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## COMMENT

# A RACIAL JUSTICE PERSPECTIVE ON PRISON GERRYMANDERING IN MINNESOTA

ELLIE TREBILCOCK\*

Prison gerrymandering is the practice of counting incarcerated people in the location where they are imprisoned, rather than where they lived before being sentenced, for the purposes of drawing election district lines and determining the amount of federal funds to provide to programs in each district.<sup>1</sup> Due to the disproportionate number of people of color who are incarcerated, this policy unfairly and unjustly affects communities of Black, Indigenous, and people of color (BIPOC).<sup>2</sup> For these reasons, it is vital to examine this issue under a racial justice lens.

Prison gerrymandering skews census data in favor of white, rural areas.<sup>3</sup> In contrast, the practice leaves communities of color underrepresented in local, state, and federal government. Further, fewer federal funds are allocated to majority BIPOC districts due to prison gerrymandering. To ensure fair and equitable districts, the Census Bureau needs to change its policy to count incarcerated individuals at their last residential address before being convicted.

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\* Ellie Trebilcock wrote this article during her third year at the University of St. Thomas School of Law in Minneapolis, Minnesota. This article was written in association with a class called “Critical Perspectives: Race” taught by Dr. Artika Tyner.

<sup>1</sup> Aleks Kajstura, *Importing Constituents: Prisoners and Political Clout in Minnesota*, PRISON POL’Y. INITIATIVE (Mar. 10, 2010), <https://www.prisonersofthecensus.org/mn/report.html>.

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

<sup>3</sup> Hansi Lo Wang & Kumari Devarajan, *Your Body is Being Used: Where Prisoners Who Can’t Vote Fill Voting Districts*, NPR CODE SWITCH (Dec. 31, 2019), <https://www.npr.org/sections/codeswitch/2019/12/31/761932806/your-body-being-used-where-prisoners-who-can-t-vote-fill-voting-districts>.

## I. BACKGROUND ON THE CENSUS

The United States Constitution requires the government to count all persons residing in the U.S. every ten years.<sup>4</sup> This counting process is called the census.<sup>5</sup> Participation in the census is mandated by Title 13 of the U.S. Code.<sup>6</sup> However, even with this requirement the census still consistently undercounts renters, people of color, people in low-income households, people with limited English language capabilities, immigrants, refugees, students, and children under five.<sup>7</sup> According to Ramsey County, Minnesota, full participation is very difficult to achieve due to declining response rates, distrust in government, limited funding for the census, and a highly mobile population.<sup>8</sup>

Having as complete and accurate of a census count as possible is essential because the data collected is used by the government for many programs and functions. For instance, states are required to redraw district boundaries every ten years to ensure each person has the same representational power as every other person in different districts.<sup>9</sup> The idea behind this is the principal of “one person, one vote.”<sup>10</sup> This requires election districts to be drawn to contain roughly the same number of constituents so every person receives the same level of representation.<sup>11</sup> To accomplish this, state authorities rely on census population data to draw district lines for state legislative districts, judicial districts, city-council districts, and school board districts.<sup>12</sup>

The census can have lasting effects on representation in Congress. One extraordinary example of this can be shown through the state of

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<sup>4</sup> Jolie Wood, *Ramsey County and the 2020 Census*, RAMSEY CNTY., file:///C:/Users/ellie/AppData/Local/Temp/Ramsey%20County%20and%20the%20Census%20-%20Public%20Health%20and%20Health%20Protection-3.pdf.

<sup>5</sup> *Id.*

<sup>6</sup> Beth Jarosz, Mark Mather, & Paola Scommegna, *U.S. 2020 Census FAQ*, PRB (May 7, 2019), <https://www.prb.org/u-s-2020-census-faq/>.

<sup>7</sup> Wood, *supra* note 4.

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

<sup>9</sup> Molly Danahy & Danielle Lang, *Distortion in the Census: America's Oldest Gerrymander?*, 49 UNIV. MEM. L. REV. 1065, 1076 (2019).

<sup>10</sup> *Political Participation Case: Prison-Based Gerrymandering Reform*, NAACP LEGAL DEF. EDUC. FUND (Feb. 16, 2018), <https://naacpldf.org/case-issue/prison-based-gerrymandering-reform/>.

<sup>11</sup> *Id.*

<sup>12</sup> Danahy & Lang, *supra* note 9, at 1077.

Minnesota's 2020 census count results.<sup>13</sup> Before the 2020 census count, Minnesota had eight congressional districts.<sup>14</sup> However, there was a high expectation that Minnesota would lose one of its districts – and therefore have one less member of Congress in the House of Representatives.<sup>15</sup> However, remarkably Minnesota kept its congressional seat.<sup>16</sup> The Census Bureau's data shockingly revealed that if twenty-six fewer Minnesota residents had not taken the census, the state would have lost a district and – with it – a member in the House of Representatives.<sup>17</sup> This has reportedly been the closest margin in which a state secured a congressional seat.<sup>18</sup>

The census also determines the distribution of federal dollars for many government programs. Based on the 2010 census data, Minnesota received \$15,459,175,947 in fiscal year 2016 through federal spending programs.<sup>19</sup> These funds are spent on government programs for food (i.e., Supplemental Nutrition Assistance Program (SNAP), Women, Infants, and Children (WIC), & Child and Adult Care Food Program), healthcare (i.e., Medicaid, Medicare Part B, & State Children's Health Insurance Program (S-CHIP)), education (i.e., Head Start, Title 1 funding, Pell grants, & special education grants), and financial assistance/housing (i.e., Section 8, Temporary Assistance for Needy Families (TANF), community development block grants, & highway funding).<sup>20</sup>

Lastly, the census also tracks demographic trends, such as population growth, density, age, and racial/ethnic make-up.<sup>21</sup> To achieve this, each census form asks every household to respond to questions identifying each resident's (1) name, (2) sex, (3) age and birthdate, and (4) race/ethnicity.<sup>22</sup> The demographic data collected by the census is used for infrastructure and

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<sup>13</sup> Hansi Lo Wang, *How 26 People in the Census Count Helped Minnesota Beat New York for a House Seat*, NPR (May 1, 2021, 5:35PM), <https://www.npr.org/2021/05/01/991671730/how-26-people-in-the-census-count-helped-minnesota-beat-new-york-for-a-house-seat>.

<sup>14</sup> Wood, *supra* note 4.

<sup>15</sup> *Id.*

<sup>16</sup> Wang, *supra* note 13.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Andrew Reamer, *Counting for Dollars 2020: The Role of the Decennial Census in the Geographic Distribution of Federal Funds – Minnesota*, GEO. WASH. INST. PUB. POL'Y (Jan. 30, 2019), [https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/IPP-1819-3%20CountingforDollars\\_MN.pdf](https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/IPP-1819-3%20CountingforDollars_MN.pdf).

<sup>20</sup> Wood, *supra* note 4.

<sup>21</sup> *Id.*

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

public services planning, policymaking and research, business, real estate, and investment decisions.<sup>23</sup>

All these government functions and programs heavily rely on the census having an accurate count of people. Without an accurate census count, many communities could either be shorted on government funding or go underrepresented. In the next sections, I will discuss prison gerrymandering and how it exacerbates this problem – especially for communities of color.

## II. GERRYMANDERING

As discussed above, after the census results are published, individual states must next begin the process of drawing the lines of each of their congressional districts.<sup>24</sup> However, sometimes government officials take advantage of this process in attempt to stay in power.<sup>25</sup> This process has been coined as gerrymandering.<sup>26</sup> The goal of gerrymandering is to draw the boundaries of congressional districts in a manner which allows the political party in power to win as many seats as possible.<sup>27</sup> To accomplish this goal, drafters of legislative districts use the methods called packing or cracking.<sup>28</sup> Packing consists of a political party crafting a congressional district to hold as many voters from its opposing party as possible.<sup>29</sup> By doing this, the party in power can limit the representation of its opposition to a specific district—while at the same time winning the surrounding districts.<sup>30</sup> In comparison, cracking splits areas where opposition voters are located and separates them into multiple districts.<sup>31</sup> This limits the power of the opposing party because their voters are outnumbered by the party in power.<sup>32</sup>

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

<sup>24</sup> Danahy & Lang, *supra* note 9, at 1076.

<sup>25</sup> Michael Wines, *What Is Gerrymandering? And How Does It Work?*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/what-is-gerrymandering.html>.

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

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Wines, *supra* note 25.

<sup>32</sup> *Id.*

This process of gerrymandering districts began almost immediately after the English colonists founded the United States.<sup>33</sup> However, the term “gerrymandering” was not used until 1812 when the state of Massachusetts began drawing oddly shaped districts in order for the Jeffersonian Republicans (one of the two main political parties at the time) to maximize their political advantage in the upcoming election.<sup>34</sup> The gerrymandering strategy worked.<sup>35</sup> Even though Jeffersonian Republicans received only approximately 49 percent of the popular vote, the party won twenty-nine of the forty state congressional seats.<sup>36</sup> In response to this, Gilbert Stewart published a political cartoon depicting the gerrymandered districts.<sup>37</sup>



**Fig. 1** A political cartoon depicting the gerrymandering of a Massachusetts electoral district in 1812. Drawn by Gilbert Stewart.

<sup>33</sup> Becky Little, *How Gerrymandering Began in the US*, HISTORY (Apr. 20, 2021), [https://www.history.com/news/gerrymandering-origins-voting?cmpid=email-hist-inside-history-2021-0421-04212021&om\\_rid=2fe979bdc59ec10e36d273c3bff96e7df39a1a800c02734213ddcd99c857c50f&~campaign=hist-inside-history-2021-0421](https://www.history.com/news/gerrymandering-origins-voting?cmpid=email-hist-inside-history-2021-0421-04212021&om_rid=2fe979bdc59ec10e36d273c3bff96e7df39a1a800c02734213ddcd99c857c50f&~campaign=hist-inside-history-2021-0421).

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

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

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (See Fig. 1).

Stewart is credited with coining the term “gerrymandering” because he reportedly thought the districts looked like a salamander.<sup>38</sup> He then combined the word with the name of the Massachusetts Governor at the time, Elbridge Gerry (making the term a play on words: Gerry–mander).<sup>39</sup>

The practice of gerrymandering districts continued for two centuries after the inception of the United States.<sup>40</sup> However, the use of gerrymandering as a tool for political suppression did not become prominent until after the Civil War when Black men gained the right to vote.<sup>41</sup> During this time, southern states began drawing districts in long string like shapes for the purpose of packing as many Black voters as possible into one district.<sup>42</sup> In turn, this strategy ensured the rest of the districts in the state would have a white majority.<sup>43</sup>

After Congress passed the Voting Rights Act of 1965, which protected people of color’s right to vote, gerrymandering was even more likely to be used in attempt to keep political power in hands of white voters.<sup>44</sup> Spurring this on, the United States Supreme Court ruled that all state voting districts must have approximately equal populations and states must adjust federal congressional districts every ten years after the census.<sup>45</sup>

Currently, states under Republican control tend to have the most skewed districts.<sup>46</sup> The reason behind this trend is Republicans did exceptionally well in the 2010 election.<sup>47</sup> This allowed the Republican party to have far wider control of state legislatures, which re-drew the district maps after the results of the 2010 census were released.<sup>48</sup>

The Supreme Court case, *Virginia House of Delegates v. Bethune-Hill*, arose after Virginia’s General Assembly re-drew the state’s district map

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

<sup>39</sup> Little, *supra* note 33.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

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

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Little, *supra* note 33.

<sup>46</sup> Wines, *supra* note 25.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

and twelve of the districts included 55 percent Black voters.<sup>49</sup> Residents argued the districts illegally packed Black voters into these districts – thus, diluting their political power.<sup>50</sup> In 2019, the United States Supreme Court ruled that the state of Virginia’s district map was unconstitutional racial gerrymandering.<sup>51</sup> The Supreme Court also affirmed the district court’s decision that race had been the main consideration used to draw each of the eleven districts.<sup>52</sup>

While the Supreme Court has struck down gerrymanders based on race, it has yet to invalidate a district map that is skewed with the intent to benefit a specific political party.<sup>53</sup> Instead, the Supreme Court has ruled this type of gerrymandering is a political issue and the decision should be left up to Congress and the states.<sup>54</sup>

### III. DEFINING PRISON GERRYMANDERING

When the census is distributed, people in prison are also included in the count. However, the Census Bureau rule requires all people to be counted under their “usual residence.”<sup>55</sup> A person’s usual residence is defined as the place where someone usually lives and sleeps.<sup>56</sup> This results in incarcerated people being counted as residents of the town in which they are imprisoned, rather than the place they lived before they were convicted.<sup>57</sup>

The federal government has counted incarcerated people this way since the first United States census in 1790.<sup>58</sup> This practice was a relatively harmless practice for about two centuries because the United States prison

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<sup>49</sup> Amy Howe, *Argument Preview: Virginia Racial Gerrymandering Case Returns to Supreme Court*, SCOTUSBLOG (Mar. 11, 2019, 2:26PM), <https://www.scotusblog.com/2019/03/argument-preview-virginia-racial-gerrymandering-case-returns-to-supreme-court/>.

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

<sup>51</sup> Ariane de Vogue, Ryan Nobles, & Devan Cole, *Supreme Court Hands Democrats a Win in Virginia Racial Gerrymander Case*, CNN POLITICS (June 17, 2019, 4:09PM), <https://www.cnn.com/2019/06/17/politics/supreme-court-racial-virginia-gerrymandering-case>.

<sup>52</sup> Howe, *supra* note 49.

<sup>53</sup> Wines, *supra* note 25.

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

<sup>55</sup> Kim Bellware, *Disappearing Act*, BELT MAG. (Feb. 1, 2019), <https://beltmag.com/census-prison-gerrymandering-bellware/>.

<sup>56</sup> *Id.*

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

<sup>58</sup> Wang & Devarajan, *supra* note 3.



population was much smaller than it is now.<sup>59</sup> For instance, in 1977 only 44 out of every 100,000 Minnesotans were incarcerated.<sup>60</sup> Today, the rate has grown to 342 per 100,000 Minnesotans.<sup>61</sup> This increase in the prison population is especially problematic because of the disproportionate number of people of color who are incarcerated. For instance, Black Americans account for 12.7 percent of the U.S. population but comprise 41.3 percent of the federal and state prison population.<sup>62</sup> Black people are also incarcerated five times more than white people and Latinos are incarcerated almost two times more than white people.<sup>63</sup>

The disproportionate number of people of color in prison combined with the Census Bureau's method of counting incarcerated people leads to drawing unequal, unfair, and undemocratic districts.<sup>64</sup> This process is called prison gerrymandering.

In the next section, I will discuss how prison gerrymandering weakens the political power of communities of color and misappropriates federal funds to rural, and predominantly white districts.

#### IV. POLITICAL EFFECT OF PRISON GERRYMANDERING

The policy of counting prisoners in the town in which they are incarcerated has resulted in a big impact on prison towns across the United States.<sup>65</sup> The population counts of rural and predominantly white towns were bolstered by prisons which were disproportionately made up of Black and Latinx people.<sup>66</sup> Between 1980 and 1999, 213 new adult prisons were built in rural areas.<sup>67</sup> This expansion occurred after the farm crisis and the closing of rural factories in the mid-1980s.<sup>68</sup> Both of these events lead to increased

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<sup>59</sup> *Id.*

<sup>60</sup> Kajstura, *supra* note 1.

<sup>61</sup> *Id.*

<sup>62</sup> Minnesota Profile, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/MN.html>.

<sup>63</sup> Faith Stachulski, *Prison Gerrymandering: Locking up Elections and Diluting Representational Equality*, UNIV. ILL. L. REV. 401, 405 (2019).

<sup>64</sup> Kajstura, *supra* note 1.

<sup>65</sup> Wang & Devarajan, *supra* note 3.

<sup>66</sup> *Id.*

<sup>67</sup> Bellware, *supra* note 55.

<sup>68</sup> Tracy L. Huling, *Prisons as a Growth Industry in Rural America: An Exploratory Discussion of the Effects on Young African American Men in the Inner Cities*, PRISON POL'Y INITIATIVE (Apr. 15, 1999), [https://static.prisonpolicy.org/scans/prisons\\_as\\_rural\\_growth.shtml#additional](https://static.prisonpolicy.org/scans/prisons_as_rural_growth.shtml#additional).

employment loss for people located in rural communities.<sup>69</sup> Due to the declining prosperity of rural communities, many towns bid for the opportunity to host prisons.<sup>70</sup> Rural towns were eager to build prisons because it was believed they could help bring back stable employment to rural areas and rejuvenate the local economy.<sup>71</sup>

The combination of increased mass incarceration and rural prison growth skewed not only demographics, but political power.<sup>72</sup> As explained above, prisoners are disproportionately people of color.<sup>73</sup> Furthermore, incarcerated people currently come disproportionately from cities and are more likely to vote Democrat.<sup>74</sup> In contrast, prisons are increasingly located in conservative rural areas.<sup>75</sup> While incarcerated people increase the population count of rural, mostly white communities, they do not have the right to vote and have no means of holding local government and state representatives accountable.<sup>76</sup>

According to data from the State Demographer, Susan Brower, there are 15 state prisons in Minnesota.<sup>77</sup> Of these, nine of the fifteen prisons are located in townships with populations less than 10,000.<sup>78</sup> The other six prisons are located either within the Twin-Cities metro area (Lino Lakes & Shakopee), Rochester, Red Wing, Faribault, or St. Cloud.<sup>79</sup>

The data on prison populations in Minnesota demonstrates how a small, rural town's population count can be bolstered by a prison inside its city limits. For example, in 2018, 1,063 people were incarcerated in Moose Lake out of a total population of 2,794 (totaling to 38 percent of the town's population is in prison).<sup>80</sup> Similarly, 1,011 people out of 3,094 were incarcerated in the prison in Rush City in 2018 (making up approximately 33

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

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

<sup>71</sup> *Id.*

<sup>72</sup> Bellware, *supra* note 55.

<sup>73</sup> *Id.*

<sup>74</sup> John Pfaff, *Demarcation's Blindspots*, 16 OHIO ST. J. CRIM. L. 253, 275 (Fall 2018).

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

<sup>76</sup> Janai Nelson, *Counting Change: Ensuring Law Inclusive Census for Communities of Color*, 119 COLUM. L. REV. 1399, 1431 (June 2019).

<sup>77</sup> *Data on the Prison Population in Minnesota*, MINN. ST. DEMOGRAPHER (2018). (See Fig. 2.)

<sup>78</sup> *Id.* These townships include Moose Lake, Rush City, Itasca Co., Sandstone, Sturgeon Lake, Hermantown, Waseca, Bayport, and Oak Park Heights.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

percent of the town's population).<sup>81</sup> Further, 1,242 out of 2,685 people were incarcerated in the prison in Sandstone (which adds up to 46 percent of the total population) and 1,603 out of 3,993 people were incarcerated in Bayport (41 percent of the total population).<sup>82</sup> Even Sturgeon Lake, which only has 504 people, sees a substantial increase in population due to the prison located there (164 people or 33 percent of Sturgeon Lake's population were located in its prison).<sup>83</sup>

County	City/Township	2018 City/Township Population Estimate	Facility	Type of Facility	2018 Facility Population
ANOKA	LINO LAKES CITY	21,347	MINNESOTA CORRECTIONAL FACILITY-LINO LAKES	PRISON/MN	1,299
CARLTON	MOOSE LAKE CITY	2,794	MINNESOTA CORRECTIONAL FACILITY-MOOSE LAKE	PRISON/MN	1,063
CHISAGO	RUSH CITY CITY	3,094	MINNESOTA CORRECTIONAL FACILITY-RUSH CITY	PRISON/MN	1,011
GOODHUE	RED WING CITY	16,522	MINNESOTA CORRECTIONAL FACILITY-RED WING	PRISON/MN	122
ITASCA	ITASCA CO. UNORGANIZED	6,453	MINNESOTA CORRECTIONAL FACILITY-TOGO	PRISON/MN	80
OLMSTED	ROCHESTER CITY	117,444	U.S. PRISON HOSPITAL	PRISON/FEDERAL	652
PINE	SANDSTONE CITY	2,685	SANDSTONE FEDERAL PRISON	PRISON/FEDERAL	1,242
PINE	STURGEON LAKE TOWNSHIP	504	MINNESOTA CORRECTIONAL FACILITY-WILLOW RIVER	PRISON/MN	164
RICE	FARIBAULT CITY	23,884	MINNESOTA CORRECTIONAL FACILITY-FARIBAULT	PRISON/MN	1,998
ST. LOUIS	HERMANTOWN CITY	9,731	FEDERAL PRISON CAMP	PRISON/FEDERAL	696
SCOTT	SHAKOPEE CITY	41,506	MINNESOTA CORRECTIONAL FACILITY-SHAKOPEE	PRISON/MN	626
SHERBURNE	ST. CLOUD CITY	68,202	MINNESOTA CORRECTIONAL FACILITY-ST. CLOUD	PRISON/MN	1,040
WASECA	WASECA CITY	9,027	WASECA FCI	PRISON/FEDERAL	677
WASHINGTON	BAYPORT CITY	3,893	MINNESOTA CORRECTIONAL FACILITY-STILLWATER	PRISON/MN	1,603
WASHINGTON	OAK PARK HEIGHTS CITY	4,801	MINNESOTA CORRECTIONAL FACILITY-OAK PARK HEIGHTS	PRISON/MN	397

**Fig. 2** Data showing the prison population in Minnesota. Provided by the Minnesota State Demographer, Susan Brower.

The data provided by the Minnesota state demographer also shows how prison populations are less influential in urban areas.<sup>84</sup> Lino Lakes incarcerated 1,299 people in 2018. However, the population in Lino Lakes totaled 21,347 people.<sup>85</sup> Therefore, people in prison only make up six percent of Lino Lake's total population.<sup>86</sup> Another example is Shakopee, which had a total population of 68,202 people in 2018 – only 1,040 of which were

<sup>81</sup> *Id.*

<sup>82</sup> MINN. ST. DEMOGRAPHER, *supra* note 77. (See Fig. 2.)

<sup>83</sup> *Id.*

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

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

<sup>86</sup> *Id.*

located at its correctional facility.<sup>87</sup> This number only makes up approximately two percent of Shakopee's total population.<sup>88</sup> Additionally, St. Cloud in 2018, which had a total population of 68,202, only imprisoned 1,603 people or approximately two percent of the population.<sup>89</sup>

As previously discussed, there are currently eight Congressional Districts located in the state of Minnesota.<sup>90</sup> According to the data collected by the state demographer, four prisons are located in Minnesota's 6th District (Lino Lakes, Bayport, Oak Park Heights, & St. Cloud), six prisons are located in the 8th District (Moose Lake, Rush City, Itasca Co., Sturgeon Lake, Sandstone, & Hermantown) two prisons are located in the 2nd District (Red Wing & Shakopee), and three prisons are located in the 1st District (Rochester, Faribault, & Waseca).<sup>91</sup> However, no state correctional facilities are located in the 7th, 3rd, 5th, or 4th Districts (three of which are located within the Twin-Cities Metro area – and therefore are the most populated areas in Minnesota).<sup>92</sup>

With six prisons located in Minnesota's 8th District, it is likely to truly benefit from prison gerrymandering. According to the Census Bureau, Minnesota's 8th District had 671,346 people living there in 2019.<sup>93</sup> However, this number has been padded by the prison population of approximately 4,256 people incarcerated in Minnesota's 8th District.<sup>94</sup> Similarly, 729,029 people were living in Minnesota's 6th district in 2019<sup>95</sup>—approximately 4,339 of whom were incarcerated in 1 of its 4 prisons.<sup>96</sup>

As mentioned previously, all of the congressional districts are meant to have approximately the same number of people within their borders.<sup>97</sup> Based on the data above, citizens in the 8th District and the 6th District are overrepresented by approximately 4,256 and 4,339 people respectively.<sup>98</sup> Complicating matters is the fact that people who are incarcerated are not

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<sup>87</sup> MINN. ST. DEMOGRAPHER, *supra* note 77. (See Fig. 2.)

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

<sup>89</sup> *Id.*

<sup>90</sup> Wood, *supra* note 4.

<sup>91</sup> MINN. ST. DEMOGRAPHER, *supra* note 77.

<sup>92</sup> *Id.*

<sup>93</sup> *Congressional District 8 (117th Congress), Minnesota*, U.S. CENSUS BUREAU (2019), <https://www.census.gov/mycd/?st=27&cd=08>.

<sup>94</sup> MINN. ST. DEMOGRAPHER, *supra* note 77.

<sup>95</sup> *Congressional District 6 (117th Congress), Minnesota*, U.S. CENSUS BUREAU (2019), <https://www.census.gov/mycd/?st=27&cd=06>.

<sup>96</sup> MINN. ST. DEMOGRAPHER, *supra* note 77.

<sup>97</sup> NAACP LEGAL DEF. AND EDUC. FUND, *supra* note 10.

<sup>98</sup> MINN. ST. DEMOGRAPHER, *supra* note 77.

allowed to vote in Minnesota.<sup>99</sup> Therefore, this means there are less voters in the 6th and 8th Districts which elect their elected officials.<sup>100</sup> However, these constituents in the 6th and 8th Districts still have the exact same amount of representation and weight in Congress as other districts which have more eligible voters.<sup>101</sup>



**Fig. 3** Map of Minnesota's Congressional Districts. Source: <https://web.archive.org/web/20140222045635/http://www.nationalatlas.gov/printable/congress.html>.

In fact, the process of counting disenfranchised prisoners in the locations where they are incarcerated has been compared to the Three-Fifth's Clause of the Constitution.<sup>102</sup> This clause originally counted only three-fifths of every Black person living in slave-holding states for purposes of determining representation in Congress.<sup>103</sup> Due to this compromise with the

<sup>99</sup> Wang & Devarajan, *supra* note 3.

<sup>100</sup> *Democracy Behind Bars*, COMMON CAUSE, [https://democracybehindbars.org/#Prison\\_Gerrymandering](https://democracybehindbars.org/#Prison_Gerrymandering).

<sup>101</sup> *Id.*

<sup>102</sup> Nelson, *supra* note 76.

<sup>103</sup> *Id.*

Southern states, the political representation of the South increased from approximately 38 percent of the seats in the Continental Congress to nearly 45 percent the of seats in the inaugural United States Congress.<sup>104</sup>

Many politicians have also admitted to not viewing the prisoners inside the walls of their districts' prisons as their constituents.<sup>105</sup> This can be problematic because then state representatives are likely to not advocate for prisoner's rights.<sup>106</sup> Further exacerbating the problem, is many prisoners are not allowed to vote in Minnesota.<sup>107</sup> According to the Minnesota Secretary of State, convicted felons are not allowed to vote if they are currently serving a sentence, on probation, parole, or supervised release.<sup>108</sup> Since many prisoners are not allowed to vote, they are considered among the country's least powerful people.<sup>109</sup> For this reason, many prisoners cannot vote to change prison gerrymandering or advocate for any other policies which affect their lives. For instance, during the 2020 COVID-19 pandemic, many members of congress were responsible for determining whether to prioritize prisoners for the vaccine.<sup>110</sup> A solution was proposed to the House of Representatives in February 2021 with the American Rescue Plan.<sup>111</sup> The American Rescue Plan was a bill which included a section to provide funding for prisons for COVID-19 tests, vaccinations for prisoners, and personal protection equipment.<sup>112</sup>

Currently, Republican members of Congress represent the 8th and 6th congressional districts. Pete Stauber represents the 8th district,<sup>113</sup> and

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

<sup>105</sup> Danahy & Lang, *supra* note 9.

<sup>106</sup> Kiran Misra, *Mass Incarceration Draws Its Own Maps and Creates a Country in Its Image*, NEW REPUBLIC (Apr. 1, 2021), <https://newrepublic.com/article/161817/mass-incarceration-prison-gerrymandering-districts>.

<sup>107</sup> Election and Voting, OFF. OF THE MINN. SEC'Y OF STATE, <https://www.sos.state.mn.us/elections-voting/register-to-vote/i-have-a-criminal-record/>.

<sup>108</sup> *Id.*

<sup>109</sup> Hansi Lo Wang, *Most Prisoners Can't Vote, But They're Still Counted In Voting Districts*, NPR (Sept. 26, 2021, 7:01AM), <https://www.npr.org/2021/09/22/1039643346/redistricting-prison-gerrymandering-definition-census-congressional-legislative>.

<sup>110</sup> Misra, *supra* note 106.

<sup>111</sup> American Rescue Plan Act of 2021, H.R. 131, 117th Cong. (2021).

<sup>112</sup> Peter J. Tomasek, *Proposed 'American Rescue Plan' Would Provide Support to Prisons*, INTERROGATING JUST. (Mar. 3, 2021), <https://interrogatingjustice.org/ending-mass-incarceration/american-rescue-plan-impacts-prisons/>.

<sup>113</sup> CONGRESSMAN PETE STAUBER, <https://stauber.house.gov/> (last visited Jan. 26, 2022).

Tom Emmer represents the 6th district.<sup>114</sup> However, both Pete Stauber and Tom Emmer voted against passing the American Rescue Act—and effectively against the interests of the people who are incarcerated in their districts.<sup>115</sup>

This trend is not limited to Minnesota. The vast majority of jurisdictions across the country rely on skewed Census data to draw congressional, state, and local district boundaries.<sup>116</sup> For instance, in Pennsylvania, if the state would undo current gerrymandering practices, “four rural districts would suddenly have too few people to satisfy equal-representation laws.”<sup>117</sup> Instead, a map would likely create one or two new majority minority districts in Pennsylvania and likely cause seats to flip from Republican to Democrat.<sup>118</sup>

Counting people in their pre-incarceration addresses would also lead to a more just distribution of public funds.<sup>119</sup> Due to prison gerrymandering, small rural towns benefit financially.<sup>120</sup> One example of this came from a mayor in Illinois who disclosed that their town of 450 people received the amount of tax money of a town of 2,700 would receive due to the prison population located there.<sup>121</sup> Although prisons receive some funding from local governments, the amount is not “enough to justify the influx of tax money and resources” created by the prison population.<sup>122</sup>

On top of this, mass incarceration can largely impact the economic status of formerly incarcerated people and their families. A year after release, nearly seventy-five percent of formerly incarcerated individuals are still unemployed.<sup>123</sup> Finding employment after being released from prison tends

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<sup>114</sup> TOM EMMER, <https://emmer.house.gov/> (last visited Jan. 26, 2022).

<sup>115</sup> Ashley Hackett, *D.C. Memo: What a Relief*, MINNPOST (Mar. 12, 2021), <https://www.minnpost.com/dc-memo/2021/03/d-c-memo-what-a-relief/>.

<sup>116</sup> Nelson, *supra* note 76.

<sup>117</sup> John F. Pfaff, *Why the Policy Failures of Mass Incarceration are Really Political Failures*, 104 MINN. L. REV. 2673, 2681 (2020).

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

<sup>119</sup> Ameer Frodole, *Where Does a Prisoner Live?: Furthering the Goals of Representational and Voter Equality Through Counting Prisoners*, 107 GEO. L.J. 175, 196 (2018).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

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

<sup>123</sup> Artika Tyner, *The Racial Wealth Gap: Strategies for Addressing the Financial Impact of Mass Incarceration on the African American Community*, 28 GEO. MASON C.R.L.J. 885 (2021).

to be more of a challenge for Black applicants than white applicants.<sup>124</sup> On average white applicants receive approximately thirty-six percent more callback interviews than Black applicants who have identical resumes and backgrounds.<sup>125</sup>

Additionally, one in nine African American children (11.4 percent), one in twenty-eight Hispanic children (3.5 percent) and one in fifty-seven white children (1.8 percent) in the United States have a parent who is incarcerated.<sup>126</sup> This can make it hard for families to support their incarcerated family member and meet the basic needs the rest of their family. For instance, sixty-five percent of families with a family member in prison reported they were unable to meet their family's basic needs.<sup>127</sup>

The Census count affects the allocation of more than \$600 billion in federal funding.<sup>128</sup> In effect, misallocation of federal funds can prevent state and local governments from adequately providing federally funded services and resources to meet constituents' needs.<sup>129</sup> For this reason, allocating funding to prisoners' home locations would help improve their communities and provide long-lasting benefits to help prisoners reintegrate back into their communities.<sup>130</sup>

## V. COMPARISONS OF STATES

Ending prison gerrymandering would mean fairer elections, more representative democracy, and decreased exploitation of a vulnerable group of people.<sup>131</sup> The Census Bureau has updated its policy to reallocate the counting of people in the military, those in healthcare facilities, and students in college.<sup>132</sup> However, the Census Bureau has yet to change its policy for people who are incarcerated.<sup>133</sup> This rule runs contrary to public opinion. In 2016, the Census Bureau took public comments on the issue and more than

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

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

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

<sup>128</sup> Sara Miller, *Ending Prison Gerrymandering is Mainly Justice for People on the Outside*, FULCRUM (Nov. 12, 2020), <https://thefulcrum.us/end-prison-gerrymandering>.

<sup>129</sup> Nelson, *supra* note 76, at 1402.

<sup>130</sup> Frodle, *supra* note 119, at 196.

<sup>131</sup> Bellware, *supra* note 55.

<sup>132</sup> Nelson, *supra* note 76.

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



ninety-nine percent of the approximately 78,000 comments suggested prisoners should be counted at their home or pre-incarceration address.<sup>134</sup>

Even if the Census Bureau does not change its policy, states have the power to correct census data by creating a special state-level census that collects the home addresses of prisoners.<sup>135</sup> After collecting this data, the state would be able to adjust the United States Census count prior to its redistricting process.<sup>136</sup> The first state to pass this type of law was Maryland.<sup>137</sup> On April 13, 2010, Maryland Governor Martin O'Malley signed a bill into law which ensured that incarcerated persons would be counted as residents of their home addresses when state and local legislative districts are drawn.<sup>138</sup> To do this, Maryland pledged to collect the home addresses of incarcerated people and correct the data state-wide.<sup>139</sup> Maryland passed this law to correct past distortions in representation caused by counting incarcerated persons as residents of prisons.<sup>140</sup> For instance, before 2010, eighteen percent of the population counted for District 2B (near Hagerstown) was actually incarcerated people from other parts of Maryland.<sup>141</sup> In effect, the legislature had granted every group of eighty-two residents in District 2B as much political influence as one hundred residents of every other district.<sup>142</sup>

After Maryland, eleven other states have passed laws to end prison gerrymandering.<sup>143</sup> New York, California, Colorado, Connecticut, New Jersey, Virginia, Delaware, Nevada, and Washington all passed legislation which would formally reject prison gerrymandering for the 2020 census.<sup>144</sup> Illinois also passed legislation which would go into effect after the 2030

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<sup>134</sup> Wang & Devarajan, *supra* note 3.

<sup>135</sup> *Prison Gerrymandering Project: Solutions*, PRISON POL'Y. INITIATIVE, <https://www.prisonersofthecensus.org/solutions.html>.

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

<sup>137</sup> Peter Wagner et al., *Maryland Enacts Law to Count Incarcerated People at Their Home Addresses*, PRISON POL'Y. INITIATIVE (Apr. 13, 2010), [https://www.prisonersofthecensus.org/news/2010/04/13/maryland\\_law/](https://www.prisonersofthecensus.org/news/2010/04/13/maryland_law/).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

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

<sup>141</sup> *Id.*

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

<sup>143</sup> Andrea Fenster, *How Many States Have Ended Prison Gerrymandering? About a dozen!* PRISON POL'Y. INITIATIVE, (Oct. 26, 2021) [https://www.prisonersofthecensus.org/news/2021/10/26/state\\_count/](https://www.prisonersofthecensus.org/news/2021/10/26/state_count/).

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

census.<sup>145</sup> Lastly in Pennsylvania the state's redistricting committee made the decision itself to count prisoners at their home location rather than where they are incarcerated.<sup>146</sup>

Local and county governments have also taken the initiative to solve the problem of prison gerrymandering.<sup>147</sup> Local and municipal governments have used various methods to avoid prison-based gerrymandering including: (1) ignoring (not counting) the prison population, (2) cutting the prison out of their district maps, (3) under-populating the district with the prison by the exact amount of the prison population, or (4) splitting the count of the prison population between all districts equally.<sup>148</sup> However, no local or county governments in Minnesota have adopted any of these methods yet.<sup>149</sup>

These new laws and policies passed in state, county, and local governments all help address the unfair redistricting and lack of representation issues caused by prison gerrymandering.<sup>150</sup> However, because these are state laws, they do not affect federal funding distributions.<sup>151</sup> For this reason, it is important for the Census Bureau to ultimately count incarcerated people as residents of their legal home addresses and not as residents of the correctional facilities.<sup>152</sup> Furthermore, changing the Census Bureau's rule would make a consistent policy across the United States and end prison gerrymandering once and for all.

## VI. ACTION AGAINST PRISON GERRYMANDERING IN MINNESOTA

Finally, there are also local organizations in Minnesota advocating for a change in the state's gerrymandering policies. For instance, Common Cause MN is a nonpartisan, grassroots organization working to create open, honest, and accountable government that serves the public interest.<sup>153</sup> One of

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

<sup>146</sup> *Id.*

<sup>147</sup> *Local Governments That Avoid Prison-Based Gerrymandering*, PRISON POL'Y. INITIATIVE (Jan. 7, 2019), <https://www.prisonersofthecensus.org/local/>.

<sup>148</sup> *Id.*

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

<sup>150</sup> Wagner et al., *supra* note 137.

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

<sup>152</sup> *Prison Gerrymandering Project: Solutions*, PRISON POL'Y. INITIATIVE, <https://www.prisonersofthecensus.org/solutions.html>.

<sup>153</sup> *About Us*, COMMON CAUSE MN, <https://www.commoncause.org/minnesota/about-us/>.

its initiatives is creating a fair and equitable re-districting process.<sup>154</sup> To accomplish this goal, Common Cause MN is asking community members to sign a petition asking state legislators to pass a law which requires state districts to be drawn impartially.<sup>155</sup> Common Cause MN also wrote two bills: one for the Minnesota House (HF 1605) and one for the Minnesota Senate (SF 2575).<sup>156</sup> Both of these bills were introduced during the 2019 legislative session.<sup>157</sup> This bill included a section which would create a nine person impartial redistricting commission.<sup>158</sup> This nonpartisan commission would count persons who are incarcerated by indicating their residence to be their last known residential address before incarceration.<sup>159</sup> While the bill passed the Minnesota House, it did not pass the Senate.<sup>160</sup> Common Cause is currently drafting an updated bill to introduce in the upcoming session.<sup>161</sup>

In 2020, Minnesota State Representative, Raymond Dehn also introduced a bill which would change Minnesota law and count prisoners by using their last known address.<sup>162</sup> However, the bill also died after it was sent to the elections subcommittee<sup>163</sup> and was not given a hearing by the committee chair.<sup>164</sup>

## VII. CONCLUSION

Prison gerrymandering creates unequal Congressional districts which leaves communities of color underrepresented in Congress and misappropriates federal funds to rural, and predominantly white districts. However, this does not have to be the case. The Census Bureau has the power

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<sup>154</sup> *Tell MN Legislators: Voters Want Fair District Maps*, COMMON CAUSE MN, [https://actionnetwork.org/petitions/add-your-name-fair-redistricting-for-minnesota/?source=action\\_panel&\\_ga=2.232436955.597763231.1620968477-1402761120.1620968477](https://actionnetwork.org/petitions/add-your-name-fair-redistricting-for-minnesota/?source=action_panel&_ga=2.232436955.597763231.1620968477-1402761120.1620968477).

<sup>155</sup> *Id.*

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

<sup>157</sup> *Id.*

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

<sup>159</sup> H.F. 1605, 2019 Leg., 91st Sess. (Minn. 2019).

<sup>160</sup> COMMON CAUSE MN, *supra* note 154.

<sup>161</sup> *Id.*

<sup>162</sup> Nina Moini, *The Census Counts Prisoners, But Who Benefits*, NPR (Mar. 2, 2020, 10:00 AM), <https://www.mprnews.org/story/2020/03/02/the-census-counts-prisoners-but-who-benefits>.

<sup>163</sup> H.F. 3493, 2019 Leg., 91st Sess. (Minn. 2019).

<sup>164</sup> *Passing Laws in Minnesota*, OFF. MINN. SEC'Y STATE STEVE SIMON, <https://www.sos.state.mn.us/about-minnesota/minnesota-government/passing-laws-in-minnesota/>.

to change its rule and allow for incarcerated people to be counted at their last known address. Additionally, local and state governments can pass laws which mitigate the effects of prison gerrymandering. By ending prison gerrymandering, our country can ensure democracy is fair and equitable for everyone.