

## **Down for the Count: *Overcoming the Census Bureau's Neglect of the Homeless***

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### **SUMMARY**

In addition to the immediate, concrete political and financial effects of inaccurate census data on the homeless, there are also more intangible costs: the Census Bureau's minimal efforts to count the homeless population conveys to these individuals, many of whom already feel estranged from society, that they do not count. ... Most crucially, Congress prohibits "the use of the statistical method known as "sampling" in the Census Bureau's "determination of population for purposes of apportionment of Representatives in Congress among the several States ... ." ... Local ordinances that restrict or prohibit conduct commonly associated with homelessness, such as begging, sleeping, or "camping" in public, exacerbate the problem by pushing homeless individuals into less conspicuous locations, where they cannot be located by either police officers or census enumerators. ... For this enumeration, the Bureau also consulted with community-based organizations to increase the accuracy and comprehensiveness of the count. ... The integration of homeless populations into the census occasionally confounded enumerators, since the processes for collecting and documenting this information deviated considerably from most of the Census Bureau's other, residence-based operations. ... Homeless individuals, as well as the organizations that assist them, could significantly contribute to the enumeration process, and better incorporating both groups into the census operations would likely yield a far more inclusive and accurate count. ... Improve Collaboration with the Community Partners Increased engagement with service providers and advocates for the homeless can also improve the Bureau's efforts to enumerate the unhoused.

### **Introduction**

It is not called "the federal government's largest and most complex peacetime operation" n1 for nothing. The United States Census Bureau's decennial count of the national population measures millions of residents, n2 costs billions of dollars to conduct, n3 and generates myriad statistics on everything from marital status to military service to mortgage costs. n4 This expansive, expensive endeavor produces a uniquely detailed and wide-ranging collection of data on the United States - a

"snapshot" of the nation at that particular time. n5 Yet the picture of the country that emerges contains a significant blur: the homeless population remains largely obscured, with potentially millions of unhoused Americans neglected by the count.

While the Census Bureau has undertaken a series of innovations to better incorporate the homeless population in the national enumeration, these procedures continue to needlessly undercount this group. The enumerators who conduct the count fail to visit many locations with homeless populations. Census organizers often lack precise knowledge of local conditions and optimal methods of public outreach. Administrative procedures needlessly obstruct the hiring of individuals who are most qualified to count the homeless. The result, repeated each decade, is census data that fails to adequately reflect the size and distribution of the large population of United States residents who lack any ordinary housing.

Homeless individuals deserve to be counted. n6 Their under-inclusion in every recent census - and the limited efforts of the government to address this inadequacy - reinforces the perception that individuals lacking a permanent address are somehow less deserving of the privileges of citizenship. While no one would expect a perfect count of every single homeless person in the United States, it is reasonable to expect that the Census Bureau would take every effort to ensure the most accurate count feasible. There are several indications that the current approach to measuring homelessness fails to achieve even this more modest standard.

This article proposes reforms to the enumeration process that more accurately account for the homeless population in the national count. Part I explores the significance of the Bureau's failure to adequately enumerate the unhoused and notes the political, economic, and social implications of this shortcoming. Part II outlines the legal framework governing the decennial census and identifies the obligations imposed by the Constitution, the restrictions established by Congress, and the flexibility granted to the Census Bureau. Part III describes how the Bureau has previously operated within these legal confines to conduct the national count and analyzes past efforts to specifically target the homeless population. Part IV proposes additional ideas to improve the accuracy and inclusiveness of the census. By further incorporating both homeless individuals and the organizations that assist them into the enumeration process, the government could simultaneously achieve a more precise count of the national population and counter the sense of marginalization that afflicts the homeless.

## I. Why Counting the Homeless Population Matters

Before examining the history and legal framework relating to the enumeration of the homeless, it is important to explain the significance of an inclusive, accurate count. The failure of the decennial census to adequately enumerate the nation's homeless population is no minor shortcoming. The consequences of this failure resonate in a variety of ways, affecting the composition of Congress, the allocation of federal funds, and even the perceived status of unhoused individuals in society. The size of the nation's homeless population is tragically large: scholars estimate that "between half a million and a million Americans are 'literally homeless' (meaning in shelters or on the streets) every night ... ." n7 The 2010 Census measured over 308 million residents of the United States, n8 and homeless persons represent a significant fraction of that population. Depending on the geographic distribution of the homeless, reforms that markedly improve their inclusion in the census could lead to consequential changes in political apportionment, as well as more precise resource allocation by federal programs - including Medicaid, Foster Care Block Grants, and Child Care and Development Block Grants n9 - influenced by this data. n10 Certain municipalities experience significant financial consequences as a result of inaccurate counts: the Census Monitoring Board's 2001 report to Congress found that the estimated undercount in the 2000 enumeration would cost \$ 3.6 billion in federal funding to the fifty-eight counties most adversely affected by the inaccuracy. n11 Although the undercount of the homeless population accounts for only a portion of this number, the shortcomings in the Bureau's efforts to count the unhoused almost certainly result in millions of dollars in lost funding for municipalities across the nation.

In addition to the immediate, concrete political and financial effects of inaccurate census data on the homeless, there are also more intangible costs: the Census Bureau's minimal efforts to count the homeless population conveys to these individuals, many of whom already feel estranged from society, that they do not count. The government must remain sensitive to the symbolic power of census measures. After all, this is a country whose founding document once stated that another uniquely marginalized and vulnerable population - slaves - should only count as three-fifths of a person for purposes of the national census. n12 The government's lackadaisical approach to measuring the homeless population provides a contemporary reminder of the institutional indifference that often confronts the poor, vulnerable, and dispossessed within the United States. Numerous observers have noted that the homeless population in the United States remains uniquely excluded from the full benefits of citizenship, existing "in a state of withdrawal, detached from social institutions." n13 This marginalization hinders public engagement with the unhoused,

who typically lack the employment, permanent residence, income, and other resources that foster inclusion in the body politic. n14 Moreover, jurisdictions across the country have further alienated the homeless through laws and ordinances that effectively "criminalize" n15 their existence. Widespread exclusion from the decennial census further underscores this estrangement, with the Census Bureau's unsuccessful attempts to count the homeless population serving as yet another affront to the dignity of these vulnerable individuals. n16

## **II. The Legal Framework of the Decennial Census**

Any effort to enumerate the homeless population must operate within the complex set of legal requirements and restrictions that govern the decennial count. This section describes the Constitutional foundations of the decennial census and the statutory framework governing the operations of the Census Bureau. It then examines the legality of the Bureau's efforts to enumerate different difficult-to-count populations, the enduring controversy over the possible use of "sampling" in the count, and the present capacity of the Bureau, operating within the existing legal framework, to produce a more inclusive count of the homeless.

The United States Constitution directs Congress to conduct a national census every ten years. n17 Besides requiring a decennial count, the Constitution provides little guidance to Congress: the Census Clause simply states that "the actual Enumeration shall be made ... in such Manner as they shall by Law direct." n18

While the data collected in the census is commonly used to draw political boundaries, n19 allocate funds to state and local governments, n20 and track a wide range of demographic and economic information, n21 the explicit constitutional purpose of the census is to achieve the proper apportionment of seats in the House of Representatives. n22 By maintaining an accurate count of the nation's population, the census purports to advance "the underlying constitutional goal of equal representation ... ." n23

Under the Census Act, Congress delegated the task of conducting the census to the Secretary of Commerce, who in turn delegated the performance of his census-related duties and functions to the Director of the Census and other employees of the Census Bureau. n24 The Bureau's actions are subject to judicial review, but the scope of review is narrow for any action deemed to lie within the agency's broad powers. n25 Over the past several decades, the courts have repeatedly de-

ferred to the "rational exercise of the Secretary's discretion, delegated to the Census Bureau, to conduct its obligation to enumerate the population for apportionment purposes." n26 As the Court held in *Wisconsin v. New York*, the Bureau satisfies the Census Clause "so long as the Secretary's conduct of the census is "consistent with the constitutional language and the constitutional goal of equal protection." n27 While each decennial census "provokes a wealth of litigation," n28 the Census Bureau has consistently prevailed over parties that challenge the results of the count. Most relevantly, the Census Bureau's approach to measuring difficult-to-count populations, including Americans living abroad, college students, and prisoners, has invariably withstood legal challenges. Federal employees located overseas may be counted, even if other similarly situated Americans (e.g., missionaries operating abroad) are not. n29 College students may be counted in the area of their university, even if particular students retain strong affiliations with their parents' residence. n30 Prisoners can be counted in the state where they are confined, even if they resided elsewhere before their incarceration. n31 These decisions demonstrate the considerable flexibility that the Census Bureau enjoys in its execution of the "actual enumeration" n32 under the Census Clause.

However, Congress has imposed its own limitations upon the Census Bureau, which complicate efforts to more accurately count the homeless population of the United States. Most crucially, Congress prohibits "the use of the statistical method known as "sampling" in the Census Bureau's "determination of population for purposes of apportionment of Representatives in Congress among the several States ... ." n33 While sampling is a complex art, the core idea is simple: the government would select a subset of individuals or locations from the census to estimate the characteristics of the whole population. There is an undeniable appeal to the use of sampling, as its use could reduce costs and increase the efficiency of the enumeration. With an elusive group like the homeless, statistical measures that incorporate already accessible data - such as eviction rates, waiting lists for public housing, reductions in affordable housing, and contacts with service providers - could yield a credible figure with far greater ease than the current approach.

However, proponents of sampling neglect the grave risks presented by its implementation. Former Secretary of Commerce Robert Mosbacher noted that sampling might enhance the numeric accuracy of the census, but only at the expense of the distributional accuracy of the data. n34 Since the primary purpose of the enumeration is the apportionment of political representation among states, any technique that compromises this information should be avoided. n35 In addition, several commentators have argued that reliance on sampling may increase the risk of political manipulation of

the data. n36 Although the issue remains hotly debated, n37 these concerns have led Congress to maintain a strict bar on the use of sampling in the actual enumeration.

In *Department of Commerce v. United States House of Representatives*, the Supreme Court unequivocally confirmed that §195 of the Census Act expressly prohibits any reliance on sampling for the purpose of determining congressional apportionment. n38 Justice O'Connor, writing for the Court, stated that both the statutory language and the historical practice of the Census Bureau reflect an enduring commitment to the use of the "'actual Enumeration' for purposes of apportionment, while eschewing estimates based on sampling or other statistical procedures, no matter how sophisticated." n39 The Census Bureau could still utilize sampling techniques to measure population, but this information could not affect the apportionment of seats in the House of Representatives.

Despite the challenges inherent in counting the homeless, exacerbated by the prohibition of sampling, the Constitution demands that the Bureau nonetheless make reasonable efforts to enumerate all residents of the United States. Section 2 of the Fourteenth Amendment uses inclusive language, directing that representation "shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." n40 Notably, there is no requirement of homeownership, a permanent address, citizenship, or even legal residence in this country. n41 All persons who "usually reside" n42 in a state must be counted, even those who lack an ordinary residence.

Fortunately, the Census Bureau can pursue this mandate far more effectively in the next decennial census without any reliance on new litigation, legislation, or any other measures to alter the laws governing the enumeration. The existing framework of constitutional obligations and statutory restrictions already provides the Census Bureau with considerable flexibility in its efforts to count the population. While this article later proposes certain minor modifications to Census Bureau regulations, as well as the elimination of certain local ordinances, in order to facilitate more accurate measurement of the homeless, the current inadequacies in the government's approach stem largely from a lack of sufficient engagement and innovation, rather than statutory or constitutional barriers. Therefore, the analysis will focus upon modifications in census operations - within the identified legal boundaries - that will enable to the Bureau to achieve a far more inclusive and accurate count.

### **III. Mission (Nearly) Impossible: the Census Bureau's Thankless Assignment**

Plainly, the task of the Census Bureau is rather daunting. Statistician Kenneth Darga effectively captures the challenge confronting the Bureau:

It is not easy to get an accurate census count ... in a large country where people move frequently, where many have more than one place of residence or are not at home, where living arrangements are varied and not always consistent with local codes or lease arrangements, and where many people have personal reasons to avoid enumeration. It is inevitable that any census ... will miss some of the people who should be counted. n43

Nathan Persily is more succinct: "A 100% accurate count of a population in excess of a quarter of a billion people is impossible." n44 According to Persily, the resulting census still serves as a valuable "snapshot of the nation at a particular time," albeit one that is "fuzzier in some areas than others, sometimes overexposed or underexposed, and with a tint and color scheme that often differs from the nation it attempts to capture in its lens." n45

While a perfectly accurate enumeration is certainly unrealistic, the decennial census remains the target of consistent criticism. Congress, local government officials, and members of the public often argue that the data produced by the Bureau is "not as accurate as it should be and therefore fails to provide a proper and legitimate basis for legislative apportionment and funding allocations." n46 Given the serious political and economic consequences of the census data, some of these frustrated parties contend that the persistence of such a "flawed census will damage the very fabric of the polity." n47

In response to the logistical challenges and political tensions inherent in the decennial census, the Census Bureau has embraced various measures to promote an inclusive and accurate count. n48 Despite the immense challenges of measuring an increasingly large population in an increasingly complex society, the government has successfully implemented a variety of innovative - and constitutionally valid - enumerating techniques. In *Department of Commerce v. United States House of Representatives*, Justice Stevens celebrated the "methodological improvements ... employed to ease the administrative burden of the census and increase the accuracy of the data collected." n49 He noted that even the "'mailout-mailback' procedure now considered a traditional method of enumeration was itself an innovation of the 1970 census." n50

In addition to mailing forms to each address and sending enumerators to collect information when forms are not returned, the Bureau undertook several other reforms to more accurately count the nation's population, including:

- . Working with local governments to ensure the accuracy of address lists; n51
- . Providing instructions in dozens of languages; n52
- . Using information provided by neighbors when no household member is available; n53
- . Incorporating a "hot-deck imputation methodology" to supply missing information about an occupied housing unit; n54 and
- . Organizing elaborate publicity campaigns to encourage completion of the census forms. n55

These reforms have substantially improved the accuracy of the census, with one analyst estimating that the percentage of the overall population that was mistakenly not counted (the "net undercount") has "steadily declined for most of the past half-century - from 5.4% in 1940 to 1.2% in 2000." n56 But such improvement belies an enduring shortcoming in census data: certain "classes" are counted more accurately than others, with groups like children, renters, [\*166] residents of large cities, and racial minorities consistently undercounted far more than other groups. n57 Unsurprisingly, given their often transitory lifestyle and lack of permanent residence, homeless individuals are perhaps the most undercounted group. n58

The Census Bureau's struggles to accurately count the homeless population are somewhat understandable, since this group has proven uniquely difficult to enumerate. n59 The Census generally counts people at their "usual residence," which is the location occupied by a person "most of the time." n60 For most individuals, determining the usual residence is easy, but - as Eric Lotke and Peter Wagner note - "special categories present special challenges." n61 And perhaps no other group challenges this "usual residence" paradigm quite like America's homeless population. Since most homeless people lack any permanent address, most of the "usual residence"-based procedures used to enumerate the general population are quite ineffectual when applied to the unhoused.

Moreover, many homeless individuals have become even more elusive (and thus more difficult to count) due to harassment by police, business owners, and members of the general public. n62 Local ordinances that restrict or prohibit conduct commonly associated with homelessness, such as

begging, sleeping, or "camping" in public, exacerbate the problem by pushing homeless individuals into less conspicuous locations, where they cannot be located by either police officers or census enumerators. n63 These efforts to "criminalize" homelessness also foster skepticism of government officials among some homeless individuals, leaving them leery of any participation in the census-taking process for fear that such information might later facilitate arrest or punishment. n64

Despite these considerable obstacles, the government has earnestly - and repeatedly - sought to enumerate the nation's poorest residents. After homelessness emerged as an increasingly prominent social problem during the 1980s, the Census Bureau initiated efforts to measure the growing number of Americans without any permanent residence. n65 The Bureau has now completed several decennial censuses that incorporated distinct programs and activities intended to more accurately count the homeless population. While these efforts introduced several valuable innovations that future enumerations should emulate, the Bureau's previous attempts to count the homeless population suffered from significant flaws in both procedure and execution. The result, in each of these censuses, was a needlessly inaccurate enumeration that excluded far too many of these already marginalized individuals.

### **A. Prehistory: Before the 1990 Census**

The Census Bureau's efforts to include the homeless population in the decennial count began on March 31, 1970, with "Transient Night." n66 This operation provided a special count of people living in motels, hotels, and similar lodgings targeted to "transients." n67 The Bureau mailed enumeration forms to the management of these facilities, who then distributed the forms to the residents. n68 One week later on April 6, the Bureau expanded its coverage with "Mission Night," a one-night count that sent enumerators to missions, soup kitchens, inexpensive hotels and motels, bus and rail stations, and other locations that provide short-term shelter. n69

At the next decennial census in 1980, the Bureau again organized both Transient and Mission Nights to target the elusive populations that inhabited flophouses, bus stations, soup kitchens, and similar facilities. n70 The government also conducted a "Casual Count" of selected urban areas over two weeks in May 1980, in which enumerators visited additional non-shelter locations - such as street corners, pool halls, welfare offices, and parks - to identify persons who might have been missed by standard enumeration procedures. n71

Rather than a systematic attempt to count the homeless, these early operations during the 1970 and 1980 counts were aimed at the broader goal of identifying "persons who may have been missed by the standard household enumeration." n72 But the operation, lacking in any coordinated effort to target the homeless population, continued to neglect a large portion of this group. n73 In the decade after the 1980 enumeration, various organizations attempted to "count" the homeless as a distinct population. Such efforts were marked by methodological flaws and "wildly divergent" results. n74 The Community for Creative Non-Violence argued that one percent of the national population was homeless. n75 The U.S. Department of Housing and Urban Development estimated that the figure was closer to 0.1%. n76 And the Urban Institute contended that more than 0.2% of the population was currently homeless. n77 However, the credibility of these measures was limited: scholars noted that such national measures all too often relied on the aggregation of local "guesstimates" and other dubious sources of information. n78 As the 1990 Census drew near, government officials and homeless advocates struggled to agree on the veracity of any data, and some advocates openly disputed the feasibility of ever obtaining such information. n79

## **B. An Earnest, Flawed Experiment: The 1990 Census**

Amidst widespread skepticism, n80 the Census Bureau began specifically targeting the homeless population in 1990. n81 The initial effort relied on an operation called "Shelter and Street Night" - or S-Night - in which enumerators collaborated with local governments and shelter staff. n82 After municipalities identified locations where the homeless population often stayed (such as shelters, bus stations, abandoned buildings, inexpensive hotels, and parks), the Census Bureau sent approximately 15,000 enumerators to these sites over the night of March 20-21, 1990. n83 Some locations missed by enumerators during S-Night were visited the following day. n84 In total, approximately 34,000 sites were canvassed, with 178,000 people enumerated in shelters and 49,000 enumerated at street locations.

The Census Bureau's earliest attempt to enumerate this difficult-to-count population introduced several important innovations to the census operation. Collaboration with local government was enhanced and expanded: municipalities provided not only address lists to the Bureau, but also identified public locations where the homeless population tended to congregate. By utilizing the local officials' knowledge of the facts-on-the-ground in each city, these partnerships facilitated the inclusion of the many unhoused and transient individuals who avoid the shelter system and other services. The S-Night operation was also notable for the staff's flexibility and persistence, with

enumerators conducting counts during unusual hours (i.e., visiting "street locations" from 2-4 A.M. n85), continuing the count at certain sites the day after S-Night enumeration, and waiting for hours outside abandoned buildings to count homeless individuals as they left their temporary dwellings. n86 Such measures undoubtedly increased the number of homeless men and women included in the count.

Despite these positive developments, however, the effort to enumerate the homeless population in the 1990 census was nonetheless fraught with shortcomings. First, by limiting the operation to an official list of sites, S-Night did not include several locations where homeless people often sleep, such as parked cars, subway tunnels, and housing project rooftops. n87 Second, an S-Day, held during daytime, would likely have been far more effective than a count held exclusively during the night, as preliminary field tests suggested that a daytime count would yield more accurate figures. n88 Third, media coverage hindered the operation in several large cities by converging on large shelters and places of commerce to report on the event. n89 Fourth, enumerators sometimes were not able to obtain the relevant information from certain homeless individuals due to language differences. n90 Fifth, roughly 25,000 of the approximately 39,000 jurisdictions contacted by the Census Bureau did not provide the requested location lists. n91 Even some relevant sites in participating localities were missed, apparently due largely to incomplete location lists provided by states and municipalities. n92 Moreover, independent observers commissioned by the Census Bureau to monitor S-Night in several large cities concluded that, even at street sites identified by local jurisdictions and visited by enumerators, "between 29[%] and 72% of the homeless were missed." n93 The operation was further marred by the active resistance of many homeless advocates, who expressed concern that the "inevitable undercount would help the Bush Administration downplay the importance of homelessness." n94 Perhaps most memorable was the resistance of Mitch Snyder, head of the Community for Creative Non-Violence in Washington, D.C. In addition to barring census takers from a 1400-bed shelter he operated, Snyder sent a dump truck to drop seven tons of sand on a sidewalk in front of the Commerce Department, later explaining that, "it is as hard to count the homeless as it is to count these grains." n95

Even those who considered the operation "a success" conceded that the operation left many people uncoun-  
 n96 Still, the S-Night served as an earnest initial attempt to enumerate the homeless - one that provided reason for cautious optimism at the Census Bureau. At the conclusion of S-Night, one district manager expressed his hope that, "this is the beginning of something. Maybe two censuses from now they'll look back on the data and say, "How primitive." n97 Unfortunately,

many of the problems with this count - particularly the inadequate outreach to homeless populations and limited collaboration with local governments and community partners - would persist in subsequent census efforts.

### **C. Still Room for Improvement: The 2000 Census**

Ten years later, the Census Bureau again pursued efforts to count the homeless - and, despite further innovation, again struggled to adequately enumerate this population due to shortcomings in the coordination, implementation, and geographic scope of the Bureau's operations. The 2000 census introduced a procedure called Service-Based Enumeration (SBE) to count people with no usual residence. n98 By counting homeless individuals at selected service locations, such as shelters, soup kitchens, mobile food vans, and specified public locations, the Bureau aimed to count people who might otherwise be missed. n99

In the year before the census, the Bureau again collaborated with local governments to identify lists of service locations open at census time. n100 For this enumeration, the Bureau also consulted with community-based organizations to increase the accuracy and comprehensiveness of the count. n101 After these lists were compiled, Census staff visited the designated SBE locations to obtain updated information and explain the enumeration process to service-providers. n102 The multi-day SBE effort commenced on March 27, 2000, when enumerators conducted a one-night count at all identified shelters. n103 The count continued on March 28 at soup kitchens and "stops made by mobile food vans with regular schedules." n104 The procedure wrapped up in the early morning of March 29, with enumerators visiting specified outdoor locations where people were known to live and sleep. n105 To supplement this enumeration effort, the Bureau distributed "Be Counted" questionnaires at non-SBE locations, including travelers' aid centers, health care clinics, and libraries, and opened walk-in Questionnaire Assistance Centers to help people complete the forms. n106

Despite the various innovations related to SBE, the Census Bureau's approach in the 2000 count remained markedly inadequate. The Bureau enumerators again limited their geographic sweep to designated sites. While this list of sites expanded to incorporate soup kitchens and "regularly scheduled mobile food vans," abandoned buildings were no longer included in the count. n107 The absence of roaming enumerators, who could seek out uncounted individuals in public spaces and other locations that the Bureau and local government failed to identify as designated sites, in-

creased the likelihood that a large portion of the homeless population would remain uncoun-  
 ted. While the "Be Counted" questionnaires placed at certain non-designated sites like libraries and  
 health clinics provided an alternative method of participation in the census for homeless people  
 missed by enumerators, the passive placement of questionnaires likely reached only a limited  
 number of targeted individuals. n108 This approach - without supplementary measures - inevitably  
 results in the inclusion of far fewer individuals than the presence of an actual enumerator at the  
 same location. n109

Implementation problems also hindered the count. The integration of homeless populations into the  
 census occasionally confounded enumerators, since the processes for collecting and documenting  
 this information deviated considerably from most of the Census Bureau's other, residence-based  
 operations. With limited training, many temporary employees struggled to adapt to the program-  
 matic hurdles inherent in the SBE count. In addition to imposing additional logistical burdens on the  
 enumerators, the complications arising from the SBE procedures sometimes affected the accuracy  
 of the counts. In one notorious example, 31,000 people counted at soup kitchens were erroneously  
 omitted from the census altogether due to flaws in the Bureau's documentation of temporary resi-  
 dents living in "group quarters." n110

#### **D. More of the Same: The 2010 Census**

The 2010 census largely continued the procedures used by the Bureau ten years earlier. Efforts to  
 count the homeless population again focused on SBE techniques, with enumerators visiting differ-  
 ent specified locations over a three-day period. n111 Notably, the range of "pre-identified non-  
 sheltered outdoor locations" included in the operation was expanded significantly, with cars and  
 recreational vehicles occupied by homeless individuals targeted for the first time. n112 Like the  
 2000 count, "Be Counted" questionnaires were distributed to a variety of locations, n113 and the  
 Census Bureau again utilized walk-in centers to assist anyone who did not receive questionnaires  
 due to unusual living arrangements. n114

The most recent decennial count thus reflected a certain degree of procedural stagnation on the  
 part of the Census Bureau. While advocates recognized the "more comprehensive list of shelters  
 and homeless providers" and greater planned outreach utilized during this count, n115 the Bureau  
 could not avoid the familiar criticisms that "inflexible rules," "unreasonable time limitations," and  
 other inadequacies would inevitably result in a "severe[] undercount[]." n116 Despite steady im-

provements over the past several counts, the Bureau continues to conduct the census in a manner that needlessly neglects many homeless individuals. Many of the criticisms leveled at the government's efforts in 1990 remain accurate twenty years later.

#### **IV. Planning for 2020: Proposed Reforms**

While the next decennial census remains nine years away, now is the time to begin implementing the programmatic changes necessary to more accurately count the unhoused. Given the scale and complexity of the operation, decisions regarding planning, operations, budgeting, and implementation must be made far in advance of the actual enumeration. n117 Consequently, the Census Bureau should begin initiating reforms necessary to foster a more inclusive census, where those experiencing homelessness are counted in far greater numbers. n118 Despite the obvious challenges of enumerating this elusive population, several feasible reforms could significantly improve the Bureau's efforts. Homeless individuals, as well as the organizations that assist them, could significantly contribute to the enumeration process, and better incorporating both groups into the census operations would likely yield a far more inclusive and accurate count.

##### **A. Increase (and Refine) the Use of Homeless Enumerators**

As far back as the 1990 census, the Bureau utilized shelter residents and other homeless people as enumerators. n119 After passing "a routine test of basic communication skills," selected individuals received a few days of training in preparation for the census operation. n120 This policy reflected the general Bureau practice of "hiring census takers from the groups being counted." n121

However, administrative regulations limited the scope and effectiveness of such hiring. n122 For example, requiring enumerators to provide multiple forms of identification renders many homeless individuals, who lack such documentation, ineligible for service. n123 Prospective homeless enumerators may also find their employment hindered by widely-criticized Bureau guidelines against hiring certain field staff with arrest records or convictions, even for minor offenses. n124

The Bureau should expand and refine its use of homeless enumerators in the coming census, modifying existing regulations and guidelines that impede homeless involvement in the census to ensure that capable individuals are not inappropriately barred from participation. Reforms that increase the number of homeless enumerators could dramatically enhance the government's efforts

to count the homeless population in several ways. First, homeless enumerators can inspire trust among their otherwise skeptical or intimidated peers. For example, when visiting shelters for abused women and children during the 1990 count, the Bureau trained a shelter resident as an enumerator, who then conducted the count at the facility. n125 The measure aimed to protect the privacy of this vulnerable population, and thus encouraged participation in the count from a group that might justifiably embrace anonymity. n126

Second, unhoused enumerators can help overcome the "fear of the homeless" that sometimes resulted in "widespread violations of bureau procedures" among Bureau staff during previous census operations. n127 Enumerators familiar with the conditions of homelessness, and the social milieu in which unhoused individuals interact with one another and the broader community, will naturally experience less trepidation when attempting to count this population, and consequently feel less compelled to violate census procedure to avoid uncomfortable situations.

Third, unhoused enumerators will typically possess far greater knowledge of the local geography of homelessness. Such employees can provide unique guidance about where homeless individuals congregate, and direct census operations toward appropriate locations to count this elusive population. These enumerators can also advise on the timing of such outreach to ensure that census employees coordinate their efforts in a manner that will yield the most inclusive and accurate results.

Fourth, homeless enumerators will likely approach the task of counting the unhoused with greater passion and commitment than the typical census enumerators who lack any personal connection with homelessness. Observers have long noted that "hired hands" sent to collect data will often take efforts to "avoid difficult, embarrassing, inconvenient, time-consuming situations ... ." n128 This tendency could undermine efforts to more accurately count the homeless population, since census employees tasked with enumerating this population must confront the unique challenges relating to the atypical living arrangements of the unhoused. But this problem is minimized with the use of enumerators that feel a more personal investment in the homeless community and its inclusion; such "hired hands" possess greater incentive to conduct their work responsibly and accurately, regardless of the logistical obstacles presented by the assignment. n129

Finally, expanded involvement of homeless individuals in the enumeration process would reflect the increasing engagement of the homeless population with social issues and government pro-

jects. The city of Berkeley, California hires recovering addicts to provide assistance to the community's homeless population by directing them to housing and drug counseling services. n130 Homeless volunteers from Lexington, Kentucky joined efforts to aid tornado victims. n131 Homeless individuals in Los Angeles even helped the city's Department of Public Works locate potholes. n132 Despite the considerable challenges facing those without permanent housing, homeless individuals across the U.S. have repeatedly displayed both competence in serving others and a commitment to public programs. Further support for the Bureau's census operation would merely continue this tradition.

The Census Bureau can more effectively utilize this uniquely capable group of enumerators through revisions to its hiring policies that expand the group of homeless individuals eligible to temporarily work for the Bureau. The requirement that enumerators provide multiple forms of identification needlessly limits such hiring, and the Bureau should accept a state-issued identity card or drivers' license - both of which can be obtained by a homeless person for little or no cost - to establish identity. In addition, the Bureau should eliminate overly restrictive hiring guidelines to ensure that previous convictions or arrests for minor offenses do not bar participation as an enumerator. These small changes in Census Bureau operations would open up opportunities for many more homeless enumerators, and likely result in a more inclusive, accurate count.

## **B. Improve Collaboration with the Community Partners**

Increased engagement with service providers and advocates for the homeless can also improve the Bureau's efforts to enumerate the unhoused. In recent counts, the Census Bureau has enhanced its capacity (with little additional cost to the government) through partnerships with community organizations. For example, civil rights organizations like the Leadership Conference Education Fund undertook extensive efforts before and during the 2010 census to collaborate with other community groups and regional Bureau staff to promote an inclusive count in underserved areas, including the still-rebuilding Gulf Coast. n133 Community and advocacy organizations can provide unique insights into the local conditions confronting the census operation, and supplement the government's promotional campaign with "creative outreach activities designed to encourage participation by hard-to-count populations ... ." n134 Organizations that support and advocate on behalf of the homeless can also offer indispensable assistance to the Bureau, sharing their expertise on homelessness and promoting participation in the census to both other organizations and homeless individuals themselves. n135

But the Census Bureau has a rather complicated history with homeless advocates, which could hinder such efforts to engage this community. As noted earlier, the highly-publicized S-Night effort during the 1990 census provoked a fierce backlash among many prominent activists, scholars, and service-providers. This backlash is perhaps best captured by the large mounds of sand deposited in front of the Department of Commerce by Mitch Snyder of the Community for Creative Non-Violence. n136

One perpetual sticking point is the lingering concern that census data related to the homeless population will be misrepresented as a "count" of the unhoused, with such numbers later serving as an inappropriate basis for policy decisions. The federal government has assertively and consistently stated that efforts to enumerate the homeless population should not be construed as a measure of the nation's homeless population, n137 and further assurances of this sort may reduce the concerns of many homeless service providers and advocates. The Census Bureau could also foster "buy-in" among community organizations that serve the homeless by emphasizing the symbolic power of a more inclusive count. As noted above, the government's special operations to include the unhoused in the national count can provide a potent reminder that, however marginalized many homeless individuals may feel, they still count. Few community organizations would oppose efforts that effectively convey this message.

There are already signs of progress, as advocates and service providers have increasingly embraced their role as facilitators in the latest decennial count. n138 In addition to advising the Bureau on locations where homeless individuals often congregate, some organizations undertook extensive efforts to promote the count and encourage participation. For example, Herb Smith, president of the Los Angeles Mission, forcefully articulated the importance of the census before the 2010 enumeration:

If you are homeless and want a meal, get counted. If you're homeless and you need a bed tonight, get counted. If you are homeless and you need a bus token, get counted. If you need showers or shelter, get counted... . Because by getting counted it will provide all of us the resources to serve the community of L.A. and particularly the homeless. n139

Such promotion can reach a wide audience of unhoused individuals, assuaging concerns about the purpose of the count and persuading otherwise skeptical parties to participate.

Despite signs of progress, collaboration between the government and community partners remains unnecessarily limited. The Bureau must work vigilantly to foster and maintain the trust and support of advocates and service providers. Through sustained outreach that specifically addresses the enduring qualms of service providers and advocates while persuasively articulating the practical and symbolic value of an inclusive census, the government can promote a more effective partnership.

### **C. Educate Municipalities on the Consequences of "Criminalizing" Homelessness**

Another area in which the interests of the Bureau and homeless advocates converge relates to the on-going "criminalization" of homelessness briefly discussed in Part III. These local ordinances, which have arisen in cities across the nation, n140 impose restraints on the use of public spaces that effectively prevent the homeless from "legally carrying out activities required for daily life." n141 Through prohibitions on activities like "loitering," n142 begging, n143 and camping, n144 as well as discriminatory enforcement of other public space laws, n145 authorities sought to decrease the visibility of the unhoused on the streets. n146 Such ordinances ostensibly addressed concerns about public safety, n147 but often it was the threat to local investment and tourism that inspired these new laws. n148

Homeless advocates have long opposed these laws, noting the serious ethical, n149 constitutional, n150 and practical n151 problems with the "anti-nuisance" approach to poverty embraced by so many mayors, city councils, and police chiefs. The Census Bureau could vastly enhance its credibility with the advocacy community, as well as improve its enumeration of the nation's unhoused population, by diplomatically reinforcing its opposition to such ordinances through educational materials and other outreach efforts that inform local leaders of the negative consequences of these policies. As noted above, the widespread "criminalization" of homelessness fosters a natural fear of any government officials who might threaten citation or even arrest for seemingly innocuous conduct, like sitting on a park bench. Bureau employees may have the most benign of intentions, n152 but many homeless individuals remain distrustful of an enumeration process that might facilitate further harassment from law enforcement. n153

By providing a federal partner in the efforts to halt this callous treatment, the Census Bureau can articulate concerns that strike uniquely at the interests of these municipalities. Cities and counties

often rely heavily on federal funding distributed based on census figures and other demographic information to fund their operations. n154 The Secretary of Commerce, the director of the Bureau, and other officials involved in the decennial count should therefore strive to educate local leadership - through pamphlets, reports, and other forms of outreach - about the considerable financial benefits that can accrue from a more accurate count, and how the "criminalization" of the homeless impedes such accuracy. While some luminaries at City Hall may find moral or even Constitutional arguments unpersuasive, they are more likely to pay attention when it might affect their municipality's bottom line.

## **Conclusion**

Obviously, this set of proposals does not address every obstacle to enumerating the homeless population. Other modifications could further increase the accuracy and inclusiveness of the count. First, hiring security guards or police to protect enumerators in high-crime and secluded areas occupied by some homeless people would enable the Bureau to achieve even higher counts of this population who are currently missed due to safety concerns. n155 Second, increasing the funds devoted to public outreach would likely reach more unhoused individuals and encourage them to participate. Finally, expanding the size of the enumerator staff assigned to count the homeless population would similarly improve participation.

While all of these modifications would likely result in a more inclusive and accurate enumeration, the Bureau must operate within the reality of budget constraints. Only a limited amount of resources can be devoted to the government's efforts to count the homeless population in the decennial census, and the improvements identified in the preceding paragraph would likely prove extremely costly. The article instead focuses upon reforms that will enhance the accuracy of the count without requiring significant new expenditures. These proposals, described in Part IV, focus on changing existing practices - especially enumerator hiring, community outreach, and education of local leaders about the unforeseen costs of "criminalizing" homelessness - that the Bureau could improve with minimal additional expense.

No one expects a perfect census. But everyone should desire a census that produces the most accurate data we can realistically expect to gather. Despite several earnest measures by the Census Bureau, the federal effort to enumerate the homeless population in the national census remains inadequate. Feasible, concrete modifications could improve the count in significant ways.

Homeless individuals, as well as the organizations that assist them, can provide unique guidance to the Bureau while planning the census and can facilitate the implementation of the actual count. Community partners can substantially enhance the Bureau's outreach by promoting the many benefits of census participation to the unhoused population. Municipalities can potentially increase their federal funding, as well as eliminate constitutionally and morally dubious policies, by rejecting local pressures to "criminalize" homeless. The Census Bureau should aggressively engage with all of these groups to dramatically enhance its efforts to enumerate the unhoused. These reforms, which are both feasible and not prohibitively expensive, would increase the accuracy of the census, as well as promote the inclusion of a uniquely marginalized sub-population into political life.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Constitutional Law  
Congressional Duties & Powers  
Census  
Apportionment & Redistricting  
Constitutional Law  
Congressional Duties & Powers  
Census  
Census & Enumeration  
Governments  
Local Governments  
Finance

### **FOOTNOTES:**

n1. Comm. on Nat'l Statistics, Nat'l Research Council of the Nat'l Academies, *The 2000 Census: Counting Under Adversity* 1 (Constance F. Citro et al. eds. 2004).

n2. Sabrina Tavernise & Jeff Zeleny, *South and West See Large Gains in Latest Census*, N.Y. Times, Dec. 22, 2010, at A1.

n3. Steve Pierson, *Controlling Decennial Census Costs Major Theme of Senate Hearing*, Amstat News, June 2011, at 26 (noting that the 2010 decennial census cost approximately \$ 13 billion to conduct).

n4. U.S. Census Bureau, *American Community Survey* 7, 9 (2010). The American Community Survey, which collected this data, was sent to 2.5% of households during the 2010 census. Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 *Cardozo L. Rev.* 755, 757 (2011); see also U.S. Census Bureau, *American Community Survey: Questions and Answers* (Feb. 2010), available at [http://www.census.gov/acs/www/Downloads/language\\_brochures/ACSQandA\\_ENG10.pdf](http://www.census.gov/acs/www/Downloads/language_brochures/ACSQandA_ENG10.pdf).

n5. Nathaniel Persily, *The Right to Be Counted*, 53 *Stan. L. Rev.* 1077, 1080 (2001) (reviewing Peter Skerry, *Counting on the Census?* (2000)).

n6. It is important to clarify that this article does not support any separate or distinct count of the homeless, but rather better inclusion of the homeless population within the national count. As both advocates for the homeless and the Census Bureau have long asserted, the use of the decennial census to "measure" homelessness is a problematic exercise that would likely produce inaccurate and misleading data. See, e.g., Denis Hevesi, *Census Count of Homeless Is Disputed*, N.Y. Times, Apr. 13, 1991, at A26 (quoting both Census Bureau officials and homeless advocates who acknowledged the limitations of a homeless count pursued through the decennial census); Michael Willrich, *Down and Out for the Count*, Wash. City Paper, Mar. 24, 1989, at 20 ("Practically every authority on the subject agrees that compiling an exact tally on the homeless is a doomed exercise ..."). The lack of a generally agreed-upon definition of homelessness further complicates the enumeration process: the federal government continues to define "homeless" in several distinct ways in various statutes and regulations. See generally U.S. Gov't Accountability Office, *Homelessness: A Common Vocabulary Could Help Agencies Collaborate and Collect More Consistent Data* (June 2010).

Moreover, the unavailability of statistical sampling techniques - which, as explained below, Congress prohibits for the decennial count that determines political apportionment - would hinder any effort to accurately count this uniquely elusive population. The Bureau's procedures, which remain heavily reliant on enumerators and mail-in forms, would struggle to reach many homeless individuals. One homeless advocate articulated the severe challenge confronting the Census Bureau by noting that enumerators "couldn't possibly have covered every place where a man might seek refuge - every Dumpster, every abandoned car, every culvert. We've got men who have dug their way into a river bank." Hevesi, *supra*. Since an undercount of the homeless population would distort public perceptions of the size and scope of this social problem and possibly even adversely influence policies relevant to the homeless, the Census Bureau should earnestly avoid releasing any "count" of the homeless produced by the decennial enumeration. Even if such figures are prefaced with disclaimers asserting the data does not reflect an exhaustive count of the nation's homeless population, many in the public may nonetheless embrace such figures. Hevesi, *supra*.

n7. Rob Rosenthal & Maria Foscarinis, Responses to Homelessness: Past Policies, Future Directions, and a Right to Housing, in *A Right to Housing: Foundation for a New Social Agenda* 316, 316 (Rachel G. Bratt et al. eds. 2006).

n8. 2010 Census Data, U.S. Census Bureau, <http://2010.census.gov/2010census/data/> (last visited Aug. 20, 2011).

n9. U.S. Census Monitoring Board, Presidential Members, Final Report to Congress 114 (Sept. 1, 2001).

n10. See, e.g., Jeffrey S. Crampton, Comment, Lies, Damn Lies and Statistics: Dispelling Some Myths Surrounding the United States Census, 1990 *Det. C.L. Rev.* 71, 87-88 ("Many federal programs are administered through the use of formulas that take population into account."); Toni Randolph, Counting the Homeless a Challenge for Census Workers, *Minn. Pub. Radio*, Mar. 26, 2010, available at <http://minnesota.publicradio.org/display/web/2010/03/26/census-homeless/> ("State officials say overlooking as few as 1,000 residents could cost Minnesota one of its eight seats in Congress.").

n11. U.S. Census Monitoring Board, *supra* note 9.

n12. Margo J. Anderson & Stephen E. Fienberg, Who Counts?: The Politics of Census-Taking in Contemporary America 14 (1999) ("The three-fifths compromise required the census to count slaves separately so they could be considered, for apportionment, as three-fifths of a free person.").

n13. Jahmeilah Roberson & Bonnie Nardi, Survival Needs and Social Inclusion: Technology Use Among the Homeless, *Proceedings of Computer Supported Cooperative Work* 445, 445 (2010); see also Kathryn Hansel, Note, Constitutional Othring: Citizenship and the Insufficiency of Negative Rights-Based Challenges to Anti-Homeless Systems, 6 *Nw. J. L. & Soc. Pol'y* 445, 464 (2011) ("Homeless people are often forced to participate in social programs that relieve the more tangible challenges they face, but deny them membership within collective identities and communities that constitute elements of citizenship.").

n14. See Tamara Walsh, A Right to Inclusion? Homelessness, Human Rights and Social Exclusion, 12 *Austl. J. Hum. Rts.* 185, 191 (2006).

n15. On the increasing "criminalization" of homeless, see, e.g., Nat'l Law Ctr. on Homelessness & Poverty and Nat'l Coal. for the Homeless, *Homes Not Handcuffs: The Criminalization of Homelessness in U.S. Cities* (July 2009); Maria Foscarinis et al., *Out of Sight - Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 6 *Geo. J. on Poverty L. & Pol'y* 145 (1999); Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 *Yale L. & Pol'y Rev.* 1 (1996); Nicholas M. May, *Fourth Amendment Challenges to Camping Ordinances: The Government Acquiescence Doctrine as a Legal Strategy to Force Legislative Solutions to Homelessness*, 8 *Conn. Pub. Int. L.J.* 113, 113 (2008); Jamie Michael Charles, Note, "America's Lost Cause": The Unconstitutionality of Criminalizing Our Country's Homeless Population, 18 *B.U. Pub. Int. L.J.* 315 (2009); Tami Iwamoto, Note, *Adding Insult to Injury: Criminalization of Homeless-*

ness in Los Angeles, 29 Whittier L. Rev. 515 (2007).

n16. See David Gonzalez, Undercount No Surprise in the Shacks, N.Y. Times, Apr. 14, 1991, at 14 ("After months or years of existing invisibly on the street, most [homeless individuals] are deeply cynical about the Government's ability - or even willingness - to seek them out.").

n17. U.S. Const. art. I, § 2, cl. 3.

n18. *Id.*; see also Douglas A. Kysar, Kids & Cul-De-Sacs: Census 2000 and the Reproduction of Consumer Culture, 87 Cornell L. Rev. 853, 860 (2000) ("The Framers left the details of both the enumeration process and the apportionment mechanism unspecified.").

n19. See Eric Lotke & Peter Wagner, Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From, 24 Pace L. Rev. 587, 588 (2004).

n20. See *id.*; see also Robert R. McCoy, Note, A Battle on Two Fronts: A Critique of Recent Supreme Court Jurisprudence Establishing the Intent and Meaning of the Constitution's Actual Enumeration Clause, 13 Cornell J. L. & Pub. Pol'y 637, 639 (2004).

n21. See U.S. Census Bureau, Factfinder for the Nation: History and Organization 3 (May 2000), available at <http://www.census.gov/history/pdf/cff4.pdf> ("The Secretary of Commerce ... is now directed by law to take censuses of population, housing, manufactures, mineral industries, other business ... , construction, transportation, and governments at stated intervals ... .").

n22. See U.S. Const. art. I, § 2, cl. 3; U.S. Const. amend. XIV, § 2; see also Lotke & Wagner, *supra* note 19, at 593.

n23. *Franklin v. Massachusetts*, 505 U.S. 788, 806 (1992).

n24. 13 U.S.C. § 4 (2010). For a description of the development of the Census Bureau and its role in the decennial census, see U.S. Census Bureau, *supra* note 21, at 1-11.

n25. Stacy Robyn Harold, Note, The Right to Representation and the Census: Is It Permissible for Congress to Exclude Illegal Immigrants from the Apportionment Base?, 53 Wayne L. Rev. 921, 928 (2007).

n26. *Utah v. Evans*, 143 F. Supp. 2d 1290, 1301 (D. Utah 2001).

n27. *Wisconsin v. City of New York*, 517 U.S. 1, 2 (1996); see also Jennifer M. Safavian, Down for the Count: The Constitutional, Political and Policy Related Problems of Census Sampling, 8 Geo. Mason L. Rev. 477, 481 (2000).

n28. McCoy, *supra* note 20, at 641. During the 1970s and 1980s, the Bureau was repeatedly sued over "the perpetual undercount," but consistently prevailed "because they were able to demonstrate that there was no known method available to correct the undercount." *Id.* at 641 n.25. See also Margo Anderson & Stephen E. Fienberg, The 2000 Census: Litigation, Results, and Implications, 77 N.D. L. Rev. 665, 669 (2001). In more recent counts, the litigation shifted to disputes over the constitutionality of Census efforts to correct the undercount, but the outcome remained the same: "No state or other group has ever prevailed in an action to win a Congressional seat that was apportioned to another state ... ." McCoy, *supra* note 20, at 641.

n29. *Franklin v. Massachusetts*, 505 U.S. 788, 806 (holding that "the Secretary of Commerce made a judgment, consonant with, though not dictated by, the text and history of the Constitution ... ."); see also *Utah v. Evans*, 143 F. Supp. 2d 1290, 1290 (D. Utah 2001) (rejecting Utah's arguments that the Census Bureau violated the Constitution by failing to count non-federal employees overseas or by counting any Americans overseas).

n30. *Borough of Bethel Park v. Stans*, 449 F.2d 575, 580-81 (3d Cir. 1971).

n31. *District of Columbia v. U.S. Dep't of Commerce*, 789 F. Supp. 1179, 1180 (D.D.C. 1992); see also *Borough of Bethel Park v. Stans*, 449 F.2d at 582 (holding that persons "confined to institutions where individuals usually stay for long periods of time, such as penitentiaries or correctional institutions ... are enumerated as residents of the state where they are confined").

n32. For a detailed discussion of these cases, see Persily, *supra* note 4, at 781-89; see also *Wisconsin v. City of New York*, 517 U.S. 1, 3 (1996) ("the wide discretion bestowed by the Constitution upon Congress").

n33. 13 U.S.C. § 195 (2010).

n34. Decision of the Secretary of Commerce, 56 Fed. Reg. 33, 593 (Jul. 22, 1991); see also Safavian, *supra* note 27.

n35. Decision of the Secretary of Commerce, 56 Fed. Reg. 33,593 (Jul. 22, 1991).

n36. *Id.* at 33,583-84. Mosbacher explained that the technical complexity of statistical sampling can result in minor modifications that "swing the outcomes of apportionment, redistricting, and Federal Funding allocation": "Decisions that may be nearly equally defensible from a technical standpoint may have very different outcomes which can be known in advance of the decisions. Thus, adjustment opens the door to manipulation of the census for partisan gain." *Id.* at 33, 605; see also Safavian, *supra* note 27.

n37. See Anderson & Fienberg, *supra* note 28, at 680-81 (describing the debates between statisticians and policy makers regarding the accuracy of proposed sampling techniques); see also Shane T. Stansbury, Note, Making Sense of the Census: The Decennial Census Debate and Its Meaning for America's Ethnic and Racial Minorities, 31 Colum. Hum. Rts. L. Rev. 403, 415 (2000) ("The use of sampling in the follow-up and quality-check stages of the census provides several clear advantages that traditional methods do not ... .", including better data, greater transparency, and lower costs).

n38. 525 U.S. 316, 334 (2002). Note, however, that the Court did not address whether the Census Clause of the Constitution bars such statistical methods in the "actual enumeration." Jennifer Safavian has argued that the language of the Census Clause, the history of the decennial census, and the design of the Constitutional system all suggest that the use of sampling in the count would violate the Constitution. Safavian, *supra* note 27, at 504-13. Thomas Lee similarly asserts that "the relevant historical record leaves little or no doubt that the Framers understood that an 'actual enumeration' would consist of an actual count and would not be based on statistical estimation." Thomas R. Lee, The Original Understanding of the Census Clause: Statistical Estimates and the Constitutional Requirement of an 'Actual Enumeration', 77 Wash. L. Rev. 1, 4 (2002); see also McCoy, *supra* note 20, at 644.

n39. 525 U.S. at 340; see also Stansbury, *supra* note 37, at 420; Benjamin J. Razi, Comment, Census Politics Revisited: What to Do When the Government Can't Count, 48 Am. U. L. Rev. 1101, 116-17 (1999).

n40. U.S. Const. amend. XIV, § 2 (emphasis added).

n41. See generally Harold, *supra* note 25 (discussing the inclusion of illegal aliens in the census and consequent controversy).

n42. Under Census Bureau policy "an individual's usual residence is the place where the person lives and sleeps most of the time." Persily, *supra* note 4, at 781.

n43. Kenneth Darga, Sampling and the Census: A Case Against the Proposed Adjustments for Undercount 4 (1999).

n44. Persily, *supra* note 5, at 1080; see also Crampton, *supra* note 10, at 73 ("Even today, in our "high-tech" society, we have trouble counting everyone."); Nat'l Research Council *supra* note 1, at 21 ("Error is an inevitable part of the census, and perfection ... is an unrealistic and unattainable standard for evaluation.").

n45. Persily, *supra* note 5, at 1080.

n46. Anderson & Fienberg, *supra* note 12, at 2; see also Crampton, *supra* note 10, at 91 ("The inability to count each person in a country so large and so mobile has caused great concern to larger cities in the past few decades.").

n47. Anderson & Fienberg, *supra* note 12, at 2.

n48. Nat'l Research Council, *supra* note 1, at 42; see also Crampton, *supra* note 10, at 91 ("One thing is certain: the Census Bureau keeps trying to improve its techniques to ensure an accurate and fair count.").

n49. 525 U.S. 316, 364 (2002).

n50. *Id.*; see also Margo J. Anderson, *The American Census: A Social History* 210-11 (1988) (noting the concerns of social scientists that the mail enumeration procedures introduced in the 1970 census "would even worsen coverage if address lists were incomplete, if the local population did not read English, or if people lacked that middle-class attribute of civic-mindedness that would make them voluntarily fill out and mail in a census schedule.").

n51. See Darga, *supra* note 43, at 3; see also Anderson & Fienberg, *supra* note 12, at 2 (noting the "politically delicate and sometimes painful" environment in which political reapportionment occurs).

n52. Darga, *supra* note 43, at 3.

n53. *Id.*

n54. "Hot-deck imputation" involves the Census Bureau completing missing information about an address or unit by "imputing" data based on the inference that an address or unit lacking in the appropriate data has the same population of surrounding addresses. McCoy, *supra* note 20, at 647. The technique has proven controversial, given the statutory restrictions on statistical methods like sampling that similarly provide an "estimate [of] the size of housing units for which there was no actual count." Lee, *supra* note 38, at 12. However, the Supreme Court in *Utah v. Evans* held that imputation does not violate the Census Act, as the methodology of hot-deck imputation is distinguishable from the prohibited forms of statistical sampling in both "degree" and "kind." 536 U.S. 452, 479 (2002); see also McCoy, *supra* note 20, at 650. Given the residence-based analysis through which the Census Bureau obtains the data necessary for imputation, it is difficult to imagine many situations in which imputation could substantially enhance the government's inclusion of a group like the homeless.

n55. Darga, *supra* note 43, at 3.

n56. Persily, *supra* note 4, at 1081.

n57. *Id.*; see also Anderson & Fienberg, *supra* note 12, at 2; Nat'l Research Council, *supra* note 1, at 42 (noting that the Census Bureau's efforts to "improve coverage of hard-to-count population groups ... were only partly effective").

n58. See Willrich, *supra* note 6 ("The homeless pose a census problem that makes counting minorities, the poor, and undocumented immigrants seem simple. The homeless can't be reached by the U.S. Mail. They can't be pinpointed on a map. And though their living circumstances make them the most public of people, they are also vulnerable, sometime-trespassers who have a vested interest in not being identified.").

n59. See U.S. Gov't Accountability Office, GAO/GCD-00-47, 2000 Census: Actions Taken to Improve the Be Counted and Questionnaire Assistance Center Programs 3 (2000) ("The Bureau has found that enumerating people with no usual place of residence ... is a particular challenge.").

n60. Lotke & Wagner, *supra* note 19, at 589 ("The usual residence need not be the same as a person's legal or voting address, and a person need not be there on the literal census day ... . They can take a vacation and still count at home.").

n61. *Id.*

n62. Jennifer E. Watson, Note, When No Place is Home: Why the Homeless Deserve Suspect Classification, 88 Iowa L. Rev. 501, 502 (2003); see also Hansel, *supra* note 13, at 447 ("In addition to statutes that disproportionately affect the homeless, homeless people may also be subject to selective or disproportionate enforcement of the law by the police.").

n63. See Andrew J. Liese, Note, We Can Do Better: Anti-Homeless Ordinances as Violations of State Substantive Due Process Law, 59 Vand. L. Rev. 1413, 1415-16 (2006) ("Many local governments have responded to the problems caused by homelessness by criminalizing certain conduct associated with homelessness ... ."); see also Timothy Zick, Constitutional Displacement, 86 Wash. U. L. Rev. 515, 577 (2009).

n64. See, e.g., Mackenzie Carpenter, "Count me out": Census workers enumerate the homeless they can find, Pitt. Post-Gazette, Mar. 21, 1990, at 1 (quoting homeless men who, before fleeing "at the first sign of the counters" during the 1990 census, told a reporter, "Count me out," and, "I don't want police knowing where I am"); see also Darga, *supra* note 43, at 12 (noting that one reason the census fails to enumerate many Americans is that "quite a few people do not want their identities known by the government").

n65. See Liese, *supra* note 63, at 1415 (noting that "homelessness was first recognized as a significant social problem in the United States in the 1980s"); see also Maria Foscarinis, Homelessness, Litigation & Law Reform Strategies: A United States Perspective, 10 Austl. J. Hum. Rts. 6, 6 (2004) ("While it has a long history, homelessness grew dramatically in size and scope beginning in the early to mid-1980s.").

n66. Nat'l Alliance to End Homelessness, Fact Sheet: The Decennial Census and Homelessness 1 (2010).

n67. See Nat'l Research Council of the National Academies, *Envisioning the 2020 Census* 51 (Lawrence D. Brown et al. eds., 2010).

n68. Nat'l Alliance to End Homelessness, *supra* note 66, at 1.

n69. *Id.*

n70. See Nat'l Research Council, *supra* note 67.

n71. Counting the Homeless: Limitations of 1990 Census Results and Methodology: Hearing Before Subcomm. on Gov't Info. & Regulation of the S. Comm. on Gov't Affairs and the Subcomm. on Census and Population of the H. Comm. on Post Office and Civil Serv., 102nd Congress 3 (1991) (statement of L. Nye Stevens, Director, Gov't Bus. Operations Issues, Gen. Gov't Div.); see also U.S. Census Bureau, 1990 Census of Population and Housing: Technical Documentation 337 (1992).

n72. Stevens, *supra* note 71, at 3. See also U.S. Census Bureau, *supra* note 71, at 337 (noting that the Casual Count "was not specifically an operation to count homeless persons living in the streets").

n73. Nat'l Coal. for the Homeless, *Census 2010: Service-based Enumeration (SBE) Operation 3* (2009).

n74. Christopher G. Hudson, *The Homeless of Massachusetts: An Analysis of the 1990 U.S. Census S-Night Data*, 9 New Eng. J. of Pub. Pol'y 79, 80 (1993).

n75. Mary Ellen Hombs & Mitch Snyder, *Homelessness in America: A Forced March to Nowhere* xvi (1982).

n76. U.S. Dep't of Housing & Urban Dev., *Report to the Secretary on the Homeless and Emergency Housing* (1984).

n77. Martha R. Burt & Barbara E. Cohen, *America's Homeless: Numbers, Characteristics, and the Programs That Serve Them* 29 (1989).

n78. Hudson, *supra* note 74, at 80.

n79. *Id.* at 81 (noting that homeless advocates "often argued that any attempt to count the homeless is futile and represents an obfuscation of the problem").

n80. See Lois M. Collins, *Homeless, transients included in tally*, *Deseret News*, Mar. 25, 1990, at B2 ("The special counts have received harsh criticism both nationally and locally."); see also Mireya Navarro, *Census Peers Into Corners to Count Homelessness*, *N.Y. Times*, Mar. 21, 1990, at B3 (noting that the procedures of S-Night "angered city officials" in New York City, who predicted a serious undercount of the homeless population).

n81. Constance F. Citro, *Coverage Improvement Procedures*, in *Encyclopedia of the U.S. Census* 101, 103 (Margo J. Anderson ed., 2000) (noting that one "coverage improvement program" incorporated into the census in 1990 was "enumeration of shelters and street locations where the homeless might be found"); see also Collins, *supra* note 80 (describing the 1990 census as "the first comprehensive nationwide effort to count homeless people").

n82. See Constance F. Citro, *Enumeration: Special Populations*, in *Encyclopedia of the U.S. Census* 204, 206 (Margo J. Anderson ed., 2000).

n83. *Id.* (noting that enumerators visited a wide variety of locations over the night, with enumerators in some cities "[staying] outside selected abandoned buildings until 8 a.m. to enumerate people as they left the buildings"); see also Navarro, *supra* note 80 (noting that the S-Night operation involved approximately 15,000 enumerators across the nation).

n84. Citro, *supra* note 82, at 206.

n85. *Id.*

n86. See *id.*; see also Stevens, *supra* note 71, at 2.

n87. Navarro, *supra* note 80.

n88. Hudson, *supra* note 74, at 81. See also Stevens, *supra* note 71, at 4 ("A major difficulty with any attempt to count the homeless is that a portion of the homeless population remains elusive. Nighttime enumerations are especially vulnerable to missing such persons.").

n89. Citro, *supra* note 82, at 206.

n90. Nat'l Coal. for the Homeless, *The 2000 Census and Homelessness* 2 (1999).

n91. *Nat'l Law Ctr. on Homelessness and Poverty v. Kantor*, 91 F.3d 178, 178 (D.C. Cir. 1996); see also Stevens, *supra* note 71, at 9 ("The Bureau made no independent effort to identify or enumerate street locations in communities that did not respond.").

n92. Stevens, *supra* note 71, at 9.

n93. Nat'l Law Ctr., 91 F.3d at 179.

n94. Navarro, *supra* note 80. See also Hevesi, *supra* note 6, at A26 ("Advocates for the homeless and local government officials scoffed at the figure" produced by the Census Bureau).

n95. Navarro, *supra* note 80; see also Carpenter, *supra* note 64.

n96. Felicity Barringer, *Despite Problems, the Census Bureau Hails Its First Count of the Homeless*, N.Y. Times, Mar. 22, 1990, available at <http://select.nytimes.com/gst/abstract.html?res=F30610FC3D5B0C718EDDAA0894D8494D81&pagewanted=all>.

n97. *Id.* (quoting Tim Horn, district manager of the Census Bureau in Austin, Texas).

n98. Citro, *supra* note 82; see also Annetta C. Smith & Denise I. Smith, U.S. Census Bureau, *Emergency and Transitional Shelter Population: 2000 2 (2001)* (providing an overview of the SBE Operation for the 2000 Census).

n99. Smith & Smith, *supra* note 98, at 2; see also Nat'l Research Council, *supra* note 67, at 151.

n100. Citro, *supra* note 82.

n101. *Id.*

n102. *Id.*

n103. D'Vera Cohn, *Census Bureau Issues Partial Homeless Count*, Wash. Post, Oct. 31, 2001, at A2.

n104. Citro, *supra* note 82.

n105. Cohn, *supra* note 103.

n106. *Id.*; see also U.S. Gov't Accountability Office, *supra* note 59, at 1.

n107. See Nat'l Research Council, *supra* note 67, at 151; see also Cohn, *supra* note 103.

n108. Finding and completing a questionnaire, without any assistance or encouragement, requires significant initiative on the part of the otherwise uncounted individual. Persons with limited interest in the census may simply forget to ever seek out such forms, or fail to fully complete them.

n109. Since participation in the census through a questionnaire demands far more initiative from the person seeking to participate, as well as requiring the level of literacy necessary to complete forms and follow directions, the Bureau cannot rely on this method to replace the presence of enumerators. Questionnaires should remain a facet of the census outreach efforts, but the Bureau must remain cognizant of the limitations inherent in such passive measures. There is a serious danger in becoming overly reliant on an inexpensive, less labor-intensive program that works far better as a supplementary measure.

n110. Nat'l Research Council, *supra* note 67, at 153.

n111. Ohio Dep't of Dev., *Counting the Homeless During the 2010 Census Through Service-Based Enumeration (SBE) 1 (2010)*.

n112. *Id.*

n113. Nat'l Alliance to End Homelessness, *supra* note 66, at 3.

n114. See T.J. Johnston, *Census Methods Could Provide Lift to Hidden Homeless*, S.F. Pub. Press, Feb. 1, 2010, <http://sfpublicpress.org/news/2010-02/new-census-methods-could-provide-lift-to-hidden-homeless>.

n115. See Nat'l Alliance to End Homelessness, *supra* note 66, at 3.

n116. See Joel John Roberts, *Advocates Worry Los Angeles Census Will Undercount Homeless*, Poverty Insights, Mar. 29, 2010, <http://www.povertyinsights.org/2010/03/29/advocates-worry-los-angeles-census-will-undercount-homeless/>.

n117. See Nat'l Research Council, *supra* note 1, at 26; see also U.S. Gov't Accountability Office, *2000 Census: Lessons Learned for Planning a More Cost-Effective 2010 Census 4* (2002) ("Planning a decennial census that is acceptable to stakeholders includes analyzing the lessons learned from past practices, identifying initiatives that show promise for producing a better census while controlling costs, testing these initiatives to ensure their feasibility, and convincing stakeholders of the value of the proposed plans.").

n118. These proposals focus on action by the Census Bureau, but real improvement in the accuracy of the decennial count will rely on effective collaboration between the Census Bureau and a variety of other entities. As Gulf Coast community organizer Trupania Bonner noted, "getting an accurate census count will require an enormous effort on the part of everyone from the president, the Congress and the Census Bureau to community-based organizations ... that have developed a special trust with people in hard-to-count groups." The Leadership Conference Education Fund, *The Hard Count: A Community Perspective on 2010 Census Operations in the Gulf Coast and Texas Colonias 3* (Feb. 2011).

n119. See Marita Hernandez, *Census Bureau Plans to Hire Street People*, L.A. Times, Aug. 11, 1988, [http://articles.latimes.com/1988-08-11/news/mn-386\\_1\\_street-people](http://articles.latimes.com/1988-08-11/news/mn-386_1_street-people).

n120. See *id.*

n121. See *id.* In addition to serving as actual enumerators, the Census Bureau has also hired homeless individuals as "cultural facilitators," who helped enumerators approach unhoused individuals and foster their cooperation with the census operation. Nathan Olivarez-Giles & Alana Semuels, *Census Project Adds to the Job Picture When It Counts*, L.A. Times, Apr. 1, 2010, available at <http://articles.latimes.com/2010/apr/01/business/la-fi-census-jobs2-2010apr02>.

n122. Hudson, *supra* note 74, at 82.

n123. *Id.*

n124. See Leadership Conference Education Fund, *supra* note 118, at 7 (noting "the Census Bureau's strict guidelines against hiring field staff with arrest records or convictions for all but minor traffic offenses"). These hiring restrictions are now the subject of class-action litigation, with plaintiffs contending that the Census Bureau's screening process was discriminatory. See Marie Claire Tran-Leung, *The U.S. Census, Arrest Records, and Employment Discrimination*, Shriver Brief, Apr. 27, 2010, <http://www.theshriverbrief.org/2010/04/articles/criminal-reentry/the-us-census-arrest-records-and-employment-discrimination/>; see also *We Can't Tell You Why*, N.Y. Times, Apr. 20, 2010, at A26.

n125. Collins, *supra* note 80; see also Lois M. Collins, *Not Everyone Fits Bill as Enumerator*, *Deseret News*, Mar. 25, 1990, at B2 (noting that over one-third of the enumerators hired for S-Night in Salt Lake City, Utah, were then experiencing homelessness).

n126. See Collins, *supra* note 80 (noting that the use of shelter residents as enumerators would help "protect privacy").

n127. See Hudson, *supra* note 74, at 82 ("Enumerators sometimes teamed up in groups of four instead of two - thus reducing coverage of the assigned locations - failed to leave their vehicles, or failed to show up at assigned locations.").

n128. Julius Roth, *Hired Hand Research*, 1 *Am. Sociologist* 190, 192 (1966).

n129. See Roberts, *supra* note 116 (quoting Rudy Salinas, "veteran of street outreach," who contends that "the best workers to count people living on our streets are skilled homeless outreach workers ...").

n130. Doug Oakley, *Berkeley Homeless Program Yields Mixed Results*, *Oakland Trib.*, May 26, 2011, available at [http://www.insidebayarea.com/oaklandtribune/localnews/ci\\_18146072](http://www.insidebayarea.com/oaklandtribune/localnews/ci_18146072).

n131. Josh Kegley, *Lexington's Homeless Helping Tornado's Victims in Joplin*, *Lexington Herald-Leader*, May 29, 2011, available at <http://www.kentucky.com/2011/05/29/1756355/lexingtons-homeless-helping-tornados.html>.

n132. Alexandra Zavis, *Venice Homeless to Report Potholes to City*, *L.A. NOW Blog*, *L.A. Times* (May 26, 2011, 2:16 PM), <http://latimesblogs.latimes.com/lanow/2011/05/venice-homeless-to-report-potholes-to-city.html>.

n133. *Leadership Conference Education Fund*, *supra* note 118, at 8.

n134. *Id.* at 6.

n135. Several organizations, both national and regional in orientation, are committed to advocating on behalf of persons experiencing homelessness, and could provide invaluable assistance to local governments and the Census Bureau during the planning and implementation of the decennial census. For a list of national homelessness organizations, with links to local groups, see *Homelessness*, U.S. Dep't of Housing & Urban Dev., <http://portal.hud.gov/hudportal/HUD?src=/topics/homelessness> (last visited June 2, 2011).

n136. Navarro, *supra* note 80; see also Carpenter, *supra* note 64.

n137. See, e.g., Stevens, *supra* note 71, at 1 (U.S. Government Accountability Office analyst noting that "the Bureau did not attempt to do a census of the homeless; instead it sought to include homeless persons in the census"); Smith & Smith, *supra* note 98, at 1 (Census Bureau employees stating "it is important to stress that these figures do not constitute and should not be construed as a count of people without conventional housing... . The Census Bureau's intent was to improve coverage of difficult to enumerate populations, including people without conventional housing.").

n138. See, e.g., Nick Taborek, *U.S. Census Prepping for Homeless Count*, *Santa Monica Daily Press*, Feb. 3, 2010, <http://www.smdp.com/Articles-c-2010-02-02-68559.113116-US-Census-prepping-for-homeless-count.html> (Census Bureau employee describing the "overwhelming response" of organizations that serve the homeless).

n139. Newly Paul, *Census 2010 Aims to Get an Accurate Count of Homeless*, *S. Cal. Pub. Radio*, Mar. 24, 2010, <http://www.scp.org/news/2010/03/24/us-census-bureaus-program-aims-get-accurate-homele/>.

n140. Nat'l Law Ctr on Homelessness & Poverty & Nat'l Coal. for the Homeless, *supra* note 15, at 33 ("Most cities throughout the country either have laws or engage in practices that criminalize homeless persons ...").

n141. Donald Saelinger, *Note, Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, *Geo. J. on Poverty L. & Pol'y* 545, 546 (2006); see also Maya Nordberg, *Jails Not Homes: Quality of Life on the Streets of San Francisco*, 13 *Hastings Women's L.J.* 261, 265 (2002).

n142. While general loitering laws have been found unconstitutionally vague, loitering ordinances "directed

at more specific behavior or limited to certain time periods have generally been upheld." Hansel, *supra* note 13, at 449. See also *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166 (2d Cir. 1974).

n143. See generally Ruth Szanto, Note, "Excuse Me! Can You Spare Some Change ... In This Economy?": A Socio-Economic History of Anti-Panhandling Laws, 4 *Phx. L. Rev.* 515 (2010).

n144. These ordinances "prohibit standing, sitting, or lying in public areas." Hansel, *supra* note 13, at 447. Enforcement of such "anti-camping" laws often involves "property sweeps to seize and destroy the possessions of homeless persons." Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 *Tul. L. Rev.* 631, 634 (1992).

n145. Zick, *supra* note 63, at 578 ("In some cities, ordinances prohibiting trespassing loitering in certain public places, interference with pedestrian traffic, vagrancy, and disorderly conduct have been enforced in such a manner that the homeless are simply removed from certain territories altogether."); see also Hansel, *supra* note 13, at 447.

n146. Saelinger, *supra* note 141, at 546 ("Anti-nuisance laws have become a popular method for making the urban lawless less visible ...").

n147. *Id.* at 553; see also Zick, *supra* note 63, at 577 (noting that the "criminalization" of the homeless "became particularly prevalent in the early 1990s, as cities began to address what many then felt was intolerable disorder in public places").

n148. Saelinger, *supra* note 141, at 552.

n149. In most - if not all - of the cities enforcing these "anti-nuisance" laws, the resources to shelter homeless people are "woefully inadequate." Foscarinis et al., *supra* note 15, at 149. Consequently, many homeless are punished for living outside despite lacking any other option.

n150. Hansel, *supra* note 13, at 447 ("Challenges to measures that adversely and disproportionately affect the homeless have come in various forms, including procedural due process, substantive due process, equal protection, and First Amendment, Fourth Amendment, and Eighth Amendment challenges.").

n151. The administrative processes required to enforce these laws imposes considerable costs on the municipality that employs the police, clerks, judges, and prosecutors involved in these proceedings. See Nordberg, *supra* note 141, at 294. In addition, the arrests and court appearances related to "anti-nuisance" measures will further hinder the stability of the homeless and potentially exacerbate their vulnerable condition: "facing a court date or arrest on a warrant leads to missed housing, job, and medical appointments, and loss of public benefits or any semblance of a safety net." *Id.* at 293.

n152. History is unfortunately littered with several instances in which census information was "utilized for nefarious or questionable purposes." Kysar, *supra* note 18, at 870. Hitler relied on the European census during his conquests, while Sherman used census data to "facilitate his March through Georgia." Kent Walker, *Where Everybody Knows Your Name: A Pragmatic Look at the Costs of Privacy and the Benefits of Information Exchange*, 2000 *Stan. Tech. L. Rev.* 106. More recently, the U.S. Census Bureau released certain aggregate information that enabled the internment of Japanese-Americans during World War II. Kysar, *supra* note 18, at 870. But, despite these worrisome exceptions, the Bureau has remained largely vigilant in its protections of personal information, maintaining a policy of strict confidentiality with respect to individual census returns since 1840. *Id.*

n153. See *supra* note 62.

n154. See *supra* Part I.

n155. See Randolph, *supra* note 10 (describing one homeless activist's frustrations with the Census Bureau's refusal to send enumerators into dangerous locations, including "boarded up houses" and "caves"); see also Johnston, *supra* note 114 (quoting former Census employee who stated "most of the census plans I remember seemed to be how to keep the enumerators safe while they did the count.").