

Enumerating Inequality: The Constitution, the Census Bureau, and the Criminal Justice System

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I am invisible, understand, simply because people refuse to see me.

— Ralph Ellison, *Invisible Man* (1952).

I. INTRODUCTION

Demography—the study of population size, density, and distribution—has been a feature of states for millennia. Ancient rulers periodically tallied their population and its characteristics for the purposes of taxation and military conscription. Egyptians even used demographic data to guide their administrative policies regarding the distribution of goods.¹

American demography owes a debt to the founders who enshrined the decennial census in the Constitution. The U.S. has among the longest-running censuses of contemporary nation-states, although periodic censuses of the population are ubiquitous in countries around the world. Table 1 shows census-taking practices in a small number of advanced industrialized countries. As the practice of census-taking has become widespread, the methods of demography have become more sophisticated. Demographic methods have expanded well-beyond simple headcounts or population rosters and states routinely employ other methods to gather demographic data—including vital registries and statistical sampling—to assess the size and condition of their population.

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¹ See ELIANE DOMSCHKE & DOREEN S. GOYER, *THE HANDBOOK OF NATIONAL POPULATION CENSUSES: AFRICA AND ASIA* 131 (1986); B.G. TRIGGER ET AL., *ANCIENT EGYPT: A SOCIAL HISTORY* 58 (1983).

Table 1**Census-taking Practices in 21 Advanced-Industrialized Nations²**

Country	Year Census Began	Contemporary Method of Enumeration	Determination of Residence
Australia	1911	Self-enumeration	Defacto
Austria	1869	Self-enumeration	Dejure
Belgium	1846	Self-enumeration/Canvass	Dejure
Canada	1871	Self-enumeration	Dejure
Czech Republic	1921	Self-enumeration	Dejure
Denmark	1769	Administrative Registers	Dejure
Finland	1749	Administrative Registers	Dejure
France	1801	Self-enumeration	Dejure
Germany	1871	Self-enumeration	Dejure
Hungary	1870	Canvass	Dejure
Italy	1861	Self-enumeration/Canvass	Dejure
Luxembourg	1839	Self-enumeration	Dejure
Netherlands	1829-30	Self-enumeration/Canvass	Dejure
Norway	1801	Administrative Registers & Self-enumeration	Dejure
Poland	1921	Canvass	Dejure
Russian Federation	1897	Self-enumeration	Dejure
Slovenia	1991	Administrative Registers, Self-enumeration & Canvass	Dejure
Spain	1857	Self-enumeration/Sampling	Dejure
Sweden	1751	Administrative Registers & Self-enumeration	Dejure
United Kingdom: England & Wales	1801	Self-enumeration/Canvass	Dejure
United States of America	1790	Self-enumeration/Canvass	Dejure

² DOREEN S. GOYER & ELIANE DOMSCHKE, THE HANDBOOK OF NATIONAL POPULATION CENSUSES: LATIN AMERICA AND THE CARIBBEAN, NORTH AMERICA, AND OCEANIA 361-63, 389, 403, 422, 430 (1983); *see generally* DOREEN GOYER & GERA DRAAIJER, THE HANDBOOK OF NATIONAL POPULATION CENSUSES: EUROPE (1992).

Modern states use demographic methods and information for a wide variety of purposes. The primary and explicitly-stated purpose of the U.S. Census continues to be the apportionment of congressional seats. Yet information about population size, age distribution, geographic concentration, level of education, economic activity, and health is vital for the distribution of resources and the design of public and private services. Demographic information helps policymakers and private citizens decide when to build and where to site schools, hospitals, churches, roads, airports, universities, prisons, and a host of other public and private goods; information on small geographic areas is commonly used to allocate federal funds. Demographic information is also used by social scientists to describe features of society and theorize about human behavior and social processes.

The design and conduct of the Census is the chief though not sole activity of the Census Bureau. The Census Bureau and myriad other state agencies all collect demographic data that provide essential information for governance and commerce. Census-taking in the United States involves a complete population enumeration but the decennial census gathers relatively little detail on the total population. Instead, social surveys including the long form of the Census and the American Community Survey (ACS) employ statistical sampling to survey a relatively small subset of the population, gather detailed information about that subset (e.g., education, economic well-being, and health), and use the results to generalize about the condition of the larger population. Administrative records or registries are widely used in other countries but limited in scope in the U.S. to individuals participating in specific programs (e.g., veterans, social security recipients, licensed drivers). Administrative records provide a wealth of data on service use and other individual characteristics.

Although the goal of most censuses is to provide accurate population counts and the aim of most sample surveys is to be representative of a larger population, the rapid and dramatic growth in the U.S. prison system has led to key lacunae in accounts of the demographic condition of the American population. Disproportionately male, African-American, and poor inmates and former inmates are routinely undercounted in censuses of the U.S. population and both categorically and systematically excluded from surveys that draw samples from rosters of households. Extremely high rates of residential instability and homelessness contribute to the invisibility of former inmates in official accounts of the population and its characteristics.³ The exclusion of the institutionalized from household-

³ See generally Jeffrey Morenoff, David J. Harding & Amy Cooter, *The Neighborhood Context of Prisoner Reentry* 7 (Sept. 22, 2008) (paper prepared for submission for the 2009 Annual Meeting of

based surveys renders inmates mute in statements of the population's condition.

The effects of the prison system on accounts of American demography have now reached historic proportions. The first U.S. Census documented 3.9 million people.⁴ Today more than half that number (2.3 million) reside in federal, state, or local prisons or jails and almost twice that number (7.3 million) are under the surveillance of the criminal justice system.⁵ Gender, race, and class disproportionality in criminal justice contact and incarceration means that as many as one in nine black men between ages twenty and thirty-four is in prison or jail on any given day and about one in three black men are expected to go to prison in their lifetime.⁶

At the nation's founding the three-fifths compromise required the consideration of slaves as three-fifths of a free person for apportionment;⁷ in short order, as many as 40 percent of African-Americans were deemed invisible. The dramatic growth of imprisonment in the U.S. since the 1970s has resulted in historically unprecedented numbers of uncounted Americans. This paper details how inmates became invisible, documents their number and distribution, and discusses the consequence of their exclusion for accounts of American inequality.

II. AMERICA'S DEMOGRAPHIC CHARTER: THREE-FIFTHS TO ONE AND BACK AGAIN

A. *The History of Enumeration*

The practice of demography was enshrined in the U.S. Constitution. Article 1, Section 2 stipulates:

the Population Association of America, on file with authors); See CAL. DEP'T OF CORR., PREVENTING PAROLEE FAILURE PROGRAM: AN EVALUATION 2 (1997).

⁴ MARGO J. ANDERSON & STEPHEN E. FIENBERG, WHO COUNTS?: THE POLITICS OF CENSUS-TAKING IN CONTEMPORARY AMERICA 15 (1999).

⁵ See HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2008, at tbl.16 (2009), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim08st.pdf>; LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2007, at tbl.1 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus07st.pdf>.

⁶ THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 6 (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>; THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION 1974-2001, at 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf>.

⁷ ANDERSON & FIENBERG, *supra* note 4, at 14.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.⁸

The first U.S. Census was conducted in 1790 under the auspices of the Executive through the Department of State.⁹ In many ways, census-taking in 1790 was very similar to contemporary census taking. In 1790 the census-taker collected information for each household about the number of free white males over and under sixteen, free white females, other free persons, and slaves.¹⁰ Today, in addition to information on individual household members provided by household heads, the Census also relies on reports from administrators of group quarters (e.g., prisons and jails, mental health facilities, long-term care facilities) who report on the residents of their facilities and some effort is made to account for those not otherwise counted (e.g., unresponsive households, homeless, transient, etc.).¹¹

Prior to the abolishment of slavery in the Thirteenth Amendment and the establishment of due process and equal protection provided by the Fourteenth Amendment, a large fraction of the U.S. population was systematically excluded from census counts: slaves. The three-fifths compromise of the nation's founders led to the exclusion of as many as 40 percent of black Americans from population totals at least through the Census of 1860.¹²

The Fourteenth Amendment to the U.S. Constitution instated the one person - one vote standard. Section 2 of the Fourteenth Amendment reads: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."¹³ The Fourteenth Amendment

⁸ U.S. CONST. art. I, § 2, cl. 3.

⁹ See MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* 13 (1988).

¹⁰ *Id.* at 14.

¹¹ See ANDERSON & FIENBERG, *supra* note 4, at 8; Constance F. Citro, *Enumeration: Special Populations*, in *ENCYCLOPEDIA OF THE U.S. CENSUS* 204-206 (Margo J. Anderson ed., 2000).

¹² See generally ANDERSON, *supra* note 9, at 58-82.

¹³ U.S. CONST. amend. XIV, § 2.

provides for the full enumeration of African-Americans.¹⁴ However, nearly 150 years after reconstruction there is widespread evidence that African-Americans continue to be undercounted by the Census and growing evidence that the full range of their experiences is concealed by other demographic methods including the now-popular sample survey.

B. The Development of Survey Research and the Household-Based Survey

Even in the late 19th century, decennial census data and other data collected by the federal government had many uses beyond congressional apportionment and taxation; some of those uses were proscribed by law, while others were artifacts of common practice. In the late 1800s the U.S. Federal Government began the practice of distributing money to states (and eventually localities) through a practice known as grants-in-aid.¹⁵ The first national grants-in-aid were land grants set aside for public universities.¹⁶

It was also at about this time that the field of statistics blossomed and significant advances were made in the use of social survey research to study human populations.¹⁷ The London Statistical Society was founded in 1834 and included the likes of Thomas Malthus and Adolphe Quetelet.¹⁸ Malthus' alarmist views on the impacts of population growth—though provocative—drew attention to the need to regularly gather information on the population for resource planning and distribution. While Quetelet's theories about the social condition were strikingly deterministic, his pioneering work on probability would have great influence on the development of probabilistic sampling and theories of statistical inference.¹⁹ Later in the 19th century, students of the British and American social condition like Charles Booth and W.E.B. DuBois conducted local social surveys which provided excruciating detail of social life in cities including London and Philadelphia.²⁰

While critics may question the effectiveness of social survey research for policy formulation, industrialization, urbanization, and westward expansion led statisticians, public health officials, and social reformers to survey the population and its condition—typically through small area studies—to bring attention to the living and laboring condition of America's

¹⁴ *Id.*

¹⁵ See PAUL R. DOMMEL, *THE POLITICS OF REVENUE SHARING* 11 (1974).

¹⁶ See *id.* at 12.

¹⁷ See *THE SOCIAL SURVEY IN HISTORICAL PERSPECTIVE 1880-1940*, at 17 (Martin Bulmer et al. eds., 1991).

¹⁸ *Id.* at 7.

¹⁹ See *id.* at 10-11.

²⁰ *Id.* at 19, 29; JEAN M. CONVERSE, *SURVEY RESEARCH IN THE UNITED STATES: ROOTS AND EMERGENCE 1890-1960*, at 22-23 (1987).

poor.²¹ Detailed information about the composition and economic capacities of the U.S. population was in high demand and the growth of grants-in-aid drove an interest at the federal level, and among states and localities, in the needs and capacities of various constituencies.²² The Census of 1890 expanded significantly to address some of these new data needs and by 1902 when the Census Office became permanent—first as part of the Department of Interior though within a year transferred to the newly created Department of Commerce and Labor—demographic information about the population was a mainstay of public discourse and policy debate particularly in relation to the fortunes of the poor or the status of American workers.²³ However, it would be more than a half-century after the first categorical grants-in-aid were distributed until sample surveys were routinely used in government policy formulation.²⁴

Shortly after the responsibility of the conduct of the decennial census was moved into the Commerce Department, it weathered another significant change in its mission. The Sixteenth Amendment (1913) allowed Congress to levy an income tax without regard to apportionment among states or based on Census results.²⁵ This had the effect of tailoring the purpose of the Census to only one thing: the apportionment of congressional seats. As a consequence, ever since 1913 the primary and only constitutionally mandated purpose of the Census has been congressional apportionment.

Nonetheless, demographic data was in high demand. It is perhaps not coincidental that two periods in American history that witnessed the greatest growth in the transfer of federal money to the states through grants-in-aid were also boom years for federal data collection about the population. Under Roosevelt's watch in the Great Depression, and during the Great Society programs of the Johnson administration, the amount of federal aid to state and local governments through grants-in-aid expanded dramatically. The amount of federal money allocated to states more than quadrupled in the first two years of the Roosevelt administration.²⁶ The 1960s witnessed the greatest expansion of government revenue sharing in absolute and percentage terms since the 1920s. Revenue sharing went from just shy of \$8 billion in 1962 to almost \$36 billion by 1972.²⁷ Table 2 tracks grants-in-aid since 1940.

²¹ CONVERSE, *supra* note 20, at 13, 22.

²² ANDERSON, *supra* note 9, at 179.

²³ *Id.* at 114.

²⁴ *Id.* at 203.

²⁵ U.S. CONST. amend. XVI.

²⁶ DOMMEL, *supra* note 15, at 19.

²⁷ *Id.*

Table 2

Federal Grants-in-Aid to State and Local Governments²⁸

Year	Current Dollars (Millions)	Constant Dollars (2000 Billions)	Percent of Federal Outlays	Percent of GDP
1940	872	11.4	9.2	0.9
1950	2,253	17.2	5.3	0.8
1960	7,019	39.0	7.6	1.4
1970	24,065	105.3	12.3	2.4
1980	91,385	192.6	15.5	3.3
1990	135,325	172.1	10.8	2.4
2000	285,874	285.9	16.0	2.9
2008, est.	466,568	367.4	15.9	3.3

Federal revenue sharing through grants-in-aid required even more information and at shorter intervals than what was already available through the decennial census. A centerpiece of New Deal legislation of the 1930s allocated federal funds to states and local governments targeted for specific aims including infrastructure development and public assistance.²⁹ Demographic data on the population was essential not simply to resolve the controversy between the Hoover and Roosevelt administrations about the depths of the depression but to target resources effectively. Statisticians and demographers were increasingly called upon to provide information about the economic condition of the population and they had to expand methods of data collection to have enough information available, at regular intervals (and certainly more often than every ten years), to be useful. The expansion of grants-in-aid demanded exactly the kinds of data that statistically-based sampling might afford. Rather than waiting every ten years for the results of the Census, statistically-based sampling offered the possibility of collecting detailed data on small, though representative, segments of the population at shorter intervals.

Despite great interest in inter-census estimates of unemployment, there was some controversy over how to gather the information. Statisticians

²⁸ U.S. CENSUS BUREAU, FEDERAL GRANTS-IN-AID TO STATE AND LOCAL GOVERNMENTS, available at <http://www.census.gov/compendia/statab/tables/09s0414.xls>.

²⁹ ANDERSON, *supra* note 9, at 178.

had made important advances in statistical sampling theory and methods, yet policymakers were reluctant to sponsor sample surveys. During the height of the Depression, the newly constituted Central Statistical Board sponsored a small three-city study of unemployment to test the feasibility of using a sample survey to gauge the economic condition of the American population.³⁰ While that survey and others including a postal enumeration of the unemployed helped advance statistical methodology on the implementation of national sample surveys, political resistance lingered.³¹ Nonetheless, in 1939, the Works Progress Administration conducted the first Sample Survey of Unemployment, a monthly, national, sample survey.³² The household-based survey provided rich and detailed information on the economic and social condition of the American population. The survey survived the abolishment of the WPA, was transferred to the Census bureau in 1942, and in 1947 the survey was renamed the Current Population Survey.³³ The Current Population Survey continues to be a primary data collection tool to report on the condition of the population and to construct small area inter-census estimates used in policy making.

As the field of probability sampling proliferated, the U.S. Congress made one more significant change to the use of the Census for apportionment. Changes to the U.S. Code in 1941 regarding the use of the Census for reapportionment instituted the concept of equal proportions.³⁴ Title 2, Section 2a finds:

On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.³⁵

³⁰ *Id.* at 183-84.

³¹ *Id.*

³² *Id.* at 189.

³³ *Id.* at 190.

³⁴ 2 U.S.C. § 2a(a) (2000).

³⁵ *Id.*

The concept of proportional representation—and proportionality more generally—guided much policy making through the latter half of the 20th century. The equal protections clause was associated with a symbolic shift toward proportionality. It, therefore, became even more important when allocating representation, goods, or services to have an accurate count of the size and composition of the population, its characteristics, and capacities.

Until the Great Society programs of the Johnson administration in the 1960s, grants-in-aid fell into two major functional categories: transportation (highways) and public assistance.³⁶ However, the Johnson administration—and later Nixon, Ford, Carter, and Reagan—expanded grants to states in a wide variety of areas including health,³⁷ education,³⁸ employment and labor,³⁹ housing,⁴⁰ and even crime control.⁴¹

This new function-oriented approach to governance⁴² required additional data collection for both program design (in theory) and program evaluation (in practice). There was an attendant proliferation of surveys administered by different governmental agencies employing statistical sampling methods. Table 3 is a partial list of major demographic and health surveys administered by the federal government and initiated since the Sample Survey of Unemployment became the Current Population Survey in 1947. Many of these surveys are on-going and continue to frame our sociological understanding of the American population and guide the evaluation of public services.

³⁶ LAWRENCE D. BROWN ET AL., *THE CHANGING POLITICS OF FEDERAL GRANTS* 6 (1984).

³⁷ *Id.* at 7; Social Security Amendments of 1960, Pub. L. No. 86-778, 74 Stat. 924 (1960).

³⁸ BROWN ET AL., *supra* note 36, at 8; Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965).

³⁹ BROWN ET AL., *supra* note 36, at 10; Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964).

⁴⁰ BROWN ET AL., *supra* note 36, at 12; Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451 (1965).

⁴¹ BROWN ET AL., *supra* note 36, at 19; Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968).

⁴² See ANDERSON, *supra* note 9, at 203-04.

Table 3**Major Sample Surveys Administered by the Federal Government**

Survey	Year Initiated	Sampling Frame	Division
Current Population Survey	1947	Household Non-institutionalized	Commerce
National Health Interview Survey	1957	Household Non-institutionalized	DHHS
National Health and Nutrition Examination Survey	1959	Household Non-institutionalized	DHHS
National Longitudinal Surveys	1966	Birth Cohorts of Men; Women; Youth	Labor
National Survey of Drug Use and Health	1971	Household Non-institutionalized	DHHS
National Survey of Family Growth	1973	Household Non-institutionalized	DHHS
National Crime Victimization Survey	1973	Household Non-institutionalized	Justice (BJS)
Medical Expenditure Panel Survey Household Component	1977	Household Non-institutionalized	DHHS
Survey of Income and Program Participation (SIPP)	1983	Household Non-institutionalized	DHHS/ Agriculture conducted by Census
National Longitudinal Studies of Aging	1984	Household Non-institutionalized	DHHS (NIA)
National Adult Literacy Survey	1992	Household and Prison	Education
Survey of Program Dynamics	1997	Household Non-institutionalized	DHHS/ Agriculture conducted by Census
American Community Survey	2003	Population	Commerce

Despite all the important changes affecting the use of the decennial census and the proliferation of other data gathering methods, the central

role of the decennial census for enumerating the population for purposes of political apportionment was upheld in Supreme Court rulings as recently as 1999.⁴³ While court decisions have barred the use of sampling for apportionment, demographic methods including statistical sampling and statistical adjustment can be used for purposes of congressional redistricting and the allocation of federal funds through general revenue sharing or grants-in-aid.⁴⁴ Contemporary estimates (shown in Table 2) suggest that 16.1 percent of the federal budget and 3.3 percent of U.S. gross domestic product is allocated to state and local governments through such programs;⁴⁵ much of the allocated money is linked to data-collected through the Census and sample surveys—about population size and characteristics.⁴⁶

C. The Rise of the Prison System and Estimating Hard-to-Reach Populations

Massive growth in the prison system since the mid-1970s has led to the elision of millions of disproportionately male, black, and poor people from both Census enumerations and household-based sample surveys used in public policy and social science research. Between 1980 and 2005, the number of Americans in prison or jail quadrupled and recent estimates suggest nearly 2.3 million Americans are incarcerated.⁴⁷ The expansion of the U.S. criminal justice system since the early 1970s now means that one in one-hundred U.S. adults is incarcerated in a correctional facility.⁴⁸

Penal growth is notable not only for its size, but also for its disproportionate effects on minority and low-skill men. In fact, spending time in prison has become a normative experience for low-skill black men: on any given day over 10 percent of black men between the ages of twenty and thirty-four are in prison or jail and nearly 60 percent of black men without a high school diploma can expect to spend time in a state or federal prison.⁴⁹

⁴³ See, e.g., *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 335-36 (1999).

⁴⁴ See *id.* at 338, 343.

⁴⁵ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2008, at 265 (2007).

⁴⁶ See ANDERSON, *supra* note 9, at 205.

⁴⁷ See U.S. Dep't of Justice, Bureau of Justice Statistics, Key Facts at a Glance: Correctional Populations, <http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm>; WILLIAM J. SABOL & HEATHER COUTURE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISON INMATES AT MIDYEAR 2007, at 6 (2008), available at <http://www.ojp.gov/bjs/pub/pdf/pim07.pdf>.

⁴⁸ See THE PEW CENTER ON THE STATES, *supra* note 6, at 5.

⁴⁹ *Id.* at 6, 34; Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 164 (2004).

It is quite striking, though increasingly clear, that the massive buildup in the size of the penal population has not been due to large-scale changes in crime or criminality. Instead, the expansion of the prison system implicates a host of changes at the local, state, and federal levels with respect to law enforcement and penal policy. Law enforcement agencies have stepped up policing, prosecutors have more actively pursued convictions, and there have been myriad changes in sentencing policy that now mandate jail or prison time.⁵⁰ The contemporary expansion of the criminal justice system is particularly noteworthy as it has accompanied claims of decreased federal involvement in the lives of Americans.⁵¹

Table 4 shows that the overall size and percentage of the decennial census undercount has diminished since mid-century, yet the undercount is still notably large among particular social and demographic groups and some groups have withstood inclusion. For example, research comparing military enlistment records and Census data suggested that in 1940 2.8 percent of draft-eligible men were not included in the Census but enlisted for military service.⁵² Among African-Americans the undercount was more than 300-percent higher: 13 percent of draft-eligible black men went uncounted by the decennial census.⁵³ Recent assessments of the conduct of the 2000 Census find that the overall undercount was quite small by historical standards, but as many as 3 percent of African-Americans were not included in population counts.⁵⁴ Perhaps even more remarkable, however, is that approximately 5 percent of black men are estimated to have been excluded from the 2000 Census counts.⁵⁵

⁵⁰ See generally MARC MAUER, *RACE TO INCARCERATE* (2d ed. 2006); MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995); See also BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

⁵¹ WESTERN, *supra* note 50, at 18.

⁵² Daniel O. Price, *A Check on Underenumeration in the 1940 Census*, 12 AM. SOC. REV. 44, 45 (1947).

⁵³ *Id.* at 49.

⁵⁴ See J. Gregory Robinson et al., *Coverage of the Population in Census 2000: Results from Demographic Analysis*, 21 POPULATION RES. & POL'Y REV. 19, 29-30 (2002).

⁵⁵ *Id.* at 31.

Table 4**Estimated Net Census Undercount from 1940-2000⁵⁶**

Year	Black	Non-Black	Difference	Overall Net Undercount
1940	10.3	5.1	5.2	5.6
1950	9.6	3.8	5.8	4.4
1960	8.3	2.7	5.6	3.3
1970	8.0	2.2	5.8	2.9
1980	5.9	0.7	5.2	1.4
1990	7.4	1.0	6.4	1.9
2000	2.8	-1.2	4.0	0.1

Exactly why African-Americans in general—and black men in particular—continue to elude census takers in such great numbers is a deep question that occupies a great deal of scholarly and policy research. Some explanations for the persistence of the undercount among African-Americans suggest that long-standing and deep-seated mistrust of government among some minority groups is associated with higher rates of refusal to participate in census-taking endeavors.⁵⁷ More prevalent, however, are explanations that suggest that African-Americans and other minorities are disproportionately, though unintentionally, missed in the Census because of the circumstances in which they live.⁵⁸ Higher rates of residential mobility and instability, homelessness, and living in highly concentrated urban areas are associated with a greater risk of under-enumeration.⁵⁹ Spending time in prison is associated with residential instability, homelessness, and living in highly concentrated urban areas.⁶⁰ Continued prison growth may exacerbate the under-enumeration of the most disadvantaged segments of the population.⁶¹

⁵⁶ ANDERSON & FIENBERG, *supra* note 4, at 122; Robinson et al., *supra* note 54, at 30, 37.

⁵⁷ See ANDERSON & FIENBERG, *supra* note 4, at 38.

⁵⁸ See *id.* at 36-37.

⁵⁹ *Id.*

⁶⁰ See Morenoff et al., *supra* note 3, at 6, 10; CAL. DEP'T CORR., *supra* note 3, at 2.

⁶¹ Current prison and jail inmates should be enumerated with certainty. However, recent iterations of the ACS suggest that the Census Bureau's registry of prisons has not kept pace with prison growth through the 2000s. In fact, the 2003-2005 ACS used a household-based sampling frame and systematically excluded the institutionalized, see THE METHODS AND MATERIALS OF DEMOGRAPHY 23 (Jacob S. Siegel & David A. Swanson, eds., 2d ed. 2004). See also, THE 2000 CENSUS: COUNTING UNDER ADVERSITY 297-98 (Constance F. Citro et al., eds., 2004).

Social surveys that employ statistical sampling do no better—and perhaps do worse—at including black men. The primary reason for this is a simple one: Nearly all federal sample surveys of the population draw their samples from U.S. households.⁶² As the prison system has grown, and to the extent that it is disproportionately comprised of men, African-Americans, and those with low levels of education, surveys that exclude the institutionalized do not accurately represent the general population.

Estimates suggest that household-based surveys that systematically exclude the incarcerated population ignore fully one in nine black men between the ages of twenty-two and thirty.⁶³ Among black men without a high school diploma, where incarceration rates are highest, approximately one-third of the population is excluded—by design—from sample surveys of households.⁶⁴

Table 5 estimates the fraction of men and women, by race and education, between age twenty and thirty-four excluded from household-based sample surveys because they are currently incarcerated in federal, state, or local correctional facilities.⁶⁵ In 1970, prior to the massive build-up of the criminal justice system in the U.S., 0.6 percent of white men between the ages of twenty and thirty-four were incarcerated in prisons or jails.⁶⁶ In 2007, after decades of prison expansion, 1.7 percent of white men were incarcerated.⁶⁷ Incarceration rates are much higher among African-American men than among whites. In 1970, 3.9 percent of black men between the ages of twenty and thirty-four were in prison or jail.⁶⁸ By 2000, that number was 12 percent, though it appears to have fallen in the last two years of data collected by the American Community Survey.⁶⁹

It is puzzling that data collected in 2006 and 2007 through the American Community Survey show a *decline* since 2000 in the number and rate of white and black men age 20-34 incarcerated in American correctional facilities despite continued *growth* in incarceration over the period as reported by the Bureau of Justice Statistics.⁷⁰ There is some

⁶² See, e.g., THE METHODS AND MATERIALS OF DEMOGRAPHY, *supra* note 61, at 22-23.

⁶³ Author's calculations based on WESTERN, *supra* note 50, at 90.

⁶⁴ Author's calculations based on WESTERN, *supra* note 50, at 91; Bruce Western & Becky Pettit, *Incarceration and Racial Inequality in Men's Employment*, 54 INDUS. & LAB. REL. REV. 3, 7 (2000).

⁶⁵ Author's calculations based on Decennial Census, Integrated Public Use Microdata Series (IPUMS) files, available at <http://usa.ipums.org/usa/index.shtml>. Data and statistical programs used to calculate estimates reported are on-file with the journal and available directly from the author.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ SABOL & COUTURE, *supra* note 47, at 6-8.

concern that Census data collection efforts have not kept pace with prison growth causing an undercount among prison inmates.⁷¹

Table 5

Percent of Men and Women 20-34 in Prison or Jail, 1970-2007, by Education⁷²

White Men						
	1970	1980	1990	2000	2006	2007
< High School	1.6	1.9	4.7	7.0	7.5	8.3
High School	0.7	0.5	1.4	2.6	2.5	2.5
Some College	0.1	0.2	0.6	0.6	0.5	0.5
All	0.6	0.5	1.3	1.8	1.7	1.7
Black Men						
	1970	1980	1990	2000	2006	2007
< High School	6.5	8.2	20.1	33.3	29.0	29.6
High School	2.2	3.2	7.1	11.2	9.8	10.3
Some College	1.0	1.9	4.1	4.3	2.9	2.6
All	3.9	4.2	8.3	12.0	9.7	9.8
White Women						
	1970	1980	1990	2000	2006	2007
< High School	0.04	0.1	1.3	1.2	1.9	2.3
High School	0.02	0.03	0.2	0.3	0.5	0.5
Some College	0.01	0.01	0.1	0.1	0.1	0.1
All	0.02	0.03	0.2	0.2	0.3	0.3
Black Women						
	1970	1980	1990	2000	2006	2007
< High School	0.3	0.6	3.1	3.5	2.9	3.1
High School	0.06	0.1	0.6	0.8	0.8	0.8
Some College	0.05	0.1	0.5	0.3	0.3	0.3
All	0.1	0.2	0.9	0.9	0.7	0.7

Table 5 confirms educational stratification in incarceration and indicates educational inequalities in incarceration have widened over the period. In 1970, 0.1 percent of white men who attended some college were in prison or jail while 1.6 percent of high school dropouts were incarcerated.⁷³ By 2007, the gap in incarceration between white college

⁷¹ THE 2000 CENSUS: COUNTING UNDER ADVERSITY, *supra* note 65, at 297.

⁷² See *supra* note 61 and accompanying text.

⁷³ *Id.*

attendees and high school dropouts had increased 400 percent.⁷⁴ In 2007, while 0.5 percent of white men with some college were in prison or jail, 8.3 percent of high school dropouts were enumerated behind bars.⁷⁵ Educational disparity in incarceration is even more dramatic among black men. In 1970, the gap in incarceration between black men with some college education and those who dropped out of high school was 5.5 percentage points (1 percent compared with 6.5 percent).⁷⁶ By 2007, the gap had grown almost four-fold.⁷⁷ While 2.6 percent of black men who had attended some college were incarcerated, 29.6 percent of black men who dropped out of high school were in prison or jail.⁷⁸

A secondary reason that survey research fails to represent the full range of the American experience is that a large number of young black men are likely to be overlooked by household-based sample surveys because they maintain tangential connections to households. These are the same men missing from the decennial census. Combining the number of currently incarcerated men with non-institutionalized men who go uncounted by the Census because of non-response or non-location suggests that 16 percent or more black men may be invisible in conventional accounts of the population.⁷⁹

Despite general improvements in Census coverage over the past half-century, African-Americans continue to be undercounted in the Census by wide margins and black men, in particular, are the most likely to be missed by the Census. High rates of incarceration among black men may further hinder future prospects for their enumeration.

At the same time, sample survey research—including the Census' own American Community Survey—has not kept pace with changes in American demographics wrought by the prison buildup. The concentration of incarceration and exclusion from household-based survey research among black men with low levels of education is startling. The omission of large segments of the population concentrated within particular social and demographic groups from the Census and sample surveys has consequence not only for political apportionment and the allocation of public resources, but obscures the establishment of fundamental social facts.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See *supra* note 61 and accompanying text.

⁷⁸ *Id.*

⁷⁹ Author's calculations based on Robinson et al., *supra* note 54, at 30-31, 37; THE PEW CENTER ON THE STATES, *supra* note 6, at 6.

III. THE DISTRIBUTION OF (IN)JUSTICE: INEQUALITY AND THE CRIMINAL JUSTICE SYSTEM

A. Explanations for the Penal Build-Up

The U.S. is the world-leader in incarceration.⁸⁰ Table 6 demonstrates that the U.S. incarcerates a higher fraction of its population than other advanced-industrialized countries. However, while most scholars agree that “mass imprisonment”⁸¹ was not driven by increases in crime or criminality, there is no consensus explanation for the punitive turn in American criminal justice since the 1970s. There is lively debate on the conceptual relevance of theories of social control, political institutions, and discursive politics.

⁸⁰ See generally International Centre for Prison Studies, World Prison Brief 2009, <http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief>; WESTERN, *supra* note 50, at 14; JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 102 (2006).

⁸¹ DAVID GARLAND, MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1 (2001).

Table 6

Incarceration Rates in 21 Advanced-Industrialized Nations, Mid-2000s⁸²

Country	Incarceration rate (per 100,000 total population)
United States of America	760
Russian Federation	626
Poland	224
Czech Republic	201
Spain	162
Luxembourg	155
United Kingdom: England & Wales	152
Hungary	149
Australia	129
Canada	116
Netherlands	100
Austria	95
Belgium	93
France	96
Germany	88
Italy	92
Sweden	74
Norway	69
Slovenia	65
Finland	64
Denmark	63

Prevailing economic explanations for prison expansion have roots in Georg Rusche's conceptualization of the prison system as an institution to manage surplus labor.⁸³ Research has drawn connections between prison growth and the labor interests of corrections officers⁸⁴ and between high rates of incarceration among black and low-skill men with periods of labor inactivity.⁸⁵ Wacquant draws attention to racial aspects of social control

⁸² International Centre for Prison Studies, World Prison Brief, Highest to Lowest Prison Population Rates Globally, http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php.

⁸³ See generally GEORG RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE (1939).

⁸⁴ KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 99-100 (1997).

⁸⁵ WESTERN, *supra* note 50, at 4, 53.

arguments by making historical parallels between the criminal justice system and other institutions like slavery and Jim Crow that subordinated the interests of African-Americans.⁸⁶ All of these arguments highlight the centrality of the economy for accounts of prison growth.

Political and institutional conditions have also been associated with prison expansion. Garland conceptualizes prison expansion as both a project and a product of late modernity—and one that views the penal system as a welfare institution; a government-sponsored effort to deal with society's failures.⁸⁷ During a period of generalized welfare retrenchment, the general population, led by calls from the Republican Party, endorsed the expansion of the penal state. From Goldwater's invocations of crime and disorder as a campaign theme in the 1964 election⁸⁸ to the relationship between representation in federal and state legislatures and the imprisonment rate,⁸⁹ the Republican Party plays a central role in accounts of prison expansion.

While Democrats may have been late to the "tough-on-crime" party, they were not immune to the punitive turn in American criminal justice policy. Figure 1 indicates that high incarceration rates are found throughout the country—even in strongly Democratic states with Democratic governors or Democratically controlled legislatures. High rates of imprisonment across jurisdictions and local areas further demonstrate the complex conditions that led to the punitive turn in American criminal justice and resulted in the massive expansion of the prison system.

⁸⁶ Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 95, 98-99 (2001); Loïc Wacquant, *The New 'Peculiar Institution': On the Prison as Surrogate Ghetto*, 4 THEORETICAL CRIMINOLOGY 377, 378 (2000).

⁸⁷ DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 269-72 (1990); WESTERN, *supra* note 50, at 58.

⁸⁸ BECKETT, *supra* note 84, at 31.

⁸⁹ David Jacobs & Jason T. Carmichael, *The Political Sociology of the Death Penalty: A Pooled Time-Series Analysis*, 67 AM. SOC. REV. 109, 120 (2002); David Jacobs & Ronald E. Helms, *Toward a Political Model of Incarceration: A Time-Series Examination of Multiple Explanations for Prison Admission Rates*, 102 AM. J. SOC. 323, 343 (1996).

Figure 1**State Variability in Incarceration Rates, 2003⁹⁰**

Although explanations for contemporary prison growth remain a source of debate, growth of the prison system itself is indisputable. Even as crime declined steeply through the 1990s, the prison system continued its historic expansion into the 21st century.⁹¹ Decades after civil rights legislation provided for the social, economic, and political rights of people of color, race and class inequality in imprisonment are at historic highs. And, despite the U.S. Supreme Court striking down federal sentencing guidelines in 2005,⁹² there is little evidence as of yet that states or localities have rushed to reintroduce discretion in sentencing or that a more

⁹⁰ See PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISON AND JAIL INMATES AT MIDYEAR 2004, at 3 (2005), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf>.

⁹¹ SHANNON M. CATALANO, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, CRIMINAL VICTIMIZATION 2005, at 1 (2006), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv05.pdf>; HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2008, at tbl.2 (2009), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim08st.pdf>.

⁹² See *United States v. Booker*, 543 U.S. 220, 244 (2005); See also *Blakely v. Washington*, 542 U.S. 296, 303 (2004).

rehabilitative penal philosophy now guides American criminal justice policy.

B. Contemporary Incarceration Patterns by Gender, Race, and Class

More than three decades of prison growth have generated a prison-industrial complex the reach of which is both wide and deep. Women and Hispanics represent some of the fastest-growing segments of the incarcerated population, but incarceration continues to be most heavily concentrated among men, African-Americans, and those with low skill.⁹³

As Table 5 shows, all groups exhibited steep increases in incarceration since the 1970s, though incarceration is still a relatively rare occurrence for women and even among white men.⁹⁴ The disproportionate concentration of incarceration among black men, and black men with low levels of education in particular, has profound implications for the collection and use of demographic data that guides public policy and frames social science research.

IV. RACE AND REDISTRIBUTIVE POLITICS: INMATES AND EX-INMATES IN ACCOUNTS OF INEQUALITY

The exclusion of inmates from social survey research and accounts of social inequality have led to acute misstatements of the American social condition—especially as it concerns African-Americans. Conventional labor force statistics overstate the economic well-being of African-Americans, and prison growth has dramatically influenced reported economic trajectories of black men.⁹⁵ Widespread felon disfranchisement has fundamentally altered the foundations of American democracy and high rates of incarceration undermine assertions of declines in voter turnout.⁹⁶ The exclusion of the prison population from national sample surveys obscures national estimates of these and other basic social indicators.

⁹³ WESTERN, *supra* note 50, at 15-17.

⁹⁴ WESTERN, *supra* note 50, at 15-16.

⁹⁵ See e.g., WESTERN, *supra* note 50, at 87-89; Bruce Western & Becky Pettit, *supra* note 64, at 4; Bruce Western & Becky Pettit, *Black-White Wage Inequality, Employment Rates, and Incarceration*, 111 AM. J. SOC. 553, 555 (2005).

⁹⁶ MANZA & UGGEN, *supra* note 80, at 171-173; Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 782 (2002); Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 AM. POL. SCI. REV. 963, 971 (2001).

A. Economics

Unemployment in the U.S. dipped to a near thirty year low by the end of the 1990s, falling below 5 percent for the first time since 1973.⁹⁷ Although higher than the national average, even the unemployment rate of black men dropped to 7.9 percent by the end of the 1990s.⁹⁸ In addition, conventional estimates of the black-white wage gap indicated that while the relative earnings of young black men fell through the early part of the 1980s, observed wage inequality peaked in 1985, and fell by about 20 percent over the next fifteen years.⁹⁹ Historically low unemployment rates and observed wage gains among black workers prompted researcher's claims that the economic boom was benefiting even the most disadvantaged segments of the population.¹⁰⁰

Conventional labor force data, like those reported by the BLS and analyzed by many social science researchers, inaccurately measure labor utilization among young black men because their incarceration rates are so high. This bias grows if we focus on workers with little schooling. Ignoring the sample selection effects induced by incarceration leads to overstatements of black labor activity and low black employment rates causes over-estimates of earnings.

The sample selection effects associated with increased incarceration are substantial. Growth in incarceration has led to the removal of large segments of the labor force from unemployment statistics artificially lowering U.S. unemployment rates. If inmates were included in unemployment statistics, the United States would exhibit significantly higher unemployment rates; U.S. unemployment rates including inmates would be comparable to those found in other advanced industrialized economies with highly developed welfare states.¹⁰¹

Racial inequality in employment-to-population ratios are also significantly altered by the inclusion of inmates. As Western (2006, p. 103) notes "Standard labor force statistics provide an optimistic picture of

⁹⁷ See Robert Shimer, *Why Is the U.S. Unemployment Rate So Much Lower?*, in NBER MACROECONOMICS ANNUAL 1998 11, 12 fig.1 (1999).

⁹⁸ News Release, Bureau of Labor Statistics, *The Employment Situation: December 1999* (Jan. 7, 2000) available at http://www.bls.gov/news.release/history/empst_01192000.txt.

⁹⁹ John Bound & Richard B. Freeman, *What Went Wrong? The Erosion of Relative Earnings and Employment Among Young Black Men in the 1980s*, 107 Q. J. ECON. 201, 204-05 (1992); A. Silvia Cancio et al., *Reconsidering the Declining Significance of Race: Racial Differences in Early Career Wages*, 61 AM. SOC. REV. 541, 548 (1996).

¹⁰⁰ See e.g., Richard B. Freeman & William M. Rodgers III, *Area Economic Conditions and the Labor Market Outcomes of Young Men in the 1990s Expansion* 4-5 (Nat'l Bureau of Econ. Research, Working Paper No. 7073, 1999), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=159691.

¹⁰¹ Bruce Western & Katherine Beckett, *How Unregulated is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 AM. J. SOC. 1030, 1031 (1999).

black economic progress because so many poor young black men are institutionalized, and thus outside the scope of labor market accounts.” Conventional labor force statistics dramatically understate the racial gap in labor inactivity among low-skill men; by the end of the 20th century, young black men without a high school diploma were just as likely to be in prison or jail as they were to be working.¹⁰²

The appearance of strong wage gains for young men after 1985 must also be assessed in light of rising joblessness. Mean relative wages of black men are likely to be inflated by low rates of labor activity associated with high rates of incarceration. Previous research has demonstrated that those not in the labor force—and inmates specifically—would expect to earn significantly less than those employed in the paid labor force.¹⁰³ In summary, high rates of black joblessness inflated black relative earnings by between 7 and 20 percent among working age men, and by as much 58 percent among young men by 1999.¹⁰⁴

B. Politics

The concealing effects of incarceration on racial inequality are not limited to economic outcomes. One of the most studied phenomena of contemporary American politics is the decline in voter turnout. A growing body of research has investigated the effects of incarceration on political enfranchisement. Recent studies claim that declines in voter turnout are likely an artifact of increased rates of felon disenfranchisement associated with incarceration and the number of non-citizens not eligible to vote.¹⁰⁵ McDonald estimates that the number of disenfranchised felons more than tripled between 1980 and 2000; 1.6 percent of the voting eligible population was disenfranchised in 2000 because of a felony conviction (compared with 7.7 percent non-citizens).¹⁰⁶

Other research powerfully demonstrates how felon disenfranchisement associated with criminal justice expansion may have altered the contours of American democracy.¹⁰⁷ It is difficult to assess the effects of the growth in incarceration on political participation, and there is some debate on the

¹⁰² Western & Pettit, *supra* note 64, at 9-10; WESTERN, *supra* note 50, at 91-92.

¹⁰³ Bruce Western & Becky Pettit, *Black-White Wage Inequality, Employment Rates, and Incarceration*, 111 AM. J. SOC. 553, 568 (2005).

¹⁰⁴ *Id.*

¹⁰⁵ McDonald & Popkin, *supra* note 96, at 970-71.

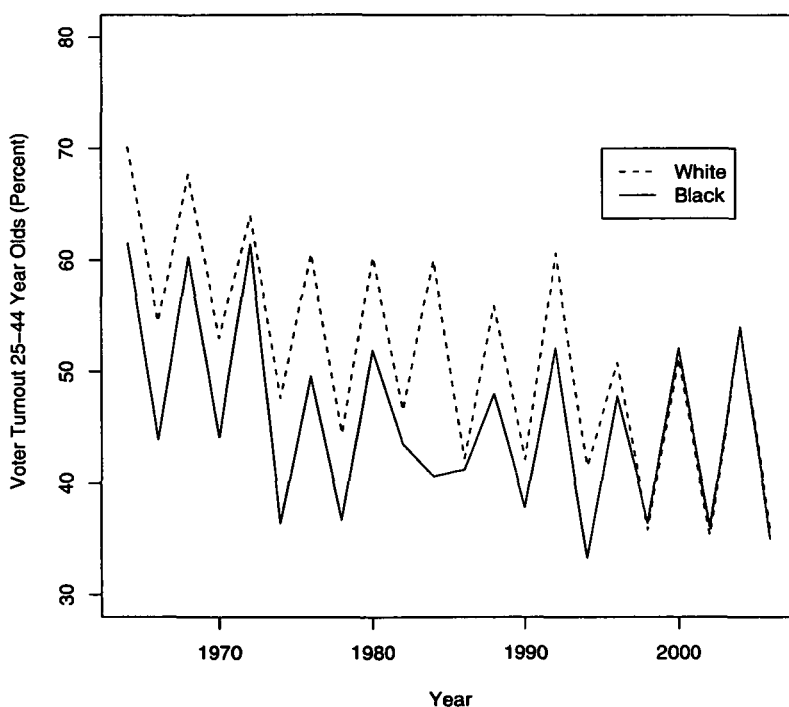
¹⁰⁶ Author's calculations based on: Michael McDonald, United States Election Project: Voter Turnout, http://elections.gmu.edu/voter_turnout.htm (follow “Turnout 1980-2008.xls” hyperlink) (last visited Nov. 2, 2009).

¹⁰⁷ Uggen & Manza, *supra* note 96, at 796; MANZA & UGGEN, *supra* note 80, at 8.

magnitude of the effects of incarceration on political participation.¹⁰⁸ It is clear, however, that more and better data are essential to resolve the controversy. Manza and Uggen write, “The main problem is that there is simply no nationally representative survey or polling data that contains information about both the respondents’ criminal records and their political participation and voting behavior.”¹⁰⁹

Figure 2

Voter Turnout among Whites and Blacks, 25-44¹¹⁰



¹⁰⁸ Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85, 86-87 (2004).

¹⁰⁹ MANZA & UGGEN, *supra* note 80, at 171.

¹¹⁰ Author's calculations based on U.S. Census Bureau, Current Population Survey, <http://www.census.gov/cps/>.

C. Other Outcomes

The exclusion of inmates from household-based sample surveys is also likely to introduce bias into national demographic estimates, measures of the health status of the population, and other social indicators constructed using data from household-based surveys. In addition to Census data and the CPS, surveys like the National Health Interview Survey (NHIS), the National Health and Nutrition Examination Survey (NHANES), and the National Survey of Family Growth (NSFG) are commonly used to gauge trends in American fertility, morbidity, and migration. Similar to the CPS, these surveys categorically exclude the institutionalized population and likely under sample former inmates with weak connections to households.

There is some debate about whether and how the demographic and health outcomes of inmates differ from otherwise similar non-institutionalized individuals.¹¹¹ As the prison system removes individuals from the general population and confines them for a specified period of time, it may have both direct and indirect effects on fertility, morbidity, and migration and population enumeration. The incapacitating effect of spending time in prison may depress fertility by reducing heterosexual contact. Criminal confinement may affect morbidity by placing men in close proximity with others who are known to be at high risk of a number of communicable diseases such as tuberculosis (TB), hepatitis C (HEP-C), and human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS).¹¹² Incapacitation is also likely to affect migration and enumeration as prisoners are often relocated to serve prison sentences outside of their own communities and in disproportionately rural areas.¹¹³ Serving time, therefore, may require involuntary migration and result in increased enumeration in non-metro areas.

There is little published empirical work that specifically investigates how reliance on data from sample surveys of U.S. households biases demographic and health statistics. There is reason to think, however, that prison expansion obscures the construction of a wide range of social statistics—including demographic and health outcomes—because incarceration is disproportionately concentrated among men, African-Americans, and those with low levels of education. Insofar as inmates

¹¹¹ See generally Evelyn J. Patterson, *Incarcerating Death: Mortality in United States' State Correctional Facilities, 1985-1998* (2007) (unpublished manuscript, on file with author); Zulficar Gregory Restum, *Public Health Implications of Substandard Correctional Health Care*, 95 AM. J. PUB. HEALTH 1689, 1689 (2005).

¹¹² Restum, *supra* note 111, at 1689.

¹¹³ See generally Editorial, *That's Two for Me*, N.Y. TIMES, Nov. 12, 2008, at A26.

differ in systematic ways from individuals living in households, data gathered through household-based surveys offer a biased glimpse into the American experience.

V. CONCLUSIONS

On January 20, 2009, 1.8 million Americans of all races, colors, and creeds stood on the mall in Washington D.C. to celebrate the inauguration of Barack Obama, America's first African-American president.¹¹⁴ Journalists hailed the historic moment and commentators from across the political spectrum questioned whether Obama's presidency marked the beginning of a post-racial America. As the crowds in Washington watched Obama take the oath to uphold the Constitution, approximately 2.3 million Americans sat invisible in America's prisons and jails.¹¹⁵ Close to 40 percent of those Americans are black.¹¹⁶

The invisibility of American inmates is a product of America's demographic charter enshrined by the Constitution, designed by various federal agencies, and upheld by the U.S. Supreme Court. Over the past 200 years the federal government has kept pace with advances in survey methodology and expanded and updated its data collection efforts intended to enhance the design of public policy and guide the allocation of goods and services. While its history is rich, the decennial census is now primarily used for congressional reapportionment. And, from humble beginnings as the Sample Survey of Unemployment, the Current Population Survey is now widely used by a range of federal agencies. Researchers have spent countless hours using the CPS to construct time series of unemployment, voter turnout, health and myriad other measures to better understand the economic, political, and social condition of the American population.

Unfortunately, the CPS and most other federally administered sample surveys have failed to keep pace with a rapidly expanding criminal justice system. The dramatic increase in prison population since the early 1970s—and its disproportionate effects on low-skill minority men—has profound effects on inequality in a host of domains. Yet we are only beginning to understand the magnitude of the effects because those same men—and their circumstances—are undercounted in Census data and excluded from survey research using household-based samples.

¹¹⁴ Ford Fessenden, *Inauguration Crowd: Less Impressive from Overhead, but Still Historic*, N.Y. TIMES, Jan. 23, 2009, at A17.

¹¹⁵ SABOL & COUTURE, *supra* note 47, at 6.

¹¹⁶ Author's calculations based on SABOL & COUTURE, *supra* note 47, at 7.

The "Road Forward" begins, then, with an appraisal of our past failures. It concludes, I hope, with greater knowledge of the full range of American experience that can only be gained by making inmates visible in the Census and sample surveys in numbers proportional to their representation in the population. That will give policymakers, researchers, and the public the information they need to make informed assessments and decisions. In the words of Thomas Jefferson: ". . . wherever the people are well informed they can be trusted with their own government; that whenever things get so far wrong as to attract their notice, they may be relied on to set them to rights."¹¹⁷

¹¹⁷ Letter from Thomas Jefferson to Richard Price (Jan. 8, 1789), in 14 THE PAPERS OF THOMAS JEFFERSON 420, 420 (Julian P. Boyd, ed., 3d ed. 1985).