Bureau counts people in prison—the impact on electoral apportionment and financial distributions. It maps the U.S. population, explains how and why the Census Bureau acts as it does, and suggests possible reforms. In brief, the article finds consistent, low-level distortions in both voting and funding that could be avoided if the Census Bureau counted people differently.

### I. The Rules

The first step is understanding how the census works. The Census Bureau's general rule is to count people in their "usual residence," the place where they live and sleep most of the time. The usual residence need not be the same as a person's legal or voting address, and a person need not be there on the literal census day (April 1st).<sup>10</sup> They can take a vacation and still count at home.

Determining the usual residence for most people is easy. However, special categories present special challenges. Sailors in the merchant marine, children in joint custody and long-term commuters all require special rules, and these rules have evolved over time.<sup>11</sup> People in prison are in a category called

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9. PRISONERS IN 2002, *supra* note 1, at 9 tbl.14.

10. U.S. Census Bureau, *Facts About Census 2000 Residence Rules: The Concept of Unusual Residence*, at [http://www.census.gov/population/www/censusdata/resid\\_rules.html](http://www.census.gov/population/www/censusdata/resid_rules.html) (last visited Mar. 20, 2004) [hereinafter *Residence Rules*].

11. Peter Wagner, *Usual Residence Rule Has Been Modified for Other Special Populations and Can be Changed for Prisoners Too*, PrisonersoftheCensus.org, at

“group quarters” which includes nursing homes, college dormitories, military installations and other places where unrelated persons live together.<sup>12</sup> As a rule, people in group quarters count where the group quarters are located.<sup>13</sup> For people in prison, that’s the prison.

Discretionary decisions are made about whether people in prison will be given census forms to fill out themselves, or whether the warden will simply provide a headcount. One in six people in prison is given a “long form” to fill out with additional information, just like in the general population.<sup>14</sup> However, if the person provides anything other than the institutional address, that information is discarded.

## II. The Map

The best way to see how prisons move people is to create a map. Fully 5% of all growth in the U.S. rural population in the 1980’s was people in prison.<sup>15</sup> In the 1990’s, an astonishing 30% of new residents of upstate New York were brought there against their will.<sup>16</sup> Guard towers are slowly replacing small towns and family farms as the struggling heartland turns to prisons as an industry of last resort.

All kinds of communities are affected. West Feliciana Parish, Louisiana, is classified by the Census Bureau as a 100% rural community, but 5,000 of its 15,000 residents live in custody—fully a third.<sup>17</sup> In comparison, Walker County, Texas is

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[http://www.prisonersofthecensus.org/news/fact\\_of\\_the\\_week-archive-3-11-2003.shtml](http://www.prisonersofthecensus.org/news/fact_of_the_week-archive-3-11-2003.shtml) (Nov. 3, 2003).

12. *Residence Rules*, *supra* note 10, at Question 11.

13. *Id.*

14. Interview with Edison Gore, U.S. Census Bureau, Assistant Division Chief for Planning Decennial Management Division (May 19, 2003).

15. Calvin L. Beale, *Prisons, Population, and Jobs in Nonmetro America*, 8 RURAL DEV. PERSP’S 16, 17 (1993).

16. ROLF PENDALL, UPSTATE NEW YORK’S POPULATION PLATEAU: THE THIRD-SLOWEST ‘STATE’ (2003), *available at* [http://www.brookings.edu/dybdocroot/es/urban/publications/200308\\_Pendall.pdf](http://www.brookings.edu/dybdocroot/es/urban/publications/200308_Pendall.pdf).

17. *Compare* U.S. CENSUS BUREAU, GROUP QUARTERS POPULATION BY GROUP QUARTERS TYPE, *at* [http://factfinder.census.gov/servlet/DTable?\\_bm=Y&-state=DT&-context=DT&-ds\\_name=DEC\\_2000\\_SF1\\_U&-mt\\_name=DEC\\_2000\\_SF1\\_U\\_PCT016&-tree\\_id=4001&-all\\_geo\\_types=N&-geo\\_id=05000US22125&-search\\_results=01000US&-format=&-lang=EN](http://factfinder.census.gov/servlet/DTable?_bm=Y&-state=DT&-context=DT&-ds_name=DEC_2000_SF1_U&-mt_name=DEC_2000_SF1_U_PCT016&-tree_id=4001&-all_geo_types=N&-geo_id=05000US22125&-search_results=01000US&-format=&-lang=EN) (last visited Apr. 14, 2004), *with* U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS, WEST FELICIANA PARISH, LOUISIANA,

more urban, with small cities totaling 60,000 people—but more than 13,000 of them cannot eat breakfast without permission of the warden.<sup>18</sup> Altogether, nearly 200 counties in America have more than 5% of their population in prison.<sup>19</sup> Eighteen counties have more than 20% of their population in prison.<sup>20</sup> This extraordinary transformation can be seen in the fine print of the 2000 census but it is unnoticed unless looked for.<sup>21</sup>

**Top Twenty Prison Counties<sup>22</sup>**

State	County	Population	% Rural	Prison Pop.	Prison %
1 Louisiana	W. Feliciana Parish	15,111	100.0%	4,995	33.1%
2 Texas	Concho	3,966	100.0%	1,299	32.8%
3 Florida	Union	13,442	52.2%	4,052	30.1%
4 Illinois	Brown	6,950	41.8%	1,912	27.5%
5 Tennessee	Lake	7,954	100.0%	2,090	26.3%
6 Virginia	Greensville	11,560	64.4%	3,027	26.2%
7 Texas	Mitchell	9,698	32.0%	2,523	26.0%
8 California	Lassen	33,828	58.7%	8,367	24.7%
9 Texas	Hartley	5,537	57.6%	1,343	24.3%
10 Missouri	DeKalb	11,597	67.1%	2,626	22.6%
11 Texas	Jones	20,785	60.9%	4,650	22.4%
12 Texas	Walker	61,758	36.3%	13,691	22.2%
13 Texas	Bee	32,359	30.6%	7,070	21.8%
14 Texas	Childress	7,688	34.0%	1,652	21.5%
15 Arkansas	Lincoln	14,492	100.0%	3,003	20.7%
16 Texas	Madison	12,940	69.9%	2,681	20.7%
17 Illinois	Johnson	12,878	79.1%	2,640	20.5%
18 Nevada	Pershing	6,693	100.0%	1,370	20.5%
19 Texas	Anderson	55,109	41.3%	10,750	19.5%
20 Virginia	Sussex	12,504	100.0%	2,379	19.0%

at <http://quickfacts.census.gov/qfd/states/22/22125.html> (last visited Apr. 14, 2004).

18. Compare U.S. CENSUS BUREAU, GROUP QUARTERS POPULATION BY GROUP QUARTERS TYPE, at [http://factfinder.census.gov/servlet/DTTable?\\_bm=Y&-state=DT&-context=DT&-ds\\_name=DEC\\_2000\\_SF1\\_U&-mt\\_name=DEC\\_2000\\_SF1\\_U\\_PCT016&-tree\\_id=4001&-redoLog=TRUE&-all\\_geo\\_types=N&-geo\\_id=05000US48471&-search\\_results=01000US&-format=&-lang=EN](http://factfinder.census.gov/servlet/DTTable?_bm=Y&-state=DT&-context=DT&-ds_name=DEC_2000_SF1_U&-mt_name=DEC_2000_SF1_U_PCT016&-tree_id=4001&-redoLog=TRUE&-all_geo_types=N&-geo_id=05000US48471&-search_results=01000US&-format=&-lang=EN) (last visited Apr. 14, 2004), with U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS, WALKER COUNTY, TEXAS, at <http://quickfacts.census.gov/qfd/states/48/48471.html> (last visited Apr. 14, 2004).

19. One hundred and ninety-seven counties out of 3140, or 6.3% of all counties have more than 5% of their population in prison. See generally U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 2000 CENSUS, at <http://www.census.gov/> (specific data sets are on file with the author) [hereinafter 2000 CENSUS].

20. See *id.*

21. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 2000 CENSUS OF POPULATION AND HOUSING: SUMMARY FILE 1 TECHNICAL DOCUMENTATION 6-68 to 6-69 (2002), available at <http://www.census.gov/prod/cen2000/doc/sf1.pdf>.

22. See 2000 CENSUS, *supra* note 19.

Because no distinction is made between being in or out of custody, people in prison count the same as shoppers in the local markets, parents whose kids will attend local schools, or people whose political interests are represented by the person who represents them in the legislature. Yet these individuals are not generally from the county where the census has them placed. They were imported from other counties for purposes of confinement. If the doors were opened, few would stay.

If the doors were open, likely they would return to where they came from. That's the place that most people in prison consider their home, and where most will return within a few years.<sup>23</sup> The Census Bureau makes no effort to track point of origin, but geographical information about convictions is generally available from state departments of corrections or the state judicial branch. Comparing the two data sets reveals where people are coming from and where they are going to.

Texas, for example, hosts nine of the top twenty counties ranked by the percentage of population in prison. None of these counties, however, convicts substantial numbers of people. The table below shows how people are shipped from one county to another. The top set of counties are all exporters and the bottom are importers. Dallas, for example, convicts 15.1% of the people in Texas state prisons but confines none of them. In contrast, Walker County confines 10.4% of the state prison population but convicts hardly anybody.

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23. The average time served in state prisons is 3 years. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NO. NCJ 198821, FELONY SENTENCES IN STATE COURTS, 2000 3 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc00.pdf> (last visited Apr. 2, 2004).

Texas Counties that Convict or Confine People<sup>24</sup>

County	Population	% State Prisoners Convicted There	% State Prisoners Held There	% County Population In State Prison
<b>Exporters</b>				
Harris (Houston)	3,400,578	21.2%	2.1%	0.1%
Dallas	2,218,899	15.1%	0.0%	0.0%
Tarrant	1,446,219	7.7%	0.0%	0.0%
Bexar	1,392,931	6.1%	0.0%	0.0%
<b>Importers</b>				
Walker	61,758	0.2%	10.4%	22.2%
Anderson	55,109	0.2%	8.2%	19.5%
Brazoria	241,767	0.8%	6.5%	3.6%
Coryell	74,978	0.1%	6.1%	10.7%
Bee	32,359	0.1%	5.4%	21.8%

Whatever benefit accrues to a jurisdiction by virtue of its population, the urban counties are all losing it. Conversely, the rural counties are getting more than their fair share. The next sections discuss these benefits.

III. The Vote

The official constitutional purpose of the census is political apportionment.<sup>25</sup> An accurate count of the population ensures that each state’s delegation in the U.S. House of Representatives and the Electoral College is appropriately proportioned. The principle of “one person, one vote,” which started as a requirement in the federal system, has since trickled down to states and even local governments.<sup>26</sup> All states base their legislative redistricting on U.S. census data.<sup>27</sup>

A cursory glance indicates the potential distortion of counting prisons as the “usual residence.” Nearly 9% of all African American men in their twenties and thirties live in prison.<sup>28</sup> Most of this group is apportioned to legislative districts that do not reflect their communities of interest or their personal politi-

24. See 2000 CENSUS, *supra* note 19; see also Texas Department of Criminal Justice, at <http://www.tdcj.state.tx.us>.

25. See U.S. CONST. art. I, § 2, cl. 3.

26. See Reynolds v. Sims, 377 U.S. 533 (1964).

27. See, e.g., N.Y. CONST. art. 3, § 4.

28. PRISONERS 2002, *supra* note 1, at 9 tbl.14 (for ages 20-24 the fraction in prison is 7.5%; ages 25-29 is 10.4%; ages 30-34 is 8.9%; ages 35-39 is 7.9%).

cal concerns. Whether they can or do vote is irrelevant; their bodies still count in the prison district. A more refined analysis shows that the impact is modest in U.S. Congressional Districts but more significant in state legislative districts.

The impact of incarceration on apportionment in the U.S. House of Representatives is small because most people are incarcerated within their own state and because congressional districts are so large. With districts containing roughly 645,000 people,<sup>29</sup> a few thousand people in prison are unlikely to have much impact. Exceptions may arise as more states send people out of state, as was the case in 1999 when Wisconsin Representative Mark Green feared that Wisconsin's plan to export almost 10,000 people to prisons in other states might tip Wisconsin towards losing a seat in reapportionment.<sup>30</sup>

The impact within state legislatures, however, is more substantial. The range in size of state legislative chambers is enormous, but the median state Senate district has 106,362 residents and the median state House district has 37,564.<sup>31</sup> Thus, just one prison of 1,000 cells is nearly 3% of the population of a median sized House district. Given the frequent clustering of prisons, the impact can accumulate dangerously. Significant densities of prisoners in legislative districts are especially important because most criminal justice policy is made in the states.

Under *White v. Regester*,<sup>32</sup> state legislative districts are not permitted to deviate in size by more than 10%. However, an analysis of New York State reveals that people in prison put

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29. Press Release, Election Data Services, 2000 Census Counts Produce Surprises in Congressional Delegations (Dec. 28, 2000), at [http://www.electiondataservices.com/Apport00release\\_wtables.htm](http://www.electiondataservices.com/Apport00release_wtables.htm) (last visited Apr. 2, 2004).

30. See H.R. 1632, 106th Cong. (1st Sess. 1999) (a bill proposed to provide that certain attribution rules be applied with respect to the counting of certain prisoners in a decennial census of population); see also *Oversight of the 2000 Census: Examining the Bureau's Policy to Count Prisoners, Military Personnel, and Americans Residing Overseas*, Hearing on H.R. 1632 Before the Subcomm. on the Census of the House Comm. on Government Reform, 106th Cong. (1999).

31. National Conference of State Legislatures, *Constituents per State Legislative District: Legislatures Ranked by Size*, at <http://www.ncsl.org/programs/leg-man/elect/cnstprst.htm> (last visited Apr. 2, 2004).

32. 412 U.S. 755 (1973).



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district deviations over the maximum range.<sup>33</sup> The most significant work to date is *Importing Constituents: Prisoners and Political Clout in New York*.<sup>34</sup> This report documents that in four New York Senate districts and in ten Assembly districts more than 2% of the constituents are in prison.<sup>35</sup> Analysis in other states and at the county level is ongoing.

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33. PETER WAGNER, *IMPORTING CONSTITUENTS: PRISONERS AND POLITICAL CLOUT IN NEW YORK: A PRISON POLICY INITIATIVE REPORT 10-12 (2002)* available at [http://www.prisonpolicy.org/importing/importing\\_body.pdf](http://www.prisonpolicy.org/importing/importing_body.pdf) [hereinafter *IMPORTING CONSTITUENTS*].

34. *Id.*

35. *Id.* at 8.

**New York Rural Assembly Districts, 2002<sup>36</sup>**

District #	Assembly- Person	Reported Population	Prisoners	% District Incarcerated	Black Prisoners	% Black Adults Disenfranchised	Reported Deviation from Ideal District Size	Actual Deviation from Ideal District Size
100	Kirwan	129,732	3,650	2.8%	1,934	11.8%	2.5%	-0.3%
103	Manning	128,212	2,793	2.2%	1,436	34.1%	1.3%	-0.9%
112	McDonald	129,570	3,611	2.8%	1,849	96.1%	2.4%	-0.4%
114	Ortloff	132,349	9,251	7.0%	4,623	82.6%	4.6%	-2.7%
116	Destito	127,574	6,187	4.8%	2,986	33.5%	0.8%	-4.0%
118	Nortz	128,234	4,245	3.3%	2,238	68.7%	1.4%	-2.0%
137	Winner	126,784	3,033	2.4%	1,665	40.0%	0.2%	-2.2%
139	Nesbitt	127,916	2,851	2.2%	1,528	41.3%	1.1%	-1.1%
146	Smith	131,864	3,864	2.9%	1,767	56.3%	4.2%	1.2%
147	Burling	125,572	6,386	5.1%	3,269	78.4%	-0.7%	-5.8%

36. See PETER WAGNER, IMPORTING CONSTITUENTS: PRISONERS AND POLITICAL CLOUT IN NEW YORK: A PRISON POLICY INITIATIVE REPORT APPENDIX 35 (2002) available at [http://www.prisonpolicy.org/importing/importing\\_append.pdf](http://www.prisonpolicy.org/importing/importing_append.pdf) [hereinafter IMPORTING CONSTITUENTS APPENDIX].

The district of Republican Assemblyperson Chris Ortloff contains the highest percentage of people in prison: 7%.<sup>37</sup> The population represented by Assemblyperson Ortloff includes 9,251 prisoners, of whom 4,623 are Black.<sup>38</sup> In a district that is already 89% White, 82.6% “of the Black adults in Ortloff’s district are barred by law from ever voting *for* or *against* him.”<sup>39</sup> By the time these prisoners complete their sentences and are again allowed to vote, they will be back home in a different district.

Similar deviations exist in the New York State Senate. All of the Senate districts in urban Queens County in New York City were drawn to contain between 12,409 and 12,412 too many people, a deviation of +4.05%.<sup>40</sup> Conversely, a number of rural Senate districts are short as many as 15,147 residents for a deviation of -4.95%.<sup>41</sup> By the official numbers, the deviation between districts is 9.78%, slightly less than the maximum allowed.<sup>42</sup> But if the prisoners were counted where they actually are from, the deviation between over-populated Queens and under-populated rural senate districts would rise to 11.4%,<sup>43</sup> more than allowed by *White*.<sup>44</sup> Senator Volker, for example, represents just 285,305 free people in his rural district; Senator Maltese from Queens represents 318,484.<sup>45</sup> The result is that each free resident of a rural district with prisons gets a larger voice in the state capitol than residents of districts in Queens.

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37. IMPORTING CONSTITUENTS, *supra* note 33, at 8.

38. IMPORTING CONSTITUENTS APPENDIX, *supra* note 36, at 35.

39. See IMPORTING CONSTITUENTS, *supra* note 33, at 8; see also N.Y. State Leg. Task Force on Demographic Research and Reapportionment, New York Assembly District 114 2 (2002), available at <http://latfor.state.ny.us/maps/propassem/fa114.pdf>.

40. IMPORTING CONSTITUENTS, *supra* note 33, at 11.

41. IMPORTING CONSTITUENTS APPENDIX, *supra* note 36, at 28-30 fig10.

42. IMPORTING CONSTITUENTS, *supra* note 33, at 10.

43. See *id.* at 11 figs.3-4 (the difference between the maximum figures is 11.4%).

44. *White v. Regester*, 412 U.S. 755 (1973).

45. IMPORTING CONSTITUENTS, *supra* note 33, at 11.

**New York Rural Senate Districts, 2002<sup>46</sup>**

District #	Senator	Reported Population	Prisoners	% Incarcerated	Black Prisoners	% Black Adults Disenfranchised	Reported Deviation from Ideal District Size	Actual Deviation from Ideal District Size
41	Saland	301,528	6,623	2.2%	3,441	19.4%	-1.5%	-3.6%
45	Stafford	299,603	12,989	4.3%	6,501	76.7%	-2.1%	-6.4%
48	Wright	290,925	5,291	4.5%	2,791	38.9%	-4.9%	-6.7%
59	Volker	294,256	8,951	3.0%	4,447	75.4%	-3.9%	-6.8%

**Urban Queens County (New York City) Senate Districts, 2002<sup>47</sup>**

Senate District	Senator, July 2002	Reported Population	NYC Prisoners Counted Elsewhere (estimate)	Prisoners Counted at a Prison Within District to Remove	Estimate of Actual Population	Actual Deviation from Ideal District Size
10	A. Smith	318,481	1,800	0	320,281	4.6%
11	Padavan	318,482	1,800	0	320,282	4.6%
12	Onorato	318,484	1,800	604	319,680	4.6%
13	(no incumbent)	318,484	1,800	0	320,284	4.5%
14	M. Smith	318,481	1,800	0	320,281	4.6%
15	Maltese	318,484	1,800	0	320,284	4.6%
16	Hevesi & Stavisky	318,483	1,800	0	320,283	4.6%

46. See IMPORTING CONSTITUENTS APPENDIX, *supra* note 36.

47. See *id.*

It is no coincidence, then, that some of the strongest proponents of incarcerative policies were upstate Republican Senators Volker and Nozzolio, heads of the Committees on Codes and Crime, respectively.<sup>48</sup> Prisons are not just big business in their districts, they inflate the political clout of every real rural constituent. Going in to the 2002 redistricting, the prisons in their two districts held more than 23% of the state's prisoners.<sup>49</sup>

Senator Volker readily admits that he does not represent the prisoners in any real sense. He told *Newhouse News Service* that he regularly receives letters from prisoners but that his real attention is directed toward corrections workers, with whom he has forged strong relationships. Volker is glad the prisoners in his district cannot vote, because if they could, "they wouldn't vote for me."<sup>50</sup>

Overall, in the states, counting urban residents as rural residents dilutes urban voting strength and increases the weight of a vote in the rural districts. In the rural prison districts, the real residents benefit because their own issues can receive individual attention from their representative on a scale unavailable elsewhere. In contrast, urban legislators are responsible not only to their "official" district but also those community members miscounted in the prison diaspora. One can only imagine the political negotiations of reapportionment, and how a plum like a prison must count.

Below the state level, in county and town governments, the impacts become more profound. In Mansfield, Ohio, two large state prisons make up more than half of Ward 5,<sup>51</sup> giving the voting residents disproportionate voice. In many cases, though, the results are so obvious, unexpected and unfair that people in prison are removed from the counts.<sup>52</sup> In Greene County, New

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48. Editorial, *Full-Employment Prisons*, N.Y. TIMES, Aug. 23, 2001, at A18.

49. These figures were somewhat lower after the 2000 redistricting, because the large increase in the prisoner population during the previous decade, forced these legislators to "share the wealth" with their neighboring but non-prison hosting districts.

50. Jonathan Tilove, *Minority Prison Inmates Skew Local Populations as States Redistrict*, NEWHOUSE NEWS SERV., Mar. 12, 2002, at <http://www.newhouse.com/archive/story1a031202.html>.

51. Linda Martz, *Taxpayers Before Wards*, MANSFIELD NEWS J., Nov. 26, 2002, at 6A.

52. Tilove, *supra* note 50.

York, where the prison town of Coxsackie would have earned almost another full seat in the county legislature, the legislature voted to remove the prison population from the apportionment entirely.<sup>53</sup> Those individuals simply disappear. Of course, exclusion is logical because people in prison aren't real residents, but it seems legally and morally inconsistent to retain them in some apportionment schemes but not others. Similarly, Iberville Parish, Louisiana excluded the prison population from school board redistricting to avoid drawing a district that only had two eligible voters.<sup>54</sup> The inconsistencies make the problem obvious: Gardner, Massachusetts was happy to claim people in prison for state legislative and congressional purposes, but it excluded them in the City Council redistricting process because the 892 disenfranchised prisoners would have earned their own district.<sup>55</sup> Thus, politicians at different levels seek to count things in different ways.

The majority of states have constitutional provisions or statutes defining the important principle of residence for electoral purposes. While most state constitutions authorize the disenfranchisement of people in prison, they also offer explicit instructions that their residence does not change by virtue of incarceration. Indeed, the New York Constitution declares: "no person shall be deemed to have gained or lost a residence, by reason of his presence or absence . . . while confined in any public prison."<sup>56</sup> The Massachusetts Constitution's definition of "inhabitant" has led the state supreme court to doubt the state constitutionality of this application of the "usual residence" rule, inviting litigation in that state.<sup>57</sup>

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53. Peter Wagner, *Prisoners Skew Local Rural Redistricting Too*, Prisoner-softheCensus.org, at <http://www.prisonersofthecensus.org/news/fact-22-9-2003.shtml> (Sept. 22, 2003).

54. Tilove, *supra* note 50.

55. Mary Jo Hill, *Gardner Excludes Prison Inmates from Political Map*, WORCESTER TELEGRAM AND GAZETTE, June 5, 2001, at B4.

56. N.Y. CONST. art 2, § 4. The New York State Constitution foresees the possibility that the census could be inadequate for state redistricting purposes in that it requires use of census data only "in so far as such census and the tabulation thereof purport to give the information necessary therefore" and mandates a special state census to fill in the gaps. N.Y. CONST. art 3, § 4.

57. "We think it clear without elaboration that a census that determines the place of which a person is an inhabitant on the basis of where he or she lives and sleeps most of the time will not satisfy the requirement of the Constitution of the Commonwealth that a person be assigned as an inhabitant to the place of his or

## IV. The Money

Larger places typically have greater needs and receive a corresponding share of government resources. Typically they contribute more as well, though it is not a dollar-for-dollar correlation. One measure of size for determining resource distribution is the official U.S. census population. The involuntary movement of the population creates a consistent, low-level distortion in funding formulations.

North Carolina distributes up to  $\square$  cents per dollar of sales tax to counties and municipalities on the basis of their populations.<sup>58</sup> Virginia distributes state aid for K-12 education on the basis of a complex formula that includes, among other things, the county population.<sup>59</sup> Thus, rural counties that import people for prisons come out ahead of urban counties that send people away. The U.S. Department of Agriculture (USDA)

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her domicil.” Opinion of the Justices to the House of Representatives, 365 Mass 661, 663-64 (1974); *see also* Blanchard v Stearns, 46 Mass 298, 304 (1843); Opinion of the Justices to the House of Representatives, 122 Mass. 594, 597, 599 (1877).

58. Approximately one half of 1½ cents per dollar sales tax is distributed per capita. However, counties can opt in or opt out of some tax collections, and there are internal distributions within counties. *See* N.C. GEN. STAT. §§ 105-463 to 105-520 (2002). The impact is moderated in North Carolina because the prison population is distributed among small county prisons close to the original home. However, the state is considering a move to larger regional prisons. *See* Dana Damico, *Proposal Would Relieve Crowded Prisons By Easing Sentencing Rules*, WINSTON SALEM J., Apr. 23, 2003, at 1. If it does, the present sales tax structure will create inequities. The inequalities will be especially ironic because the funds must be spent on educational capital outlays, so the schools of exporting jurisdictions will decay but prison towns will improve.

59. The statutory authority is distributed throughout title 22 of the Virginia code, updated by current appropriations legislation. *See, e.g.*, VA. CODE ANN. § 58.1-638 (Michie 2001). Population affects the “composite index.” *See* JOINT LEGISLATIVE AUDIT AND REVIEW COMM’N OF THE VA. GEN. ASSEMBLY, REVIEW OF ELEMENTARY AND SECONDARY SCHOOL FUNDING (2002), *available at* [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD0C2002/\\$file/rpt277.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD0C2002/$file/rpt277.pdf). The impact of population can be seen by using the macro-enabled spreadsheets provided by the Virginia Department of Education, and simply adjusting the population variable. *See* VA. DEP’T OF EDUC., COMPOSITE INDEX OF LOCAL ABILITY TO PAY (2002-04), *available at* <http://www.pen.k12.va.us/VDOE/Finance/Budget/2004cistmplate.xls> (last visited Apr. 2, 2004); *see also* VA. DEP’T OF EDUC., FINAL FY 2003 DIRECT AID ENTITLEMENTS (CHAPTER 1042) BASED ON MARCH 31, 2003 AMD AS OF JUNE 6, 2003 (STATE FUNDS ONLY), *available at* <http://www.pen.k12.va.us/VDOE/Finance/Budget/CalcTool-FinalEntitlements.xls> (last visited Apr. 2, 2004). The city of Richmond loses roughly \$230,000 annually. The prison county of Sussex, gains approximately \$90,000 annually as a result of its prison population. Virginia is exceptional in using raw population in this way.

distributes \$60 million annually to impoverished Appalachian communities via the Appalachian Regional Commission.<sup>60</sup> Population is a distribution factor, so rural communities with prisons have an advantage over communities without prisons. There is no indication that the USDA intended to reward prison construction, but it has that result.

The amount of money at stake is difficult to generalize. Some states (e.g., Texas) move hardly any revenues between geographic regions or levels of government whereas other states (e.g., Arizona) move funds generously. Similarly, many specialty taxes (e.g., liquor taxes, cigarette taxes, recreational park usage fees and hunting-fishing license fees) are distributed on the basis of population, but a specialty tax that moves significant revenues in one state might not even exist in another.<sup>61</sup> The largest funding flows—schools, health and highways—tend not to depend upon population.

With these cautions firmly in mind, it is still worth drawing some broad, general conclusions. All things considered, the total impact of counting prisoners in their institutional communities rather than their communities of origin runs a range between \$50 and \$250 per person. This estimate is based upon budgetary analysis of numerous jurisdictions, ranging from towns to states, as well as news accounts and interviews with responsible officials. The impact is seldom far below \$50 per head and rarely in the high \$200's. Most frequently it appears to run in the range of \$100 per head.

Thus, when a jurisdiction announces plans to open a new 1,000-bed prison, pause to consider: It will likely generate something like \$100,000 in new, “unearned” revenues. Of course, the estimate could be wrong by over 100% in either direction—depending upon what state it is in, how that state shares reve-

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60. See The Catalog of Fed. Domestic Assistance, 23.001 *Appalachian Regional Development*, available at <http://www.cfda.gov/public/viewprog.asp?progid=678> (last visited Apr. 2, 2004); see also Appalachian Regional Commission, at [www.arc.gov](http://www.arc.gov) (last visited Apr. 2, 2004).

61. Ironically, many of these specialty taxes fund programs that exclude by definition people in prison. For example, the state hunter-fishing license fee might be distributed for the purpose of improving sports gaming resources, and it might be distributed to counties on the basis of population, but people in prison will never use this resource in a county that receives a greater share as a formula artifact of the prison population.



nues, and the particularities of the specialty taxes—but doubling it or halving it still gives a general idea.<sup>62</sup> In percentage terms, \$100,000 is seldom a great deal of money, but in dollar terms it always is. Times are tight and towns are counting every nickel. That \$100,000 means a new fire truck, a free renovation for the youth center, or the computer upgrade that was cut from last year's budget. When a new wing opens, every additional prison bed will bring an additional \$100—or thereabouts.

The most dramatic impact is in Arizona, a state with significant revenue sharing and large prisons. Florence, Arizona, has a free population of roughly 5,000 plus another 12,000 living under lock and key.<sup>63</sup> The state and federal funds specifically linked to the incarcerated population have been estimated at \$4 million annually, compared to \$1.8 million for the free residents and \$2.3 million raised locally.<sup>64</sup> Such lucre tempted the Arizona town of Buckeye to annex nearby Lewis State Prison, population 4,600, though first it had to defeat a matching attempt by neighboring Gila Bend.<sup>65</sup> The mayor of Buckeye, with a population 5,038 before the annexation, promised to use the expected \$1.3 million to upgrade parks and family services, and assured everybody that it would more than pay for the additional burden on fire and police.<sup>66</sup>

But it is important to note that the new funds do not usually *come from* the exporting jurisdiction. New York City does not lose what Attica gains. The export of 43,000 New Yorkers to

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62. Researchers who want more detail should focus on taxes on the sale of liquor and cigarettes, and the lottery. These sources generate sizeable revenues, exist in most states, and often consider population in the distribution formulas. However, the largest pots of money—schools, health and highways—typically do not have population variables. The public officials to call with questions tend to be in state and county budget or finance offices. Elected officials and professionals in development or planning offices seldom have precise knowledge of the relevant formulas.

63. See 2000 CENSUS, *supra* note 19.

64. Nicholas Kulish, *Annexing the Penitentiary*, WALL ST. J., Aug. 9, 2001, at A1.

65. See Beth DeFalco, *Buckey Wins Bid to Annex Lewis State Prison*, ARIZ. REPUBLIC, Dec. 22, 1999, at B1; see also *S. Comm. on Judiciary*, 1999 Leg., 1st Reg. Sess. (Ariz. 1999) (committee meeting minutes), available at [http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/Legtext/44leg/1R/comm\\_min/Senate/0202JUD%2EWPD.htm](http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/Legtext/44leg/1R/comm_min/Senate/0202JUD%2EWPD.htm) [hereinafter *Arizona Committee on Judiciary*].

66. *Arizona Committee on Judiciary*, *supra* note 65.

upstate towns does not affect the gigantic overall population of New York City. Although the exported New Yorkers come from a small number of “hotspot” neighborhoods, the budget allocations within the city are not localized in that way. Departments of sanitation and fire have total budgets, and those budgets are distributed to districts within the city—but population is not a variable. Similar analysis leads to similar conclusions in large cities such as Dallas, Texas, and smaller ones such as New Haven, Connecticut.

Indeed, the most likely losers are similar jurisdictions that share the same pot of money. For example, the USDA Appalachian Regional Commission grants,<sup>67</sup> use population as a variable. However, the urban community that exported those prisoners isn’t eligible for those funds anyway. It isn’t rural. The winner is the rural prison town and the loser is the similarly situated community without a prison.

Other funding implications are even more subtle. People in prison tend to be male and they tend to be members of minority groups—typically more so than the host community. Thus, the host town shows odd spikes in gender and racial distribution, which can improve their prospects in formula grant allocations, especially programs intended to assist minorities. Furthermore, people in prison are not technically part of the workforce, and residents of group quarters are not members of households.<sup>68</sup> Consequently, they do not count towards unemployment or poverty rates in a community.<sup>69</sup> They do, however, affect per capita income because it is calculated simply by dividing the total community income by the total population.<sup>70</sup> Thus, assistance that targets communities with high unemployment is not affected but assistance that targets communities with low per capita income can be distorted. Ron Roth, the planning director of Coxsackie, New York, where prisoners make up 28% of the town population of 7,600, admitted to *Newsday* that the formula depression of per capita income makes the town “more

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67. See *supra* note 60 and accompanying text.

68. SUMMARY FILE 3, *supra* note 7 (these determinations were made by an analysis of the technical definitions in collaboration with experts at the Census Bureau).

69. *Id.* at 9-6 to 9-6 & n.1

70. *Id.* at B-20.

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competitive” for U.S. Housing and Urban Development (HUD) grants aimed at low income communities.<sup>71</sup> “All things being equal,” he concluded, the appearance of greater need is “enough to push us over the edge.”<sup>72</sup>

### V. Recommendations for Reform

Reforms are possible at many levels. Obviously, the great underlying problem is the national over-reliance on incarceration. The ultimate solution is to fix the criminal justice system. Reforms are needed for sentencing, prevention, preparing people for return from prison, and a host of matters that other articles address. The nation needs to reconsider the relationship between civil society and the hardware of justice, and truly to address problems that are presently being locked up.

At the same time, the problems of the heartland cannot be ignored. If they could, family farmers would prefer not to build prisons on their land and towns would prefer not to exchange the nighttime stars for the glare of perimeter lighting. But without viable alternatives, such communities are pulling in that direction. They will continue to pull until their fortunes shift. Activists and scholars need to explore means to unite the interests of urban progressive communities concerned about incarceration with rural progressive communities concerned about the moral and economic health of the heartland.

The Census Bureau has the most power to make specific reforms. In particular, people in prison should fill out their own forms and provide what they consider to be their “usual residence.” This is the simplest, cleanest way to proceed. Most importantly, it will credit the genuine home community with connection to these individuals.

It’s true that the institutional home may lose some formula funding for water or sewerage, but these costs can be covered in other ways. States often reimburse towns or counties for the lost tax revenue associated with the public use of land, and state departments of corrections often make arrangements for

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71. Zachary R. Dowdy, *Prisoner Count Tips Census Scales: Funds Don't go to Their Hometowns*, *NEWSDAY*, Apr. 3, 2000, at A06.

72. *Id.*

police and fire. These are the appropriate mechanisms for covering these costs.

It's also true that the address provided might not be valid. But court papers use an official "last known address" and the parole authorities ask people in prison to provide an expected address for return. If the address provided is good enough for their purposes of individual tracking, it should be good enough for the Census Bureau's more statistical purposes. Moreover, the Census Bureau accepts unstable addresses for homeless people, migrant workers and even the highly mobile urban youth who sometimes end up behind bars for a while. The difficulty in precisely identifying individuals' home address should not be a barrier to putting them in their own neighborhood rather than an entirely different congressional district.

Funding formulas can also be adjusted to minimize this problem. The Appalachian Regional Commission could adjust the formula to "non-institutionalized population" rather than "population." The data is just as readily available from the Census Bureau, with just a few extra clicks on the web page. Similarly, agencies like HUD that assess minority representation or per capita income can adjust their formulas to avoid the distortions of institutionalized population. It will enable them to target their limited funds more closely on the intended result.

Litigation might help to spur some particular reforms. The Census Bureau's use of the usual residence rule is likely not "arbitrary and capricious" under the relevant legal authority.<sup>73</sup> However, there may be some specific violations of equal protection. Stretches could be made to challenge funding flows, especially where the prison population is disproportionately minority and people in prison are excluded by definition from using the funds—such as specialty taxes for sport fishing. Closer to fundamental rights, a plaintiff in a heavily minority district with a large number of residents counted in prisons outside the district may have a strong, if novel, vote dilution claim. Even stronger arguments can be made under state con-

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73. The Administrative Procedures Act gives the Census Bureau, like other executive agencies, broad authority to determine its own rules. *See* 5 U.S.C. §706 (1966); *see also* *Dist. of Columbia v. U.S. Dep't of Commerce*, 789 F. Supp. 1179 (1992).

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stitutional law, combining state equal protection theory with state definitions of residence.

The U.S. Census Bureau consistently does a tremendous job in the arduous task of the decennial count. It is odd, however, that people who are easy to count by virtue of their confinement should present such difficulty. A simple rule deprives them of the economic and political clout to which they are entitled as members of this great nation. Fortunately, rules can change.

