

One Size Does Not Fit All:

**Why the Census Bureau
Should Change the Way
It Counts Prisoners**

Raising Voices

A Series by the Brennan Center for Justice

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Raising Voices is a series produced by the Criminal Justice Program at the Brennan Center for Justice at NYU School of Law. Our Program's goal is to highlight and address the implications of the criminal justice system in order to make it more just, informed, and effective. We also seek to promote sensible approaches to public safety in all communities through policy and legislative advocacy, public education, and litigation. The Raising Voices series elevates the voices and experiences of low-income communities and communities of color that are often treated most harshly by criminal justice policies but least likely to have a role in shaping them.

One Size Does Not Fit All: Why the Census Bureau Should Change the Way it Counts Prisoners discusses how the Census Bureau's approach to counting people in prison—as residents of prison towns rather than their home towns—hurts communities that lose large numbers of people to prison and runs counter to the Bureau's mission of providing the nation with data that paints an accurate picture of the nation's communities.

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by Patricia Allard, Molly K. Biklen
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Introduction

Through its data collection the Census Bureau aims to provide accurate information about the economy and society to support effective decision-making for policymakers, businesses and the American public, and to ensure equitable distribution of public dollars.¹

Critical changes over the last two decades in the prison and criminal justice systems make the Bureau's current approach to counting prisoners—as residents of their prison towns and not the communities from which they come—one that impedes both of these goals. First, the incarcerated population has more than quadrupled since 1980. While this nation incarcerated 500,000 that year, it locked up just over two million by the end of 2002.² Second, the overwhelming number of prisons in this country are sited in rural areas often hundreds of miles from the urban centers from which the majority of inmates come.³ Given this trend, the Bureau's current approach to prisoner enumeration disserves state and local governments that need accurate demographic data to set policy. In this new climate, the Census Bureau's counting method also disserves communities that prisoners call home, denying them both vital information about how many residents have been lost to (and will return from) prison, and preventing them from receiving their fair share of essential public dollars that support services and programs for families and communities. Finally, the approach disserves people returning home from prison because they are subtracted from the populations in which their interests, if not their bodies, permanently remain.

The Census Bureau must adapt its policies to the changes wrought by the dramatic increase in the number of people in prison. Counting prisoners in their homes of record is the most fair and accurate procedure, and is the best vehicle to ensure the Bureau meets its strategic goals.

Rethinking The Usual Residence Rule

In order to understand why the drastic exodus of people from urban areas to rural prisons makes the Census Bureau's current counting method both unfair and inaccurate, it is useful to compare two groups that the Census currently lumps together in a sort of one size fits all category known as "group quarters": Prisoners and students. Both groups are counted away from home—college students at their universities, and prisoners in their cells.⁴ Although college students and people in prison have very different relationships to the institutions in which they live and, perhaps more significantly, to the surrounding communities, the Bureau enumerates them the same way under the "usual residence rule." In most cases, that rule works to count people at their household, the place where they live and sleep most of the time, and to which they have ties. However, the Census classifies all people not living in individual households as living in "group quarters,"⁵ which include a broad spectrum of facilities where people eat, live and sleep most of the time such as college dormitories, prisons, and nursing homes.⁶

Legal precedent suggests that defining a "home" is more complicated than noting where a person eats her breakfast cereal or lays her head each night. The U.S. Supreme Court, in *Franklin v. Massachusetts*,⁷ recognized that the "usual residence" concept has a more expansive meaning than "mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place."⁸ Unlike college students living away from their home of origin, incarcerated people do not become active members of the communities in which their prisons are located. Their only options are to maintain enduring ties with their home communities, or maintain no ties at all. The Bureau's failure to acknowledge this reality results in an inaccurate population allocation of prisoners to communities that do not reflect or address their interests. It also unfairly penalizes their home communities by denying them their fair share of public dollars and data to inform sound policymaking.

For purposes of the student v. prisoner comparison, patterns of mobility are telling and, in at least two ways, quite distinct. Unlike incarcerated people, college students generally select the institution they will attend, while corrections officials determine where prisoners will be locked away. Next, attending college is a ticket to opportunity that carries students to new places. In contrast, prisoners are much more likely to return to their home communities upon release and, in many cases, are actually required to.

This policy paper describes fundamental differences between students and prisoners that argue for different treatment under Census policy.

Patterns of Mobility

A. Students Move Voluntarily

College students generally select the school they attend, often with care. This choice is based on many factors, one of which may be the city or town in which the college is located.⁹ In fact, students attending a college may come from all over the country. Prospective students often visit colleges before choosing, bringing dollars to a city's tourism and hospitality industries.¹⁰ To attract students and the talent and money they inject into the local economy, colleges pitch themselves and their surrounding communities to prospective college students as places that are youth-friendly and will provide opportunities for students and graduates.¹¹ Even before a student picks a school, then, he is developing a relationship with the institution and the area surrounding it. Thus it is not surprising one court found when someone enters college it is "reasonable to conclude that [a student's] usual place of abode ceases to be that of his parents."¹² Prior to 1950, however, the Census Bureau enumerated college students at their family home. In 1948, The Bureau's Technical Advisory Committee on General Population Statistics completed a study that reviewed "the sharp increase in the number of college students" that were not reported at their colleges or at their parents' homes. The Technical Committee concluded that the most accurate way to enumerate college students is to count them in the states they lived while attending college.¹³

In stark contrast, corrections officials assign prisoners to the institutions in which they serve their sentences without regard for the individuals' interests or needs (i.e. availability of education programs, distance from family, etc.). Prison officials can transfer prisoners, who typically come from low-income communities and communities of color, to different facilities within the prison system, or even extradite them to other states without obtaining the incarcerated person's consent or informing his or her family. Without any control over their location or their right to stay in a location, prisoners cannot be said to "reside" in their place of incarceration.

B. College Graduates Have Greater Mobility Upon Leaving their Institutions

Although many factors influence an individual's mobility, such as family, geography and economic conditions, one predictor of mobility is educational attainment.¹⁴ College graduates and those with advanced degrees are more likely to have job opportunities that take them to different parts of the country. Nationwide, almost 30% of college graduates leave the state in which they earned their degree upon graduation.¹⁵ In some places close to half of college graduates move on.¹⁶ Intrinsically, college is a transitional time in a student's life, one in which many move out of their parents' homes and establish their own.¹⁷ In upholding the Bureau's decision to distinguish between boarding school and college students, enumerating the former at their family homes, the court noted that "older college students, at a transitional stage of their lives," couldn't properly be ascribed to their parents' homes.¹⁸ A federal court agreed with this distinction among students, noting that different conditions warrant

different enumeration standards.¹⁹ The current boarding school—college student distinction is just one example of the Bureau’s flexibility in shaping policy to fit population needs.

Prisoners overwhelmingly return to where they lived prior to their incarceration.²⁰ In fact, prisoners granted conditional release—according to the terms of their parole supervision—may be required to return to the county or district in which they were convicted.²¹ Some states that export prisoners to serve sentences in out-of-state facilities even mandate that those prisoners return to the home state upon release.²²

In many cases, prisoners return to communities with high levels of unemployment, crime and poverty, and few options for affordable housing and rehabilitative services—programs offering vocational training, education or drug treatment.²³ Still, once back in their communities, people under parole supervision may not leave the county to explore opportunities like job prospects in other cities unless they are granted specific permission by the county parole commission to do so.²⁴ This system of parole supervision formally links formerly incarcerated people to their communities of origin.²⁵

The situation for formerly incarcerated people and their communities of origin is unique. They remain inextricably, even legally, bound to each other. To ensure home communities of incarcerated people receive their fair share of census-based public funding—dollars that will aid the integration process of people returning home from prison—and critical data to inform policies, the Census should count prisoners in the communities from which they come and to which they will almost certainly return.

“Enduring Ties and Allegiance” To Community

In the Supreme Court case asserting that the concept of “usual residence” for Census purposes “can mean more than mere physical presence,” the issue before the Court was the enumeration and allocation of overseas employees of the United States—mainly military personnel. Because the last duty addresses in the United States of overseas federal employees were likely to have been “only a work address,” that “may not have reflected the more enduring tie of usual residence,” the Census Bureau decided to allocate overseas federal personnel to their “home of record” as reported by the federal agencies’ administrative records.²⁶ Moreover, as the Supreme Court noted in its explanation of the term “usual residence,” the framers of the Constitution and drafters of the first Census Act understood that even a lengthy absence from one’s home on public or private business did not change the person’s usual residence.²⁷

Like federal employment overseas, incarceration should not change a person’s residence for purposes of the Census. For most prisoners, the prison never becomes “home.” Prisons are generally dangerous places. Sexual and physical assaults can be common.²⁸ A person in prison has no idea from one day to the next whether he’ll be transferred to a new facility. And, perhaps more importantly, as a New York Court observed in the prosecution of a person who listed a prison as his home address “[t]he Tombs is not a place of residence. It is not constructed or maintained for that purpose. It is a place of confinement for all except the keeper and his family, and a person cannot, under the guise of a commitment, or even without any commitment, go there as a prisoner, having a right to be there only as a prisoner, and gain a residence there.”²⁹

While confined in prison, many inmates maintain some connection or allegiance to the communities they left and to which they will return. Most people who are incarcerated leave behind families and children.³⁰ In 1999, 55% of state prisoners and 63% of federal prisoners were parents.³¹ Despite the numerous hurdles incarcerated parents and their children face, continued contact between them is important for the almost 1.5 million children of incarcerated parents and the parents themselves.³² In state prison, 60% of mothers and 40% of fathers reported having at least weekly contact with their children, generally by phone or mail.³³ Because of the harm to children that results from parental separation during long stays in foster care, state and federal child protection laws require parents to remain in contact with their children in order to retain their parental rights.³⁴ Under the federal Adoption Safe Families Act (ASFA), for example, state child welfare workers can request that termination of parental rights proceedings be commenced after a child has been in foster care for fifteen of the last twenty-two months provided the state agency has made reasonable efforts to secure family reunification. Where parents are incarcerated, ASFA allows states to move for termination proceedings even without showing that it has made reasonable efforts to preserve the family. However, termination proceedings may not be commenced where there are compelling reasons demonstrating that termina-

tion of parental rights would not be in the best interest of the child, including presence a strong parent-child bond through regular contacts and parental involvement with a child welfare worker to develop a family service plan.

To support children and counter the effects of parental incarceration, some prisons are beginning to offer programs that help parents connect with their children while in prison. In addition to parenting classes, these programs often facilitate visits between incarcerated parents and their kids by providing transportation, allowing extra visiting time, and increasing contact visits between parents and children.³⁵ These family unification programs and child protection laws, under which an incarcerated parent's sustained contact with their children dictates whether they maintain their parental rights, often cement an inmate's ties with family and other support networks in their home communities. They are one of the most powerful examples of enduring ties and allegiance to community.

Other examples of student and prisoner ties differ. Though both live in group quarters, these populations have very different economic and civic relationships with the towns in which they are temporarily quartered. Unlike prisoners, who are generally confined to a correctional facility psychologically, if not geographically, on the outskirts of town, colleges and college students are central parts of the community. College students can register to vote in their adopted town, while prisoners in 48 of the 50 states cannot vote. Notably in the 2 states that permit prisoners to vote—Maine and Vermont—those inmates vote by absentee ballot back in their home communities. In addition to participating in local politics, college students, unlike incarcerated people, also live and work in the community and utilize local resources, such as public parks and libraries, sidewalks, hospitals, and police protection.

Recommendations

As the Census Bureau reevaluates its residency rules in preparation for the 2010 Census, it should implement these new approaches to counting incarcerated people.

1. Enumerate Incarcerated People as Residents of their Home Communities

The Bureau should enumerate people in prison as residents of their home communities by adopting the “home of record” approach used to enumerate overseas military personnel. In collaboration with state and federal corrections agencies, the Bureau should identify a person’s home community as recorded during the prison admission process or as collected through use of an Individual Census Report (“ICR”). For example, the ICR could be revised to include the question “What was the address of your last residence prior to entering this facility?”

2. Adopt a Uniform Prison Enumeration Process

Census enumeration methods for people in prison vary from facility to facility. In some prisons officials complete census forms on behalf of incarcerated people, while in others officials distribute forms to individuals who complete and return them. The Census Bureau should study the accuracy of the approaches currently utilized and select one to apply uniformly at all prison facilities, ensuring quality control of the counting process.

3. Identify the Informational Needs of Data Users

The Bureau should survey data users who set policies and provide services aimed at meeting the needs of people released from prison and their communities to determine the information necessary to help these data users serve communities effectively.

Endnotes

- ¹ See Bureau of the Census, “U.S. Census Bureau Strategic Plan, FY 2004-2008” at <http://www.census.gov/main/www/strategicplan/strategic03.pdf> (accessed Sept. 29, 2003).
- ² At the end of 2002, there were 2,166,260 prisoners in this country. See <http://www.ojp.usdoj.gov/pressreleases/BJSO3114.htm>. The comparable number in 1980 was approximately 500,000. See <http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm>.
- ³ In New York, for example, while 66% of the state inmates come from New York City, some 91 percent of state inmates are housed outside New York City, the majority in prisons hundreds of miles from the city. See “Importing Constituents: Prisoners and Political Clout in New York” by Peter Wagner (April 22, 2002).
- ⁴ See 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, 49-52 (2000). See also U.S. Bureau of the Census, Plans and Rules for Taking the Census: Residence Rules at www.census.gov/population/www/censusdata/resid_rules.html (accessed on July 10, 2003).
- ⁵ See Bureau of the Census, “Group Quarters,” Glossary at <http://www.census.gov/main/www/cen2000.html> (accessed June 20, 2003). Within the group quarters classification, the census distinguishes between institutionalized and non-institutionalized populations. The Bureau of the Census defines institutionalized populations as “[p]eople under formally authorized, supervised care or custody in institutions at the time of enumeration. Generally, restricted to the institution, under the care or supervision of trained staff, and classified as “patients” or “inmates.”” Id. Noninstitutionalized population is defined as all individuals living in group quarters other than institutions, such as boarding houses, communes, dormitories and religious group homes. *Id.*
- ⁶ See Mehling, *supra* note 4 at 49-52.
- ⁷ 505 U.S. 788 (1992).
- ⁸ *Id.*
- ⁹ See Mary Beth Marklein, *Come for a Diploma, Stay for Life*, USA Today, Apr. 23, 2003.
- ¹⁰ Pennsylvania Economy League, Greater Philadelphia’s Knowledge Industry II, at 21-22 (2000) available at www.peleast.org.
- ¹¹ See Marklein, *supra* note 9.
- ¹² *Borough of Bethel Park v. Stans*, 449 F.2d 575, 581-82 (3rd Cir. 1971).
- ¹³ See *Bethel Park*, 449 F.2d at 579. Census Bureau, Measuring America: Decennial Censuses from 1790-2000 at 70 (2002).
- ¹⁴ Pennsylvania Economy League, Greater Philadelphia’s Knowledge Industry II, at 9 (2000) available at www.peleast.org. See also Indiana’s Human Capital Retention Project, Indiana Fiscal Policy Institute, Graduate Migration from Indiana’s Postsecondary Institutions, March 1999 at 21.
- ¹⁵ See Indiana’s Human Capital Retention Project, *supra* note 14 at 19 (using data from the U.S. Department of Education, National Center for Education Statistics, Baccalaureate and Beyond Longitudinal Study (1996)).

- ¹⁶ *See id.*
- ¹⁷ *See Bethel Park*, 449 F.2d at 581 n.3 (finding that college is a transitional time for many young people).
- ¹⁸ *See id.*
- ¹⁹ *See id.*
- ²⁰ *See* Joan Petersilia, *When Prisoners Return to Communities: Political, Economic and Social Consequences*, 5 *Correct. Mgmt. Quarterly* 1, 1 (2001).
- ²¹ *See, e.g.*, N.Y. *Correct. Law* § 273. *See also* Jeremy Travis, et al, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry*, Urban Institute, 2001.
- ²² *See also* Oversight of the U.S. Census: Examining the Bureau's Policy to Count Prisoners, Military Personnel, and Americans Residing Overseas Hearing Before the Subcomm. On the Census, Committee on Government Reform, 106th Cong., June 9, 1999 (Lexis File Federal News Service) (statement of Mark Green).
- ²³ *See* Petersilia, *supra* note 25 at 3-4. *See also* Nancy G. La Vigne, et al, *A Portrait of Prisoner Reentry in Illinois*, Urban Institute, Research Report 2003.
- ²⁴ *See e.g.*, N.Y. *Correct. Law* § 275.
- ²⁵ *See* Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences*, *Sentencing & Corrections*, November 2000 at 3.
- ²⁶ *Franklin v. Mass.*, 505 U.S. at 795.
- ²⁷ *See id.* at 804-05 (citing 2 Farrand, *Records of the Federal Convention of 1787*).
- ²⁸ *See, e.g.*, Human Rights Watch, *No Escape: Male Rape in U.S. Prisons*, April 2001.
- ²⁹ 143 N.Y. 100 (1894).
- ³⁰ *See* Christopher J. Mumola, U.S. Dep't of Justice, Pub. No. NCJ-182335, *Bureau of Justice Statistics Special Report, Incarcerated Parents and Their Children* (August 2000).
- ³¹ *Id.* at 1.
- ³² Mumola, *supra* note 30 at 1.
- ³³ *Id.* at 5.
- ³⁴ *See* Robert Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption Safe Families Act of 1997*, 83 *Minn. L. Rev.* 637, 648 (1999) (describing legislative concerns about long term foster care placement and foster care "drift," where children are continually moved between placements).
- ³⁵ *See, e.g.*, Gail Braccidiferro, *At a Prison, Obeying the Girl Scout Law*, *N.Y. Times*, July 20, 2003 at 14CN, p. 1 (reporting on a Connecticut girl scouts program that brings incarcerated mothers and their daughters together for a scouting program).

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