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## ONE SIGNIFICANT STEP: HOW REFORMS TO PRISON DISTRICTS BEGIN TO ADDRESS POLITICAL INEQUALITY

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Erika L. Wood\*

### INTRODUCTION

Skyrocketing rates of incarceration over the last three decades have had profound and lasting effects on the political power and engagement of local communities throughout the United States. Aggressive enforcement practices and mandatory sentencing laws have an impact beyond the individuals who are arrested, convicted, and incarcerated. These policies have wide-ranging and enduring ripple effects throughout the communities that are most heavily impacted by criminal laws, predominantly urban and minority neighborhoods. Criminal justice policies broadly impact everything from voter turnout and engagement, to serving on juries, participating in popular protests, census data, and the way officials draw legislative districts. The result is the disengagement, disenfranchisement, and disempowerment of residents of these communities, many of whom have never had direct contact with law enforcement or the criminal justice system.

One of the ways that criminal justice policies impact communities stems from the Census Bureau's policy of counting people who are incarcerated as residents of their prison cells rather than of their home communities, where the majority return within just a few years. This policy results in more than two million people incarcerated on Census Day, being counted as residents of their prison cells for the entire decade following the census.<sup>1</sup>

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\* Professor of Law and Director, Voting Rights and Civic Participation Project, New York Law School. I am grateful to my NYLS colleagues, Susan Abraham, Carol Buckler, Doni Gewirtzman, Carlin Meyer, Frank Munger, Lynnise Pantin, and Edward Purcell for their valuable insight and advice, and the staff of the Mendik Law Library as well as NYLS students Melissa Ruhry, Danielle Miranda, Rachel Searle, and Rachel Blackhurst for their research assistance. Thank you as well to Brenda Wright of Dēmos and Peter Wagner from the Prison Policy Initiative for their wisdom and expertise, and to the editors of the University of Michigan Journal of Law Reform for their thoughtful comments and careful edits. Any omissions, errors or mistakes are entirely my own.

1. The Bureau of Justice Statistics (BJS) estimated the total number of state and federal prisoners at year-end 2010 to be 1,612,395. PAUL GUERINO, PAIGE M. HARRISON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010, at 1 (2011). In addition, BJS estimated that the total population of county and local jails in 2010 was 748,728. TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, JAIL INMATES MIDYEAR 2010—STATISTICAL TABLES 1 (2011). Thus, the total number of incarcerated people in 2010 was estimated to be 2,361,123.

The census counts incarcerated individuals as residents of the prison, grouping them together with non-incarcerated individuals living in the surrounding community to form legislative districts. This inflates the voting strength of the actual constituents who live outside the prison simply because of their proximity to a correctional facility. Critics labeled this phenomenon “prison-based gerrymandering.”<sup>2</sup>

In 2010, New York and Maryland were the first states in the country to pass laws to correct this imbalance. These new laws were in place and implemented in time for the 2011 decennial round of redistricting, the process of drawing new legislative districts for Congress, state, and local legislatures. Under the 2010 laws, officials in New York and Maryland undertook a process to remove each individual who was incarcerated in state prison on Census Day—April 1, 2010—from their prison district and reallocate that person back to his or her home address for purposes of drawing new legislative districts.<sup>3</sup> An analysis of the implementation of the Maryland and New York laws reveals three points that should inform the thinking and advocacy on this issue moving forward.

First, despite the hopes of the Democratic legislators who supported the legislation and the fears of Republicans who opposed it, implementation of the laws did not create a partisan shift in either the Maryland or the New York state legislatures. Democrats did not gain seats, and Republicans did not lose seats as a result of these new laws.<sup>4</sup> Although partisan jousting has consistently obstructed similar laws from passing in other states, this analysis shows that party politics should no longer impede reform.

Second, although they had a minimal effect on state legislative district lines, the 2010 Maryland and New York laws still achieved important results. On the local level, the reallocation of incarcerated people back to their home communities likely corrected the dilution of the voting strength of residents in those home communities. In doing so, these laws begin to address the harms suffered by communities when the criminal justice system intrudes upon our system of democratic representation.

And finally, in addition to these democratic reforms, these laws contribute to the necessary, ongoing conversation about reforming our criminal justice system. Implementation of these laws required

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2. See Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 *STAN. L. & POL'Y REV.* 355, 355 (2011); Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 *WM. MITCHELL L. REV.* 1241, 1242 (2012).

3. See *infra* notes 76–82 and 119–128 and accompanying text.

4. See *infra* notes 130–140 and accompanying text.

Maryland and New York to re-establish a link between each incarcerated individual and his or her home community, signaling a shift away from viewing the goal of incarceration as isolation and segregation and towards viewing the goal as rehabilitation and reintegration.

Part I of this Article explains the problem of prison-based gerrymandering and its effects in Maryland and New York. Part II discusses the 2010 laws and their implementation in both states. Part III explains that the real impact of these laws was the likely correction of vote dilution on the very local level in poor and minority communities disproportionately affected by criminal justice policies, renewing group power that forms the building blocks of legislative districts. Finally, Part IV concludes that these reforms have another value beyond democratic reform; they contribute to a larger conversation about reforming the criminal justice system.

#### I. THE CENSUS AND PRISON-BASED GERRYMANDERING<sup>5</sup>

To fully understand the imbalance created by prison-based gerrymandering, it must be placed in the context of rising incarceration over the past three decades. In the early 1970s, a shift at the state and federal level toward mandatory sentencing structures limited judges' and prosecutors' discretion when sentencing defendants.<sup>6</sup> These mandatory sentencing laws, followed by the "war on drugs" and a wave of "three strikes" laws through the 1980s, caused incarceration rates to skyrocket across the country.<sup>7</sup> From 1920 to 1970, incarceration rates remained stable, hovering around 200,000.<sup>8</sup> But between 1972 and 2004, incarceration rates climbed rapidly, increasing by more than 600 percent.<sup>9</sup> Today there are 2.2 million

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5. Some of the factual research presented in Parts I and II of this Article was originally presented in ERIKA WOOD, DEMOS, IMPLEMENTING REFORM: HOW MARYLAND AND NEW YORK ENDED PRISON GERRYMANDERING (2014), <http://www.demos.org/sites/default/files/publications/implementingreform.pdf>.

6. MARC MAUER, RACE TO INCARCERATE 20 (2006).

7. A thorough exploration of the history of criminal punishment and incarceration in the United States is beyond the scope of this Article, but remains an important and fascinating—yet little known—aspect of American history. For further reading see, for example, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2011); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); DAVID GARLAND, THE CULTURE OF CONTROL (2001); DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY (1990); MARC MAUER, RACE TO INCARCERATE (2006); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011).

8. MAUER, *supra* note 6, at 18.

9. *Id.* at 20.

people in prison in America; by far the highest incarceration rate in the world.<sup>10</sup>

There is no question that these policies disproportionately impact minority communities, particularly African American communities. Today, more than sixty percent of incarcerated individuals are racial minorities.<sup>11</sup> On any given day, one out of every ten African American men in their thirties is in prison or jail.<sup>12</sup> African American men have a thirty-two percent chance of serving time, Latino men a seventeen percent chance, and white men a six percent chance.<sup>13</sup> In other words, African American men are five times more likely to serve time in prison than white men.<sup>14</sup> The lasting impact the criminal justice system has on urban, minority communities explains the significance of how the census counts incarcerated people.

#### A. Census Policy and Redistricting

Once every ten years, the United States conducts the census to determine the country's population. The U.S. Constitution requires this enumeration in order to determine the apportionment for the U.S. House of Representatives, but today census data is used for wide ranging calculations. Federal, state, and local governments use the census data for a variety of purposes. They use census data to plan and prioritize community services such as where to provide additional education, public health, infrastructure, and transportation services. Based on census data, the federal government distributes more than \$400 billion in federal funds to local and state governments each year.

Officials also rely on census data when drawing legislative districts for Congress, the state legislature, and local government.<sup>15</sup> State and local governments rely on data compiled by the Census

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10. Adam Liptak, *U.S. Prison Population Dwarfs That of Other Nations*, N.Y. TIMES, (Apr. 23, 2008), [http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all&_r=0); THE SENTENCING PROJECT, FACTS ABOUT PRISONS & PEOPLE IN PRISON (2014), [http://www.sentencingproject.org/doc/publications/inc\\_Facts%20About%20Prisons.pdf](http://www.sentencingproject.org/doc/publications/inc_Facts%20About%20Prisons.pdf).

11. THE SENTENCING PROJECT, *supra* note 10.

12. *Racial Disparity*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=122> (last visited Sept. 24, 2015).

13. THE SENTENCING PROJECT, *supra* note 10.

14. *Id.*

15. *What We Do*, U.S. CENSUS BUREAU, <http://www.census.gov/about/what.html> (last visited Sept. 24, 2015).

Bureau to draw election district lines, a process known as redistricting.<sup>16</sup> As local populations shift and move, congressional, state, county, and municipal legislative districts must be redrawn to assure that each district has an equal population. This in turn protects the principle of “one person, one vote,” assuring that every voter has equal representation in our government.<sup>17</sup> The Census Bureau produces several data sets used to design election districts. It releases data sets on a rolling basis over a period of about a year after the census is complete. The dataset available for redistricting is created pursuant to Public Law 94-171, called “PL 94-171” data.<sup>18</sup> The PL 94-171 dataset includes age, race, and ethnicity down to individual blocks.<sup>19</sup>

In 1790, the First Decennial Census Act directed the U.S. Census Bureau to enumerate people in their “usual place of abode.”<sup>20</sup> To comply with this requirement, the Bureau established the “usual residency rule” which remains in effect today. Under this rule, on Census Day—April 1 of the decennial year—the Bureau counts each person as a resident of “the place where [that] person lives and sleeps most of the time.”<sup>21</sup> To compile the PL 94-171 data, the Census Bureau enumerates individuals according to the “usual residency” rule.<sup>22</sup>

The Census Bureau classifies certain residential facilities as “Group Quarters,” including college dormitories, military barracks, residential treatment centers, psychiatric hospitals, and adult and juvenile correctional facilities.<sup>23</sup> Group Quarters create a challenge

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16. See Act of Dec. 23, 1975, Pub. L. No. 94-171, 89 Stat. 1023; Establishment of the 2010 Census Redistricting Data Program, 69 Fed. Reg. 26547 (May 13, 2004).

17. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 568–76 (1964) (holding that the Equal Protection Clause requires that legislative seats be apportioned on the basis of population). For a more detailed discussion of the “one person, one vote” principle as it pertains to prison-based gerrymandering, see *infra* notes 57–59, 157–62, and accompanying text.

18. Act of Dec. 23, 1975, *supra* note 16.

19. See *id.*; see also *Public Law 94-171 Requirements*, U.S. CENSUS BUREAU, [http://www.census.gov/rdo/about\\_the\\_program/public\\_law\\_94-171\\_requirements.html](http://www.census.gov/rdo/about_the_program/public_law_94-171_requirements.html) (last visited Sept. 24, 2015). A “census block” is a physical area set by the U.S. Census Bureau; it is the smallest geographic unit for which the Census Bureau collects data. In some cases, it will be the same area as a city block, but especially in rural areas, it can be substantially larger. See *Decennial Management Division Glossary: Census Block*, U.S. CENSUS BUREAU, <https://www.census.gov/dmd/www/glossary.html> (last visited Sept. 24, 2015).

20. Act of Mar. 1, 1790, ch. II, § 5, 1 Stat. 101.

21. *Residence Rule and Residence Situations for the 2010 Census*, U.S. CENSUS BUREAU, [http://www.census.gov/population/www/cen2010/resid\\_rules/resid\\_rules.html](http://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html) (last visited Sept. 24, 2015).

22. See *id.*

23. U.S. CENSUS BUREAU, 2010 AMERICAN COMMUNITY SURVEY/PUERTO RICO COMMUNITY SURVEY GROUP QUARTERS DEFINITIONS 1, [http://www2.census.gov/programs-surveys/acs/tech\\_docs/group\\_definitions/2010GQ\\_Definitions.pdf](http://www2.census.gov/programs-surveys/acs/tech_docs/group_definitions/2010GQ_Definitions.pdf). “Group Quarters” are defined as “a place

for applying the usual residency rule because individuals staying in them sometimes consider somewhere else to be their “home,” regardless of where they slept on Census Day.<sup>24</sup>

Under the usual residency rule, census officials count people who are incarcerated as residents of the correctional facility, because that is where they “live and sleep most of the time.”<sup>25</sup> As a result, over the last three decades of increasing incarceration rates, the Census Bureau counted more than two million individuals as residents of their prison cells rather than their home communities, to which most return in just a few years.<sup>26</sup>

Once the census is complete, states and localities use the data to draw legislative districts for Congress, the state legislature, and local government. By relying on the census data, line drawing officials group incarcerated individuals together with non-incarcerated individuals living in the surrounding area.<sup>27</sup> However, in all but two states, incarcerated individuals cannot vote.<sup>28</sup> Often people in prison have no ties to the local community beyond being sent there by the criminal justice system. Consequently, inmates become “ghost constituents” whose presence helps shape the district, but to whom the legislator representing the district has no connection or

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where people live or stay, in a group living arrangement, that is owned or managed by an entity or organization providing housing and/or services for the residents.” *Id.*

24. Different types of Group Quarters are treated differently under the usual residency rule. College students living away from home are counted at their college residence. Military personnel living in military barracks in the U.S. are counted at the military barracks. Merchant Marines are counted at the onshore U.S. residence where they live and sleep most of the time. People in adult group homes, residential treatment centers, nursing homes and psychiatric hospitals are counted at the facility. Hospital patients are counted at their residence. Of particular note, children who are away from home at boarding school are counted as residents of their parents’ home, but children who are in juvenile detention centers are counted as residents of the detention centers. U.S. CENSUS BUREAU, *supra* note 21; *see also* John C. Drake, *Locked Up and Counted Out: Bringing an End to Prison-Based Gerrymandering*, 37 WASH. U. J.L. & Pol’y 237, 239–40 (2011).

25. *See* U.S. CENSUS BUREAU, *supra* note 21.

26. The question inevitably arises about those sentenced for life who will never return to their home communities. This is a legitimate question, but it is important to keep in mind that nationwide, only about three percent of incarcerated people are sentenced to life without parole. *See* THE SENTENCING PROJECT, *LIFE GOES ON: THE HISTORIC RISE OF LIFE SENTENCES IN AMERICA* 3 (2013), [http://sentencingproject.org/doc/publications/inc\\_Life%20Goes%20On%202013.pdf](http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf).

27. U.S. CENSUS BUREAU, *supra* note 21.

28. Forty-eight states prohibit people from voting while serving a felony sentence in prison. *See* ERIKA L. WOOD, *RESTORING THE RIGHT TO VOTE* 3 (2009); *see also* JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT* (2006). Maine and Vermont are the only two states that do not disenfranchise based on a felony conviction—people in those states may vote while in prison. *Id.* In those two states, incarcerated people maintain residency in their home communities for voting purposes and vote in their home district by absentee ballot; they do not vote in the district where they are incarcerated. *See* ME. REV. STAT. ANN. tit. 21-A, § 112(14); VT. STAT. ANN. tit. 17, § 2122(a).

accountability.<sup>29</sup> The actual constituents who live near the prison enjoy inflated voting strength simply because they live near a correctional facility.<sup>30</sup>

Moreover, because incarceration rates disproportionately impact minority and urban communities, census data ultimately erodes voting strength in these home communities—often located hundreds of miles away—where most incarcerated individuals return.<sup>31</sup> The result is fewer voices and fewer votes, demanding government accountability and representation by local officials. As prison districts artificially inflate, home communities diminish and decline.<sup>32</sup>

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29. Dale Volker, a former New York state senator who represented a district that included a large prison stated that his community “has more cows than people” and that he would choose the cows over incarcerated people as his constituents because “[t]hey would be more likely to vote for me.” Jonathan Tilove, *Minority Prison Inmates Skew Populations as States Redistrict*, NEWHOUSE NEWS SERV., (Mar. 11, 2002), <http://www.prisonpolicy.org/news/newhousenews031202.html>. Prison-based gerrymandering has other troubling implications. A legislator whose district depends on the occupants of a correctional facility to meet its population requirement has every incentive to keep that prison not just open, but filled to capacity. This incentive may influence the legislator’s positions on criminal justice policies and sentencing laws.

30. Prison-based gerrymandering also creates an imbalance between neighboring districts. A district that contains a prison will have inflated voting strength compared to a neighboring district without a prison, creating inequalities between residents of neighboring communities. One of the most stunning examples of this was in Anamosa, Iowa. See Sam Roberts, *Census Bureau’s Counting of Prisoners Benefits Some Rural Voting Districts*, N.Y. TIMES, (Oct. 23, 2008), [http://www.nytimes.com/2008/10/24/us/politics/24census.html?\\_r=0](http://www.nytimes.com/2008/10/24/us/politics/24census.html?_r=0); see also *Anamosa: Prison-based gerrymandering dilutes your vote*, PRISON POLICY INITIATIVE, <http://www.prisonersofthecensus.org/story/Anamosa> (last visited Sept. 24, 2015). During the 2002 election, Anamosa was divided into four City Council wards of about 1370 people each. *Id.* Ward 2 contained a large state prison containing over 1320 incarcerated people. The non-incarcerated population of Ward 2 was fewer than sixty people. *Id.* Ward 2’s constituents therefore wielded twenty-five times more political power than the voters in their neighboring districts. *Id.* The City Councilmember chosen to represent Ward 2 was elected by just two votes total, write-ins from his wife and a neighbor. *Id.*

31. See PATRICIA ALLARD & KIRSTEN D. LEVINGSTON, *ACCURACY COUNTS: INCARCERATED PEOPLE & THE CENSUS 1* (2004), [http://www.brennancenter.org/sites/default/files/legacy/d/RV4\\_AccuracyCounts.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/RV4_AccuracyCounts.pdf); NAT’L RES. COUNCIL OF THE NAT’L ACADS., *ONCE, ONLY ONCE AND IN THE RIGHT PLACE: RESIDENCE RULES IN THE DECENNIAL CENSUS 97* (2006), <http://www.nap.edu/catalog/11727/once-only-once-and-in-the-right-place-residence-rules>; Peter Wagner & Eric Lotke, *Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From*, 24 PACE L. REV. 587, 592 (2004); see also Fletcher v. Lamone, 831 F.Supp.2d 887, 896 (D. Md. 2011) (concluding that “it would certainly be true that at least some prisoners will return to their old communities . . . .”); Little v. LATFOR, No. 2310-2011 at 7 (N.Y. Sup. Ct. Dec. 1, 2011) (noting that there was nothing in the record indicating that people in prison “have any actual permanency in these locations or have an intent to remain.”).

32. For a discussion of vote dilution as it relates to prison-based gerrymandering, see Part III.B, *infra*.

*B. Prison-Based Gerrymandering in Maryland and New York*

Real world examples in New York and Maryland illustrate the impact of prison-based gerrymandering. Baltimore and New York City both have dense urban neighborhoods largely segregated along racial and economic lines, burdened by drug crimes and a heavy law enforcement presence. In both Maryland and New York correctional facilities are located in mostly rural districts, far from the urban centers that many of those who are incarcerated call home.

## 1. Maryland

The average annual inmate population in Maryland state correctional facilities is about 27,000.<sup>33</sup> The incarceration rate for African Americans in Maryland is approximately five and a half times that of whites.<sup>34</sup> The total population of Baltimore is approximately 615,000. The city's population is sixty-three percent African American.<sup>35</sup> While one out of ten Maryland residents is from Baltimore, one out of three people in Maryland's state prisons is from Baltimore.<sup>36</sup> In 2006 alone, 115,000 people were arrested in the city.<sup>37</sup>

Within Baltimore, incarceration rates are heavily concentrated in a handful of neighborhoods. While more than two hundred neighborhoods make up the city of Baltimore,<sup>38</sup> seventy-five percent of Baltimore residents who are incarcerated come from just twenty-five of those neighborhoods.<sup>39</sup> Residents from five of these twenty-five neighborhoods account for a quarter of those who are incarcerated.<sup>40</sup>

While one-third of incarcerated individuals in Maryland come from Baltimore, eighty-three percent of the state's twenty-eight correctional facilities are located in rural or suburban communities

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33. MARYLAND GEN. ASSEMBLY DEP'T OF LEG. SERVS., H.B. 496 FISCAL & POLICY NOTE, 2010 Sess., at 2. In Maryland, 380 people, or one percent of all inmates, are sentenced to life without parole. See THE SENTENCING PROJECT, *supra* note 26.

34. MARC MAUER & RYAN S. KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 6 (2007).

35. *State and County Quick Facts: Baltimore, Maryland*, U.S. CENSUS BUREAU <http://quickfacts.census.gov/qfd/states/24/24510.html> (last visited Sept. 24, 2015).

36. JUSTICE POLICY INST. & PRISON POLICY INITIATIVE, THE RIGHT INVESTMENT? CORRECTIONS SPENDING IN BALTIMORE CITY 2 (2015), [http://www.justicepolicy.org/uploads/justicepolicy/documents/rightinvestment\\_design\\_2.23.15\\_final.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/rightinvestment_design_2.23.15_final.pdf).

37. PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 27 (2009).

38. BALTIMORE CITY DEP'T OF PLANNING, BALTIMORE NEIGHBORHOOD PROFILES, <https://baltimore2006to2010acsprofiles.wordpress.com> (last visited Sept. 24, 2015).

39. JUSTICE POLICY INST. & PRISON POLICY INITIATIVE, *supra* note 36, at 13.

40. *Id.* at 15.

outside of Baltimore.<sup>41</sup> The facilities are, on average, located sixty miles outside of Baltimore; and, five facilities are more than one hundred miles away.<sup>42</sup> Notably, Maryland spans only 12,000 square miles. The average length of time served in Maryland state prisons is two and a half years.<sup>43</sup>

This prison geography creates a significant political imbalance. For example, in 2010, Somerset County, the First County Commission District included a large prison that made up sixty-four percent of its population. As a result, each resident in that district had 2.7 times as much influence as residents in other districts.<sup>44</sup> Similarly, in 2010, eighteen percent of residents in County Commission District 2B were incarcerated, giving every four District 2B residents as much political influence as five residents elsewhere in the state.<sup>45</sup> Of the 5,268 African Americans in District 2B, ninety percent were incarcerated residents from other parts of the state.<sup>46</sup>

## 2. New York

The imbalance created by prison-based gerrymandering has been particularly severe in New York. In 2014, the total population of New York state correctional facilities was 54,142.<sup>47</sup> Currently, nearly half of all people in prison—forty-five percent—come from New York City.<sup>48</sup> This number dropped in recent years; in 2002, approximately seventy percent of inmates, nearly 70,000, came from New York City.<sup>49</sup> Nearly a quarter of people incarcerated in

41. *Id.* at 2; *Correctional Facility Locator*, MD. DEP'T OF PUB. SAFETY & CORR. SERVS., <http://www.dpccs.state.md.us/locations/prisons.shtml> (last visited Sept. 24, 2015).

42. *Correctional Facility Locator*, *supra* note 41.

43. MD. DEP'T OF LEGISLATIVE SERVS., MARYLAND DIMINUTION CREDIT SYSTEM 7 (2011), [http://dls.state.md.us/data/polanasubare/polanasubare\\_coucrijusncivmat/Diminution-Credits.pdf](http://dls.state.md.us/data/polanasubare/polanasubare_coucrijusncivmat/Diminution-Credits.pdf).

44. See Peter Wagner & Olivia Cummings, *Importing Constituents: Incarcerated People & Political Clout in Maryland*, PRISON GERRYMANDERING PROJECT, PRISON POLICY INITIATIVE (Mar. 4, 2010), <http://www.prisonersofthecensus.org/md/report.html>; PRISON POLICY INITIATIVE, ENDING PRISON-BASED GERRYMANDERING WOULD AID THE AFRICAN AMERICAN VOTE IN MARYLAND (2010), <http://www.prisonersofthecensus.org/factsheets/md/africanamericans.pdf>.

45. PRISON POLICY INITIATIVE, *supra* note 44.

46. *Id.*; see also *Fletcher v. Lamone*, 831 F. Supp.2d 887, 893 (D. Md. 2011) *aff'd*, 133 S. Ct. 29 (2012) (mem.).

47. N.Y. DEP'T OF CORR. & COMMUNITY SUPERVISION, UNDER CUSTODY REPORT AS OF JANUARY 1, 2014, at ii, [http://www.doccs.ny.gov/Research/Reports/2014/UnderCustody\\_Report\\_2014.pdf](http://www.doccs.ny.gov/Research/Reports/2014/UnderCustody_Report_2014.pdf). In New York, 246 individuals, or less than one percent of inmates, are sentenced to life without parole. THE SENTENCING PROJECT, *supra* note 26, at 6.

48. N.Y. DEP'T OF CORR., *supra* note 47.

49. Jeffrey Fagan, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URBAN L. J. 1551, 1555 (2002).

New York come from seven state senate districts representing minority communities in New York City.<sup>50</sup> The incarceration rates for African Americans in New York is nine and a half times that of whites; for Latinos it is four and a half times that of whites. Seventy-three percent of those currently incarcerated in New York are African American and Latino.<sup>51</sup>

There are fifty-five state prisons in New York, and only four are located in New York City.<sup>52</sup> The rest are located in upstate, rural communities. Approximately seventy-five percent of New York's prisons are located more than one hundred miles from New York City, more than sixty percent are located over two hundred miles from the city, and over a third are located more than three hundred miles from the city.<sup>53</sup> The average length of time served in New York prisons is 3.5 years.<sup>54</sup>

The policy of basing legislative districts on prison populations creates an imbalance not just between upstate and downstate communities in New York, but between neighboring upstate communities as well. A district with a prison has inflated voting strength compared to any other district without a prison, including the district right next door. For example, in 2000 in Saint Lawrence County, two towns, Ogdensburg and Gouverneur, included more than 3,000 incarcerated people as if they were residents for purposes of redistricting.<sup>55</sup> Consequently, the residents' political power in those two small towns inflated, and the political power of Saint Lawrence County residents, who did not live near a prison, diluted.

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50. The senate districts most disproportionately represented in the New York prison system are: Brooklyn District 18 representing parts of Bedford Stuyvesant and Red Hook; Brooklyn District 20 representing parts of Crown Heights and Flatbush; Brooklyn District 19 representing East New York, Brownsville and Canarsie; Brooklyn District 17 representing Bushwick, Williamsburg and Cypress Hills; Manhattan District 28 representing East Harlem; Manhattan District 30 representing Harlem; and Bronx District 32 representing the South Bronx. After the adjustment of the population data in 2011, 13,725 incarcerated individuals were reallocated to these seven districts. *See* THE NEW YORK WORLD, CHANGING HOW NEW YORK COUNTS PRISONERS, <http://www.thenewyorkworld.com/2012/01/10/redistricting> (last visited Sept. 24, 2015).

51. N.Y. DEP'T OF CORRS., *supra* note 47, at ii (reporting that 49.2% are African American and 24% are Latino).

52. *Facility Listing*, N.Y. DEP'T OF CORRS. & CMTY. SUPERVISION, <http://www.doccs.ny.gov/facilst.html> (last visited Sept. 24, 2015).

53. *See id.*

54. PEW CTR. ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 13 (2012), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing\\_and\\_corrections/PrisonTimeServedpdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/PrisonTimeServedpdf.pdf).

55. PETER WAGNER, ET AL., PRISON POLICY INITIATIVE, PHANTOM CONSTITUENTS IN THE EMPIRE STATE: HOW OUTDATED CENSUS BUREAU METHODOLOGY BURDENS NEW YORK COUNTIES 8 (2007), <http://www.prisonersofthecensus.org/nycounties/nycounties.pdf>.

During the 2000 redistricting cycle in New York, population figures revealed that each New York State Senate district should have held approximately 306,000 people—the state population divided by the number of districts.<sup>56</sup> Under the “one person, one vote” principle, if each district has equal population, then each resident will have the same electoral power as residents elsewhere in the state.<sup>57</sup> But counting people in prison as “residents” of the prison meant that several districts in New York were padded with large concentrations of individuals who could not vote. Generally, states are allowed to draw districts that deviate from the ideal size by a maximum of ten percent; one district can be five percent below, and another can be five percent above the ideal size, for a ten percent maximum deviation.<sup>58</sup> By at least one analysis, seven New York State Senate districts would have fallen more than five percent short of the 306,000 average if the prison population had been removed from those districts during the 2000 redistricting cycle.<sup>59</sup> That is, the combined deviations of these districts would have exceeded the ten percent maximum discretion typically allowed states in their redistricting.

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56. N.Y. State Legislative Task Force on Demographic Research and Reapportionment, *2000 Census Data by District*, <http://www.latfor.state.ny.us/data/2000files/2000sen-prof.pdf>.

57. It should be noted that there are two standards for what is “equal population” for the purpose of drawing legislative districts: one for congressional districts and the other for state legislative districts. For congressional districts, the Supreme Court has required equal population “as nearly as is practicable.” *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). The Court has interpreted this to mean that states must make a “good-faith effort to achieve absolute equality.” *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969)). However, the Court has allowed more flexibility for state legislative districts; they must reflect only “substantial equality of population.” *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). Generally, this means that the population difference between the largest and smallest state legislative districts may not be more than ten percent of the average district population. *See Brown v. Thomson*, 462 U.S. 835, 842–43 (1983) (explaining that “as a general matter, . . . an apportionment plan with a maximum population deviation under 10% falls within th[e] category of minor deviations.”). The different standards for drawing congressional and state districts arise from different clauses in the U.S. Constitution. Population disparities for congressional districts are governed by the Apportionments Clause, U.S. CONST. art. I, § 2. Population disparities for state legislative districts are regulated by the Equal Protection Clause, U.S. CONST. amend. XIV, § 1. *See generally Reynolds*, 377 U.S. at 558–560.

58. *See supra* note 57.

59. *Gerrymandering and relying on the miscount of prisoners combine to violate the U.S. Constitution in New York*, PRISON POLICY INITIATIVE, <http://www.prisonersofthecensus.org/nygerrymander.html> (last visited Sept. 24, 2015).

## II. RECENT REFORMS

The clearest solution to the imbalance caused by prison-based gerrymandering is for the Census Bureau to count people who are in prison as residents of their home communities. With this policy, the Census Bureau would achieve a more accurate population count of those home communities, assuring full access to services, programs, and federal funds. Moreover, this policy would enable local redistricting officials to design fair, accountable legislative districts.<sup>60</sup>

Although the Census Bureau did not change its usual residency rule as it applies to prisons in 2010, it did make a significant change in the way it published the population data in 2011. For the first time, the Census Bureau released the Group Quarters data to the states earlier in the redistricting cycle.<sup>61</sup> Traditionally, the first counts of people in Group Quarters were not available until the summer of the year after the census, too late to be useful for redistricting in most states. The deadlines for redistricting vary state-by-

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60. It is important to remember that the census tally impacts communities beyond legislative districts. Census population and demographic statistics are used to influence decision-making at all levels of government, including distributing more than \$300 billion in federal funds, providing housing and new development, planning new schools, libraries and health care facilities, locating manufacturing and commercial facilities, and improving public transportation and infrastructure. To assure long-term and lasting economic equality, the Census Bureau should amend its “usual residency” rule to count people in prison as residents of their home communities throughout the country. In 2013, more than two hundred organizations signed a letter urging the Census Bureau to conduct the research necessary to ensure that the 2020 census counts incarcerated people at their home addresses. *February 2013 stakeholder’s letter*, PRISON POLICY INITIATIVE (Feb. 14, 2013), <http://www.prisonersofthecensus.org/letters/feb2013.html>. In May 2015, the U.S. Department of Commerce announced that the U.S. Census Bureau was “reviewing the 2010 Residence Rule . . . to determine if changes should be made . . . for the 2020 Census.” 80 Fed. Reg. 28950 (May 20, 2015). The Bureau solicited public comments on whether any changes should be made to the residence rule, and noted that it anticipates publishing the final residence rule for the 2020 census in late 2017. *Id.* A study of the 2010 count of the jail and prison group quarters population recommended that the Census Bureau create a self-enumeration pilot to determine the utility of prison inmates completing their own census forms. BARBARA OWEN & ANNA CHAN, U.S. CENSUS BUREAU, ETHNOGRAPHIC STUDY OF THE GROUP QUARTERS POPULATION IN THE 2010 CENSUS: JAILS AND PRISONS 37–38 (2013), <http://www.census.gov/srd/papers/pdf/ssm2013-13.pdf>. The Owen and Chan study presents a detailed analysis of how the 2010 census was conducted in two women’s state prisons and in one county jail, with additional information from observations of the collection of American Community Survey data in a large male state prison and other facilities. *Id.* It was not intended to be a review of the feasibility of enumerating incarcerated people at alternative addresses, but its review of existing practices and its suggestions for how those practices could be improved, make it a valuable first step. To be sure, there are practical challenges to implementing a change in the residency rule, but it is certainly possible. See ERIKA WOOD, *supra* note 5, at 24–29; see also OWEN & CHAN, *supra*, at 37–38.

61. See Robert Groves, *So, How Do You Handle Prisons?*, U.S. CENSUS BUREAU: DIRECTOR’S BLOG (Mar. 1, 2010), <http://directorsblog.blogs.census.gov/2010/03/01/so-how-do-you-handle-prisons>. For a discussion of Group Quarters see *supra* notes 23–24 and accompanying text.

state, and within each state there are often different timelines for state legislative districts and congressional districts. Still, generally states must draw new districts in time to allow potential candidates to file their candidacy in the next election cycle. As a result, most states will draw their new districts in the spring and summer of the year following the census. In 2000, general redistricting data was released to the states in March 2001, but the Group Quarters data was gradually rolled out on a state-by-state basis between June and August 2001.<sup>62</sup> Due to this timing, even states that were aware of the problems caused by prison-based gerrymandering were unable to address the problem because they did not have access to the Group Quarters data when they apportioned their residents for districts.<sup>63</sup>

The Census Bureau released its 2010 Group Quarters data in April 2011, significantly earlier than in previous decades.<sup>64</sup> This earlier release allowed states and localities that were interested in adjusting the incarcerated population to access the necessary data. The Census Director explained the Bureau's rationale: "This decade we are releasing early counts of prisoners . . . so that states can leave the prisoners counted where the prisons are, delete them from the redistricting formulas, or assign them to some other locale."<sup>65</sup>

The early release of the Group Quarters data allowed states and localities to reallocate people in prison back to their home communities during the 2011 redistricting cycle. Since 2010, nine states have introduced legislation to do just that.<sup>66</sup> Of these, six bills are still pending in Illinois, Minnesota, New Jersey, Oregon, Rhode Island, and Tennessee.<sup>67</sup> Three local redistricting bodies also passed related resolutions or legislation, and over two hundred localities actually removed people in prison when redrawing their local government districts in the 2011 redistricting cycle.<sup>68</sup>

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62. *Census 2000 Data Products at a Glance*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/censusdata/c2kproducts.html> (last visited Sept. 24, 2015).

63. See Groves, *supra* note 61; PETER WAGNER, *Tools for Using the Advanced Group Quarters Summary File*, PRISON POLICY INITIATIVE (May 17, 2011), [http://www.prisonersofthecensus.org/news/2011/05/17/agqsf\\_tools](http://www.prisonersofthecensus.org/news/2011/05/17/agqsf_tools).

64. Groves, *supra* note 61.

65. *Id.*

66. Arkansas, Connecticut, Illinois, Indiana, Kentucky, New Jersey, Oregon, Rhode Island, and Texas. See *Legislation*, PRISON POLICY INITIATIVE, <http://www.prisonersofthecensus.org/legislation.html> (last visited Sept. 24, 2015).

67. *Id.*

68. *Local governments that avoid prison-based gerrymandering*, PRISON POLICY INITIATIVE (July 20, 2015), <http://www.prisonersofthecensus.org/local/>.

In addition, California, Delaware, Maryland, and New York passed laws to reallocate people in prison back to their home communities.<sup>69</sup> California and Delaware will implement their new laws after the 2020 census, but Maryland and New York completed reallocation in time for the 2011 redistricting cycle.<sup>70</sup>

#### A. *Maryland: No Representation without Population Act*

In April 2010, Maryland's governor signed into law the No Representation without Population Act, H.B. 496.<sup>71</sup> Proponents introduced the bill in February 2010, and it passed into law a few months later.<sup>72</sup> The bill's Senate sponsor, testifying in support of the legislation, emphasized the democratic nature of the bill, explaining that the policy it aimed to change "artificially enhances the votes of districts with prisons and unfairly dilutes the votes of all other districts . . . ."<sup>73</sup>

The No Representation without Population Act requires that, as a general rule, the population count used to create legislative districts for the General Assembly, counties, municipalities, and U.S. House of Representatives, not include individuals incarcerated in state or federal correctional facilities or those individuals who were not residents of the state before their incarceration.<sup>74</sup> The legislation provides:

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69. See CAL. ELEC. CODE § 21003 (West 2013); DEL. CODE ANN. tit. 29, § 804A (2010); MD. CODE ANN. STATE GOV'T § 2-2A-01 (West 2010); N.Y. LEGIS. L. § 83-m(13)(b) (McKinney 2011).

70. See CAL. ELEC. CODE § 21003 (a)(1) (specifying that the law shall apply "[n]ot sooner than April 1, 2020, and not later than July 1, 2020 . . ."); DEL. CODE ANN. tit. 29, § 804A(c) ("This section shall not apply to the redistricting of the State following the 2010 federal decennial census. This section shall apply to the redistricting of the State following each federal decennial census thereafter.").

71. *Bill Info: House Bill 496*, GEN. ASSEMBLY OF MD., <http://mgaleg.maryland.gov/webmga/frnMain.aspx?ys=2010rs%2fbillfile%2fb0496.htm> (last visited Sept. 24, 2015).

72. H.B. 496, 2010 Regular Session (Md. 2010).

73. Statement of Sen. Catherine E. Pugh, S.B. 400, at 2 (Mar. 4, 2010), [http://www.prisonersofthecensus.org/testimony/Sen\\_Pugh\\_MD\\_SB400\\_March\\_4\\_2010.pdf](http://www.prisonersofthecensus.org/testimony/Sen_Pugh_MD_SB400_March_4_2010.pdf).

74. MD. CODE ANN., STATE GOV'T § 2-2A-01 (West 2010). The Maryland Constitution requires the Governor to prepare a legislative redistricting plan following the decennial census and present the plan to the President of the Senate and the Speaker of the House of Delegates. MD. CONST. art. III, § 5. Both houses of the legislature must have the plan introduced as a joint resolution on the first day of the regular session in the second year following the census. *Id.* If the legislature does not adopt another redistricting plan by the forty-fifth day of the session, the Governor's plan as presented becomes law. *Id.*

The population count used after each decennial census for the purpose of creating the congressional [and legislative] districting plan . . . shall count individuals incarcerated in . . . correctional facilities . . . at their last known residence before incarceration . . . .<sup>75</sup>

## 1. Implementation

Implementing the new law required the Maryland Department of Public Safety and Correctional Services (DPSCS) to provide the data necessary to determine the last known address of each prisoner.<sup>76</sup> DPSCS formed a special team to gather and verify home address data. To gather the required data, DPSCS first consulted its own database, which maintains demographic and other information concerning inmates housed in Maryland correctional facilities.<sup>77</sup> It forwarded these lists to the correctional facilities where the inmates were housed so they could be reviewed by prison staff for accuracy.<sup>78</sup> Each correctional facility then completed and corrected the missing and inaccurate home address fields, relying on three sources: (1) interviews with inmates; (2) pre-sentence investigation documents; and (3) correctional facility intake forms.<sup>79</sup> DPSCS officials then entered the corrected information into one database and provided it to the Maryland Department of Planning (MDP), the agency charged with reallocating the prison population.<sup>80</sup>

Once the DPSCS database was complete, MDP completed the process to remove each inmate from the district where he was incarcerated and reallocate him back to his or her home address.

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75. MD. CODE ANN., ELEC. LAW § 8-70(a)(2) (2010). The broad language of the legislation proved troublesome for the Maryland Department of Planning (MDP), the agency tasked with implementing the new law. To assist in determining exactly what information was to be used to determine the last known residence, the MDP drafted regulations to guide and inform its implementation efforts. The focus of these regulations was largely on how to determine the last known residence by specifying the information that could be relied upon to reallocate incarcerated individuals to their home communities. *See* MD. CODE REGS. 34.05.01.01 *et seq.* (2010).

76. For a detailed, step-by-step explanation of how the New York and Maryland laws were implemented, *see* Wood, *supra* note 5.

77. Combs Decl. ¶ 3–4, *Fletcher v. Lamone*, 831 F.Supp.2d 887 (D. Md. 2011).

78. *Id.* at ¶ 4.

79. *Id.* at ¶ 6.

80. *Id.* at ¶ 6; Telephone Interview with Felicia Hinton, Assistant Comm'r, Md. Dep't of Pub. Safety & Corr. Servs. (Mar. 15, 2013).

This process, known as “geocoding,”<sup>81</sup> matched each inmate address to a census block and lot. MDP then re-tallied the population for each block, allowing the legislature to use the adjusted population data to create legislative districts with equal population.<sup>82</sup>

## 2. A Legal Challenge: *Fletcher v. Lamone*

On November 10, 2011, the Legacy Foundation, a conservative Iowa-based advocacy group,<sup>83</sup> financed a lawsuit filed in the U.S. District Court for Maryland, challenging the adjustment process, the legality of the resulting districts, and the validity of the No Representation without Population Act.<sup>84</sup> On December 23, 2011, a three-judge panel<sup>85</sup> granted the state’s motion for summary judgment, finding the new law to be constitutional and the implementation of the law to be proper and nondiscriminatory.<sup>86</sup>

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81. Geocoding is the process of finding associated geographic coordinates from other data such as a street address. Geocoding takes an address, matches it to a street and specific segment (usually a “block”), and then inserts the position of the address within that segment. Once the geographic coordinates are located, the address can be mapped and entered into a Geographic Information System (GIS) to allow technical staff and policymakers to draw legislative districts. See generally DANIEL W. GOLDBERG, N. AM. ASS’N OF CENT. CANCER REGISTRIES, INC., A GEOCODING BEST PRACTICES GUIDE (2008), [https://www.naacr.org/LinkClick.aspx?fileticket=ZKekM8k\\_IQ0%3D&tabid=239&mid=69](https://www.naacr.org/LinkClick.aspx?fileticket=ZKekM8k_IQ0%3D&tabid=239&mid=69).

82. The MDP regulations determined that if the agency was unable to geocode the last known address after making reasonable efforts, then the last known address would be “the state or federal correctional facility where the individual is incarcerated.” MD. CODE REGS. 34.05.01.04(C)(1) (2010). This is a significant difference between the Maryland and New York laws. In New York, a person with an unknown address was simply not allocated to any legislative district, while in Maryland the person would be allocated back to the prison district. *Id.*; N.Y. LEGIS. L. § 83-m(13)(b) (McKinney 2011). The regulations provide examples of “ungeocodable” addresses, including: no address or an address of “homeless,” address of a correctional facility, rural route address, post office box, address with no house number, addresses with multiple errors or no street suffix, and addresses that are incorrect or not included in the Census Bureau’s TIGER street centerline file used to geocode addresses. MD. CODE REGS. 34.05.01.04 (D) (2010).

83. See Annie Linskey, *Iowa Group to Fund Suit Against Maryland’s Congressional Map*, BALTIMORE SUN (Nov. 10, 2011) <http://www.baltimoresun.com/news/maryland/bs-md-redistricting-lawsuit-20111110,0,848688.story>; see also *Case Filings*, LEGACY FOUND., <http://legacyfoundation.us/case-filings> (last visited Sept. 24, 2015). The Legacy Foundation’s stated mission is “to advance individual liberty, free enterprise and limited, accountable government.” *Why the Legacy Foundation?*, LEGACY FOUND., <http://legacyfoundation.us/why-the-legacy-foundation> (last visited Sept. 24, 2015).

84. *Fletcher v. Lamone*, 831 F.Supp.2d 887, 890 (D. Md. 2011), *aff’d*, 133 S. Ct. 29 (2012) (mem.).

85. The case was heard by a three-judge panel under 28 U.S.C. § 2284(a). *Id.* That section provides for a three-judge panel to decide any action that challenges the constitutionality of the apportionment of any statewide legislative body.

86. *Fletcher*, 831 F. Supp.2d at 910.

The primary basis for the plaintiffs' challenge was that Maryland's adjustment to the census data under the No Representation without Population Act violated the "one person, one vote" principle established by the Supreme Court in *Reynolds v. Sims*.<sup>87</sup> Essentially, plaintiffs argued that by adjusting the census data to re-allocate people in prison back to their home communities, Maryland ignored the instructions of the Supreme Court in *Karcher v. Daggett* that census data is "the only basis for good-faith attempts to achieve population equality."<sup>88</sup> The court rejected plaintiffs' argument, explaining that although the Supreme Court did require states to use census data "as a starting point,"<sup>89</sup> the Court did not hold that states could not modify census data "to correct perceived flaws."<sup>90</sup> Citing *Karcher*, the Maryland Federal District Court clarified that if a state attempts to correct census figures, "it may not do so in a haphazard, inconsistent, or conjectural manner."<sup>91</sup> The court then concluded that *Karcher* suggests that "a State may choose to adjust the census data, so long as those adjustments are thoroughly documented and applied in a nonarbitrary fashion and they otherwise do not violate the Constitution."<sup>92</sup> It noted that its conclusion that states can adjust census data during redistricting is also "consistent with the practices of the Census Bureau," explaining that according to the Bureau, "prisoners are counted where they are incarcerated for pragmatic and administrative reasons, not legal ones."<sup>93</sup> Finally, the court determined that Maryland's adjustments to the census data were done "in the systematic manner" required by *Karcher*.<sup>94</sup>

Additionally, the plaintiffs raised two objections to the Maryland law itself. First, they argued that if Maryland wished to correct inaccuracies in its population resulting from allocation of prisoners, it must also adjust for inaccuracies created by college students and members of the military. Second, they insisted that most prisoners do not return to their last known address after release.<sup>95</sup>

The court dismissed both arguments. First, the court noted that plaintiffs' argument "imply[d] that college students, soldiers, and prisoners are similarly situated groups," an assumption the court

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87. 377 U.S. 533 (1964); see also *infra* notes 160-62 and accompanying text.

88. 464 U.S. 725, 738 (1983); see also *Fletcher*, 831 F.Supp.2d at 894.

89. *Fletcher*, 831 F. Supp.2d at 894.

90. *Id.*

91. *Id.* at 894 (quoting *Karcher v. Daggett*, 464 U.S. 725, 732 n.4 (1983)).

92. *Id.* at 894-95.

93. *Id.* at 895.

94. *Id.* at 896.

95. *Id.*

deemed “questionable at best.”<sup>96</sup> The court observed that “[c]ollege students and members of the military are eligible to vote” and that they “have the liberty to interact with members of the surrounding community and to engage fully in civic life.”<sup>97</sup> The court concluded, “[B]oth groups have a much more substantial connection to, and effect on, the communities where they reside than do prisoners.”<sup>98</sup>

On the second point, the court determined that “it would certainly be true that at least some prisoners will return to their home communities . . . ,” citing an Urban Institute study finding that most Maryland prisoners returned to Baltimore after their release from prison.<sup>99</sup> The court concluded that “some correction is better than no correction” and that the adjusted data would “be more accurate than the information contained in the initial census report which [did] not take prisoners’ community ties into account at all.”<sup>100</sup>

In June 2012, the United States Supreme Court affirmed the Maryland District Court in a memorandum disposition.<sup>101</sup> Maryland’s law and the 2011 adjustment to the incarcerated population were upheld.

### B. New York Law: Part XX

On August 11, 2010, Part XX of Chapter 57 of the Laws of 2010 (Part XX) became law.<sup>102</sup> Part XX directed the New York State Legislative Task Force on Demographic Research and Reapportionment (LATFOR) to reallocate people in correctional facilities back to their home communities for purposes of drawing state and local districts.<sup>103</sup>

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96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* (citing NANCY G. LA VIGNE ET AL., URBAN INSTITUTE, A PORTRAIT OF PRISONER REENTRY IN MARYLAND 39 (2003), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/410655-A-Portrait-of-Prisoner-Reentry-in-Maryland.pdf>)

100. *Id.* at 897.

101. 133 S. Ct. 29 (2012) (mem.). The case was appealed directly to the U.S. Supreme Court pursuant to 28 U.S.C.A. § 1253, which allows direct appeal of any order granting or denying an interlocutory or permanent injunction in any civil action determined by a three-judge district court.

102. Assemb. B. A09710-D, Reg. Sess. (N.Y. 2010).

103. New York law designates LATFOR as the body responsible for the “preparation and formulation of a reapportionment plan . . . [and] the utilization of census and other demographic and statistical data for policy analysis, program development and program evaluation purposes for the legislature.” N.Y. LEGIS. LAW § 83-m(3) (McKinney 2011). The task force is bipartisan and consists of six members, two whom are appointed by the state Senate president, two of whom are appointed by the speaker of the Assembly and one each appointed by the minority leaders of the Senate and Assembly. *Id.* § 83-m(2). Four task force members are

No doubt the title of the law, Part XX, sparks some curiosity. It comes from its designation as Part XX of the annual state budget. Critics long ago labeled Albany the most dysfunctional legislature in the country, notorious for its lack of transparency, closed-door dealings, and failure to engage with the public.<sup>104</sup> The passage of Part XX only reinforced this (dis)reputation.

Over the years, legislators repeatedly introduced the bill to reallocate people in prison back to their home communities. But because of its assumed political implications, particularly for upstate Republicans who had long controlled the state Senate, the legislation never advanced. Then came the summer of 2010. For the first time in four decades, Democrats controlled both houses of the legislature and the governor's office. The 2011 redistricting cycle was fast approaching. The bill's longtime champion, then state Senator Eric Schneiderman, was running for state Attorney General. With the budget 125 days past due, the legislature feared setting a new record (and no doubt members were eager to take their August vacations). The pressure was on to get the bill on the governor's desk. The budget finally passed at 8:30 PM on August 3, with no public debate and not a single Republican vote.<sup>105</sup> Part XX was buried deep inside, and included language identical to Schneiderman's most recently proposed legislation, Senate Bill 6725A.<sup>106</sup>

Part XX directed the New York State Department of Corrections and Community Supervision (DOCCS) to deliver various data concerning each individual in its custody to the redistricting taskforce (LATFOR), including the residential address of the person prior to

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members of the legislature and two are not. *Id.* The New York legislature has primary responsibility for drawing the state's congressional and state legislative lines. N.Y. CONST. art. III, § 4. While LATFOR recommends congressional and state legislative plans to the legislature, the legislature is free to amend or even ignore its proposals. See N.Y. LEGIS. LAW § 83-m (McKinney 2011). New York law does not impose a particular deadline for drawing congressional or state legislative lines, but in practice district lines must be final in time to allow candidates to meet the filing deadlines for the next primary election. See N.Y. ELEC. LAW § 6-158 (McKinney 2015).

104. See generally JEREMY M. CREELAN & LAURA M. MOULTON, BRENNAN CTR. FOR JUSTICE, THE NEW YORK STATE LEGISLATIVE PROCESS: AN EVALUATION AND BLUEPRINT FOR REFORM (2004), [http://www.brennancenter.org/sites/default/files/legacy/d/albanyreform\\_finalreport.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/albanyreform_finalreport.pdf); LAWRENCE NORDEN, DAVID E. POZEN, & BETHANY L. FOSTER, BRENNAN CTR. FOR JUSTICE, UNFINISHED BUSINESS: NEW YORK STATE LEGISLATIVE REFORM (2006), [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_37893.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_37893.pdf); ANDREW STENGEL, LAWRENCE NORDEN, & LAURA SEAGO, BRENNAN CTR. FOR JUSTICE, STILL BROKEN: NEW YORK STATE LEGISLATIVE REFORM 2008 UPDATE (2009), <http://www.brennancenter.org/sites/default/files/legacy/publications/Still.Broken.pdf>.

105. Danny Hakim, *125 Days Late, A State Budget with New Taxes* NEW YORK TIMES (Aug 4, 2010), [http://www.nytimes.com/2010/08/04/nyregion/04albany.html?\\_r=0](http://www.nytimes.com/2010/08/04/nyregion/04albany.html?_r=0).

106. See S. 6725A (N.Y. 2010), <http://open.nysenate.gov/legislation/bill/S6725A-2009>.

incarceration.<sup>107</sup> Part XX also required LATFOR, upon receipt of this information from DOCCS, to determine the census block “corresponding to the street address of each [incarcerated] person’s residential address prior to incarceration” and the census block “corresponding to the street address of the correctional facility.”<sup>108</sup> The new law then directed LATFOR to create “a database in which all incarcerated persons shall be . . . allocated for redistricting purposes, such that each geographic unit reflects incarcerated populations at their respective residential addresses prior to incarceration rather than at the addresses of [the] correctional facilities.”<sup>109</sup> Part XX requires LATFOR to maintain the amended population dataset and use the dataset to draw state assembly and senate districts.<sup>110</sup> The law also required LATFOR to make the adjusted population data available to localities for county and municipal redistricting.<sup>111</sup> At least twelve counties and New York

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107. N.Y. CORRECTS. LAW § 71(8)(a) (McKinney 2011). Interestingly, Article III, section 4 of the New York State Constitution provides that, for the purpose of *voting*, “no 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.”

108. N.Y. LEGIS. LAW § 83-m(13)(b) (McKinney 2011).

109. *Id.*

110. *Id.* In contrast to the Maryland law, under Part XX all individuals with out-of-state or unknown pre-incarceration addresses, and all individuals incarcerated in federal correctional facilities, would be “counted at an address unknown” and not included in the redistricting dataset. *Id.* Whereas in Maryland these individuals would be allocated to the prison district, in New York they were “subtracted” from the prison district, but not reallocated to a home district. In effect, they were not “counted” for redistricting purposes. The choice to not reallocate people in federal prisons reflected concerns about the privacy laws that govern federal facilities and the lack of state authority over those in federal custody. The Privacy Act of 1974 regulates what personal information the Federal Government can collect about private individuals and how that information can be used. *See* 5 U.S.C. § 552a (1996), *et seq.* While there is concern that federal prisons may be restricted from disclosing personal records, even if the records do not include personally identifiable information, it is also clear that at least one state—Kansas—has a long history of successful cooperation between federal and state agencies. Kansas reallocates people living on military bases for redistricting, and the U.S. military has worked with the state to collect and share home residence data for people living on military bases in the state. *See* KRIS W. KOBACH, KAN. SEC’Y OF STATE, ADJUSTMENT TO THE 2010 U.S. DECENNIAL CENSUS 4–5 (2011), <https://www.kssos.org/forms/elections/2010CensusAdj.pdf>.

111. N.Y. LEGIS. LAW § 83-m(13)(b) (McKinney 2011). Part XX also amended the Municipal Home Rule Law to provide that for purposes of establishing a population base for local government’s plan of apportionment, “‘population’ shall mean residents, citizens, or registered voters.” N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(13)(c) (McKinney 2011). The law then clarified that “[f]or such purposes, no person shall be deemed to have gained or lost residence, or to have become a resident of a local government . . . by reason of being subject to the jurisdiction of the department of corrections and community supervision and present in a state correctional facility pursuant to such jurisdiction.” *Id.*

City used the adjusted population data when creating their 2011 districts.<sup>112</sup>

### 1. A Legal Challenge: *Little v. LATFOR*

On April 4, 2011, a group of upstate Republican state senators—all of whom represented districts that included at least one New York state prison—and a handful of voters who lived in those districts, filed a lawsuit against LATFOR and DOCCS. They argued that Part XX was unconstitutional and asked the court to enjoin the agencies from implementing it.<sup>113</sup> Plaintiffs asserted that the new law violated Article III, section 4 of the New York State Constitution, which provides that the federal census “shall be controlling as to the number of inhabitants in the state or any part thereof for the purpose of apportionment of members of assembly and readjustment or alteration of senate and assembly districts.”<sup>114</sup> The Complaint alleged that Part XX was unconstitutional because it “creat[ed] a structural change by an artificial realignment of political power in the State.”<sup>115</sup>

On December 1, 2011, on cross motions for summary judgment, the New York State Supreme Court in Albany County upheld the new law.<sup>116</sup> The court relied in part on the new census policy of releasing the Group Quarters data early to allow states to enact re-districting plans that allocate prisoners to their pre-incarceration locations. It found that plaintiffs had not demonstrated that Part XX “rendered the data provided by the Census Bureau to be anything less than ‘controlling’ in the redistricting process.”<sup>117</sup> The

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112. PRISON POLICY INITIATIVE, *supra* note 68, <http://www.prisonersofthecensus.org/local>. The New York City Districting Commission states on its website: “The NYC Districting Commission will be using LATFOR prisoner-adjusted data for districting purposes.” Resources, N.Y. CITY DISTRICTING COMM’N, <http://www.nyc.gov/html/dc/html/links/links.shtml> (last visited Sept. 24, 2015).

113. Complaint ¶¶ 1, 12–21, *Little v. LATFOR*, No. 2310-2011 (N.Y. Sup. Ct. Apr. 4, 2011).

114. N.Y. CONST. art. III, § 4.

115. Complaint at ¶ 86, *LATFOR*, No. 2310-2011. Numerous voting rights and civil rights groups which had advocated for the reforms in Part XX intervened on behalf of the state defendants, representing voters from both upstate and downstate communities. The voters who intervened represented different interests, including: (1) those who lived in districts with high numbers of incarcerated individuals; (2) those who lived in both upstate and downstate counties that did not contain a prison; and (3) those who lived in a county where a prison was located but whose vote would nevertheless be diluted if the lawsuit prevailed because their local county legislative districts did not contain a prison. Memorandum in Support of Motion to Intervene at 2–3, *LATFOR*, No. 2310-2011.

116. *LATFOR*, No. 2310-2011.

117. *Id.* at 6–7.

court further explained that there was nothing in the record indicating that people in prison “have any actual permanency in these locations or have an intent to remain. . . . [P]laintiffs have not proffered evidence that inmates have substantial ties to the communities in which they are involuntarily and temporarily located.”<sup>118</sup>

## 2. Implementation

In 2011, prior to the Supreme Court’s 2013 decision in *Shelby County, Ala. v. Holder*,<sup>119</sup> New York submitted Part XX to the United States Department of Justice (DOJ) for “preclearance” under section 5 of the Voting Rights Act because the law constituted a change to voting laws and procedures.<sup>120</sup> Due to past discrimination against language minorities, Bronx, Kings, and New York counties were “covered jurisdictions” under section 5, required to seek DOJ approval before implementing any changes to their voting laws or procedures.<sup>121</sup>

In its preclearance submission, the New York Attorney General’s office explained that Part XX would “directly benefit[ ]” minority voters protected by section 5 because those incarcerated in New York state prisons “originate predominantly from urban districts . . . subject to § 5, and are incarcerated in non-covered jurisdictions.”<sup>122</sup> The submission concluded that Part XX would

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118. *Id.* at 7. Plaintiffs’ attempt to appeal directly to the New York Court of Appeals was denied, and they chose not to appeal the Supreme Court’s decision to the mid-level appellate court. *Little v. LAFTOR*, SSD 3 (N.Y. Ct. App. Feb. 14, 2012) (mem.).

119. 133 S. Ct. 2612 (2013).

120. 52 U.S.C. § 10304 (2006). As a result of the 2013 Supreme Court ruling in *Shelby County, Ala. v. Holder*, 113 S. Ct. 2612 (2013) striking down the Voting Rights Act’s preclearance coverage formula, New York is no longer required to pre-clear changes to its voting laws.

121. 52 U.S.C. § 10304 (2006). *See About Section 5 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/crt/about-section-5-voting-rights-act> (“In addition, the 1965 definition of ‘test or device’ was expanded to include the practice of providing election information, including ballots, only in English in states or political subdivisions where members of a single language minority constituted more than five percent of the citizens of voting age. This third formula had the effect of covering Alaska, Arizona, and Texas in their entirety, and parts of California, Florida, Michigan, New York, North Carolina, and South Dakota.”); *see also Jurisdictions Previously Covered by Section 5*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/crt/jurisdictions-previously-covered-section-5> (last visited Sept. 24, 2014) (listing Bronx, Kings and New York counties).

122. Letter from Joel Graber, Special Litigation Counsel, N. Y. State Att’y Gen. to Christian Herren Jr., Chief, Voting Section, U.S. Dep’t of Justice (Mar. 7, 2011), <http://www.priersonsofthecensus.org/little/NYS-Sec5-partxx-submission.pdf>.

“appropriately adjust the weight of the vote of members of protected classes in New York’s three § 5 counties . . . .”<sup>123</sup> DOJ granted preclearance on May 9, 2011, finding that the state carried its burden of establishing that Part XX was free of any discriminatory effect or intent.<sup>124</sup> Subsequently, New York moved forward with implementation in time for the 2011 redistricting cycle

The data DOCCS provided to LATFOR in compliance with Part XX included several fields of address information for each incarcerated person. While the legislation required DOCCS to provide each inmate’s “residential address prior to incarceration,”<sup>125</sup> DOCCS interpreted this broadly. The information it provided included each inmate’s “legal residence address,” address at time of arrest, and the address of the inmate’s parents, spouse (if any), and nearest relative.<sup>126</sup>

LATFOR undertook a process to check each home address provided by DOCCS, remove each incarcerated person from his prison district, and reallocate him back to his home address.<sup>127</sup> Ultimately, LATFOR assigned geographic coordinates for the addresses of 46,003 incarcerated individuals to 24,245 unique census blocks statewide.<sup>128</sup>

#### SUMMARY COMPARISON OF NEW YORK AND MARYLAND LAWS

	NEW YORK	MARYLAND
Applies to state legislative districts?	YES	YES
Applies to congressional districts?	NO	YES
Applies to local districts?	YES	YES
Applies to state prisons?	YES	YES

123. *Id.*

124. Letter from T. Christian Herren, Jr., Chief, Voting Section, U.S. Dep’t of Justice to Joel Graber, Special Litigation Counsel, N.Y. State Att’y Gen. (May 9, 2011), [http://www.prisonersofthecensus.org/little/doj\\_preclearance\\_letter.pdf](http://www.prisonersofthecensus.org/little/doj_preclearance_letter.pdf).

125. N.Y. LEGIS. LAW § 83-m(13)(b) (McKinney 2011).

126. *Relocating Prisoners to Home Community Addresses* at 2 (N.Y. State Assembly, Sept. 2011).

127. For a detailed, step-by-step explanation of how the New York and Maryland laws were implemented, see WOOD, *supra* note 5.

128. Memorandum from Isaac Fefer, Senior Demographer, Bruce Ruiz, GIS Manager & Marisa Vallvé, Senior GIS Analyst to Debra A. Levine & Lewis M. Hoppe, Co-Executive Directors, N.Y. State Legis. Task Force on Demographic Research & Reapportionment 4 (Jan. 5, 2012), [http://www.latfor.state.ny.us/justice2012/senate1/Exhibits/007Joint%20Exhibit%207%20—%20Prisoner%20Allocation%20Documents/0\\_ReadMe.pdf](http://www.latfor.state.ny.us/justice2012/senate1/Exhibits/007Joint%20Exhibit%207%20—%20Prisoner%20Allocation%20Documents/0_ReadMe.pdf).

	NEW YORK	MARYLAND
Applies to federal prisons?	YES for subtraction NO for reallocation	YES
Specifies implementing agency?	YES	NO
Directs correctional system to provide specific data?	YES	NO
Out-of-state and unknown addresses allocated?	NO– excluded from dataset	YES– allocated to correctional facility

### III. THE IMPACT OF THE NEW YORK AND MARYLAND LAWS

Once officials crunched the data and finally drew legislative maps, the inevitable question became: “What changed?” Inspecting the state legislative district lines reveals that, actually, very little changed in that regard. In New York, Republicans did not lose upstate districts, and Democrats did not gain downstate districts. Republicans continue to hold the majority in the Senate; Democrats continue to hold the majority in the Assembly.<sup>129</sup> Similarly, in Maryland, Baltimore did not gain Democratic districts, and Maryland rural areas did not lose Republican districts. To the disappointment of Democratic lawmakers who pushed for the legislation and the relief of Republicans who opposed it, eliminating prison-based gerrymandering did not have a partisan impact.

However, even though the new laws did not affect the number of legislative districts, there is reason to believe that they did have a real impact in correcting the dilution of the voting strength of residents of the home communities. The districting impact of these laws was at the local level, likely correcting a skew that had existed for decades under the census policy.

#### A. *Minimal Partisan Impact*

In New York, the net loss of upstate residents after the reallocation of incarcerated individuals was about twelve percent of a single

129. Jesse McKinley, *In Rebuke to Democrats, Voters Return Control of New York Senate to G.O.P* N.Y. TIMES (Nov. 5 2014), <http://www.nytimes.com/2014/11/05/nyregion/with-early-results-republicans-hover-close-to-control-of-new-york-senate.html>.

district when the Senate comprised sixty-two districts, or 38,404 residents.<sup>130</sup> The net gain downstate was 20,112 residents.<sup>131</sup> By at least one analysis, the reallocation of incarcerated individuals resulted in two upstate Senate districts having populations below the required threshold to remain viable.<sup>132</sup> Since the 2000 census, the population of the New York City area has grown, while the upstate population has shrunk slightly. This decrease in population was augmented by the reallocation of people in prison.<sup>133</sup>

As a result of demographic changes over the last decade, several districts in upstate New York fell below the legal minimum population for a sixty-two-seat Senate after the 2010 census. Although the story remains somewhat murky, it appears that New York Senate Republicans proposed adding a sixty-third Senate district.<sup>134</sup> By adding a sixty-third seat, every other Senate district would have to become smaller, thus reversing the loss of residents from the prisoner reallocation and protecting the Republicans' one-seat Senate majority. LATFOR agreed to the proposal and its final Senate plan included sixty-three districts.<sup>135</sup> Democrats challenged the additional district, but the New York Supreme Court ultimately upheld it.<sup>136</sup> The court commented that while the new district was not unconstitutional, the legislature's apportionment methodology was "disturbing."<sup>137</sup>

There is less analysis available regarding Maryland's districts, but it appears that the reallocation had minimal political impact there as well.<sup>138</sup> District 2B in Washington County, where Maryland Correctional Institution-Hagerstown is located, lost 5,386 prisoners, or just over three percent of its population.<sup>139</sup> About 8,000 residents

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130. Sasha Chavkin & Michael Keller, *Proposed 63rd Senate Seat Would Negate Impact of Counting Prisoners at Home*, N.Y. WORLD (Jan. 10, 2012), <http://www.thenewyorkworld.com/2012/01/10/redistricting>.

131. *Id.*

132. *Id.*

133. *Id.*

134. See Adam Shanks, *LATFOR Releases Proposed Senate and Assembly District Maps*, LEGISLATIVE GAZETTE (Jan. 26, 2012), <http://www.legislativegazette.com/Articles-Top-Stories-c-2012-01-26-81252.113122-LATFOR-releases-proposed-Senate-and-Assembly-district-maps.html>.

135. See *View District Maps*, LATFOR, <http://www.latfor.state.ny.us/maps/?sec=2012s> (last visited Sept. 24, 2015); see also Shanks, *supra* note 134.

136. *Cohen v. Cuomo*, 945 N.Y.S.2d 857, 863 (N.Y. Sup. Ct. 2012).

137. *Id.* at 862.

138. For a discussion of the impact of the new law on Maryland's districts see Michelle Davis, *Assessing the Constitutionality of Adjusting Prisoner Census Data in Congressional Redistricting: Maryland's Test Case*, 43 U. BALT. LAW FORUM 35, 48 (2012).

139. Maggie Clark, *Could a Recount of Prisoners Affect Elections?*, STATELINE (Oct. 12, 2012), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/10/12/could-a-recount-of-prisoners-affect-elections>.

were reallocated to Baltimore, helping offset its population decline.<sup>140</sup>

Thus, eliminating prison-based gerrymandering did not significantly impact the size of state legislative districts or shift the political control of either state. After all, legislators in both states have many tools available to design districts to their own liking; it turns out that reallocating the prison population, a relatively small portion of the overall population of the state, is not a particularly effective method to impact the design of state and congressional districts.<sup>141</sup> This realization should dampen the political opposition to reforming these laws. However, despite the lack of statewide partisan impact, these reforms do have important results for the local communities in New York City and Baltimore.

### B. Correcting Vote Dilution

The greater impact of the New York and Maryland laws was on the local level. Because large numbers of incarcerated individuals were reallocated to a few distinct urban neighborhoods in both New York City and Baltimore, the impact of the reallocation was heavily concentrated in certain city council districts in both cities. Because of high incarceration rates, these same neighborhoods lost significantly more residents than other districts within the city for decades prior to the reallocation.

For example, about one-third of the total prison population reallocated under Part XX in New York, totaling about 13,724 people, returned to eight New York City neighborhoods: Bedford Stuyvesant, Crown Heights, Flatbush, East New York, Brownsville, Bushwick, Harlem, and the South Bronx.<sup>142</sup> In Maryland, although the overall numbers are smaller, the concentrated impact on certain Baltimore neighborhoods is similar to New York. Approximately forty-five percent of all incarcerated individuals reallocated to home addresses in Maryland were reallocated to

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140. *Id.*

141. For a thorough explanation of redistricting and gerrymandering techniques, see JUSTIN LEVITT, BRENNAN CENTER FOR JUSTICE, A CITIZEN'S GUIDE TO REDISTRICTING (2009); *see also* JEFF GERALD HEBERT ET AL., THE REALIST'S GUIDE TO REDISTRICTING (2d ed. 2010); Nat'l Conference of State Legislators, REDISTRICTING LAW 2010; Samuel Issacharoff, *Gerrymandering & Political Cartels*, 116 HARVARD L. REV. 594 (2002); Nathan Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARVARD L. REV. 649 (2002).

142. *Redistricting Prisons*, N.Y. WORLD, <http://public.thenewyorkworld.com/public/2012/jan/redistricting-prisons/index-expand.html> (last visited. 24, 2015).

Baltimore City.<sup>143</sup> Of the incarcerated individuals reallocated to Baltimore City, more than half returned to City Council Districts 6, 7, 8, and 9, which make up the area of West Baltimore.<sup>144</sup>

Losing residents means losing political power. Like all legislative districts, city council districts must be drawn to include the same number of residents, but this is necessarily a smaller number for municipal districts than for state legislative districts. The smaller size of municipal districts means the prisoner reallocation has a greater impact on the local level. When inmates were allocated to the prison district, their home districts likely had to expand their boundaries in order to bring the population numbers up to the level needed to create a viable district. This expansion likely brought in residents of neighboring communities, diluting the relative voting power of each resident of the original district.

In New York City and Baltimore, where very different urban neighborhoods often sit right up against each other, the expansion of district lines could bring in residents from a community that has interests quite different from those of a community with a high concentration of incarcerated residents. Residents may have widely divergent experiences within their communities, including where their children attend school, whether they use public transportation, whether they live in public housing, and whether they receive public assistance. Moreover, how the community interacts with and experiences the criminal justice system varies depending on whether it is a community with a high number of incarcerated residents or a less affected neighboring community. These differences between bordering neighborhoods may be due in large part to the racial demographics of each area.

For example, New York City Council District 6 consists mostly of the Upper West Side; it borders District 7, which is comprised

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143. See MARYLAND DEP'T OF PLANNING, 2010 ADJUSTED CENSUS POPULATION FOR MARYLAND BY COUNTY AND REGION, [http://www.mdp.state.md.us/PDF/Redistricting/2010docs/Adj\\_2010\\_Tot\\_Pop\\_by\\_MDCntyReg.pdf](http://www.mdp.state.md.us/PDF/Redistricting/2010docs/Adj_2010_Tot_Pop_by_MDCntyReg.pdf) (Total people reallocated: 16,988; Total reallocated to Baltimore City: 7,797). Note that there seems to be a discrepancy in the total number if incarcerated individuals reallocated to Baltimore. The Maryland Department of Planning reports 7,797 people were reallocated to Baltimore City. But the Baltimore City Council's final "Demographic Summary by District" states that 5,703 incarcerated individuals were included in the final population data. BALTIMORE CITY COUNCIL, DEMOGRAPHIC SUMMARY BY DISTRICT: BILL 11-642 AMENDED (2011), <http://www.baltimorecitycouncil.com/Redistricting%202011/Final%20Bill%20Demographic%20Summary%20by%20District.pdf>.

144. *Id.* West Baltimore is approximately ninety percent African American; 31.9% of the population lives below the poverty line. *West Baltimore Neighborhood in Baltimore Maryland Detailed Profile*, CITY-DATA, <http://www.city-data.com/neighborhood/West-Baltimore-Baltimore-MD.html> (last visited Sept. 24, 2015).

largely of Harlem.<sup>145</sup> The two districts share a border, but have different communities with different interests and concerns.<sup>146</sup> In 2011, Harlem received about 2,240 incarcerated residents after implementation of Part XX; the Upper West Side received about two hundred.<sup>147</sup> Prior to Part XX, without these incarcerated residents, the line separating District 7 from District 6 would likely have moved south. This would pull additional Upper West Side residents into the Harlem district, bringing the district up to the required population. This likely would dilute the voting strength of that Harlem community. Although the final data of how these residents were allocated within District 7 is not available, it is likely that incarcerated residents caused that southern border to move further north, so that District 7 more accurately reflects the Harlem community. This shift likely corrects the dilution of the Harlem community's voting strength caused by the failure to include incarcerated residents in prior redistricting cycles.

Similarly, City Council District 9 in West Baltimore received 1,032 residents back after the implementation of the No Representation without Population law.<sup>148</sup> District 9 has a population that is eighty-seven percent African American with thirty-eight percent of residents living below the poverty level.<sup>149</sup> District 9 includes a large portion of the Sandtown-Winchester neighborhood (the rest of which spreads across the district line to City Council District 7), the neighborhood where Freddie Gray grew up and ultimately died while in police custody.<sup>150</sup> The neighborhood was one of the areas where violent protests took place in April 2015 after his death. Life expectancy in Sandtown-Winchester is 69.7 years, (on par with Iraq and Kazakhstan, according to the New York Times).<sup>151</sup> According to the 2010 census, the area was ninety-seven percent black; more

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145. NYC Districting Comm'n, NYC Council Districts Revised Plan (Feb. 6, 2013), [http://www.nyc.gov/html/dc/downloads/pdf/Manhattan\\_Feb6.pdf](http://www.nyc.gov/html/dc/downloads/pdf/Manhattan_Feb6.pdf).

146. In 2000, prior to Part XX, District 6 was seventy-three percent white, six percent black, and eleven percent Hispanic. Table SF1-DP CNCLD: Demographic Profile—2003 New York City Council Districts 2000 and 2010, [http://www.nyc.gov/html/dcp/pdf/census/census2010/t\\_sf1\\_dp\\_cncl.pdf](http://www.nyc.gov/html/dcp/pdf/census/census2010/t_sf1_dp_cncl.pdf). District 7 was thirteen percent white, thirty-one percent black, and fifty percent Hispanic. *Id.*

147. *Redistricting Prisons*, *supra* note 142.

148. *Id.*

149. *West Baltimore Neighborhood in Baltimore*, *supra* note 144.

150. Scott Shane, *Baltimore Riots Are Another Scar on a City Long Battered by Neglect*, N.Y. TIMES (Apr. 28, 2015), <http://www.nytimes.com/2015/04/29/us/baltimore-riots-are-another-scar-on-a-city-battered-by-neglect.html>. A map of Baltimore city council districts is available here: [http://www.baltimorecitycouncil.com/Redistricting%202011/New%20District%20Maps/Full%20City%20Districts%20New%20040111.pdf?fileticket=Bnm45Yvl\\_vc=&tabid=1003&mid=1770](http://www.baltimorecitycouncil.com/Redistricting%202011/New%20District%20Maps/Full%20City%20Districts%20New%20040111.pdf?fileticket=Bnm45Yvl_vc=&tabid=1003&mid=1770).

151. *Id.*

than half the households had incomes less than \$25,000; and just six percent of adults had a bachelor's degree or more.<sup>152</sup> Unemployment was double the city average.<sup>153</sup> In addition, Sandtown-Winchester has the highest incarceration rate in the state. Three percent of the total neighborhood population, or 458 residents, were incarcerated on Census Day 2010.<sup>154</sup>

District 11, which borders District 9, received 386 incarcerated residents back.<sup>155</sup> It has a population that is eighty-three percent white with twenty-five percent living below the poverty level.<sup>156</sup> As with the example of Harlem and the Upper West Side, although the precise data showing where inmates were reallocated on the local level is not available, it is plausible that the addition of over 1,000 residents to District 9 shrunk the border with District 11, reversing the dilution of District 9 voters.

This concept of vote dilution has long been recognized as violating the Equal Protection Clause, which protects the principle of "one person, one vote." In *Reynolds v. Sims*, the 1964 Supreme Court interpreted the Equal Protection Clause to require the "one person, one vote" rule. The Court determined that Article I, section 2 of the Constitution, which requires representatives to be chosen "by the People of the several States," means that one person's vote in an election must be worth the same as every other person's vote.<sup>157</sup> The Court held that "the right of suffrage can be denied by a debasement or a dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."<sup>158</sup>

While "vote denial" claims address the disenfranchisement of an individual voter, vote dilution is about the interests of groups coming together to elect a representative of choice. In essence, the "one person, one vote" rule is about group power; its purpose and effect are about whether and how a group of people will be able to elect

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152. BALTIMORE CITY DEP'T OF PLANNING, BALTIMORE NEIGHBORHOOD PROFILES: DATA FROM THE 2000 CENSUS, 2010 CENSUS, AND 2006–2010 AMERICAN COMMUNITY SURVEY (Apr. 28, 2014), <https://baltimore2006to2010acsprofiles.wordpress.com/>.

153. *See id.*

154. JUSTICE POLICY INST. & PRISON POLICY INITIATIVE, *supra* note 36, at 18; *see also* Justin Fenton, *Report: Sandtown-Winchester Leads State in Number of People Incarcerated*, THE BALTIMORE SUN, (Feb. 25, 2015), <http://www.baltimoresun.com/news/maryland/crime/blog/bs-md-ci-baltimore-report-20150224-story.html>.

155. BALTIMORE CITY COUNCIL, *supra* note 143.

156. MORRELL PARK NEIGHBORHOOD DETAILED PROFILE, CITY-DATA, <http://www.city-data.com/neighborhood/Morrell-Park-Baltimore-MD.html> (last visited Sept. 24 2015).

157. *Reynolds v. Sims*, 377 U.S. 533, 56–61 (1964).

158. *Id.* at 555.

representatives.<sup>159</sup> “One person, one vote” claims are about the interests of groups of people who live within a certain geographic area in securing democratic representation in proportion to their numbers.<sup>160</sup> As the Court explained in *Reynolds*, “overvaluation of the votes of those living here has the certain effect of dilution . . . of the votes of those living there.”<sup>161</sup>

By reallocating incarcerated residents back to their home districts, the laws in Maryland and New York represent a significant step in returning political power to inner-city communities whose voice has long been weakened and diluted by the intersection of the Census and mass incarceration. Perhaps it was not the seismic partisan shift that the legislators anticipated, but democracy is not always about politics.

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159. Joseph Fishkin, *Weightless Votes*, 121 YALE L.J. 1888, 1892–93 (2012).

160. *Reynolds*, 377 U.S. at 555; see also Fishkin, *supra* note 159, at 1899. The correction of vote dilution in Baltimore and New York City that resulted from the reallocation of the prison population was quite different from a traditional racial minority vote dilution claim under section 2 of the Voting Rights Act (VRA), 52 U.S.C. § 10301 (2006). Under section 2 and *Thornburg v. Gingles*, 478 U.S. 30, 56–58 (1986), a vote dilution claim arises when a legislative district has the effect of denying racial minority voters the opportunity to elect a candidate of their choice. While no section 2 claim has been brought to challenge districts created under prison-based gerrymandering laws, some voting rights experts have argued that such a claim may be viable. See Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL’Y REV. 355, 387–88 (2011); NAACP-LDF, CAPTIVE CONSTITUENTS: PRISON-BASED GERRYMANDERING AND THE DISTORTION OF DEMOCRACY (2010), <http://www.naacpldf.org/files/publications/Captive%20Constituents%20Report.pdf>. Moreover, the Second Circuit Court of Appeals essentially invited consideration of such a claim on two separate occasions. See *Hayden v. Pataki*, 449 F.3d 305, 328–29 (2d Cir. 2006) (en banc) (remanding for consideration of a possible claim, stating “[i]t is unclear whether plaintiffs’ vote dilution claim [challenging New York’s felony disenfranchisement law] also encompasses a claim on behalf of plaintiffs who are neither incarcerated nor on parole, that their votes are ‘diluted’ because of New York’s apportionment process . . . which counts incarcerated prisoners as residents of the communities in which they are incarcerated, and has the alleged effect of increasing upstate New York regions’ populations at the expense of New York City’s.”); see also *Baker v. Cuomo*, 58 F.3d 814, 823 (2d Cir. 1995).

161. 377 U.S. at 563. Currently there are cases pending in both Rhode Island and Florida that challenge the application of the census usual residency rule under a “one person, one vote” theory. In Rhode Island, voters and the ACLU challenged the 2012 redistricting plan of the City of Cranston that included the 3,433 incarcerated individuals housed at the Adult Correctional Institution (ACI). *Davidson v. Cranston*, 42 F. Supp.3d 325, 326 (R.I. 2014). The court denied defendant’s motion to dismiss, finding “[i]t is not clear from the information available to the Court at this juncture . . . that the prisoners at the ACI’s inclusion in Ward Six furthers the Constitutional goals of either representational or electoral equality.” *Id.* at 332. In Florida, plaintiffs challenged the 2013 redistricting plan of the Jefferson County Board of Commissioners, arguing that the population of the local prison constitutes nearly forty percent of the population of one district in the plan. Complaint, *Calvin v. Jefferson Cty. Bd. Of Comm’rs*, No. 4:15-cv-00131-MW-CAS (Mar. 9, 2015).

*C. Rebuilding the Building Blocks*

The vote dilution caused by prison based gerrymandering laws illustrates an important element of the harm that occurs when the criminal justice system intrudes upon our democratic systems. While the common perception is that our democracy is based on the right to vote—an individual right, exercised alone, in the isolation of a private voting booth—the reality is that our democracy is equally based on groups of people coming together. Our representation before the government relies on whether a group of “We the People” has collected itself into a community with sufficient numbers to warrant representation. As Justice Harlan explained, “the fundamental principle of representative government in this country is one of equal representation for equal numbers of people . . . .”<sup>162</sup> A legislative district is the mechanism used to identify and acknowledge a community that merits representation in our government. The district lines define the group and its common interests and values as they are to be represented in the policymaking process of the legislative body. In this way, districts are the building blocks that form the foundation of our representative democracy.

Mass incarceration manipulates these building blocks of group power, and in doing so weakens our democracy. Incarceration removes people from their communities, a displacement that is both physical and legal. People who are arrested, convicted and sentenced to prison are physically removed from their home communities and relocated to another. In addition to their physical displacement, incarcerated individuals are simultaneously legally displaced from the political process through laws that deny the right to vote to people in prison. The group left behind—a group that once had numbers meriting democratic representation of a collective voice—gradually dwindles, not through its own choice, decision or exercise of free will, but through the forcible removal of its members. The Census Bureau’s current application of the usual residency rule to incarcerated individuals permits and sanctions this manipulation.

This manipulation of group power undermines the fundamental principle of democratic representation in our country—not only the representation of the two million Americans who are incarcerated but also the millions of Americans who remain in the communities that have been disproportionately impacted by the criminal justice system. These communities should be equal building blocks, deserving equal representation. Yet because they have

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162. *Id.* at 560–61.

lost so many members of their community to prison, they are not equal.

The implementation of the Maryland and New York laws required each state to create a link between each incarcerated person and his or her home community. Through the technical steps of information gathering, data analysis, geocoding, and finally the drawing of new district lines, each state began to rebuild the building blocks of democratic representation. In this way, the new laws in Maryland and New York are about democracy, not politics. They are a recognition that elected officials represent the collective voice of group power. And they are an attempt to take one significant step to reverse the effects of years of the criminal justice system's manipulation of this collective voice.

#### IV. CONCLUSION

In addition to these democratic reforms, the reallocation of people in prison back to their home communities could mark an important philosophical shift in our criminal justice policies. On its face, incarceration punishes those who commit crimes in our society. It is carried out by administrative government bureaucracies tasked with processing and housing those charged with and convicted of crimes. But it is also “an expression of state power, a statement of collective morality.”<sup>163</sup> As David Garland has observed:

Punishment is an embodiment of current sensibilities, and a set of symbols which display a cultural ethos and help create a social identity . . . . What appears on its surface to be merely a means of dealing with offenders so that the rest of us can lead our lives untroubled by them, is in fact a social institution which helps define the nature of our society, [and] the kinds of relationships which compose it . . . .<sup>164</sup>

New laws in Maryland and New York created a technical link between the incarcerated individual and his or her community, resting upon a recognition of the continuing relationship between incarcerated individuals and their home communities. This recognition seems to signal a shift away from a view of incarceration as a permanent end in itself and towards a view that recognizes that incarceration is temporary. Rather than viewing the goal of

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163. DAVID GARLAND, *supra* note 7, at 287.

164. *Id.*

incarceration as isolation and separation, this view seems to recognize broadly that incarcerated individuals are people who maintain ties to real communities to which most will return upon release. A criminal justice system that understands and values this connection between individual and community will hopefully begin to see its goal as rehabilitation and reintegration rather than isolation and punishment.

Indeed, there is a growing national conversation about the need to reform our criminal justice policies. The recent disturbing and very public deaths of Michael Brown in Ferguson, Missouri, Eric Garner in Staten Island, New York, Freddie Gray in Baltimore, Maryland, Tamir Rice in Cleveland, Ohio, and Walter Scott in Charleston, South Carolina, all at the hands of police officers, have focused attention on the relationship between police and minority communities.

The immediate attention on policing in minority communities has opened a broader national discussion recognizing the larger impact of mandatory minimum sentences, mass incarceration, and race and poverty in cities across the country; a conversation that is long overdue. Indeed, the United States Department of Justice and President Obama have made strong and honest statements about the harm mass incarceration has caused to minority communities, and about the continuing racial bias that pervades our criminal justice policies. In its stinging critique of the Ferguson Police Department, the Department of Justice stated, “Over time, Ferguson’s police and municipal court practices have sown deep mistrust between parts of the community and the police department, undermining law enforcement legitimacy among African Americans in particular.”<sup>165</sup> Later in its report DOJ advised, “[r]estoring trust in law enforcement will require recognition of the harms caused by Ferguson’s law enforcement practices, and diligent, committed collaboration with the entire Ferguson community.”<sup>166</sup>

And in his speech at the NAACP’s 106th national convention in July 2015, President Obama stated:

A growing body of research shows that people of color are more likely to be stopped, frisked, questioned, charged, detained. African Americans are more likely to be arrested. They are more likely to be sentenced to more time for the same

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165. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

166. *Id.* at 6.

crime. And one of the consequences of this is, around one million fathers are behind bars. Around one in nine African American kids has a parent in prison.

What is that doing to our communities? What's that doing to those children? Our nation is being robbed of men and women who could be workers and taxpayers, could be more actively involved in their children's lives, could be role models, could be community leaders, and right now they're locked up for a non-violent offense.<sup>167</sup>

Significantly, these comments recognize the impact of policing and sentencing on real neighborhoods and the daily lives of the people who live there. They reflect a shifting perspective of the federal government, an understanding that aggressive policing and incarcerating millions of young, black men has had devastating consequences for families and communities, and a recognition that these policies must change

The New York and Maryland laws that reallocate incarcerated individuals back to their home communities signify one step towards a shift in emphasis away from isolation and segregation of the incarcerated individual and towards rehabilitation and reintegration. Hopefully this step is a reflection of a bigger shift, a shift towards acknowledging that punishment and incarceration are institutions for the expression of social values, sensibility, and morality, rather than an instrumental means to a punitive end. By recognizing that incarcerated individuals are people with homes and families to which one day most will return, and that those homes sit within functioning communities deserving an equal voice in our government, these laws may signal the beginning of another pendulum swing in the long, troubled history of criminal punishment in this country.

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167. David Hudson, *President Obama: "Our Criminal Justice System Isn't as Smart as It Should Be,"* THE WHITE HOUSE (July 15, 2015, 1:12 PM), <http://www.whitehouse.gov/blog/2015/07/15/president-obama-our-criminal-justice-system-isnt-smart-it-should-be>.