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## COMMENTS

# COUNTED OUT TWICE—POWER, REPRESENTATION & THE “USUAL RESIDENCE RULE” IN THE ENUMERATION OF PRISONERS: A STATE- BASED APPROACH TO CORRECTING FLAWED CENSUS DATA

DAVID HAMSHER\*

### INTRODUCTION

The American incarcerated population, 2,212,475 persons strong,<sup>1</sup> is larger than the population of the fourth-largest city in the United States,<sup>2</sup> commands a greater population than *fifteen* individual states,<sup>3</sup> and contains more people than the three smallest states combined.<sup>4</sup> If the incarcerated population of the United States were a state of its own, it would qualify for five Electoral College votes.<sup>5</sup> As the United States emerges from two consecutive close national elections featuring razor-thin margins of victory,

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<sup>1</sup> PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BUREAU OF JUST. STAT. BULL.: PRISONERS IN 2004, at 1 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf>.

<sup>2</sup> U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004–2005, at 30, available at <http://www.census.gov/prod/2004pubs/04statab/pop.pdf> [hereinafter Statistical Abstract 2003] (showing the population of the fourth largest U.S. city, Houston, TX, to be 2,010,000).

<sup>3</sup> *Id.* at 20.

<sup>4</sup> *Id.*

<sup>5</sup> Burt Constable, *Some Arresting Facts about Our Fastest-Growing, Fourth-Largest City*, CHI. DAILY HERALD, June 30, 2001, § 1, at 11.

commentators have noted that felon disenfranchisement may have influenced the outcome of these elections.<sup>6</sup>

Lurking below the surface of felon disenfranchisement analysis lays a nascent discourse on the effect of mass incarceration on the complicated world of state and federal legislative apportionment. Specifically, a small but growing number of journalists, legal and academic scholars,<sup>7</sup> and politicians have started to take note of the profound effect of the U.S. Census Bureau's "usual residence rule" - the method by which the Census Bureau determines where to count people - and its application to those behind bars.<sup>8</sup> A November 2004 *New York Times* editorial, for example, called for a change in the way prisoners are counted by the U.S. Census Bureau, noting that in the past year at least three major reports have made the same recommendation.<sup>9</sup> Each of these reports outlines just how significantly the application of this 200-year-old method of population

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<sup>6</sup> Voting rights scholars Jeff Manza and Christopher Uggen have shown that in 2000 Al Gore would have won Florida by some 80,000 votes had felons not been disenfranchised. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 792 (2002).

<sup>7</sup> See, e.g., Eric Lotke & Peter Wagner, *Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From*, 24 PACE L. REV. 587 (2004); Taren Stinebrickner-Kauffman, *Counting Matters: Prison Inmates, Population Bases, and "One Person, One Vote"*, 11 VA. J. SOC. POL'Y & L. 229 (2004); Rosanna M. Taormina, Comment, *Defying One-Person, One-Vote: Prisoners and the "Usual Residence" Principle*, 152 U. PA. L. REV. 431 (2003); Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269 (2002); Elizabeth D. Mehling, Comment, *Where Do Prisoners Live: Do Taxpayers Have a Valid Legal Claim for Lost Federal Funds Resulting from the Census Bureau's Enumeration Standards Pertaining to Prisoners?*, 32 U. TOL. L. REV. 47 (2000).

<sup>8</sup> In particular, a great number of academic studies, reports, and newspaper articles have been devoted to the effect of this policy in New York State. Peter Wagner, a Soros Justice Fellow from the Prison Policy Initiative has undertaken numerous studies on the subject - both in New York and around the country. Mr. Wagner has championed the cause of reform across the nation, though particularly in New York. See generally *Prisoners of the Census*, <http://www.prisonersofthecensus.org/> (last visited Oct. 9, 2005); Prison Policy Initiative, <http://www.prisonpolicy.org/> (last visited Oct. 9, 2005).

<sup>9</sup> Editorial, *Jailhouse Blues*, N.Y. TIMES, Nov. 22, 2004, at A26; see PATRICIA ALLARD & KIRSTEN D. LEVINGSTON, BRENNAN CENTER FOR JUST. AT NYU SCH. OF L., ACCURACY COUNTS: INCARCERATED PEOPLE & THE CENSUS (2004), available at <http://www.brennancenter.org/programs/cj/RV4AccuracyCounts.pdf>; ROSE HEYER & PETER WAGNER, PRISON POLICY INITIATIVE, TOO BIG TO IGNORE: HOW COUNTING PEOPLE IN PRISONS DISTORTED CENSUS 2000 (2004), available at <http://www.prisonersofthecensus.org/toobig/toobig.shtml>; SARAH LAWRENCE & JEREMY TRAVIS, URBAN INST. JUSTICE POLICY CTR, THE NEW LANDSCAPE OF IMPRISONMENT: MAPPING AMERICA'S PRISON EXPANSION (2004), available at [http://www.urban.org/UploadedPDF/410994\\_mapping\\_prisons.pdf](http://www.urban.org/UploadedPDF/410994_mapping_prisons.pdf); see also Editorial, *Phantom Constituents in the Census*, N.Y. TIMES, Sept. 26, 2005, at A16.

enumeration, the “usual residence rule,” affects the distribution of representative power.<sup>10</sup>

Ever since the first U.S. Census in 1790, the Census Bureau has used the concept of “usual residence” to determine who lives in which state.<sup>11</sup> The Census Bureau defines “usual residence” as “the place where the person lives and sleeps most of the time. This place is not necessarily the same as the person’s voting residence or legal residence.”<sup>12</sup> This particular enumeration method comes neither from the U.S. Constitution nor from a federal statute, but rather from an administrative determination that such a rule would be an effective means of enumeration.<sup>13</sup>

While the fundamental constitutional mandate of the Census Bureau—to count the number of people in each state in order to apportion Representatives of the United States amongst the several States<sup>14</sup>—has not changed since 1787, the ancillary use of the collected data has dramatically increased in importance.<sup>15</sup> Today, Census Bureau data is used extensively, not only to apportion population to both state and federal legislative districts, but also for the annual allocation of more than \$140 billion in formula-based federal grants to state and local jurisdictions.<sup>16</sup> With such widespread vital uses of Census data, one can easily see how imperative it is that the Census Bureau counts accurately, counts fairly, and counts people in the right place.

Generally, the “usual residence rule” works well; people are counted at their homes—normally where they sleep most of the time, vote, and work. However, when this policy is applied to prisoners who spend a generally short period of time behind bars in prisons located far from their true homes, distortions arise.<sup>17</sup>

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<sup>10</sup> Editorial, *Jailhouse Blues*, *supra* note 9.

<sup>11</sup> U.S. CENSUS BUREAU, FACTS ABOUT CENSUS 2000 RESIDENCE RULES, [http://www.census.gov/population/www/censusdata/resid\\_rules.html](http://www.census.gov/population/www/censusdata/resid_rules.html) (last visited Oct. 9, 2005) [hereinafter USUAL RESIDENCE RULE].

<sup>12</sup> *Id.*

<sup>13</sup> See generally U.S. CONST. art. I, § 2, cl. 3 (directing that representation be enumerated through a decennial census); Act of March 1, 1790, ch. II, § 1, 1 Stat. 101 (directing the “marshals of the several districts” to enumerate their residents, though without specifying a particular enumeration method).

<sup>14</sup> U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

<sup>15</sup> HEYER & WAGNER, *supra* note 9.

<sup>16</sup> LAWRENCE & TRAVIS, *supra* note 9, at 3.

<sup>17</sup> Lotke & Wagner, *supra* note 7, at 588. The average U.S. Congressional district population after the 2000 Census was 646,952 people. KAREN M. MILLS, CONGRESSIONAL APPORTIONMENT: CENSUS 2000 BRIEF 1 (2001), <http://www.census.gov/prod/2001pubs/c2kbr01-7.pdf>. After the 2000 Census the average state Senate district population was 106,362 people and the average state House district was 37,564 people. National

When the Census Bureau counts prisoners in the decennial census, it applies the “usual residence rule,” and counts prisoners as residents of the prison in which they eat and sleep during the period of their incarceration.<sup>18</sup> However, in most states the prisoners legally reside in the community in which they were arrested.<sup>19</sup> The prisoners’ pre-incarceration community is normally the community in which they would use the services of their political representatives and where they would vote (were they able).<sup>20</sup> Prior to 1970, this was not a significant problem, as the number of people behind bars was generally stable and not as significant as it is today.<sup>21</sup> However, since 1970, the U.S. prison population has grown more than 600%, and continues its torrid growth.<sup>22</sup> Much of the growth in prison facilities has been in rural areas, while the majority of inmates come from urban areas.<sup>23</sup> Thus, an increasing number of people are counted by the Census Bureau as residents of communities that do not reflect their true, legal homes. As a result, a smaller permanent resident population in the rural, prisoner-hosting communities elects representatives than in those urban communities that tend to export prisoners. This means that prisoner-exporting communities experience a dilution of their relative voting power, while prisoner-importing communities experience a corresponding strengthening of their relative voting power.

For example, New York City produces nearly 66% of all New York State prisoners.<sup>24</sup> However, more than 91% of prisoners are incarcerated outside of New York City.<sup>25</sup> Thus, when the Census Bureau applies the “usual residence rule” to prisoners in New York, 91% of the prisoners from New York City are counted as residents outside of New York City, despite the fact that they legally remain New York City residents.<sup>26</sup> As a result, the

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Conference of State Legislatures, *Constituents per State Legislative District: Legislatures Ranked by Size*, <http://www.ncsl.org/programs/legman/elect/cnstprst.htm> (last visited Mar. 2, 2005). Thus, distortions can have a more powerful per representative effect in state legislatures than in the U.S. Congress.

<sup>18</sup> See U.S. CENSUS BUREAU, *FACTS ABOUT CENSUS 2000 RESIDENCE RULES: PEOPLE IN HOSPITALS, PRISONS OR OTHER INSTITUTIONS*, [http://www.census.gov/population/www/censusdata/resid\\_rules.html#Inst](http://www.census.gov/population/www/censusdata/resid_rules.html#Inst) (last visited Oct. 9, 2005).

<sup>19</sup> See *infra* Part I.A.

<sup>20</sup> *Id.*

<sup>21</sup> See *infra* Part II.A.1.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> PETER WAGNER, *PRISON POLICY INITIATIVE, IMPORTING CONSTITUENTS: PRISONERS AND POLITICAL CLOUT IN NEW YORK* (2002), <http://www.prisonpolicy.org/importing/importing.shtml>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

interests of rural, prisoner-hosting communities in New York are overrepresented, and the interests of prisoner-exporting communities are underrepresented in the state and federal government.

While there have been numerous attempts to modify the implementation of the “usual residence rule” from statehouses to the United States Congress, these efforts have thus far been unsuccessful.<sup>27</sup> These efforts, however, continue to gain momentum.

By examining the causes and effects of prison expansion, the U.S. Census Bureau enumeration policies, and the relevant case law regarding state and federal legislative apportionment, this comment will evaluate various solutions to this growing problem. In particular, this comment will examine the legality of state based adjustments to Census data which aim to correct the flaws that the “usual residence rule” creates when applied to America’s swollen prison population.

One can see the effects of the Census Bureau’s “usual residence rule” on prison populations when examining every state. However, while looking at the problem from the perspective of any individual state, as well as from a national legal and policy perspective, this comment will focus on the causes, effects, and solutions to the problem caused by the “usual residence rule” in Illinois. Beyond being the home of this journal, Illinois proves a useful case study for a number of reasons. First, Illinois has one large city, Chicago, which exports a large number of prisoners to geographically distant prisons.<sup>28</sup> As a result, one can clearly see the effects of the Census Bureau’s prisoner enumeration method in Illinois. Second, prison growth in Illinois has largely mirrored the growth seen throughout the United States.<sup>29</sup> Finally, legislation of the very type examined by this comment has been introduced in the Illinois General Assembly.<sup>30</sup>

Part I will present background on the census and the “usual residence rule,” including, in Part I.A, an historical and modern background on the role and legal directives of the U.S. Census Bureau. In Part I.B, an analysis of how the Census Bureau’s enumeration policy affects representation will be presented.

Part II will more exhaustively examine the scope of the problem. First, in Part II.A, both national and Illinois-based analyses of the growth of prison population and prison facilities will be undertaken. In Part II.B, the effect of the Census Bureau’s “usual residence rule” upon legislative redistricting and population-based funding will be examined.

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<sup>27</sup> See *infra* note 195.

<sup>28</sup> See *infra* Part II.A.2

<sup>29</sup> See *infra* Part II.A.

<sup>30</sup> See *infra* note 195.

Part III will examine the relevant case material on the subject. Since the seminal cases of *Reynolds v. Sims*<sup>31</sup> and *Wesberry v. Sanders*,<sup>32</sup> there have been hundreds of cases which have clarified the judicially imposed legislative apportionment mantra—one person, one vote. The cases will be examined by first looking at relevant federal Congressional reapportionment cases in Part III.A and relevant state legislative reapportionment cases in Part III.B. Additionally, Part III.C will examine cases which have attempted judicially to alter Census Bureau enumeration procedures.

Part IV will examine the efficacy and legality of various census adjustment options potentially available to any individual state. Further, Part IV will argue that under guidance offered in *Reynolds*, *Wesberry* and their progeny a state may take back the reins from a recalcitrant Census Bureau to correct the inequities created by the “usual residence rule.”

Finally, in Part V, this comment will argue that the Census Bureau’s use of the “usual residence rule” to enumerate prisoners creates striking inequities and that in the absence of federal action state legislatures must make a bold step to ensure that we are all counted accurately, counted fairly, and counted in the right place.

## I. COUNTING PRISONERS: AN INTRODUCTION TO HOW PRISON TOWNS REAP LEGISLATIVE POWER FROM THE UNITED STATES’ MASSIVE PRISON POPULATION

### A. THE INTRICACIES OF ENUMERATION: HOW THE CENSUS BUREAU FULFILLS ITS CONSTITUTIONAL MANDATE

At the Constitutional Convention in 1787, a bitter dispute arose that nearly ended the United States of America before it began.<sup>33</sup> Some members of the Convention advocated a system of government whereby each state would have an equal number of votes in Congress, while others were adamant that states with greater population should be afforded greater power.<sup>34</sup> Eventually, Benjamin Franklin led the delegates to the Great Compromise—a system of governance whereby one house of the federal legislature, the House of Representatives, would be comprised of a proportional number of Representatives from each state based on the states’ relative populations, while another legislative house, the Senate, would be

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<sup>31</sup> 377 U.S. 533 (1964).

<sup>32</sup> 376 U.S. 1 (1964).

<sup>33</sup> See *id.* at 10-14.

<sup>34</sup> *Id.*

comprised of an equal number of Senators from each state.<sup>35</sup> The resultant Constitution of the United States spelled out the details of that compromise, stating:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.<sup>36</sup>

This principle of representation was amended by the passage of the Fourteenth Amendment to the United States Constitution.<sup>37</sup> The Fourteenth Amendment requires that “[r]epresentatives shall be apportioned among the several States according to their respective numbers,”<sup>38</sup> “counting the whole number of persons in each State, excluding Indians not taxed.”<sup>39</sup>

According to this Constitutional mandate, the First Decennial Census Act<sup>40</sup> directed the U.S. Census Bureau to enumerate the people of the several States in their “usual place of abode.”<sup>41</sup> In order to accomplish this straightforward, though not insignificant task, the U.S. Census Bureau established the “usual residence rule” in 1790.<sup>42</sup> Rather than track down and validate one’s official legal residence or domicile—a legal determination made at the state level based on different state laws—the Census Bureau would merely have to determine where one normally ate and slept, most of the time.<sup>43</sup>

At the Constitutional Convention, and in the debates for the ratification of the new U.S. Constitution, delegates and proponents of the Constitution argued that any desire a state might have to increase its population in order to achieve greater numbers in the Congress would be offset by the state’s

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<sup>35</sup> *Id.*

<sup>36</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>37</sup> U.S. CONST. amend. XIV, § 2.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Act of March 1, 1790, ch. II, § 1, 1 Stat. 101.

<sup>41</sup> ALLARD & LEVINGSTON, *supra* note 9, at 9 (citing 1 Stat. 101).

<sup>42</sup> See *Oversight of the 2000 Census: Examining the Bureau’s Policy to Count Prisoners, Military Personnel, and Americans Residing Overseas: Hearing Before the Subcomm. on the Census of the Committee on Government Reform, 106th Cong. 21 (1999)*, available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106house\\_hearings&docid=f:60341.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106house_hearings&docid=f:60341.pdf) [hereinafter *Oversight Hearing*].

<sup>43</sup> USUAL RESIDENCE RULE, *supra* note 11.



desire to limit its taxation responsibility.<sup>44</sup> While we have moved away from taxation based on state population,<sup>45</sup> representation continues to be drawn from such figures, eliminating this counterbalance.<sup>46</sup>

Today, the Census Bureau is charged with taking a decennial census every ten years beginning on April 1, 1980, the “decennial census date”, “in such form and content as [the Secretary of Commerce] may determine.”<sup>47</sup> Within nine months of the census date, the Census Bureau is required to transmit to the President the total population of the states.<sup>48</sup> The President must then transmit a statement to the Congress within one week after the beginning of the first session of Congress after the census showing “the whole number of persons in each state . . . and the number of Representatives to which each State would be entitled” under the statutorily approved apportionment formula.<sup>49</sup> Each state is entitled to the number of representatives shown in the President’s statement.<sup>50</sup> Finally, within fifteen days of receipt of the President’s statement, the Clerk of the House of Representatives must submit to the “executive of each State” the number of representatives to which that state is entitled.<sup>51</sup>

While the Census Bureau’s constitutionally-mandated responsibility remains today, Census data is used by a whole host of public and private institutions. As a result, the Census Bureau’s mantra reflects its mission—“Helping You Make Informed Decisions.”<sup>52</sup> Census data forms a cornerstone of government policy-making, business decision-making, statistical research, and a whole host of public and private population analyses of such things as marriage rates, age, gender, economic health, racial composition, per capita income, population density, and migration patterns, amongst others.<sup>53</sup> Most importantly for the purposes of this analysis, Census data is used by state governments to apportion political

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<sup>44</sup> See, e.g., THE FEDERALIST NO. 54 (James Madison) (“By extending the rule [of Census-based apportionment] to both objects [taxation and representation], the States will have opposite interests, which will control and balance each other, and produce the requisite impartiality.”); U.S. CENSUS BUREAU, HISTORY AND ORGANIZATION, FACTFINDER FOR THE NATION (2000), <http://www.Census.gov/prod/2000pubs/cff-4.pdf> (“[S]tates’ wishes to report few people in order to lower their shares in the war debt would be offset by a desire for the largest possible representation in Congress.”).

<sup>45</sup> U.S. CONST. amend. XVI.

<sup>46</sup> U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

<sup>47</sup> 13 U.S.C.A. § 141(a) (West 2005).

<sup>48</sup> *Id.* § 141(b).

<sup>49</sup> 2 U.S.C.A. § 2a(a) (West 2005).

<sup>50</sup> *Id.* § 2a(b).

<sup>51</sup> *Id.*

<sup>52</sup> See U.S. Census Bureau, <http://www.census.gov/>.

<sup>53</sup> HEYER & WAGNER, *supra* note 9.

representation at the state and federal levels and to form political districts from which such representatives will be drawn and by the federal government to disburse billions of dollars a year in funding to local government agencies.<sup>54</sup> In short, the data the U.S. Census Bureau collects and disseminates to public and private agencies is an integral part of our society. It is clear, therefore, that any enumeration method the Census Bureau employs should be squarely based on a strong, clear policy that takes into account the underlying purposes for which this data is used, and not merely what is the most convenient method for the agency charged with its collection.

While for a great number of people their “usual residence” is the same as their legal and permanent residence, we live in an increasingly mobile society which places strains on the Census Bureau’s “usual residence rule.” Beyond normal migration, students, domestic and overseas military and federal employees, institutionalized disabled people, and prisoners represent large classes of people who regularly eat and sleep in places that are not their actual legal homes.<sup>55</sup> As a result, the Census Bureau has occasionally modified the application of the “usual residence rule” to fairly and effectively enumerate people in these classes. For example, in 1950 the Census Bureau changed its enumeration method for students.<sup>56</sup> This change was the result of a study by the Census Bureau’s Technical Advisory Committee on General Population Statistics, which discovered that large numbers of students were not being counted at either their parents’ home address or at their school address.<sup>57</sup> Additionally, in 1990—following a last-minute effort by the Defense Department, several members of Congress, and the Secretary of Commerce<sup>58</sup>—the Census Bureau decided to include overseas Americans working for the federal government at their “home of record,” or the address at which those individuals resided prior to taking up their job overseas.<sup>59</sup> However, each of the above-cited classes of citizens differs from prisoners in important respects. For example, in many communities, students are actual members of the communities in which they are enumerated; they are allowed to vote in that community, they are

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<sup>54</sup> *Id.*

<sup>55</sup> See generally *Prisoners of the Census*, *supra* note 8; see also *Borough of Bethel Park v. Stans*, 449 F.2d 575, 583 (3d Cir. 1971).

<sup>56</sup> ALLARD & LEVINGSTON, *supra* note 9, at 11. See generally PETER WAGNER, PRISON POLICY INITIATIVE, ACTUAL CONSTITUENTS: STUDENTS AND POLITICAL CLOUT IN NEW YORK, (2004), available at [http://www.prisonersofthecensus.org/students/student\\_report.shtml](http://www.prisonersofthecensus.org/students/student_report.shtml).

<sup>57</sup> *Id.*

<sup>58</sup> The Bureau of the Census is organized under the jurisdiction of the Department of Commerce. 13 U.S.C. § 2 (2005).

<sup>59</sup> *Franklin v. Massachusetts*, 505 U.S. 788, 793-94 (1992).

encouraged to interact with members of the community, the community generally actively wants them there and will represent their interests, and they benefit from the services that their enumeration affords—in short, they draw benefit from their enumeration in that community.<sup>60</sup> Further, as we shall see shortly, the movement of prisoners to locations other than their home address is more numerous, more concentrated, and more predictable than these other classes of people.

According to Peter Wagner of the Prison Policy Initiative, the majority of states have either a constitutional or legislative provision stating that prisoners cannot lose their legal residence as a result of incarceration.<sup>61</sup> While Illinois appears to have had such a statute as of 1877,<sup>62</sup> no such statute remains on the books today.<sup>63</sup> However, Illinois common law, like common law around the nation, clearly states that one's legal residence cannot be abridged by incarceration.<sup>64</sup> Thus, the residence that a prisoner would use to vote (if he was able), to pay taxes, to access state courts, to invoke federal diversity jurisdiction in accessing the federal courts, and to seek the services of a political representative would be based on his or her pre-incarceration legal residence, and not the prison in which he or she temporarily resides.

One of the most difficult to reconcile portions of the “usual residence rule” is that the purpose of the census—to apportion political representation which is to be wielded by elected officials on behalf of their constituents—is not in accord with the law on how that purpose is effectuated. Every state determines its own voting procedures based upon its own residency requirements in order to allow an individual to cast a ballot in a particular

<sup>60</sup> HEYER & WAGNER, *supra* note 9.

<sup>61</sup> Telephone Interview with Peter Wagner, Soros Justice Fellow, Prison Policy Initiative, in Northampton, Mass. (Dec. 3, 2004).

<sup>62</sup> ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* tbl.A.6 (2000).

<sup>63</sup> It is unclear when and why this statute was removed from the books.

<sup>64</sup> See *Illinois v. Carman*, 52 N.E.2d 197, 198 (Ill. 1943) (“involuntary imprisonment cannot change a man’s legal residence”);

The matter of domicile is largely one of intention and, hence, is primarily a question of fact. Once a domicile is established, it is presumed to continue, and the burden of proof in such cases rests on the party who attempts to establish that a change of domicile occurred. It is manifest that very slight circumstances often decide the question of domicile, and the determination is made based on a preponderance of the evidence in favor of some particular place as a domicile. In addition, in light of the factual issue to be decided, the resolution of the question of domicile depends upon the facts and circumstances of the particular case, for precedents with different factual patterns are of slight assistance.

*In re Estate of Elson*, 458 N.E.2d 637, 642 (Ill. App. Ct. 1983) (citations omitted).

legislative district.<sup>65</sup> Thus, *legal* residence does not necessarily comport with *usual* residence. Members of a traveling circus, for example, by Census Bureau *policy* are counted at the place they are located on Census Day. Therefore, they help draw political representation to the city in which they are performing on Census Day even though they may be there for only one day and by *law* vote in a different district.

One court in Illinois has noted this oddity. In the case of *Oswego Community Consolidated School District Number No. 434 v. Goodrich*,<sup>66</sup> a community desired to hold an election regarding the formation of a school district within the community.<sup>67</sup> However, the Illinois School Code required that a community population of 1500 was a jurisdictional prerequisite to the calling of an election of this sort.<sup>68</sup> At issue was the inclusion of several residents who for one reason or another were not in town on the local Census Day.<sup>69</sup> The court noted, "It would certainly be an anomaly to hold that these persons are not residents for the purpose of determining the population of the district, but that they are residents for the purpose of voting on the proposition to organize the district."<sup>70</sup> The judge thus deemed it inconsistent that residents who were otherwise eligible to vote as a result of their *legal* residence should be excluded due to their *usual* residence. This is the exact situation we face with prisoners, yet no federal judge has ever issued such a ruling.

These dichotomies—*policy* versus *law*, *usual* versus *legal*—can have serious effects on the interests of the represented when sufficient numbers of people with a common interest are counted in a geographical subdivision with a competing interest. When one adds to the equation that those enumerated cannot even wield the power of their numbers because they are disenfranchised, serious problems arise. When Chicago successfully boosted its political representation through the Census Bureau's inclusion of 112 circus performers temporarily present in the City of Chicago on Census Day 2000, it did not have an altogether dramatic effect upon the representational power of the community.<sup>71</sup> However, when a particular political subdivision has 20% of its residents behind bars with no effective political tools with which to represent their interests, the social, economic,

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<sup>65</sup> *Kirkpatrick v. Preisler*, 394 U.S. 526, 536 (1969).

<sup>66</sup> 171 N.E.2d 816 (1961).

<sup>67</sup> *Id.* at 817.

<sup>68</sup> *Id.* at 818.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 820.

<sup>71</sup> Evan Osnos & Flynn McRoberts, *In Census, Count 'Em If You Can; Rules Let Towns Add To Their Rolls*, CHI. TRIB., Apr. 9, 2000, at C1.

and political ramifications start to unfold in a far more dramatic, and potentially detrimental manner.

#### B. THE RESULTS: THE EFFECT OF THE USUAL RESIDENCE RULE ON REPRESENTATION

When the “usual residence rule” is applied to the huge number of prisoners incarcerated in the United States, the result is that the representational strength of their presence in downstate<sup>72</sup> correctional facilities is transferred from their home community to the situs of their incarceration.<sup>73</sup> All too often, those downstate communities which house prisoners are interested in drawing jobs, political power, and financial strength from incarcerated, imported constituents, rather than addressing the serious crime problem in our cities and our society as a whole.<sup>74</sup> Thus, the interests of the non-incarcerated, vote-eligible free population in these communities can run contrary to the interests of the prisoners from whom the downstate communities draw strength.<sup>75</sup> As a result, political power is shifted from those communities most afflicted by crime to those communities most interested in gaining from incarceration—potentially at the expense of any alternative means of retribution, crime prevention, drug treatment, or rehabilitation.<sup>76</sup> As has been pointed out by a leading commentator on the subject, the transfer of political power has dulled one of the most important counter-balances to the economic strength of the prison industrial complex: the power of the democratic populace.<sup>77</sup>

In forty-eight out of fifty states and the District of Columbia, prisoners are not allowed to vote while incarcerated.<sup>78</sup> As a result of the Census Bureau’s enumeration policy, more than twenty counties in the United

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<sup>72</sup> For the purposes of this comment, which focuses on Illinois, I use the term “downstate” to represent those predominantly distant, rural areas where the largely urban, Chicago-resident inmates are housed in Illinois Department of Corrections facilities. While the geographic nature of the term may not apply in other states, the sentiment remains the same. In New York, for example, New York City is the only large city in the state and “upstate”, the appropriate geographical equivalent of “downstate”, would refer to the same communities.

<sup>73</sup> Peter Wagner, *Locked Up Then Counted Out: Prisoners and the Census*, FORTUNE NEWS, Winter 2002-2003, available at <http://www.prisonpolicy.org/articles/fn011703.shtml>.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Only Maine and Vermont allow those convicted of a felony the right to vote. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2005), <http://www.sentencingproject.org/pdfs/1046.pdf>.

States have more than 20% of their residents behind bars.<sup>79</sup> In these twenty counties in particular, and to a lesser extent in the hundreds of counties nationwide with significant prison populations, legislators are all too happy to claim the extra power and money their prison populations command, though not necessarily all too eager to represent the interests of those who buoy their political fortunes. For example, in Rhode Island, State Representative Peter Palumbo has said of his prison population windfall: “All these years the prison has caused me grief with my constituents. Now maybe it will help with redistricting.”<sup>80</sup> In Ina, Illinois, Mayor Andy Hutchens has claimed that as state and federal tax revenues are figured per capita, a prison population which places no strains on city services is a permanent windfall.<sup>81</sup> “It really figures out this way,” Hutchens said, “[t]his little town of 450 people is getting the tax money of a town of 2,700 . . . [a]nd those people in that prison can’t vote me out of office.”<sup>82</sup> Given that prisoners are a source of increasing political and economic power, it is not surprising that the leaders of these downstate communities have gone from saying “not in my backyard,” to “yes, in my backyard.”<sup>83</sup>

## II. THE SCOPE OF THE PROBLEM

### A. THE EXPLOSIVE GROWTH OF PRISONERS AND THE CONCOMITANT GROWTH OF PRISON FACILITIES IN THE UNITED STATES AND SPECIFICALLY IN ILLINOIS

#### 1. *The Growth in the United States*

The relevance and dramatic results of the U.S. Census Bureau’s “usual residence rule” have grown in national importance over the past twenty years as incarceration rates have skyrocketed.<sup>84</sup> As is well-known and documented, the growth in the number of prisoners and concomitant growth in the number of prison facilities in the United States over the course of the

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<sup>79</sup> Rose Heyer & Peter Wagner, *Twenty-One Counties Have Twenty One Percent of Their Population in Prisons and Jails*, PRISONERS OF THE CENSUS, Apr. 19, 2004, <http://www.prisonersoftheCensus.org/news/fact-19-4-2004.shtml>.

<sup>80</sup> WAGNER, *supra* note 24.

<sup>81</sup> Paul Street, *The Political Consequences of Racist Felony Disenfranchisement*, BLACK COMMENTATOR, Dec. 11, 2003, [http://www.blackcommentator.com/68/68\\_street\\_prisons.html](http://www.blackcommentator.com/68/68_street_prisons.html).

<sup>82</sup> *Id.*

<sup>83</sup> LAWRENCE & TRAVIS, *supra* note 9, at 14.

<sup>84</sup> *Id.* at 2.

past twenty years have been higher than at any time in our history.<sup>85</sup> The United States had six times as many prisoners in state and federal penitentiaries in 2003 as in 1970.<sup>86</sup> This rate of incarceration, nearly one in every 140 Americans in 2003, gives the United States the highest reported rate of incarceration in the world.<sup>87</sup> Indeed, the U.S. rate of incarceration shows no signs of slowing down—from mid-2002 to mid-2003, state and federal prisoner growth rates were higher than at any point since 1999—higher than in 2000 and 2001 combined.<sup>88</sup>

The increased incarceration rate means that the Census Bureau's enumeration of prisoners at their place of incarceration rather than at their home address has increased by 318%; more than one million more prisoners were counted in 2000 than were in the 1980 census.<sup>89</sup>

While prisoners largely originate from urban centers, prisons have been constructed at increasing distances from those urban centers in geographically dispersed downstate communities.<sup>90</sup> In fact, a new rural prison has been opened on average every fifteen days in the United States in the last ten years.<sup>91</sup> This fact is demonstrated by examining the number of counties in the United States containing prisons. In 1979, 133 U.S. counties claimed a prison.<sup>92</sup> Today, more than 330 claim one.<sup>93</sup>

## 2. *The Growth in Illinois*

The State of Illinois has been one of the leaders in the national prison growth rate. In the last twenty-five years of the twentieth century, the number of state prisons grew by 73% across the United States.<sup>94</sup> Illinois ranked seventh in terms of the total number of prisons with forty.<sup>95</sup> In

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<sup>85</sup> *Id.* at 42.

<sup>86</sup> THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS (2005), <http://www.sentencingproject.org/pdfs/1035.pdf>.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> LAWRENCE & TRAVIS, *supra* note 9, at 6.

<sup>90</sup> *Id.* at 36 (In a study of the counties where inmates are actually incarcerated and where they are convicted in Georgia, Ohio, Texas, California and Florida, Lawrence and Travis note that "the largest sources of prisoners were very much aligned with the major cities in a state. . . . At the same time, the counties of imprisonment were more widely dispersed across the states.").

<sup>91</sup> Douglas Clement, *Big House on the Prairie*, FEDGAZETTE, Jan. 2002, at <http://minneapolisfed.org/pubs/fedgaz/02-01/house.cfm>.

<sup>92</sup> LAWRENCE & TRAVIS, *supra* note 9, at 13.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 8.

<sup>95</sup> *Id.* at 10.

1979, by contrast, Illinois had only twelve prisons; Illinois has experienced an increase of more than 300% in less than thirty years.<sup>96</sup> The total number of counties in Illinois with one or more prisons has grown from 7% to 28%.<sup>97</sup> Accordingly, more Illinois counties have seen prisoner-swollen census counts, resulting in more widespread representational flaws.

Only one of the new Illinois Department of Corrections facilities is in the northeastern part of the state (home to Chicago), and very few were added to the northern portion of the state.<sup>98</sup> In fact, while 66% of the prisoners entering Illinois Department of Corrections facilities in 2004 were from Cook County<sup>99</sup> and the surrounding communities,<sup>100</sup> 99% of the cells are outside of Cook County.<sup>101</sup>

As in many states, incarceration for drug offenses in Illinois has grown dramatically in the last several decades.<sup>102</sup> The increase in admissions for drug crimes has resulted in a higher proportion of incoming inmates facing relatively shorter sentences.<sup>103</sup> In 2002, 28,229 inmates were released from Illinois Department of Corrections facilities.<sup>104</sup> These inmates had an average prison stay of 1.4 years, though fully half of them were in prison for less than eight months.<sup>105</sup> The number of prisoners released in 2002 increased by 11.6% over 2001, and is up 60% over ten years ago.<sup>106</sup> Given that the census is conducted relatively infrequently and increasing numbers of prisoners are incarcerated for extremely short periods of time, it becomes increasingly illogical to qualify those prisoners as residents of their prison community.

The massive number of short-stay prisoners tends to overshadow the increases in longer-stay prisoners when looking at data such as exit numbers and average prison stay.<sup>107</sup> Yet, the number of prisoners in Illinois

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 14.

<sup>98</sup> *Id.*

<sup>99</sup> Cook County, Illinois is home to the state's largest city, Chicago.

<sup>100</sup> ILL. DEP'T. OF CORR., 2003 DEP'T. DATA (2004), [http://www.idoc.state.il.us/subsections/reports/department\\_data/Department%20Data%202004.pdf](http://www.idoc.state.il.us/subsections/reports/department_data/Department%20Data%202004.pdf).

<sup>101</sup> HEYER & WAGNER, *supra* note 9.

<sup>102</sup> ILL. DEP'T. OF CORR., STATISTICAL PRESENTATION 2003, at 6 (2004), *available at* [http://www.idoc.state.il.us/subsections/reports/statistical\\_presentation\\_2003/2003StatisticalPresentation.pdf](http://www.idoc.state.il.us/subsections/reports/statistical_presentation_2003/2003StatisticalPresentation.pdf) [hereinafter ILL. CORR. STAT. PRES., 2003].

<sup>103</sup> *Id.* at 4, 25 (supplemental meritorious good time, educational good conduct credits, and earned time incentives have played a role in reducing the average length of incarceration).

<sup>104</sup> *Id.* at 26.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*



who will never be released is growing too, having nearly doubled between 1993 and 2002.<sup>108</sup> As a result of the longer-term sentencing changes enacted in the 1990s, the Director of the Illinois Department of Corrections believes that the number of prisoners in Illinois will increase further in the next couple of years.<sup>109</sup> Such increases will further exacerbate the representational transfer between those communities where prisoners tend to originate and those communities that temporarily house them.

#### B. DOUBLE WHAMMY: THE EFFECTS OF EXPLOSIVE INCARCERATION AND THE APPLICATION OF THE “USUAL RESIDENCE RULE”

The U.S. Census Bureau’s policy of counting prisoners at their place of incarceration results in the Bureau’s failure to live up to its mantra: “Helping you make informed decisions.”<sup>110</sup> Businesses, governments, policy makers, taxpayers, prisoners, and citizens are all misinformed. The “usual residence rule” may be an effective way to efficiently acquire a large, difficult-to-collect data set within an acceptable margin of error for the majority of people. However, the sheer number of incarcerated individuals living in dense<sup>111</sup> institutions sited in some of the least dense communities in the country for relatively short periods of time<sup>112</sup> clearly presents a misleading data set.

Beyond apportionment, governments and public sector aid agencies like the United Way use Census data to examine the financial well-being of a community and anticipate any needs that community may develop.<sup>113</sup> If these agencies are looking at a good data set, they may be able to divert resources to where they are needed most. For example, declining populations are often a sign of economic weakness.<sup>114</sup> In the 2000 census, one in fifty U.S. counties where Census Bureau data shows an expanding

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<sup>108</sup> In 1993 there were just over 800 prisoners who would never be released and in 2002 there were more than 1,400. *Id.* at 16.

<sup>109</sup> *Id.* at xi.

<sup>110</sup> See U.S. Census Bureau, <http://www.census.gov/> (last visited Oct. 23, 2005).

<sup>111</sup> At the close of 2002, the Illinois Department of Corrections adult incarceration facilities were dramatically over capacity. In facilities designed to house 31,351 inmates lived 42,693 inmates—36.2% over the stated capacity. Clearly, this population group lives in housing of far greater density than found in any of the nation’s dense metropolises, let alone in the types of communities which generally house prisoners. Ill. Corr. Stat. Pres., 2003, *supra* note 102, at 4.

<sup>112</sup> *Id.* at 26.

<sup>113</sup> ALLARD & LEVINGSTON, *supra* note 9, at 3 (describing how the United Way of the Texas Gulf utilizes Census data for aid delivery).

<sup>114</sup> Peter Wagner, *Prison Expansion Made 56 Counties with Declining Populations Appear to be Growing in Census 2000*, PRISONERS OF THE CENSUS, Apr. 26, 2004, <http://www.prisonersoftheCensus.org/news/fact-26-4-2004.shtml>.

population—a mark of a healthy economy—was actually shrinking when prisoners were removed from the equation.<sup>115</sup> Thus, a government or aid agency looking to spot potential economic distress before it ravages a community would get a completely misleading picture of the well-being of these counties.<sup>116</sup> We can see this phenomenon when we look at Perry County, Illinois, where Census Bureau data shows that the population grew by 1,682 people, while a prisoner-adjusted picture shows that the true members of the Perry County community, its free population, actually shrunk by 492 people from 1990 to 2000.<sup>117</sup> Perry County is one of seven such counties in Illinois and fifty-six nationwide.<sup>118</sup>

In 2000, the African-American share of the Illinois incarcerated population was 65%<sup>119</sup> while the African American share of the total Illinois population was only 15%.<sup>120</sup> As a result of the “usual residence rule” and its application to prison populations, in 173 U.S. counties more than 50% of the African-American residents are behind bars.<sup>121</sup> Illinois is home to nineteen of these 173 counties – more than 10% of the national total.<sup>122</sup> For example, Brown County, Illinois holds the highest percentage of African-Americans in one community behind bars—99.6%.<sup>123</sup> Brown County’s census-delineated African-American population in 2000 was 1,265 strong, yet all but five were incarcerated.<sup>124</sup> Clearly, the Census Bureau’s race statistics give an incorrect picture of American communities.

While there is debate about the amount of state and federal funding that follows strictly population-based formulas, it is clear that there is a

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> ILL. DEP’T. OF CORR., DEP’T. DATA 2000, available at [http://www.idoc.state.il.us/subsections/reports/department\\_data/Department%20Data%202000.pdf](http://www.idoc.state.il.us/subsections/reports/department_data/Department%20Data%202000.pdf) (last visited Nov. 15, 2005).

<sup>120</sup> U.S. CENSUS BUREAU, AMERICAN FACTFINDER: QUICK TABLES: RACE, COMBINATIONS OF TWO RACES, AND NOT HISPANIC OR LATINO: 2000, [http://factfinder.Census.gov/servlet/QTTable?\\_bm=y&-geo\\_id=04000US17&-qr\\_name=DEC\\_2000\\_SF1\\_U\\_QTP4&-ds\\_name=DEC\\_2000\\_SF1\\_U&-\\_lang=en&-\\_sse=on](http://factfinder.Census.gov/servlet/QTTable?_bm=y&-geo_id=04000US17&-qr_name=DEC_2000_SF1_U_QTP4&-ds_name=DEC_2000_SF1_U&-_lang=en&-_sse=on) (last visited Nov. 15, 2005).

<sup>121</sup> Peter Wagner, *Outdated Methodology Impairs Census Bureau’s Count Of Black Population*, PRISONERS OF THE CENSUS, May 3, 2004, <http://www.prisonersoftheCensus.org/news/fact-3-5-2004.shtml> (excluding counties with fewer than 100 incarcerated African-Americans).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

financial benefit to prison-hosting communities.<sup>125</sup> While prisoners do not generally receive any benefit from the funding that goes to the community just beyond the barbed wire fences, prisoners add to the population rolls, and therefore the hosting community receives population-based funding from state and federal governments for their name, but not for their benefit. For example, Crest Hill, Illinois earns \$270,000 from such population-based assistance.<sup>126</sup> In Pontiac, Illinois, the City Administrator claims that the town gains \$120,000 annually as a result of prisoners being counted in Pontiac by the Census Bureau.<sup>127</sup> In Johnson County, Illinois, the town's budget nearly doubles to \$3.4 million as a result of \$1.5 million per year in population-based funding received due to the census including Johnson County's 2,955 prisoners as residents of Johnson County.<sup>128</sup>

The vast majority of released inmates return to their home county after incarceration.<sup>129</sup> Indeed, in Illinois the state provides exiting prisoners with a bus ticket to their intended residence within the state.<sup>130</sup> The vast majority of the time, the intended destination is where they came from, their home community.<sup>131</sup> Fifty-three percent of Illinois prisoners released in 2001 returned to the City of Chicago; 62% returned to Cook County.<sup>132</sup> Of the prisoners who were released to Cook County, 66% had served less than one year in prison.<sup>133</sup> An additional 15% had served between one and two years.<sup>134</sup> It is in Cook County where they will use the services that population-based funding provides and where they will use their political representatives, yet it is downstate communities which draw additional representation and funding from the prisoners' presence on Census Day.

The value of political representation is dramatically skewed in a large number of counties in Illinois, and across the nation. Of the ten states with the most prisons in the United States, one in every five counties had 1% or

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<sup>125</sup> See generally Lotke & Wagner, *supra* note 7, at 601-05.

<sup>126</sup> Molly Dugan, *Census Dollars Bring Bounty To Prison Towns*, CHI. REP., July, 2000.

<sup>127</sup> *Id.*

<sup>128</sup> Osnos & McRoberts, *supra* note 71.

<sup>129</sup> Dugan, *supra* note 126.

<sup>130</sup> Telephone Interview with Officer Cotton, Big Muddy River Correctional Institution, in Ina, Ill. (Dec. 3, 2004).

<sup>131</sup> *Id.*

<sup>132</sup> NANCY G. LA VIGNE & CYNTHIA A. MAMALIAN, URBAN INST. JUST. POL'Y CTR., A PORTRAIT OF PRISONER REENTRY IN ILLINOIS 46 (2003), [http://www.urban.org/UploadedPDF/410662\\_ILPortraitReentry.pdf](http://www.urban.org/UploadedPDF/410662_ILPortraitReentry.pdf). Ninety-seven percent of Illinois prisoners released in 2001 were released to communities in Illinois. *Id.*

<sup>133</sup> *Id.* at 50.

<sup>134</sup> *Id.*

more of its census delineated population behind bars.<sup>135</sup> In Illinois, 26 of 102 counties (25%) had more than 1% of their population behind bars, twelve had 5% or more incarcerated, and two counties had more than 20% of their apportioned residents in prison.<sup>136</sup>

The Census Bureau's "usual residence rule" does not properly compute local populations when millions of people incarcerated in state and federal penitentiaries are fed into the enumeration machine as though they were a part of a community to which they simply do not belong. The costs are great—prison communities like Perry and Brown Counties receive greater political representation and financial assistance at the cost of those communities which tend to export prisoners—counties like Cook County.<sup>137</sup>

### III. ONE PERSON, ONE VOTE: AN EXAMINATION OF THE RELEVANT FEDERAL CONGRESSIONAL AND STATE LEGISLATIVE CASE LAW

#### A. AS EQUAL AS IT GETS: APPORTIONMENT OF U.S. CONGRESSIONAL DISTRICTS AFTER *WESBERRY V. SANDERS*

The congressional apportionment standard was set by *Wesberry v. Sanders*.<sup>138</sup> In that case, the Supreme Court ruled that the congressional districting in Georgia, which included some districts that contained two to three times more people than other districts, violated the Equal Protection Clause of the Fourteenth Amendment.<sup>139</sup> The Court ruled, "We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."<sup>140</sup>

Following *Wesberry*, this quote has become the guiding principal in congressional apportionment cases. As cases in this line have been more fully fleshed out, it has become clear that the Supreme Court, and any court hearing such a case, will apply a strict test to determine whether or not the state has proposed a plan that is legitimately "as nearly as practicable."<sup>141</sup>

In *Karcher v. Daggett*, the Supreme Court showed just how serious it was about population equality in congressional districts.<sup>142</sup> In that case, the

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<sup>135</sup> LAWRENCE & TRAVIS, *supra* note 9, at 32.

<sup>136</sup> *Id.* at 31.

<sup>137</sup> *See supra* Part II.B.

<sup>138</sup> 376 U.S. 1 (1964).

<sup>139</sup> *Id.* at 7-8.

<sup>140</sup> *Id.*

<sup>141</sup> *Karcher v. Daggett*, 462 U.S. 725 (1983).

<sup>142</sup> *Id.*

New Jersey legislature was prohibited from implementing a reapportionment plan in which the average district differed from the ideal district size<sup>143</sup> by just .1384%, or about 726 people.<sup>144</sup> However, the legislature had rejected other plans before it with even smaller average deviations from the ideal.<sup>145</sup>

More relevant to the issue at hand, however, was the Court's statement that the "Census data count represents the 'best population data available,' it is the only basis for good-faith attempts to achieve population equality."<sup>146</sup> In making this statement, the Court cited *Kirkpatrick v. Preisler*.<sup>147</sup> In *Kirkpatrick*, the Court held that Missouri's redistricting plan did not satisfy the "as nearly as practicable" standard because the 25,000-plus population difference between the largest and smallest districts was avoidable.<sup>148</sup> Missouri attempted to justify deviations by saying that the population differences between districts were the result of a legislative attempt to factor in projected population shifts.<sup>149</sup> The Court stated that "where substantial population shifts . . . can be predicted with a high degree of accuracy, States that are redistricting may properly consider them. . . . Findings as to population trends must be thoroughly documented and applied throughout the state in a systematic, and not ad hoc, manner."<sup>150</sup> Missouri, however, did not make a consistent or systematic projection and had relied on less accurate data than the Census Bureau provided.<sup>151</sup>

In *Karcher*, the Court left open the possibility that states could use data other than the Census data or even modified Census data in determining apportionment, stating, "Attempts to explain population deviations on the basis of flaws in Census data must be supported with a precision not achieved here."<sup>152</sup> The Court continued, stating,

We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives as long as those objectives were consistent with a good-faith effort to achieve population equality at the same

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<sup>143</sup> Ideal district size is the total apportionment base divided by the number of congressional districts allocated to a particular state by the Congress. *Id.* at 728.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 738 (citations omitted).

<sup>147</sup> 394 U.S. 526 (1969).

<sup>148</sup> *Id.* at 534-35.

<sup>149</sup> *Id.* at 535.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 529.

<sup>152</sup> *Karcher v. Daggett*, 462 U.S. 725, 738 (1983).

time. . . . [T]he State bears the burden of justifying the differences with particularity.<sup>153</sup>

The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whatever deviations are justified requires case-by-case attention to these factors.<sup>154</sup>

Thus, the Supreme Court has given guidance that a clearly articulated, consistently applied, legitimate state interest may justify either deviation from strict population equality in congressional districts or the use of modified Census data or alternative population estimates. However, no court has upheld such a state policy and the rule remains fairly clear — congressional districting is to be decided on a population basis without regard to local interests or political deal-making. The intriguing possibility remains, however, that a state with a clear, well-reasoned, consistently applied policy could defend adjustments to Census data as a legitimate state interest.

#### B. STATE PRIORITIES: STATE LEGISLATIVE APPORTIONMENT AFTER *REYNOLDS V. SIMS*

The seminal case in state legislative redistricting is *Reynolds v. Sims*, which outlined the fundamental question in evaluating any legislative districting scheme that a state may employ: “whether there has been any discrimination against certain of the State’s citizens which constitutes an impermissible impairment of their constitutionally protected right to vote.”<sup>155</sup> In *Reynolds*, the Court examined the apportionment of representatives in the Alabama Legislature and found that a scheme which weighted the votes of some at two, five, or ten times the power of votes in another district violated the Equal Protection Clause of the Fourteenth Amendment.<sup>156</sup>

The *Reynolds* Court, enunciating the same basic principles as in *Wesberry*, used high-minded American idealism in outlining the essential nature of American democracy and the fundamental imperative that each vote should be afforded essentially the same weight in any legislative

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<sup>153</sup> *Id.* at 739 (citations omitted).

<sup>154</sup> *Id.* at 741 (citations omitted).

<sup>155</sup> 377 U.S. 533, 561 (1964).

<sup>156</sup> *Id.* at 569.

districting scheme.<sup>157</sup> The Court outlined the general principle for legislative apportionment, stating, "The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races."<sup>158</sup> Indeed, the Court recognized this distinction in guiding judicial inquiries, stating:

So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests cast votes.<sup>159</sup>

Clearly, then, a state may consider state interests in apportioning state legislative districts to a degree that would be unacceptable in the congressional apportionment context.

Following *Wesberry*, the Court in *White v. Regester*<sup>160</sup> established the rule that prevails today: population in state legislative districts is not to deviate by more than 10%.<sup>161</sup> More specifically, because the total population deviation is calculated by adding the deviation of the most under-populated district to the deviation of the most over-populated district, state legislatures generally try to make sure that no single district varies from the ideal district size by greater than 5%.<sup>162</sup> However, neither federal case law nor any statute indicates that a state must utilize data from the U.S. Census Bureau in apportioning representatives. In fact, in *Borough of Bethel Park v. Stans*, the Third Circuit stated that "although a state is entitled to the number of representatives in the House of Representatives as determined by the federal census, it is not required to use these census figures as a basis for apportioning its own legislature."<sup>163</sup>

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<sup>157</sup> *Id.* at 565-69.

<sup>158</sup> *Id.* at 568.

<sup>159</sup> *Id.* at 579-80.

<sup>160</sup> 412 U.S. 755 (1973).

<sup>161</sup> *Id.* at 764 (citations omitted) (noting that differences between the largest and smallest district may not be more than 10% when compared to the ideal district size would "not be tolerable without justification 'based on legitimate considerations incident to the effectuation of a rational state policy'").

<sup>162</sup> See *Mahon v. Howell*, 410 U.S. 315, 330-32 (1973).

<sup>163</sup> 449 F.2d 575, 583 n.4 (3d Cir. 1971).

### C. CHALLENGING THE COUNT: ATTEMPTS TO MODIFY THE “USUAL RESIDENCE RULE” THROUGH LITIGATION

Challenges have been brought against the Census Bureau’s application of the “usual residence rule,” though they have thus far been unsuccessful.<sup>164</sup>

*Bethel Park* involved a challenge to the application of the “usual residence rule” to “college students, members of the Armed Services stationed in the United States, and inmates of institutions.”<sup>165</sup> The challengers asserted that as a result of the “usual residence rule” the population of their districts was undercounted as the districts tended to export more people in the aforementioned categories than they imported.<sup>166</sup> The court noted that the Constitution granted broad discretion to the Census Bureau and did not dictate a specific enumeration method.<sup>167</sup> The court held that the Census Bureau used a “historically reasonable means of interpreting the Constitutional and legislative phrase ‘whole number of persons in each state.’”<sup>168</sup> The court reviewed the case of students and members of the armed services at length, finding the “usual residence rule” appropriate.<sup>169</sup> The court gave one paragraph to institutional inmates, including those in mental institutions, penitentiaries, homes for the needy, and hospitals for the chronically ill.<sup>170</sup> The court stated that as inmates have “no other fixed place of abode and the length of their institutional stay is often indefinite . . . we think that the decision of the Bureau as to the place of counting institution inmates has a rational basis.”<sup>171</sup>

The court’s short treatment of the application of the “usual residence rule” to prisoners in *Bethel Park* occurred in 1971, prior to the explosion in prison populations.<sup>172</sup> In subsequent challenges to the “usual residence rule” that are unrelated to prison populations, courts have continued to grant wide leeway to the Census Bureau to conduct the census in the way in which it sees fit.<sup>173</sup>

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<sup>164</sup> See, e.g., *id.*

<sup>165</sup> *Id.* at 577.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 578.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 579-81.

<sup>170</sup> *Id.* at 582.

<sup>171</sup> *Id.*

<sup>172</sup> See *supra* Part II.A.1.

<sup>173</sup> See *Franklin v. Massachusetts*, 505 U.S. 788 (1992).



#### IV. TAKING MATTERS INTO THEIR OWN HANDS: THE EFFICACY AND LEGALITY OF STATE BASED ADJUSTMENTS TO CENSUS DATA

Three options exist to correct the inequities created by the application of the “usual residence rule” to the more than 2.2 million incarcerated people in the United States.<sup>174</sup> First, and least likely in the short term,<sup>175</sup> the Census Bureau could change its enumeration methodology; second, and also unlikely, the states could individually undertake their own census; third, states could modify the Census data to meet state priorities and conceptions of fairness.<sup>176</sup>

While the number of congressional seats apportioned to each state is determined by the federal government,<sup>177</sup> it is up to each individual state to determine the Congressional and state legislative district maps within that state.<sup>178</sup> Thus, while a state legislature may not be able directly to force the Census Bureau to alter its enumeration policy, the legislature does have some latitude in determining what data source to use and how to use it. Therefore, within the Constitutional framework outlined by *Reynolds* and *Wesberry* and their progeny, a state may be able to correct the effects of the “usual residence rule.”<sup>179</sup>

It is worth noting that, symptomatic of the problem at hand, a state legislator attempting to promote representational fairness in his state will find, perversely, that the power imbalance this enumeration method creates makes change a decidedly uphill battle.<sup>180</sup> If a legislator is successful in

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<sup>174</sup> *Texas Bill Shows States Could Correct Census Counts of Prisoners*, PRISONERS OF THE CENSUS, July 19, 2004, <http://www.prisonersofthecensus.org/news/fact-19-7-2004.shtml>.

<sup>175</sup> However, Congress recently directed the Bureau of the Census to “undertake a study on using prisoner’s permanent homes of record, as opposed to their incarceration sites, when determining their residences. The Bureau should report back to the Committee on its findings within 90 days of enactment of this Act.” H.R. REP. NO. 109-118, AT 83 (2005) [hereinafter *Congressionally Mandated Study*].

<sup>176</sup> *Id.*

<sup>177</sup> See *supra* Part I.A.

<sup>178</sup> *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969).

<sup>179</sup> *Id.*

<sup>180</sup> State legislators around the country have acknowledged that while they may have a large prison population in their district, they do not consider the inmates to be their constituents and they are certain that if the prisoners were allowed to vote they would not vote for the incumbent legislator in the prisons district. See, e.g., Amaris Elliott-Engel, *Who Should Count Auburn’s Prisoner’s?*, CITIZEN (Auburn, N.Y.), Mar. 4, 2005 (quoting New York State Senator Michael Nozzolio, whose district includes eight prisons, as saying “I really haven’t focused on [state prisoners]”); *Counting Urban Prisoners as Rural Residents Counts out Democracy in New York Senate*, PRISONERS OF THE CENSUS, Dec. 1, 2003, <http://www.prisonersofthecensus.org/news/fact-1-12-2003.shtml> (“The inmates at Attica prison in western New York state are represented in Albany by state Sen. Dale Volker, a

bringing prisoners to his community through new or added prison space or by annexing a prison from an unincorporated community, and thus gains power, the representative will be hesitant to change the system.

No state presently attempts to modify Census data to shuffle around a particular class of state residents prior to congressional apportionment, though cases in the *Wesberry* line have certainly left open the prospect. The possibility of a state modifying Census data, using some other set of data, or even drawing congressional districts with some level of departure from the ideal district size is an intriguing, yet difficult course of action. While the Supreme Court has said that a state interest, consistently applied and rationally defended may pass muster,<sup>181</sup> it has not as of yet shed light on any examples of such a case. However, in light of the strong case for the inequities created by the present enumeration method and the possibility that a state could convincingly argue that such modifications were necessary to further state equality and representational strength, a state could most certainly test these waters.<sup>182</sup>

While no state modifies Census data for congressional districting, the State of Kansas offers a useful model in the state legislative arena. Kansas modifies census population data prior to legislative districting.<sup>183</sup> The Kansas Constitution calls for a state-run census to be undertaken according to chapter 61 of the 1987 Session Laws of Kansas<sup>184</sup> for district apportionment to be undertaken in 1989. Then, in 1992 and in “every tenth

conservative Republican who says it’s a good thing his captive constituents can’t vote, because if they could, ‘They would never vote for me.’”); Stinebrickner-Kauffman, *supra* note 7, at 303.

I sent to all members of the lower house of the Indiana state legislature a brief survey that included the following question:

“Which inmate would you feel was more truly a part of your constituency?

“a) An inmate who is currently incarcerated in a prison located in your district, but has no other ties to your district.

“b) An inmate who is currently incarcerated in a prison in another district, but who lived in your district before being convicted and/or whose family still lives in your district.

Every single one of the forty respondents who answered the question—regardless of their political party or the presence or absence of a prison in their district—chose answer (b). Had the responses been more ambiguous there might have been reason to repeat the survey with other groups of legislators. However, unless there is something highly anomalous about Indiana, it is quite clear that representatives do not consider inmates to be constituents of the districts in which they are incarcerated—unless, of course, they happen to have prior ties to those districts.”

*Id.*; see also *supra* notes 76-78 and accompanying text.

<sup>181</sup> *Karcher*, 462 U.S. at 739.

<sup>182</sup> See *supra* Part II.B.

<sup>183</sup> See KAN. CONST. art. 10 § 1; KAN. STAT. ANN. § 11-205 (1988).

<sup>184</sup> Subsequently codified as KAN. STAT. ANN. § 11-205 (1988).

year thereafter”<sup>185</sup> the legislature is to draw congressional lines using the federal Decennial Census published by the Census Bureau.<sup>186</sup> However, the Kansas Constitution requires that the legislature modify the Census data prior to apportionment.<sup>187</sup> These modifications include directives to reapportion students resident in the state to their legal home address, to exclude non-resident military, and to include resident military at their legal residence.<sup>188</sup> Interestingly, chapter 61 of the 1987 Session Laws of Kansas requires a state-run census employing similar enumeration policies, though they include several additional provisions that are not in line with the normal U.S. Census Bureau’s “usual residence rules.”<sup>189</sup> Specifically, amongst other provisions, the law requires that the Kansas Secretary of State

enumerate residents by county, township, city, ward and precinct in which they reside. For the purpose of determining residence<sup>190</sup> . . . the residence of persons living in state hospitals and state benevolent and correctional institutions shall be the place such persons resided before entering the hospital or institution unless such residence has been abandoned and new legal residence established at the time of such enumeration.<sup>191</sup>

While the residence of prisoners was defined as their previous address in the 1989 one-time census, this provision was not readjusted in subsequent decennial census enumerations while other adjustments were retained. It is not clear why the change occurred. However, as both the statute and the constitutional provision were condoned by the Kansas Supreme Court<sup>192</sup> and no further action was undertaken at either the state or federal level, it is clear that this type of modification may be made.

In Illinois, where inmate incarceration rates and prison construction have in many ways mirrored those seen around the nation,<sup>193</sup> journalists and legislators alike have taken note, and have started to take action. On February 2, 2005, Democratic Illinois State Representative Arthur L. Turner from the Ninth District in Chicago, a Deputy Majority Leader in the Illinois General Assembly, introduced legislation to modify U.S. Census Bureau data to reallocate prisoners to their last home address prior to

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<sup>185</sup> KAN. CONST. art. 10 § 1, cl. 1(a).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> KAN. STAT. ANN. § 11-205 (1988).

<sup>190</sup> *Id.*

<sup>191</sup> KAN. STAT. ANN. § 11-205(f) (1988).

<sup>192</sup> *In re Stephan*, 775 P.2d 663, 670 (1989).

<sup>193</sup> LAWRENCE & TRAVIS, *supra* note 9, at 51-52.

incarceration for redistricting of all state political subdivisions.<sup>194</sup> While this legislation only affects state legislative districting and not federal congressional districting or federal population-based funding, it reflects attempts legislators are making to correct a perceived enumeration injustice, as well as their belief that such adjustments will pass Constitutional muster.<sup>195</sup>

The legislation introduced by Rep. Turner would mandate that each governmental entity in the state that “operates a facility for the incarceration of persons convicted of a criminal offense, including a mental health institution for those persons, or that places any person convicted of a criminal offense in a private facility to be incarcerated on behalf of the governmental entity” shall produce a report including the name, age, and last address of residence before incarceration of each person incarcerated within that facility on Census Day.<sup>196</sup> In addition, the same information for inmates of federal incarceration facilities operated within the state will be requested from the appropriate body.<sup>197</sup> Once such data is acquired, the Illinois Secretary of State would be required to adjust the Census data such that it appears as “if the person resided at that address on the day for which the Census reports population”<sup>198</sup> and remove the prisoner from the population counts for the district in which the Census Bureau originally enumerated that prisoner on Census Day.<sup>199</sup>

In the context of *Reynolds*, it is clear that courts will be less strict in scrutinizing state legislative districting plans than in the *Wesberry*-guided

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<sup>194</sup> Ill. Gen. Assemb. H.B. 0906, 94th Gen. Assemb. (Ill. 2005). A largely identical bill was introduced in the New York State Senate by Senator Schneiderman. Sen. S. 2754, 2005 (N.Y. 2005). Senator Schneiderman’s bill, however, includes adjustments for congressional districts as well as state legislative districts. *Id.* § 3-112. In 2001 Texas Representative Harold Dutton (D-Houston) introduced a similar bill to re-apportion inmates to their pre-incarceration home of record. H.R. HB 2639, 2001 Leg., 77th Reg. Sess. (Tex. 2001); *Texas Bill Shows States Could Correct Census Counts of Prisoners*, PRISONERS OF THE CENSUS, July 19, 2004, available at <http://www.prisonersofthecensus.org/news/fact-19-7-2004.shtml>. This bill did not pass the Texas legislature, though it was approved by the Elections Committee. *Id.* In addition, Kansas has in the past adjusted Census data to reapportion inmates to their home of record. *See supra* text accompanying note 148. *See also* H.R. 1632, 106th Cong. (1st Sess. 1999) (a proposed bill whereby prisoners whose incarceration costs are paid for by one state yet housed in another state would be enumerated as a resident of the state who pays the incarceration costs); *see also Oversight Hearing, supra* note 42; *see also* Congressionally Mandated Study, *supra* note 175.

<sup>195</sup> *See* ARTHUR L. TURNER, PRISONER CENSUS ADJUSTMENT ACT, H.B. 7338, 93rd Gen. Assembly State of Ill. (2004).

<sup>196</sup> *Id.* § 15.

<sup>197</sup> *Id.* § 20.

<sup>198</sup> *Id.* § 25, cl. 1.

<sup>199</sup> *Id.* § 25, cl. 2.

congressional context.<sup>200</sup> However, the trick here is that while a state interest may be clear, removing prisoners from places like Johnson County where they make up 20% of the population may violate the principle that the “resulting apportionment was . . . based substantially on population and the equal population principle.”<sup>201</sup> As in the *Wesberry*-guided congressional context, however, there is certainly an argument that consistently using corrected population data is in furtherance of a legitimate state interest.

Stirrings of Rep. Turner’s plan have already been seen in one Illinois County. In Knox County, The Knox County Democratic Central Committee challenged the Knox County Board’s exclusion of Henry C. Hill Correctional Center from the population base when apportioning the county’s five districts.<sup>202</sup> The court ruled that the exclusion of a non vote-eligible population from the population base did not violate the Equal Protection Clause, stating: “[T]o require that ineligible voters must always be included in the apportionment base merely because they were included in the census would violate the Equal Protection Clause.”<sup>203</sup> The court presciently continued, clearly delineating the issue at the heart of this comment, stating:

The problem with the plaintiffs’ position would be more readily apparent if the inmate population were 15,000 rather than 1,248. Under such circumstances, if the plaintiffs’ position were adopted, the few eligible voters residing in the same district as the inmates would have voting power equal to that of hundreds of eligible voters in other districts.<sup>204</sup>

Clearly, the issue in Knox County was a microcosm of the problem experienced on a broader scale in Illinois and throughout the nation. The court continued:

Here, the Board recognized that the same type of vote enhancement and dilution would occur on a smaller scale unless they took steps to avoid it. Had the Board adopted the plaintiffs’ position and automatically included an extra 1,248 ineligible voters in a single district, there would have been substantially fewer eligible voters in that district when compared to the other four districts. Thus, the eligible voters in that district would have possessed a disproportionate share of voting power. Accordingly, the Board excluded the non-voting inmates when constructing the districts.<sup>205</sup>

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<sup>200</sup> See *supra* Part III.B.

<sup>201</sup> *Reynolds v. Sims*, 377 U.S. 533, 578 (1964).

<sup>202</sup> *Knox County Democratic Cent. Comm. v. Knox County Bd.*, 597 N.E.2d 238 (Ill. App. Ct. 1992).

<sup>203</sup> *Id.* at 239.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

State legislators around the country would be well served to follow the lead of the Knox County Board and recognize that the present Census Bureau enumeration policy results in prison hosting communities holding a “disproportionate share of voting power” while diluting the representational strength of non-prison-hosting communities.

#### V. CONCLUSION

In the last twenty years the nation’s prison population has grown dramatically.<sup>206</sup> By looking at the effects of the U.S. Census Bureau’s “usual residence rule” as it applies to prisoners in Illinois and throughout the nation, we have seen that a clear injustice for prisoner-exporting communities has resulted from the *policy* decision of the U.S. Census Bureau.<sup>207</sup> Our Founding Fathers believed that the states would be imperative to the effective operation of the census, and that the states’ desires to minimize taxation would suppress any desires to expand population rolls.<sup>208</sup> Now, with taxation based on population a thing of the past,<sup>209</sup> we see communities across the nation, and particularly in Illinois, screaming loudly, “yes, in my backyard!” Prisons have proved a great source of funds for these communities—jobs, political power, and big money from the federal government. Accordingly, we see a contrary situation to what we saw 200 years ago—communities want more people not because they place a premium on representation over money, but because they want both—and they are getting it.

Prison expansion has happened at an alarming rate.<sup>210</sup> Only now are we starting to come to terms with the number of people we put behind bars and the drain it creates on our financial and human resources. Unfortunately, those with disproportionate political power as a result of the Census Bureau’s “usual residence rule” are the ones who will be most vociferous in their desire to maintain present incarceration policy.<sup>211</sup>

The courts have issued numerous opinions regarding representative apportionment on the state legislative as well as on the federal congressional level.<sup>212</sup> Unfortunately, it is not precisely clear from these decisions whether or not a state which altered Census data prior to apportionment would be overruled by the Court. Fortunately, however,

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<sup>206</sup> LAWRENCE & TRAVIS, *supra* note 9, at 2.

<sup>207</sup> See *supra* Part II.B.

<sup>208</sup> See *supra* note 41 and accompanying text.

<sup>209</sup> U.S. CONST. amend. XVI.

<sup>210</sup> LAWRENCE & TRAVIS, *supra* note 9, at 2.

<sup>211</sup> See *supra* text accompanying notes 76-78.

<sup>212</sup> See *supra* Part III.B.

there are strong arguments to be made in support of such an attempt, and there is at least one partial success story.<sup>213</sup> Thus, whatever correction method a state feels to be appropriate, whether it be omitting prisoners from the apportionment base altogether or whether it be adjusting Census data to reflect prisoners' true "home of record," the time is ripe for states to make a bold move to correct the injustices of the "usual residence rule."

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<sup>213</sup> See *supra* notes 179-85 and accompanying text.