

Primer for reporters on redistricting & prison-based gerrymandering

Who should use this primer: Reporters covering county or municipal redistricting in jurisdictions that contain prisons.

What's at stake: Counties and cities that contain large prisons must decide if the people who live immediately adjacent to a prison should receive more political influence than everyone else. Prisoners are counted by the Census as residents of the prison location even though they can't vote and aren't county residents. More than 100 counties and cities across the country refuse to use prison counts to draw districts; but many others fail to notice the problem.

Will your local government allow an obscure Census Bureau practice to change the outcome of all future legislative decisions?

By Peter Wagner, JD¹

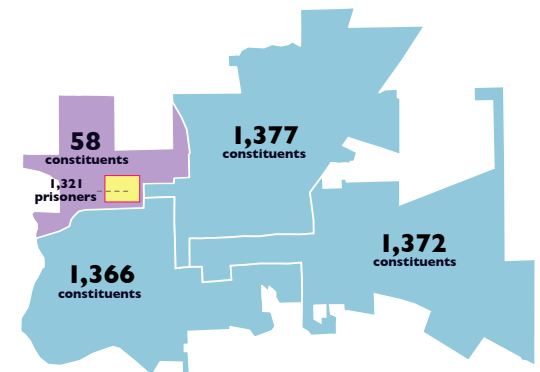
Right now is the time when, once per decade, counties and other local governments must engage in redistricting in order to ensure that each district contains the same population. Redistricting ensures that each resident will have the same access to government, regardless of where she lives.

But sometimes the population data used to draw the districts does not accurately reflect the population in the county and democracy suffers. The Census Bureau's policy of counting people in prison as residents of the prison location creates serious problems for democracy in rural areas.²

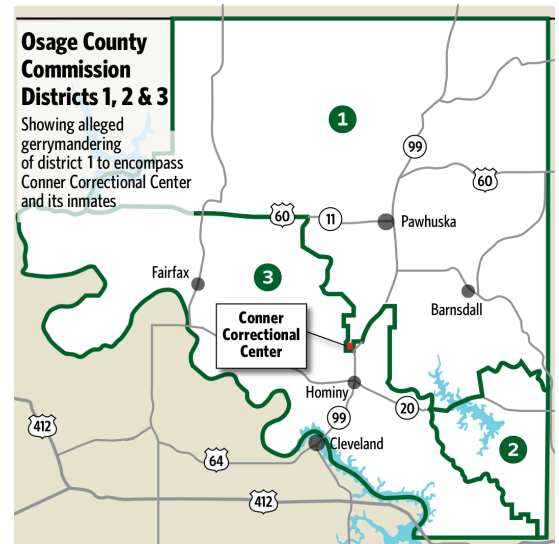
Prison-based gerrymandering is the practice of counting incarcerated persons as "residents" of a prison when drawing legislative districts in order to give extra influence to the districts that contain the prisons. The U.S. Constitution requires that election districts be roughly equal in size, so that everyone is represented equally in the political process. But prison-based gerrymandering distorts our democracy by artificially inflating the population numbers — and thus, the political clout — of districts with prisons, while diluting the political power of all other voters.

With redistricting underway, these communities must choose between correcting the Census or diluting the votes of their own constituents. While the national media tends to focus on prison-based gerrymandering at the state legislative level, the problem is actually most dramatic at the county and municipal level where a single large prison can be the majority of a district.

City Council Wards in Anamosa, Iowa, 2002



Ward 2 is almost entirely incarcerated so the actual residents of the ward receive 25 times the political influence of the other wards' residents.



District 1 in Osage County Oklahoma goes out of its way to include a large prison. The prisoners come from all over Oklahoma, but the prison itself is technically within Hominy City limits in District 3.

¹ Peter Wagner is the Executive Director of the Prison Policy Initiative. For the last decade, he has led a national effort to persuade the Census Bureau to count incarcerated people as residents of their home — not prison — addresses, and worked with state and local governments on interim solutions. An attorney, he is a co-founder of the Massachusetts-based non-profit, non-partisan organization.

² This primer uses the generic words "commissioner", "district", "legislature", "board" and "county" but the principles here apply to all population based electoral systems, including weighted voting and multi-member districts for counties, cities, towns, school boards, etc. See some examples: <http://www.prisonersofthecensus.org/toolkit/section1.html> and don't hesitate to contact us for help.

Many local officials are not aware that:

- Most state constitutions or state election law statutes declare that a person in prison remains a resident of their pre-incarceration address.
- When prisoners are allowed to vote they are required to do so by absentee ballot at their home address.
- Adjusting the Census is common and it is legally permissible under federal law.
- More than 100 rural counties and municipalities already refuse to include prisoners in local districts.
- The Census Bureau will be publishing a special file in May to make these adjustments easier to do.
- Federal or state funding is not affected by how counties draw their local districts.

Most communities that engaged in prison-based gerrymandering after the last Census did not do so deliberately.

With one exception, whenever the public has learned that local districts are being based on prison populations, there was public outcry and the county decided to avoid prison-based gerrymandering by adjusting the census. St. Lawrence County, New York, ignored the public outcry and hired lawyers to invalidate a ballot initiative that challenged the new districts, and then saw angry voters replace the majority of county legislators at the next election.

Questions about local redistricting:

- Is the county or city planning to include the prison population when redistricting?
- Is the local government aware that the Census Bureau will publish the Advance Group Quarters Table in May so that counties can more easily identify the prison populations in the redistricting data?
- Does the county intend to draw one or more districts to allow minority voters to elect the candidate of their choice? And if so, is the county making sure not to confuse the actual and incarcerated populations?

Why this matters: In 1986, Somerset County Maryland agreed to create a majority African-American district to settle a Voting Rights lawsuit, but for two decades, the district was unable to elect an African-American because the district includes the prison population which can not vote. An effective African-American district could have been drawn if the prison population was not included in the population count.

- If the local government cites a state law that requires them to use the prison population when redistricting, do other jurisdictions in the state disregard that law?

“I don't know that I represent [the prisoners].... No one's called me about a pothole.”

—Sumter County Florida Commissioner Randy Mask, whose district includes a large federal prison complex. *Daily Commercial*, March 2, 2011



“Persons incarcerated in state and federal correctional institutions live in a separate environment, do not participate in the life of Essex County and do not affect the social and economic character of the towns.... The inclusion of these federal and state correctional facility inmates unfairly dilutes the votes or voting weight of persons residing in other towns within Essex County....”

Essex County New York Local Law Number 1 of 2003



“The study found ... 59 percent of Dodge [County, Wisconsin's] 31st District ... are prisoners. In these districts, constituents get double the electoral power of other voters. James Layman, the Dodge 31st supervisor, who describes himself as a conservative-leaning independent, says the inequality should be addressed. **‘I think that’s a false presentation because I don’t represent those people,’** he says of the prisoners.”

—“Fuzzy Math: Is the Census Bureau creating unfair politics in Wisconsin?”, by Evan Solochek, *Milwaukee Magazine* March 2008



Things to be aware of:

- Until early May 2011, it may be difficult to find the prisons in the redistricting data as the Census Bureau sometimes puts populations in unexpected locations or mixes prison and non-prison populations in the same census block. We may be able to help you identify these populations in your county's redistricting data now. Contact us if you need help.
- In early May 2011 the Census Bureau will be releasing an Advance Group Quarters Table <http://www.prisonersofthecensus.org/technicalolutions.html> with the group quarters counts, including correctional facilities, for each census block. Hopefully within hours of this file's release, we'll be making it easier to use, with a Google maps interface and ESRI shapefiles. <http://www.prisonersofthecensus.org/data>
- The legislatures or Attorneys General in six states (Colorado, Maryland, Mississippi, New Jersey, New York and Virginia) encourage or even require local governments to avoid engaging in prison-based gerrymandering.
- In a handful of other states, however, there are state constitutional provisions, statutes or attorney general opinions that require or appear to require counties to include the prison populations when redistricting. These state laws are in conflict with federal One Person One Vote standards.

Resources:

- **Preventing Prison-Based Gerrymandering in Redistricting: What to Watch For** is a guide for redistricting advocates, shadow commissions and the media on avoiding prison-based gerrymandering <http://www.prisonersofthecensus.org/news/2011/02/23/preventing/>
- List of counties and municipalities known to have excluded prison populations after the last Census <http://www.prisonersofthecensus.org/local/>
- The Prison Policy Initiative has written county commissioners and city councilors in hundreds of counties and cities to tell them about the problem of prison-based gerrymandering and the solutions. Copies of the letters are available on request.
- **The Democracy Toolkit** is a guide prepared after the 2000 Census to help rural democracy advocates determine whether and how prison populations were distorting democracy in their area. <http://www.prisonersofthecensus.org/toolkit/>

“... [N]o person shall be deemed to have gained or lost a residence, by reason of his or her presence or absence ... while confined in any public prison.”

New York State Constitution Article II §4. British common law and virtually all states define residence as the place a person chooses to be without a current intention to go elsewhere. Most states (Alabama, Arizona, California, Colorado, Connecticut, District of Columbia, Hawaii, Idaho, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, and Washington) have explicit constitutional clauses or statutes similar to that in New York.



“It's a matter of fair representation. The prison population are our guests in our county. They are not voting. They don't pay taxes.”

Oneida County New York Legislator Ed Welsh, R-Utica on why the county should not include incarcerated people in county districts, Utica Observer Dispatch, January 3, 2010.



“It doesn't matter to me. It is just a fair way to count” and “It was the right thing to do.”

Maryland Delegate Joseline Peña-Melnyk and Sen. Catherine Pugh on why they sponsored the successful “No Representation Without Population” Act that counts incarcerated people at home for redistricting purposes even though each had massive prisons in their districts.



- **States are Authorized to Adjust Census Data to End Prison-Based Gerrymandering, and Many Already Do** is a fact sheet, primarily intended for state level redistricting, but it also discusses federal and state laws that allow local governments to adjust the census. <http://prisonersofthecensus.org/factsheets/adjusting.pdf>
- **Fixing Prison-based Gerrymandering After the 2010 Census: A 50 State Guide** includes information on how each state defines residence for incarcerated people and how the prison miscount harms state and local democracy in each state. <http://www.prisonersofthecensus.org/50states/>
- Fact sheets about prison-based gerrymandering at the county and municipal level for California counties, Florida counties, Georgia counties, Iowa cities and counties, Ohio cities, Texas counties, New York cities and counties, and Wisconsin counties are available on request.
- For a detailed discussion of other redistricting issues and the merits of various reform proposals **A Citizen's Guide to Redistricting** by the Brennan Center for Justice can be helpful. http://www.brennancenter.org/content/resource/a_citizens_guide_to_redistricting/
- Website and blog for more information: <http://www.prisonersofthecensus.org>
- Weekly newsletter about prison-based gerrymandering: <http://www.prisonersofthecensus.org/subscribe>

For more information

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“[C]ounting prisoners as residents of the towns in which they are incarcerated is counterproductive....”

Rep. Jennifer Benson D-37th Middlesex, Massachusetts. Her district contains more incarcerated people than any other in the state.



“The Tombs [Prison] 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.”

New York State's highest court in the 1894 case of *People v. Cady* 143 N.Y. 100.



“Inmates under the jurisdiction of the Mississippi Department of Corrections ... are not deemed ‘residents’ of that county or locality, as incarceration cannot be viewed as a voluntary abandonment of residency in one locale in favor of residency in the facility or jail. For purposes of the Census, these individuals should have been counted in their actual place of residence. Such inmates should not be used in determining the population of county supervisor districts for redistricting purposes by virtue of their temporary presence in a detention facility or jail in the county, unless their actual place of residence is also in the county.”

Mississippi Attorney General in Opinion No. 2002-0060 (2002).