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## **Prison Preparedness and Legal Obligations To Protect Prisoners During Natural Disasters**

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STUDENT PAPER

**PRISON PREPAREDNESS AND LEGAL  
OBLIGATIONS TO PROTECT PRISONERS  
DURING NATURAL DISASTERS**

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By William Omorogieva

May 2018

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## EXECUTIVE SUMMARY

Since at least 2004, the intensity of hurricanes and the damage they have caused in America has increased significantly.<sup>1</sup> After the turbulent hurricane season of 2017, citizens should recognize the elevated risks to safety that occur when individuals stay put, especially during high-intensity hurricanes (Category 3 and higher). States of emergency and evacuation orders have been declared recently in many states and cities that anticipated extreme hurricane conditions.<sup>2</sup> However, even with increased calls for evacuations, warnings from public officials, and around the clock media coverage, a significant portion of the population has continued to be overlooked during times of natural disasters. This neglected group of citizens “left out of sight and out of our hearts” during natural disasters are the incarcerated men and women in correctional facilities across the country.<sup>3</sup>

Part 1 of this paper begins with an overview of the correctional sector in the United States. Part 1 then goes on to explore the culture of neglect regarding prisoner safety and well-being during natural disasters, and examines how this leads to repeated cycles of

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<sup>1</sup> STANLEY SMITH & CHRIS MCCARTHY, FLEEING THE STORM(S): AN EXAMINATION OF EVACUATION BEHAVIOR DURING FLORIDA’S 2004 HURRICANE SEASON, *Demography* 46.1, 127-145 (Feb. 2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2831263/>.

<sup>2</sup> Jeremy Berke, *Nearly 7 Million people told to evacuate in Florida and Georgia as Hurricane Irma approaches with 125-mp Winds*, *Business Insider* (Sep. 9, 2017), <http://www.businessinsider.com/hurricane-irma-florida-evacuation-orders-2017-9>.

<sup>3</sup> Van Jones, *The One Group We Abandoned during the Hurricanes*, *CNN* (Sept. 13, 2017), <http://www.cnn.com/2017/09/12/opinions/prisoners-pet-irma-opinion-jones-jackson/index.html>.

unacceptable living conditions and deprivation of rights prisoners were forced to endure during Hurricanes Rita, Ike, and Katrina.

Part 2 reviews the rights that prisoners are granted under the Eighth Amendment of the United States Constitution. This section then explores other federal statutes like the National Environmental Policy Act, and the gaps and issues inherent in these laws, which fail to adequately address prisons and inmate safety. Furthermore, this section examines prison emergency preparedness in general and the lack of continuity regarding planning for natural disasters.

Part 3 examines the recent events of Hurricanes Harvey, Irma, Maria. Part 3 then continues on to examine how the culture of neglect toward inmate safety and health has continued over a decade after the abuses that took place during hurricanes Katrina, Ike, and Rita. Part 3 also highlights how a lack of adequate emergency planning led to inmates living in unsuitable conditions that violated their constitutional rights.

Part 4 will then explore possible solutions to some of the previously discussed issues by recommending changes to some of the federal legislation that was discussed in part 2. The suggestions in part 4, which range from legislative approaches to litigation, are meant to create comprehensive federal protections for prisoners who are confronted with unsuitable living conditions and inadequate health care when they are not evacuated during hurricanes.

# 1 THE CORRECTIONAL SECTOR AND A CULTURE OF NEGLECT DURING TIMES OF EMERGENCY

## 1.1 Overview of the Correctional Sector

There are more than 2.3 million people incarcerated in our criminal justice system in more than 1,800 federal and state prisons and more than 3,100 local jails across America.<sup>4</sup> The Federal Bureau of Prisons (BOP), an agency of the Department of Justice (DOJ), runs the federal prison system that houses all adults convicted of a federal crime.<sup>5</sup> The BOP manages 122 of its own “institutions,” but it also teams up with the private sector to create “contract prisons” in order to help manage the inmate population.<sup>6</sup> There are federal facilities in 37 states as well as the District of Columbia and Puerto Rico.<sup>7</sup> All 50 states have their own prison systems, and according to the most recent federal census of these correction facilities in 2005, there were 1,719 functioning state correctional

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<sup>4</sup> Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, Prison Policy Initiative (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html>.

<sup>5</sup> U.S. Department of Justice, *About The Federal Bureau of Prisons* (Jun. 2015), <https://www.bop.gov/resources/pdfs/ipaabout.pdf>

<sup>6</sup> Fed. Prisons, FED. BUREAU OF PRISONS, [bop.gov/about/facilities/federal\\_prisons.jsp](http://bop.gov/about/facilities/federal_prisons.jsp) (last visited Nov. 10, 2017); Contract Prisons, FED. BUREAU OF PRISONS, [bop.gov/about/facilities/contract\\_facilities.jsp](http://bop.gov/about/facilities/contract_facilities.jsp) (last visited Nov. 10, 2017).

<sup>7</sup> *List of Our Facilities*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/list.jsp> (last visited Nov. 10, 2017).

facilities.<sup>8</sup> Out of the 1,841 state and federal correctional facilities, 415 were run by private institutions compared to the 1,406 run by federal or state authorities.<sup>9</sup> Generally, the privately run facilities are smaller, are for-profit, and are less occupied than the federal and state run facilities, which tend to house more inmates and as a result are more overcrowded.<sup>10</sup>

In a country that has more correctional facilities than colleges, it seems unconscionable that prisoners are often forgotten.<sup>11</sup> However, this is the reality of the world we live in. A brief history lesson will show that inmates' rights have often been neglected in emergency situations, and because of this, they have constantly suffered physical and mental injuries during and after natural disasters like hurricanes. This is an important constitutional problem, because inmates in prisons and jails cannot take care of themselves and must rely on prison officials to do so.<sup>12</sup> However, prison officials have

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<sup>8</sup> BUREAU OF JUSTICE STATISTICS, NCJ 222182, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2005, at 2 tbl.1 (2008),

<https://www.bjs.gov/content/pub/pdf/csfcf05.pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 4.

<sup>11</sup> Christopher Ingraham, *The U.S. Has More Jails Than Colleges. Here's a Map of Where those Prisoners Live*, Washington Post (Jan. 6, 2015),

[https://www.washingtonpost.com/news/wonk/wp/2015/01/06/the-u-s-has-more-jails-than-colleges-heres-a-map-of-where-those-prisoners-live/?utm\\_term=.38927999d292](https://www.washingtonpost.com/news/wonk/wp/2015/01/06/the-u-s-has-more-jails-than-colleges-heres-a-map-of-where-those-prisoners-live/?utm_term=.38927999d292) (Showing over 5,000 correctional facilities, compared to under 5,000 "degree-granting colleges and universities").

<sup>12</sup> *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (Noting inmates' dependence on the correctional institution for all of their needs since they lack liberty).



consistently underperformed when it comes to protecting inmates during hurricanes, and this paper argues that some of the worst violations of prisoners' rights usually occur when officials fail to evacuate correctional facilities. This lack of preparedness by prison officials in failing to have suitable evacuation plans and procedures for sustaining prison populations during and after a hurricane, has often led to litigation highlighting the pain and suffering that thousands of inmates endure.<sup>13</sup>

## **1.2 A Culture of Neglect**

Until recently, the implications of climate change for correctional facilities have been "largely disregarded by both correctional administrators and public officials working on climate adaption policy."<sup>14</sup> Multiple examples of this complete disregard for prisoners' safety, health, and rights during natural disasters can be seen when one looks back on how prison and government officials behaved during Hurricanes Rita (2005), Ike (2008), and Katrina (2008). Before each of these disasters, evacuation orders were issued to citizens in the Texas and Louisiana counties that were projected to be hit hard by the storms. Before Hurricane Ike, the mandatory evacuation order given was meant to

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<sup>13</sup> Michael Welch, *Hurricane Katrina Was a Nightmare for Inmates in New Orleans*, Vice News (Aug. 29, 2015), [https://www.vice.com/en\\_us/article/5gjdxn/hurricane-katrina-was-a-nightmare-for-inmates-in-new-orleans-829](https://www.vice.com/en_us/article/5gjdxn/hurricane-katrina-was-a-nightmare-for-inmates-in-new-orleans-829).

<sup>14</sup> Daniel W.E. Holt, *Heat In US Prisons And Jails Corrections and the Challenge of Climate Change*, Columbia Law School (2015), [https://web.law.columbia.edu/sites/default/files/microsites/climate-change/holt\\_-\\_heat\\_in\\_us\\_prisons\\_and\\_jails.pdf](https://web.law.columbia.edu/sites/default/files/microsites/climate-change/holt_-_heat_in_us_prisons_and_jails.pdf).

“alleviate the suffering of the people.”<sup>15</sup> However, it is clear that Galveston County, Texas, for example, was only concerned with preventing the suffering of its citizens who were not inmates, because the Galveston County Jail was not evacuated, and chaos ensued.<sup>16</sup> The same can be argued for conditions at Orleans Parish Prison (OPP) in Louisiana during Hurricane Katrina, and at Beaumont Federal Prison in Texas during Hurricane Rita, when both facilities decided not to evacuate their inmates.

On Sunday, August 28, 2005, a day before Hurricane Katrina hit, Mayor Ray Nagin issued the first-ever mandatory evacuation of the city of New Orleans.<sup>17</sup> This seemed completely appropriate for a hurricane that had winds up to 175 MPH and was predicted to bring up to 20 feet of water into the city. At the time, Governor Kathleen Blanco warned about the seriousness of the storm and said that, “we need to get as many people out as possible.”<sup>18</sup> But despite the clear danger and numerous warnings from

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<sup>15</sup> James D. Yarbrough, *Declaration of Local State of Disaster for the County of Galveston, Texas Due to Hurricane Ike* (Sept. 10, 2008).

<sup>16</sup> Texas Civil Rights Project, *Galveston County’s Refusal to Evacuate Detainees and Inmates at Its Jail During Hurricane Ike* (2009), [https://www.texascivilrightsproject.org/en/wp-content/uploads/2016/04/TCRP\\_2009\\_HumanRights.pdf](https://www.texascivilrightsproject.org/en/wp-content/uploads/2016/04/TCRP_2009_HumanRights.pdf).

<sup>17</sup> Gordon Russell, *Nagin Orders First-ever Mandatory Evacuation of New Orleans*, NOLA.com The Times-Picayune (Aug. 28, 2005), [http://www.nola.com/katrina/index.ssf/2005/08/nagin\\_orders\\_first-ever\\_mandatory\\_evacuation\\_of\\_new\\_orleans.html](http://www.nola.com/katrina/index.ssf/2005/08/nagin_orders_first-ever_mandatory_evacuation_of_new_orleans.html).

<sup>18</sup> Welch, *supra* note 13.

officials, inmates at OPP were not evacuated because, as Sheriff Marlin Gusman announced, the prisoners needed to “stay where they belong”.<sup>19</sup>

This is clear evidence of the culture of neglect and indifference toward the safety and well-being of prisoners that seems to stretch across the country. Ironically, before Katrina landed in the U.S., more concern was shown for the safety of stray animals than for the prisoners in Orleans Parish.<sup>20</sup> Before the storm, the Louisiana Society for the Prevention of Cruelty to Animals (“LSPCA”), in accordance with its evacuation policy for Category 3 hurricanes or above, got the animals’ paperwork in order and evacuated 263 dogs and cats.<sup>21</sup> A total and complete lack of preparedness for inmates’ safety and government and prison officials’ apathy toward them in the days before Katrina was a recipe for disaster and led to the violation of inmates’ constitutional rights.

In Hurricanes Katrina, Rita, and Ike, all three of the facilities previously mentioned suffered a breakdown of prison order, and inmates were exposed to unsanitary conditions, a lack of food and water, and other unacceptable living conditions. All three hurricanes show how a failure to adequately plan for natural disasters can lead directly to unnecessary anguish and misery for inmates. But OPP is a particularly strong example

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<sup>19</sup> *Id.*

<sup>20</sup> ACLU, *OPP Report*, 20 (2006), <https://www.aclu.org/files/pdfs/prison/oppreport20060809.pdf>.

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

of an institution that failed to adequately plan for a natural disaster, because it had no known emergency plan in existence when Katrina touched down in Louisiana.<sup>22</sup>

Over a decade has passed since Hurricane Katrina and Hurricane Rita ravaged parts of the South. But history seems to repeat itself, and government and prison authorities continue to overlook the dangers associated with keeping inmates locked up during natural disasters without proper plans for supporting them.<sup>23</sup> The hardships endured by inmates during Hurricanes Katrina, Rita, and Ike returned to plague our correctional facilities in the summer of 2017 when Hurricanes Harvey and Irma reached the mainland U.S. But before moving on to the recent inmate hardships, some quick background about the constitutional abuses that took place during Katrina, Rita, and Ike will be helpful in showing how history has repeated itself.

### **1.3 Katrina, Rita, and Ike: the Deprivation of Inmates' Rights**

Some of Katrina's worst victims were located at OPP during the time the hurricane hit. Comprised of 12 buildings, OPP is the largest detention facility in Louisiana and was filled with many detainees who had been accused of offenses such as "loitering, public intoxication" and "failure to pay traffic fines or child support."<sup>24</sup> Even after President

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<sup>22</sup> *Id.* at 25.

<sup>23</sup> Jones, *supra* note 3.

<sup>24</sup> Bob Williams, *Reflections on Katrina's First Year: The Story of Chaos and Continuing Abuse in One of America's Worst Justice Systems*, Prison Legal News (Apr. 15, 2007),

George W. Bush declared a state of emergency, prisoners from surrounding areas piled into OPP, and when Hurricane Katrina struck, the 8,000 prisoners in OPP exceeded the prison's capacity.<sup>25</sup> Forty-eight hours before the storm, OPP was placed on lockdown and the chain of command had already started to break down when deputies began abandoning their posts, a trend which continued while Katrina ravaged the prison.<sup>26</sup>

When Hurricane Katrina hit OPP on Monday, August 29, 2005, there was no water, electricity, or plumbing. Prisoners were trapped in their cells with rising water from sewage and overflowing toilets filled with excrement.<sup>27</sup> Many prisoners almost drowned after being trapped in their cells, as water levels continued to rise. The flood water was so contaminated that OPP's own medical director, Dr. R. Demaree Inglese, said that it stripped all the skin off of his chest.<sup>28</sup> During the hurricane, Dr. Inglese treated officers for trench foot, a medical condition often seen in World War 1, and commented that "[t]he skin was peeling off their muscles. That's how bad it was in that water."<sup>29</sup>

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<https://www.prisonlegalnews.org/news/2007/apr/15/reflections-on-katrinas-first-year-the-story-of-chaos-and-continuing-abuse-in-one-of-americas-worst-justice-systems/>.

<sup>25</sup> *Id.*

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

<sup>27</sup> ACLU, *National Prison Project Calls for Immediate Action by President, Congress and Justice Department*, ACLU (Aug. 10, 2016), <https://www.aclu.org/news/aclu-report-details-horrors-suffered-orleans-parish-prisoners-wake-hurricane-katrina>.

<sup>28</sup> Williams, *supra* note 23.

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

Food and water were scarce at OPP after Katrina hit. Most prisoners had their last meal there the day before the storm hit on Sunday, August 28, 2005, and many prisoners reported that guards taunted them with food and water, which was consumed by the guards and their families.<sup>30</sup> Some prisoners were so desperate that they drank the contaminated flood water. Children were among those subjected to these conditions. Ashley George, a 13-year-old who was originally housed at a youth detention center and moved to OPP before Katrina, described being housed with grown male inmates who watched her use the restroom before the storm even landed, and also described flood water up to her neck for a couple of days without food or water.<sup>31</sup>

One deputy at OPP described the prison as “chaotic” and complained that “no one gave any orders.”<sup>32</sup> With the breakdown of the prison command, prisoners were attacked by other prisoners and medical attention for most prisoners was nonexistent.<sup>33</sup> Some prisoners reported not seeing guards for over four days, let alone medical staff.<sup>34</sup> On Monday, August 29, right before midnight, Sheriff Gusman finally called the Louisiana

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

<sup>31</sup> Interview with Ashley George, June 20, 2006 (Notes on File with the ACLU National Prison Project); Interview with Ashley George, Mar. 1, 2006 (Notes on File with the ACLU National Prison Project).

<sup>32</sup> ACLU, *supra* note 20, at 57.

<sup>33</sup> *Id.* at 67.

<sup>34</sup> Williams, *supra* note 24.

Department of Corrections for evacuation help, almost 21 hours after the storm hit.<sup>35</sup> The largest prison evacuation in U.S. history at the time started on Tuesday, August 30 and ended on Friday, September 2-- but the nightmare was not over even after the inmates had been evacuated.<sup>36</sup>

Many inmates were moved to an overpass on I-10 and several collapsed from dehydration as they sat for days in the sweltering Louisiana heat.<sup>37</sup> Prisoners were not allowed to move, women who were menstruating “had no sanitary napkins” and were forced to wear what they had for three days.<sup>38</sup> Inmates were instructed to relieve themselves where they sat and if prisoners needed to stretch their muscles, they were often met with mace and dog attacks from the guards.<sup>39</sup> For many prisoners, the conditions they faced after being evacuated were just as bad as the conditions they faced inside of OPP.

About a month after Katrina, Hurricane Rita landed on U.S. soil. Prisoners in the United States Penitentiary in Beaumont, Texas, were not evacuated, and similar to what happened with Katrina, they were helpless during and after Hurricane Rita.<sup>40</sup> A few days

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

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

<sup>37</sup> *Id.*

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

<sup>39</sup> *Id.*

<sup>40</sup> Sarah Portlock, *Inmates caught in Rita lose appeal*, Amarillo Globe-News (July 28, 2016), <http://amarillo.com/texas-news/2010-08-19/inmates-caught-rita-lose-appeal>.

after Rita had passed, Mike Truman, a spokesman for the Bureau of Prisons, told reporters that inmates had portable toilets and were receiving two hot meals a day-- but none of this was true because inmates did not receive food for two days and did not have hot meals for over a month.<sup>41</sup> Inmates were deprived of basic human needs for many weeks, and lived without adequate food, water, medicine, clothes, and sleep.<sup>42</sup>

The guards' idea of preparing for Rita involved instructing inmates to fill garbage bags with tap water (this was the only drinking water after Rita hit and the electricity and water systems died).<sup>43</sup> The combination of humidity and damp cells often kept prisoners up for days without sleep. Isaac Ortiz, the correction officers' union president, even commented that the warden knew about the dangerous storm that was approaching, and he backed up most of the prisoners' accounts of what happened during Hurricane Rita.<sup>44</sup> Ortiz even admits that when the penitentiary decided not to evacuate, "they risked everybody's life."<sup>45</sup>

Hurricane Ike occurred three years after Katrina and Rita, but prison officials did not learn from the mistakes made by their peers during the earlier storms when facilities failed to evacuate prisoners located in high risk areas. The Galveston County Jail held

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<sup>41</sup> Chris Vogel, *A Prison Cover-up During Hurricane Rita*, Houston Press (Mar. 5, 2008), <http://www.houstonpress.com/news/a-prison-cover-up-during-hurricane-rita-6575872>.

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

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

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

<sup>45</sup> *Id.*



people convicted of minor crimes or individuals who could not make bond and were not yet convicted of anything.<sup>46</sup> One would think that the type of prisoners in the jail would have garnered more empathy or elicited more attention, but the mere fact that they were prisoners meant that the officials in Galveston County simply did not care about their well-being.

During Hurricane Ike and weeks following its aftermath, prisoners were left without adequate food and water, had to live in filthy conditions, had severely restricted communication with the outside world, and suffered physical injuries due to both a lack of medical personnel and angry prison guards.<sup>47</sup> Before the storm landed, numerous inmates were told by guards that their social security numbers and birth dates would be put on their arms with permanent markers, so their dead bodies could be identified if the jail flooded and they died.<sup>48</sup> This never actually occurred, but it is strong evidence that shows officials did have knowledge of the potential risks the inmates would have to face and suffer through during the hurricane and failed to take the proper steps to prevent them.

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<sup>46</sup> Texas Civil Rights Project, *supra* Note 16, at 6.

<sup>47</sup> *Id.* at 12-19.

<sup>48</sup> *Id.* at 27.

When Hurricane Ike hit, the power, plumbing, and water systems at the jail immediately went out.<sup>49</sup> Power was not restored for over a week, and running water was not restored until two weeks after the storm.<sup>50</sup> Within a day, all of the toilets were overflowing in the jail and a week later, inmates were given buckets and bags for their bathroom needs.<sup>51</sup> The trash began to overflow immediately, and the limited airflow in the jail combined with the stench from the trash bags filled with excrement made prisoners vomit while waiting in line for their food.<sup>52</sup> A few weeks later, two portable toilets were brought in for more than 200 inmates, but those soon flooded.<sup>53</sup> By that point, the majority of inmates had already been sleeping every night for weeks next to overflowing toilets.<sup>54</sup>

There were reports of inmates going without water for days after the hurricane, and when the Federal Emergency Management Agency (FEMA) finally arrived with water, each inmate was allowed a 6-ounce cup, which they could refill only twice a day, supplies permitting.<sup>55</sup> Inmates couldn't bathe for over a week, there were fights over

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<sup>49</sup> Interview with Ray Lazare, Galveston County Jail Inmate during Hurricane Ike, in Beaumont, Tex. (Jun 3 18, 2009).

<sup>50</sup> See Telephone Interview with Denise Y. Forteson, Galveston County Jail Inmate during Hurricane Ike, (Aug. 4, 2009).

<sup>51</sup> Texas Civil Rights Project, *supra* Note 16, at 12.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 13.

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

<sup>55</sup> *Id.* at 14.

water, and even when water was restored to the jail, prison officials assured inmates that it was safe to drink from the faucets. The problem was that everyone in the county, other than the prisoners, knew that the water was contaminated and was not safe to drink.<sup>56</sup> Multiple inmates got sick from drinking the water and many got diarrhea, which only added to an already revolting bathroom situation.<sup>57</sup>

Even weeks after Ike had passed, inmates were deprived of hot meals and were given two sandwiches a day, one Peanut butter sandwich, and one baloney sandwich with a single slice of meat.<sup>58</sup> Before the storm, prisoners usually had full meals that included vegetables and dessert, but when the Texas Commission on Jails visited the prion weeks after Ike, meals were improved for a day but immediately returned to the sparse sandwiches the next day.<sup>59</sup>

There were worms in shower drains, moldy ceiling tiles, and “clouds of gnats” in the jail after Ike.<sup>60</sup> Most of the medical staff left before the hurricane, so there were only two members of the medical staff at the jail with limited medical supplies during and

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

<sup>57</sup> Interview with Leonard Rodriguez, Galveston County Jail Inmate during Hurricane Ike, in Beaumont, Tex. (July 15, 2009).

<sup>58</sup> Interview with Jim Brown, Galveston County Jail Inmate during Hurricane Ike, in Beaumont, Tex. (July 15, 2009).

<sup>59</sup> Interview with Lawrence Rodriguez, *supra* note 32.

<sup>60</sup> *Id.*

after Ike.<sup>61</sup> This resulted in a shortage of medication for high risk prisoners with diabetes, and insufficient medical care for prisoners who sustained injuries during and after the hurricane. In one instance, a prisoner even revived his cellmate from diabetic shock with a piece of candy he had stashed away, because no one in the “diabetic tank” was getting the insulin they needed.<sup>62</sup>

Prison guards also intentionally restricted inmates’ access to the phones, even when electricity was restored.<sup>63</sup> Inmates were only allowed to use the phones in order to end rumors that they had not survived the hurricane; but more often than not conversations were monitored, or guards made calls for inmates, so they couldn’t inform the outside world about the conditions they were living in.<sup>64</sup> Many prison officials were upset with their realities in the outside world, due to the destruction in the community Hurricane Ike left in its path. This led to some guards taking out their anger on inmates verbally and physically.<sup>65</sup> The conditions in the jail were so bad that some prisoners even overheard guards talking about suing the County.<sup>66</sup>

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<sup>61</sup> Texas Civil Rights Project, *supra* Note 16, at 18.

<sup>62</sup> Interview with Jim Brown, *supra* note 58.

<sup>63</sup> Interview with James Carl Willis, Galveston County Jail Inmate during Hurricane Ike, in Beaumont, Tex. (June 18, 2009).

<sup>64</sup> Interview with Lawrence Rodriguez, *supra* note 32.

<sup>65</sup> *Id.*

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

## 2 PRISONER RIGHTS, FEDERAL PROTECTIONS, AND EMERGENCY PLANNING

### 2.1 Constitutional Rights: the Eighth Amendment's Protection Against Cruel & Unusual Punishment

Looking back at the repugnant conditions prisoners were forced to endure during hurricanes Katrina, Rita, and Ike raises the question about exactly what duties the correctional facilities owe these prisoners. In fact, “[t]he state’s power to imprison its citizens carries with it the duty to provide for their basic needs.”<sup>67</sup> The Eighth Amendment of the U.S. Constitution protects against the infliction of “cruel and unusual punishment.”<sup>68</sup> Up until 1975, the Eighth Amendment was interpreted by the courts to prohibit only cruel and unusual sentences, and was not thought to apply to cruel prison conditions.<sup>69</sup>

This all changed after *Estelle v. Gamble*, 429 U.S. 97 (1976), when the Supreme Court of the United States expanded the scope of the cruel and unusual punishment clause to include conditions inside of correctional facilities.<sup>70</sup> Since then, the Supreme Court has ruled that the Eighth Amendment imposes duties on prison officials to provide

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<sup>67</sup> ACLU, *supra* note 20, at 18.

<sup>68</sup> U.S. CONST. amend. VIII.

<sup>69</sup> Timothy Maloney, *Rights of Detainees and Prisoners in The United States*, [https://www.law.ufl.edu/pdf/academics/centers/cgr/11th\\_conference/Tim\\_Maloney\\_Rights\\_of\\_Detainees.pdf](https://www.law.ufl.edu/pdf/academics/centers/cgr/11th_conference/Tim_Maloney_Rights_of_Detainees.pdf).

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

“humane conditions of confinement,” and they must “ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates.”<sup>71</sup> The Eighth Amendment’s ban on cruel and unusual punishment is “made applicable to the States through the Fourteenth Amendment’s Due Process Clause”.<sup>72</sup> This modern application means that the Eighth Amendment should protect both federal and state prisoners from exactly the type of deprivations they experienced during Hurricanes Katrina, Rita, Ike, Harvey, and Irma.

42 U.S.C. § 1983 allows inmates who think their Eighth Amendment rights have been violated by prison officials to bring suit for monetary damages and injunctive and declaratory relief.<sup>73</sup> In order for a court to find that a prison official has violated the Eighth Amendment, two requirements must be met.<sup>74</sup> The first and objective requirement is that “[t]he inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.”<sup>75</sup> The second requirement is that, “only the wanton

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<sup>71</sup> *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (noting that prison officials have a duty to provide prisoners with humane conditions of confinement).

<sup>72</sup> *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 198 (1989) (finding that the Eighth Amendment ban is “made applicable to the states through the Fourteenth Amendment’s Due Process Clause”).

<sup>73</sup> 42 U.S.C.S. § 1983.

<sup>74</sup> *Farmer*, *supra* note 71, at 834 (stating that a prison official violates the Eighth Amendment only when two requirements are met).

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

infliction of pain implicates the Eighth Amendment.”<sup>76</sup> This subjective requirement means that in order to violate the Cruel and Unusual Punishment Clause of the Eighth Amendment, a prison official needs to have “a sufficiently culpable state of mind.”<sup>77</sup> This is because without a showing of this mindset the courts do not consider the harm to be a punishment, and hence the Cruel and Unusual Punishment Clause would not apply.

When challenging conditions of confinement, if prisoners can show that prison officials were aware of an “excessive risk to inmate health or safety” but failed to take practical measures to stop that risk, the courts have held this to be a sufficiently culpable state of mind.<sup>78</sup> In the cases involving prison conditions, the state of mind by a prison official must be one of “deliberate indifference to inmate health or safety.”<sup>79</sup> Therefore, the Eighth Amendment is violated when a prison official shows deliberate indifference to conditions that pose a substantial risk of serious harm to inmates. If prisoner plaintiffs can show evidence that a risk to inmates was “longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information

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<sup>76</sup> *Wilson v. Seiter*, 501 U.S. 294 (1991) (holding that only a wanton infliction of pain brings the Eighth Amendment into play).

<sup>77</sup> *Id.*

<sup>78</sup> *Farmer*, *supra* note 71, at 837 (stating the deliberate indifference standard).

<sup>79</sup> *Id.* at 834 (explaining the deliberate indifference standard).

concerning the risk and thus ‘must have known’ about it,” then a court could find that an official had knowledge of such risk.<sup>80</sup>

Initially, this deliberate indifference standard only applied when prisoners raised concerns about their medical care or lack thereof, but in *Wilson v. Seiter*, the Supreme Court decided that the standard should be extended to prisoners challenging the conditions of their confinement.<sup>81</sup> Three years later, the deliberate indifference standard was again interpreted and expanded by the Supreme Court to include actions where prison officials failed to prevent harm to an inmate.<sup>82</sup> The Supreme Court has ruled that “deliberate indifference entails something more than mere negligence” and that at the same time, “it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.”<sup>83</sup> Correctional facility officials in failing to plan for deadly natural disasters, failing to have evacuation plans, failing to have plans to sustain inmate populations that are not evacuated, and the resulting turmoil from these failures after Hurricanes Katrina, Rita, Ike, Harvey, and Irma, raise serious Eighth Amendment concerns.

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<sup>80</sup> *Id.* at 842-843 (quoting Brief for Respondents, at 22).

<sup>81</sup> *Wilson*, *supra* note 76, at 303 (stating that the deliberate indifference standard was expanded to include prisoners challenging the conditions of their confinement).

<sup>82</sup> *Farmer*, *supra* note 71, at 834 (noting deliberate indifference standard expanded to include prison officials’ failure to prevent harm to inmates).

<sup>83</sup> *Id.* at 834 (citing *Estelle v. Gamble*, 429 U.S. 97 (1976)).



However, even though the scope of the deliberate indifference standard has been expanded, with regard to when it applies, that does not mean 42 U.S.C. § 1983 claims make it easy for prisoners to prevail.<sup>84</sup> Whether a prisoner's claim is challenging conditions that created a serious risk of harm or prison officials' denial of medical treatment, "the biggest hurdle for a prisoner-plaintiff will be overcoming the subjective requirements of the deliberate indifference standard."<sup>85</sup> It may prove difficult for a prisoner-plaintiff to prove that prison officials were aware of risks to inmate health or safety, because prison officials are permitted to prove that they didn't know about the risks, and officials can also claim that they took reasonable measures to protect prisoners despite the harms they still endured.<sup>86</sup> From 2006-2007 in the aftermath of Hurricane Katrina, numerous prisoners' 42 U.S.C. § 1983 claims were dismissed as frivolous, for failure to state a claim, or for lack of jurisdiction.<sup>87</sup> In *Fairley v. Louisiana*, a prisoner's 42

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<sup>84</sup> Brandon L. Garrett & Tania Tetlow, *Thirty-Sixth Annual Administrative Law Issue: Article: Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 Duke L.J. 127, 165 (2006).

<sup>85</sup> Ira P. Robbins, *Lessons from Hurricane Katrina: Prison Emergency Preparedness as a Constitutional Imperative*, 42 U. Mich. J.L. Reform 1, 25 (2008).

<sup>86</sup> Farmer, *supra* note 71, at 844 (noting how prison officials can say they took reasonable measures or did not know about risk as a defense).

<sup>87</sup> See *Allen v. Gusman*, No. 06-4539, 2007 WL 2407305 (E.D. La. Aug. 20, 2007) (claims dismissed as frivolous); *Bridges v. Gusman*, No. 06-4444, 2007 WL 2362335 (E.D. La. Aug. 15, 2007) (claims dismissed as frivolous); *Frye v. Orleans Parish Prison*, No. 06-5964, 2007 WL 2362338 (E.D. La. Aug. 14, 2007) (claims dismissed as frivolous); *Francis v. United States*, No. 07-1991, 2007 WL 2332322 (E.D. La. Aug. 13, 2007) (claims dismissed as frivolous); *Jones v. Gusman*, No. 06-5275, 2007 WL 2264208 (E.D. La. Aug. 2, 2007) (claims dismissed as frivolous); *Burbank v. Gusman*, No. 06-4398, 2007 WL 2228593 (E.D. La. July 27, 2007) (claims dismissed as frivolous); *Maturin v.*

U.S.C. § 1983 claims were dismissed for lack of jurisdiction because they attempted to sue the state and state employees, who were protected under Eleventh Amendment immunity.<sup>88</sup> After Katrina over a dozen inmates sued Orleans Parish Sheriff Marlin Gusman, but similar to what occurred in *Smith v. Gusman*, 2007 U.S. Dist. LEXIS 20824, most of these cases were dismissed because the complaints failed to allege that he was “personally involved” and there was no showing that he acted with deliberate indifference.<sup>89</sup> However, succeeding on these Eighth Amendment claims is not impossible. If inmates, when challenging their conditions of confinement, can show evidence that the officials had knowledge of the risks and failed to act reasonably, then the subjective part of the deliberate indifference standard may be met.<sup>90</sup> Part 4 will make further recommendations on how prisoners affected by hurricanes Harvey and Irma could frame their 42 U.S.C. § 1983 claims in a way that would give them the best chance at success.

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*Gusman*, No. 07-1932, 2007 WL 2079709 (E.D. La. July 17, 2007) (claims dismissed as frivolous); *Lloyd v. Gusman*, No. 06-4288, 2007 U.S. Dist. LEXIS 46380, 2007 WL 1850999 (E.D. La. June 26, 2007) (claims dismissed as frivolous).

<sup>88</sup> *Fairley v. Louisiana*, No. 06-3788, 2007 U.S. Dist. LEXIS 20825, 2007 WL 914024 (E.D. La. Mar. 23, 2007) (claims dismissed for lack of jurisdiction and failure to state a claim).

<sup>89</sup> [Smith v. Gusman, No. 06-4095, 2007 U.S. Dist. LEXIS 20824, 2007 WL 914171](#) (E.D. La. Mar. 23, 2007) (claims dismissed for failure to state a claim).

<sup>90</sup> *Robbins*, *supra* note 85.

## 2.2 Federal Protection of Rights During Times of Natural Disasters and Their Application to Prisoners

During times of emergency and natural disasters, prisoners are some of the most vulnerable members of society and depend on governmental authorities for their welfare.<sup>91</sup> Prisoners can only evacuate, get medical attention, and get food and water if prison officials allow it, and during times of natural disasters like hurricanes, inmates' survival totally depend on the choices that prison officials make.<sup>92</sup> Since these prisoners are dependent on government entities for their subsistence, they are entitled to adequate food, clothing, medical assistance, and shelter under the law, because as the Supreme Court noted in *Deshaney v. Winnebago County*, "When a state...restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety," the state is in conflict with "the limits on state action set by the Eighth Amendment and the Due process clause".<sup>93</sup> Similarly, for federal prisoners in state or non-federal correctional facilities, 18 U.S.C. § 4002 "charges the Bureau of Prisons with

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<sup>91</sup> Sharona Hoffman, *Preparing for Natural Disaster: Protecting the Most Vulnerable in Emergencies*, 42 U.C. Davis L. Rev. 1491, 1504 (2009).

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

<sup>93</sup> *DeShaney*, *supra* note 72 (summarizing that prisoners are entitled to food, clothing, and shelter, from the government while incarcerated).

ensuring Federal prisoners under the care of another entity, are provided suitable living conditions, care, safekeeping, subsistence, and protection”.<sup>94</sup>

There are multiple statutes and acts that touch on governmental obligations to protect individuals during natural disasters, but even though prisoners are some of the most vulnerable members of society during natural disasters, there is relatively little legislation that directly focuses on this crucial issue in respect to this vulnerable population.<sup>95</sup> However, there are numerous federal antidiscrimination statutes that apply to emergency planning and responses to such emergencies. These statutes sometimes fail to specifically mention prisoners, and as a result they create a “patchwork of legislation that leaves many gaps and unanswered questions.”<sup>96</sup> However, they can be interpreted as providing protections and relief to prisoners. The Americans with Disabilities Act (ADA), the Rehabilitation Act, Title VI of the Civil Rights Act of 1964, the Stafford Act, the Post Katrina Emergency Management Reform Act (PKEMRA), the Civil Rights of Institutionalized Persons Act (CRIPA), and the National Environmental Policy Act

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<sup>94</sup> Melissa A. Saviolis, *Thesis: Prisons and Disasters*, 23 (2013); 18 U.S.C. § 4002.

<sup>95</sup> Hoffman, *supra* note 91.

<sup>96</sup> Hoffman, *supra* note 91, at 1539; 42 U.S.C. §4321 et seq. (1969); 42 U.S.C. § 12132 (1990); 42 U.S.C. § 2000d (2000); 6 U.S.C. § 321b(a) (2006); 42 U.S.C. 5122; 42 U.S.C. § 1997; Disaster Recovery Reform Act, H.R. 4460, 115<sup>th</sup> Cong. (2017-2018).

(NEPA) are some of the major statutes that can be interpreted to apply to certain prisoners during times of disaster.<sup>97</sup>

Both the Rehabilitation Act of 1973 and the ADA protect individuals with disabilities from discrimination.<sup>98</sup> The courts tend to analyze these two acts in the same way even though the Rehabilitation Act applies to federal executive agencies, including the Bureau of Prisons, and any program that receives federal funding, while the newer Americans with Disabilities Act expands on the Rehabilitation Act and regulates state and local government programs.<sup>99</sup> Both the ADA and Rehabilitation Act “establish a dual mandate of nondiscrimination and accommodation” and require entities to “not only eschew discrimination, but also to take affirmative steps to accommodate the needs of individuals with disabilities,” and this applies especially to disabled individuals in times of emergencies.<sup>100</sup>

Title II of the ADA reads, “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination

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<sup>97</sup> *Id.* At 1504.

<sup>98</sup> U.S. Department of Justice, *A Guide to Disability Rights Laws* (July 2009), <https://www.ada.gov/cguide.htm>.

<sup>99</sup> ACLU National Prison Project, *Know Your Rights Legal Rights of Disabled Prisoners*, 1 (2005).

<sup>100</sup> Hoffman, *supra* note 91, at 1526.

by any such entity.”<sup>101</sup> In *Pennsylvania DOC v. Yeskey*, the Supreme Court held that the ADA applies to people in prison because “public entity” was defined to include “any department, agency, special purpose district, or other instrumentality of a State or States local government.”<sup>102</sup> Although the ADA lacks language specifically mentioning disasters, its language is broad and can apply to emergency preparedness and responses to disasters.<sup>103</sup> In the landmark case of *Tennessee v. Lane*, the Supreme Court held that Title II was undeniably valid and, in doing, so demonstrated that prisons must be accessible for disabled prisoners.<sup>104</sup> This means that the ADA can be used as a mechanism for prisoners to bring suit against state or local governments when there is a deficiency in emergency response preparation and when plaintiffs find themselves “without means of evacuation, communication or access to other services during an emergency.”<sup>105</sup>

On July 22, 2004, in order to further the ADA’s goals, President Bush issued Executive Order 13347, “Individuals with Disabilities in Emergency Preparedness.”<sup>106</sup> The purpose of this Executive Order is to “ensure that the Federal Government

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<sup>101</sup> 42 U.S.C. § 12132.

<sup>102</sup> *Pennsylvania Doc v. Yeskey*, 524 U.S. 206 (1998) (noting that the ADA applies to people in prison).

<sup>103</sup> Nancy Jones, *The Americans with Disabilities Act and Emergency Preparedness and Response*, Congressional Research Service, 1 (Dec. 9, 2010), <https://fas.org/sgp/crs/homesecc/RS22254.pdf>

<sup>104</sup> Thomas Weiss, *The Americans with Disabilities Act and Prisoners*, Prison Legal News (Sept. 15, 2013), <https://www.prisonlegalnews.org/news/2013/sep/15/the-americans-with-disabilities-act-and-prisoners/>.

<sup>105</sup> Hoffman, *supra* note 91, at 1525-1526.

<sup>106</sup> Jones, *supra* note 103.

appropriately supports safety and security for individuals with disabilities in situations involving disasters, including earthquakes, tornadoes, fires, floods, hurricanes, and acts of terrorism".<sup>107</sup> This Executive Order is another useful tool for disabled prisoners who can use Executive Order 13347 as evidence of a government policy which has not been effectively enforced. The Executive Order also created the Interagency Coordinating Council on Emergency Preparedness and Individuals with Disabilities (ICC) and directed numerous federal departments and agencies to work together to create emergency preparedness plans that are sensitive to the needs of disabled individuals. The ICC organizes the policies and then creates an annual report.<sup>108</sup>

Title VI of the Civil Rights Act of 1964 is another federal statute that prisoners may be able to use when challenging the conditions of their confinement. This law aims to protect vulnerable populations like minorities and prohibits programs that receive federal funds from engaging in discrimination on the basis of race, color, or national origin.<sup>109</sup> In *Alexander v. Sandoval*, the Supreme Court ruled that plaintiffs do not have a private cause of action to litigate disparate impact cases under Title VI, but they do have a private cause of action to challenge intentional violations of the statute.<sup>110</sup> To succeed on

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<sup>107</sup> *Id.* at 5.

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

<sup>109</sup> 42 U.S.C. § 2000d (2000).

<sup>110</sup> *Alexander v. Sandoval*, 532 U.S. 275, 284-285 (2001) (holding that plaintiffs have the right to challenge intentional violations of Title VI).

a Title VI Claim, plaintiffs must show discriminatory intent, and since this is so difficult to prove, plaintiffs rarely prevail.<sup>111</sup> However, Title VI of Civil Rights Act would allow injured prisoners to pursue relief if they can show that federally and state funded programs intentionally denied disaster related service to them because of their race, color, or natural origin.<sup>112</sup> In our society where minorities make up 30% of the population but account for 60% of incarcerated individuals, Title VI allows these protected groups another resource to rectify abridgement of their rights.<sup>113</sup>

Congress passed the Post-Katrina Emergency Management Reform Act (PKEMRA) after Hurricane Katrina in 2006. Similar to the ADA, the focus of PKEMRA is on those with disabilities, and this Act created the position of Disability Coordinator in FEMA to aid in disaster planning for individuals with disabilities by interacting with agencies and organizations representing the interests of the disabled, developing evacuation plans, and ensuring that accessible transportation is available for the disabled.<sup>114</sup> PKEMRA was intended to create a line of communication between FEMA and the president in order to bypass bureaucratic obstacles that got in the way during

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<sup>111</sup> Hoffman, *supra* note 91, at 1527.

<sup>112</sup> *Id.*

<sup>113</sup> Sophia Kerby, *The Top Ten Most Startling Facts About People of Color and Criminal Justice in the United States, A Look at the Racial Disparities Inherent in Our Nation's Criminal-Justice System*, Center for American Progress, (Mar. 13, 2012),

<https://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/>.

<sup>114</sup> 6 U.S.C. § 321b(a) (2006); Hoffman, *supra* note 86, at 1533-1544.



Hurricane Katrina and delayed FEMA's mission to reduce the loss of life and property during emergency situations.<sup>115</sup> Under PKEMRA, the government has a responsibility to protect members of society by providing the resources necessary to save lives, and this includes disabled incarcerated individuals who have the right to receive basic necessities for their survival.<sup>116</sup> Unfortunately there is no specific mention of prisons or prisoners in this Act, so it may be difficult to argue that prisoners fall under PKEMRA.<sup>117</sup>

Another federal statute that could be helpful for addressing prisoner conditions during natural disasters is the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act). Enacted in 1988, it establishes a broad nondiscrimination mandate to protect vulnerable populations by authorizing the delivery of federal assistance to states during declared major disasters or emergencies.<sup>118</sup> During an emergency the governor of the affected state must respond first before requesting a presidential declaration for additional federal resources and relief carried out by FEMA,

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<sup>115</sup> Rafael Lemaitre, *Is the Trump Administration Ready for the Worst?*, The Hill, (Jan. 24, 2017), <http://thehill.com/blogs/congress-blog/homeland-security/315761-is-the-trump-administration-ready-for-the-worst>.

<sup>116</sup> Savilonis, *supra* note 94, at 25.

<sup>117</sup> *Id.* at 64.

<sup>118</sup> Hoffman, *supra* note 86, at 1533.

but the president also has the authority to provide federal assistance when it is necessary to save lives.<sup>119</sup>

The Stafford Act defines major disasters as natural catastrophes that include “any hurricane, tornado, storm, high water, wind-driven water.”<sup>120</sup> After Hurricane Katrina, the Stafford Act was amended to apply to both public and private non-profit facilities, but the Act does not specifically mention the protection of prisoners.<sup>121</sup> Nevertheless, the statute is somewhat ambiguous and includes “facilities that provide health and safety services of governmental nature” under the definition of private non-profit facilities.<sup>122</sup> One may be able to interpret such a facility to include prisons, and thus correctional facilities in need of additional federal assistance should be covered by the Stafford Act.

The Civil Rights of Institutionalized Persons Act (CRIPA) was enacted in 1980 for the express purpose of protecting the civil rights of individuals confined in state or locally operated prisons.<sup>123</sup> CRIPA does not create new rights for inmates but instead allows the United States Department of Justice’s Civil Rights Division to investigate state

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<sup>119</sup> Astho Legal Preparedness Series Emergency Authority & Immunity Toolkit, *Robert T. Stafford Disaster Relief and Emergency Assistance Act* (2011), <http://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Authority-and-Immunity-Toolkit/Robert-T--Stafford-Disaster-Relief-and-Emergency-Assistance-Act-Fact-Sheet/>.

<sup>120</sup> 42 U.S.C. 5122.

<sup>121</sup> Savilonis, *supra* note 94, at 66.

<sup>122</sup> 42 U.S.C. 5122.

<sup>123</sup> *Civil Rights of Institutionalized Persons*, Findlaw, <http://civilrights.findlaw.com/other-constitutional-rights/civil-rights-of-institutionalized-persons.html>.

run facilities in response to reports and complaints about unconstitutional conditions of confinement.<sup>124</sup> If civil rights violations are found, then the DOJ notifies the facility about its violations, gives suggestions for remedies, and if the violations are not corrected by the given deadline, the DOJ has the authority to bring a lawsuit against the facility.<sup>125</sup>

Section 1997d of CRIPA reads, “No person reporting conditions which may constitute a violation under this subchapter shall be subjected to retaliation in any manner for so reporting.”<sup>126</sup> This means that CRIPA prohibits facilities from retaliating against prisoners who report potential civil rights violations, and it protects inmates’ rights to report civil rights abuses while confined. CRIPA also gives the Attorney General the power to intervene in ongoing civil rights litigation if he or she believes that the deprivation at hand is part of a larger pattern of constitutional violations.<sup>127</sup> This intervention power is seldom used; however when used, it can strengthen the case of a prisoner-plaintiff.<sup>128</sup> CRIPA is an extremely useful law that can assist inmates in bringing their unconstitutional conditions of confinement to light.

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

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

<sup>126</sup> 42 U.S.C. § 1997d.

<sup>127</sup> 42 U.S.C. § 1997c.

<sup>128</sup> Patricia Puritz & Mary Ann Scali, *Beyond the Walls Improving Conditions of Confinement for Youth in Custody*, Office of Juvenile Justice and Delinquency Prevention (Jan. 1998), <https://www.ojjdp.gov/pubs/walls/contents.html>.

The National Environmental Policy Act (NEPA) became law on January, 1 1970 and requires federal agencies to evaluate the future environmental effects of their proposed actions, like “constructing highways and other publicly-owned facilities” like prisons, before making decisions.<sup>129</sup> The BOP is a federal agency and is required to comply with NEPA regulations, these regulations involve a certain process that agencies must undergo to complete environmental review.<sup>130</sup> Some Categorical Exclusions (CATEX) for things like minor renovations, expansions, and security upgrades are available for projects where the environmental impact is minimal.<sup>131</sup> The process for an agency like the BOP really begins when they create a proposal for their desired action accompanied by an Environmental Assessment (EA), which helps the agency determine whether the action has the potential to cause significant environmental effects.<sup>132</sup> If the agency believes that the action will not have a substantial environmental impact, they will issue document explaining the reasons why the agency has come to this determination, also known as a Finding of No Significant Impact (FONSI).<sup>133</sup> However, if

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<sup>129</sup> Environmental Protection Agency (EPA), *What is the National Environmental Policy Act* (Jan. 2017), <https://www.epa.gov/nepa/what-national-environmental-policy-act>.

<sup>130</sup> Environmental Protection Agency (EPA), *National Environmental Policy Act Review Process* (Jan. 2017), <https://www.epa.gov/nepa/national-environmental-policy-act-review-process>.

<sup>131</sup> Bureau of Justice Assistance (BJA), *National Environmental Policy Act (NEPA) Guidance*, <https://www.bja.gov/Funding/nepa.html> (last visited Feb. 1, 2018).

<sup>132</sup> EPA, *supra* note 130.

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

the agency determines that the effect of their desired action on the environment may be significant, an Environmental Impact Statement will be prepared.

An Environmental Impact Statement has more rigorous requirements than an EA. If an EA indicates that a project will have a significant impact on the environment, an EIS is usually required for the proposed construction of new facilities, and is sometimes used for expansion of existing facilities.<sup>134</sup> The EIS produced by an agency not only has to explore the environmental impact of their purposed actions, but the EIS must also explore alternatives to their approach. Every draft EIS is published and open for public review and comment.<sup>135</sup> NEPA policy calls upon the federal government to exhaust all reasonable measures to “create and maintain conditions under which man and nature can exist in productive harmony.”<sup>136</sup> However NEPA makes no mention of the environmental effects that the proposed construction site could have on humans living in the facilities.<sup>137</sup> The health of nearby residents is taken into account, but NEPA never mentions the people who will inhabit the prisons, the inmates.<sup>138</sup> With no explicit requirement for the BOP to explore the negative effects that proposed prison construction

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<sup>134</sup> BJA, *supra* note 131.

<sup>135</sup> EPA, *supra* note 129.

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

<sup>137</sup> Nicole Greenfield, *The Connection Between Mass Incarceration and Environmental Justice*, Natural Resources Defense Council (Jan. 19, 2018), <https://www.nrdc.org/onearth/connection-between-mass-incarceration-and-environmental-justice>

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

sites could have on prisoners, prisons are often built carelessly and often leave prisoners to live in toxic conditions.<sup>139</sup>

Although many of the federal laws that protect individuals during times of natural disasters fail to explicitly mention prisoners, the recent events of the 2017 hurricane season seem to have caught the attention of Congress. On November 28, 2017, H.R. 4460, also known as the Disaster Recovery Reform Act, was introduced in the House by Republican Representative Lou Barletta from Pennsylvania.<sup>140</sup> The purpose of this bill is “to improve the provision of disaster and mitigation assistance to eligible individuals and households and to eligible State, local, Tribal, and territorial governments and certain private nonprofit organizations.”<sup>141</sup> The Disaster Recovery Reform Act would task the FEMA Administrator with identifying evacuation routes during disasters and evacuating special needs populations, including prisoners.<sup>142</sup> Although this law is still being amended and has yet to pass the House, its creation and the fact it is cosponsored by representatives on both sides of the aisle, suggests that some members of Congress are starting to recognize the increased need to prepare for natural disasters, recover from natural disasters, and evacuate special needs populations, including individuals in

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

<sup>140</sup> Disaster Recovery Reform Act, H.R. 4460, 115<sup>th</sup> Cong. (2017-2018).

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

<sup>142</sup> Disaster Recovery Reform Act, H.R. 4460, 115<sup>th</sup> Cong. § 204 (2017-2018).

prisons, before emergencies cause serious damage to people who cannot take care of themselves.<sup>143</sup>

### 2.3 Correctional Facilities and Emergency Preparedness

Correctional facility officials have a constitutional duty to plan for emergencies and natural disasters, and this paper argues that the failure to develop and carry out adequate emergency plans that ensure a reasonable standard of care for prisoners would result in a violation of the Eighth Amendment.<sup>144</sup> As evidenced by Orleans Parish Prison during Hurricane Katrina, the lack of a comprehensive and efficient emergency preparedness plan can lead to unsuitable living conditions and the constitutional deprivation of prisoners' rights. No state has a comprehensive preparedness approach for vulnerable populations during natural disasters, and even though some states require emergency plans for vulnerable populations like prisoners, others completely ignore the subject.<sup>145</sup> The law also lacks consistent clarity regarding which officials are specifically responsible for emergency preparedness for defenseless individuals.<sup>146</sup>

As noted by the National Institute of Corrections (NIC), which is a federal agency within the DOJ, "[e]mergency preparedness is a crucially important topic...for every

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<sup>143</sup> Disaster Recovery Reform Act, H.R. 4460, 115<sup>th</sup> Cong. Cosponsors, <https://www.congress.gov/bill/115th-congress/house-bill/4460/cosponsors> (2017-2018).

<sup>144</sup> Robbins, *supra* note 85, at 4.

<sup>145</sup> Hoffman, *supra* note 91 at 1539.

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

correctional institution,” but “emergency preparedness is often not afforded the priority that it needs and deserves.”<sup>147</sup> It is possible that in the past prison facilities didn’t place a high priority on emergency preparedness because planning for future emergencies can be seen as less pressing than day-to-day problems that correctional officers encounter with inmates, and oftentimes people usually cast judgment on natural disasters based on the end result as opposed to closely looking at how the situation was handled.<sup>148</sup> However, Hurricanes Katrina, Ike and Rita show just how dangerous this complacent train of thought can be. This is because large scale natural disasters can threaten the lives of inmates as well as prison staff, can cost taxpayers millions of dollars, and can result in litigation which may damage the reputation of these institutions.<sup>149</sup>

Some blame the lack of prison preparedness for natural disasters on the fact that the federal government does not have one comprehensive policy in place that prisons can refer to when preparing for emergencies.<sup>150</sup> Despite the warranted criticism, individual correctional facilities have made some progress with regard to emergency preparedness. Over the past quarter century, for example, the majority of the correctional sector has become significantly more organized in regard to preparing for emergency situations, as

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<sup>147</sup> Jeffrey A. Schwartz & Cynthia Barry, *A Guide to Preparing for and Responding to Prison Emergencies*, National Institute of Corrections (June 2005), <https://s3.amazonaws.com/static.nicic.gov/Library/020293.pdf> [hereinafter NIC Guide].

<sup>148</sup> *Id.* at 3.

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

<sup>150</sup> Savilonis, *supra* note 94, at 12.



evidenced by the increase in emergency plans nationwide.<sup>151</sup> Although there have been vast improvements in emergency preparedness and increased resources available to prisons, serious problems still exist, especially pertaining to emergency training, drills, and specific procedures for natural disaster response plans.<sup>152</sup>

In 2003 the NIC created an emergency preparedness survey of Department of Corrections across the nation, which was the first of its kind.<sup>153</sup> This survey details inadequate emergency preparedness training for new recruit correctional officers who on average had six hours of emergency training over the course of a five-week training program.<sup>154</sup> This small amount of time dedicated towards training new prison officials for emergencies is concerning, especially given the recent impact hurricanes have had on correctional facilities. The survey also reported that “some departments appear to have no substantial program of emergency drills and exercises.”<sup>155</sup>

NIC’s self-audit survey provides correctional facility officials with an objective assessment of the progress and status of their emergency systems, and also helps to identify gaps in the emergency preparedness plans that otherwise may not have been

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<sup>151</sup> Robbins, *supra* note 85, at 13.

<sup>152</sup> *Id.* at 14.

<sup>153</sup> NIC Guide, *supra* note 147, at 12.

<sup>154</sup> *Id.* at 190.

<sup>155</sup> *Id.* at 199.

identified.<sup>156</sup> The NIC survey results show that “emergency plans differ dramatically from department to department, in form as well as content.”<sup>157</sup> The emergency plans are so dissimilar that some prisons may have no emergency plans at all, while other plans could be anywhere between hundreds of pages to fewer than ten pages in length.<sup>158</sup> Data from the NIC survey suggests that individual DOCs adopted a wide range of emergency plans, with close to all DOCs having plans for fires, hostage situations, and riots.<sup>159</sup> However, just over a third of responding departments had engaged in any specific planning for hurricanes in their emergency plans.<sup>160</sup> The fact that so few correctional facilities reported having emergency plans for hurricanes is telling and very alarming.

Prison preparedness plans for natural disasters are important because these plans (if implemented) impact the lives of inmates who are left powerless in an emergency. Although prison preparedness plans have increased in volume across the country, it is obvious that problems still exist in regard to training, planning, and executing these plans once disasters actually strike.<sup>161</sup> The same prison preparedness issues that set the stage for the constitutional abuses that occurred during Katrina, Rita, and Ike, surfaced again in 2017 when Hurricanes Harvey, Irma, and Maria hit the United States.

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<sup>156</sup> *Id.* at 17.

<sup>157</sup> *Id.* at 186.

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

<sup>159</sup> *Id.* at 187.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 199.

### 3 BACK-TO-BACK: ABANDONED PRISONERS DURING HURRICANES HARVEY, IRMA, AND MARIA

2017 was the costliest year ever for natural weather disasters in the United States; that year they totaled \$306 billion in damages, surpassing the previous record of \$215 billion from 2005 when Katrina occurred.<sup>162</sup> Hurricanes are “the costliest weather events, responsible for about half of the total losses among all US billion-dollar disasters despite accounting for less than 20% of the total events since 1980”.<sup>163</sup> In 2017 hurricanes Harvey, Irma, and Maria ravaged Texas, Florida, Puerto Rico, and accounted for the top three most expensive natural disasters of the year, and all three totaled damages that put them in the top 5 costliest weather disasters on record in the U.S.<sup>164</sup> History tends to repeat itself, and even after inmates experienced unsuitable living conditions during Hurricanes Katrina, Ike, and Rita, the Federal Bureau of Prisons did not learn from its mistakes, stuck to the status quo, and failed to evacuate thousands of prisoners in Federal prison during Harvey, Irma, and Maria.<sup>165</sup>

Hurricane Harvey produced high speed winds up to 150 mph, unprecedented flooding in Texas, registered as the most expensive natural disaster of 2017, and ranked

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<sup>162</sup> Brandon Miller, *US Shatters Record for disaster costs in 2017*, CNN (Jan. 8, 2018), <http://www.cnn.com/2018/01/08/us/2017-costliest-disasters/index.html>.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Jones, *supra* note 3.

the second most expensive disaster in U.S. history at \$125 billion behind Hurricane Katrina.<sup>166</sup> A week after Harvey, the Category 5 Hurricane Irma struck Florida and South Carolina with record winds of 185 mph for 37 hours and forced evacuation orders for over 5 million people in Florida.<sup>167</sup> Seven days after Irma the Category 4 Hurricane Maria destroyed Puerto Rico and set a record for the most Category 4 or greater hurricanes landing in the U.S. in one year. Hurricane Maria, the third most expensive U.S. hurricane ever, was so destructive because it intensified at an extremely fast pace in a relatively short period of time and had similar wind speeds to Irma while also producing rainfall numbers comparable to Hurricane Harvey.<sup>168</sup> Prisoners, some of the most vulnerable members of society during natural disasters were hit hard by these hurricanes and it certainly didn't help that "all three hurricanes hit regions that have built prisons in or near potential flood zones".<sup>169</sup>

### **3.1 Deplorable Prison Living Conditions During Hurricane Harvey and Hurricane Irma**

Dating back to 2005 when Hurricane Katrina hit, there has been a documented history of unsanitary living conditions and the deprivations of prisoner rights when they

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<sup>166</sup> Miller, *supra*, note 162.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Yolanda Martinez, Anna Flagg, Andres Caballero, *Prisons and the Deluge*, The Marshall Project (Oct. 20, 2017), <https://www.themarshallproject.org/2017/10/20/prisons-and-the-deluge>.

are not evacuated during hurricanes. Despite this repeated cycle of cruel and unusual punishment, the Federal Bureau of Prisons has continued to abandon these vulnerable populations in the wake of record setting storms.<sup>170</sup> In the days leading up to Hurricane Harvey, hundreds of inmates in Texas were forced to fill sandbags, which were meant to protect prisons from the floodwaters, but sandbags would not be enough to handle record levels of rain that started on August 25, 2017.<sup>171</sup> The Texas Department of Criminal Justice manages its own emergency procedures for all of its facilities without using standards set by other state or local governments, and chose not to evacuate prisoners near the city of Beaumont from the federal prison or from the three state prisons near the city.<sup>172</sup> The decision not to evacuate Beaumont prisons came as a worrisome surprise to family members of inmates and the decision was also criticized by legal experts.<sup>173</sup>

The flooding from hurricane Harvey caused the evacuations of thousands of civilians and prisoners, but the decision was made to keep three thousand male prisoners

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<sup>170</sup> Democracy Now, *Texas Prisoners Are Facing Horrid Conditions After Hurricane Harvey & Retaliation for Reporting Them* (Sept. 8, 2017), [https://www.democracynow.org/2017/9/8/texas\\_prisoners\\_are\\_facing\\_horrid\\_conditions](https://www.democracynow.org/2017/9/8/texas_prisoners_are_facing_horrid_conditions).

<sup>171</sup> Polly Mosendz, *When Do You Move Prisoners Out of a Storm's Path?*, Bloomberg Politics (Sept. 8, 2017), <https://www.bloomberg.com/news/articles/2017-09-08/when-do-you-move-prisoners-out-of-a-hurricane-s-path>.

<sup>172</sup> Martinez, *supra* note 169.

<sup>173</sup> Albert Samaha, *Prisoners Face Horrifying Conditions, Limited Drinking Water After Harvey Pounds Texas*, BuzzFeed News (Sept. 6, 2017), [https://www.buzzfeed.com/albertsamaha/prisoners-face-horrifying-conditions-limited-water-after?utm\\_term=.dqOqy3pE5P#.utYgA8ZLb4](https://www.buzzfeed.com/albertsamaha/prisoners-face-horrifying-conditions-limited-water-after?utm_term=.dqOqy3pE5P#.utYgA8ZLb4).

inside the Stiles Unit, a Texas prison near Beaumont, during the hurricane.<sup>174</sup> David Hartvikson, an inmate inside the Stiles unit during Hurricane Harvey stated, “Us inmates knew we were in trouble when breakfast consisting of 2 boiled eggs and a piece of cornbread were delivered to our cells.”<sup>175</sup> In addition to inadequate food, prisoners near Beaumont reported overflowing toilets in cells followed by unbearable smells of urine and feces, a lack of drinkable water, and a loss of electricity.<sup>176</sup> Similar to the events during Hurricane Ike, as Hurricane Harvey raged on outside of the prison, conditions inside continued to deteriorate. Hartvikson reported having only two portable toilets for a cell block of 450 people, and reported receiving only 48 ounces of water between August 27 and August 31, which shows that the prison officials were clearly unprepared for the storm and undersupplied; the Mayo Clinic advises that men require at least 124 ounces of fluid each day.<sup>177</sup>

Further complicating matters, on September 1, 2017, the Texas Commission on Environmental Quality (TCEQ) sent out a “Boil Water Notice” to residents of Beaumont

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<sup>174</sup> Nathalie Baptiste, “We Didn’t Have to Suffer Like that”: Inside a Texas Prison During Hurricane Harvey, Mother Jones (Nov. 9, 2017), <http://www.motherjones.com/crime-justice/2017/11/we-didnt-have-to-suffer-like-that-inside-a-texas-prison-during-hurricane-harvey/>.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

warning that the drinking water was contaminated due to the severe flooding.<sup>178</sup> Over a week later this notice was rescinded, but by that time inmates at the medium security federal prison in Beaumont had already begun to face serious health problems.<sup>179</sup> Inmates used the restroom in bags, in order to save toilet water for drinking.<sup>180</sup> David Vergara, an inmate at Beaumont's federal prison reports observing other prisoners faint from dehydration and, "he had resorted to drinking discolored and possibly contaminated toilet water to stay hydrated."<sup>181</sup> Another diabetic inmate with high blood pressure in the prison, Johnathan Grimes, complained about how he did not have access to his medication for days during Harvey because the infirmary was understaffed.<sup>182</sup> Clifton Cloer, an inmate housed on the first floor of the Stiles Unit, told his wife that water in his cell was up to his knee caps and was calf-high by Monday, August 28, 2017.<sup>183</sup> Similar to prison officials in Katrina, Rita, and Ike, the Texas Department of Criminal Justice denied

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<sup>178</sup> Carol Riley, *Public Information: Boil Water Notice to Rescind*, Beaumont Texas (Sept. 9, 2017), <http://beaumonttexas.gov/public-information-boil-water-notice-rescind/>.

<sup>179</sup> Gabrielle Banks, *Texas Prisoners Take Hit from Harvey, Complaints of Water Sewage Problems Surface*, Houston Chronicle (Sept. 4, 2017), <http://www.chron.com/news/houston-texas/article/Texas-prisons-take-hit-from-Harvey-complaints-of-12172438.php>.

<sup>180</sup> Democracy Now, *supra* note 170.

<sup>181</sup> Banks, *supra* note 179.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

these reports and maintained that the prisons had been inspected and there was no water in any of the state facilities.<sup>184</sup>

However, it is difficult to believe that none of the facilities were affected by water because Harvey set the record for highest rainfall total from a tropical storm in the U.S. and these prisons had been flooded before.<sup>185</sup> Conditions outside of the prisons in Beaumont only added to the deplorable conditions inside of these facilities. Some of the Beaumont prison buildings had roof and fence damage, and several hundred correctional officers couldn't cross the flooded Neches River to make it into work.<sup>186</sup> These prisons had many staffing shortages and some officers were even stuck at work because "the roadways going in and out of the majority of the facilities were severely flooded."<sup>187</sup> Prisoners reported high levels of anxiety during Harvey and Irma, and there were reports that officials had to break down certain doors that would not function due to the lack of power.<sup>188</sup> More than two weeks after Hurricane Harvey landed, prisoners at Beaumont's federal prison still reported a lack of access to showers, toilets, and food.<sup>189</sup>

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<sup>184</sup> Baptiste, *supra* note 174.

<sup>185</sup> Miller, *supra* note 162; Democracy Now, *supra* note 170.

<sup>186</sup> Banks, *supra* note 179.

<sup>187</sup> Baptiste, *supra* note 174.

<sup>188</sup> Daniel Gross, *Weathering a Hurricane in Prison*, *The New Yorker* (Sept. 8, 2017), <https://www.newyorker.com/sections/news/weathering-a-hurricane-in-prison>.

<sup>189</sup> Prisoners Legal Advocacy Network, *Notice to BOP* (Sept. 11, 2017), <https://www.nlg.org/wp-content/uploads/2017/10/09-11-2017-DE-NJ-NLG-PLAN-Notice-to-FBOP-re-Post-Harvey-Conditions-w.-Exhibits.pdf>.



By Tuesday, August 29, two more prisons (outside of the Beaumont area) in the Houston area were evacuated, which brought the total evacuation count to five prisons and around 6,000 inmates at the time.<sup>190</sup> Unfortunately, all of five of these prisons are located near the Brazos River.<sup>191</sup> Similarly, in accordance with Florida’s emergency plan which is based on a directive from the state legislature, Irma forced the evacuations of over 12,000 prisoners in Florida, which was one of the largest evacuations in state history.<sup>192</sup> Hundreds of other prisoners in Texas from the Stringfellow Unit were evacuated to Pack Unit, which a federal judge had ruled was “too dangerously hot for inmates with medical conditions” a few weeks earlier.<sup>193</sup> There is evidence that over 600 inmates who came from Stringfellow were heat sensitive, so this means that the “Texas Department of Criminal Justice chose to violate a federal order and expose hundreds of its most vulnerable inmates to dangerous heat levels at the Pack Unit that Judge Ellison has already ruled were unconstitutional”.<sup>194</sup> In fact, a few weeks after the evacuation, Judge Ellison ruled that the evacuated inmates housed at the Pack Unit were placed there

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<sup>190</sup> Jolie McCullough, *Two more Texas prisons evacuated as Hurricane Harvey flooding continues*, The Texas Tribune (Aug. 29, 2017), <https://www.texastribune.org/2017/08/29/two-more-texas-prisons-evacuated-harvey-flooding-continues/>.

<sup>191</sup> *Id.*

<sup>192</sup> Martinez, *supra* note 169.

<sup>193</sup> Banks, *supra* note 179.; Cole v. Collier, 2017 U.S. Dist. LEXIS 168703 (holding that the Pack Unit was too hot for inmates with medical conditions).

<sup>194</sup> Banks, *supra* note 179.

in violation of the court's order, and were eligible to join the class of heat-sensitive inmates who were originally involved in the lawsuit over the hot prison conditions.<sup>195</sup>

Surely if the Texas Department of Corrections had a stronger emergency plan for natural disasters, they wouldn't have been forced to evacuate heat sensitive inmates to a prison that was recently ruled to be dangerous. As David Fathi, the director of the ACLU's National Prison project said, "Prisons and jails need to have contingency plans for these kinds of emergencies" and this includes having realistic evacuation plans.<sup>196</sup> It is unacceptable that during Hurricanes Harvey and Irma, more care was shown towards animals who were evacuated to safety, than was shown towards human beings who have constitutional protections under the law.<sup>197</sup> Texas and Florida host over a quarter million incarcerated individuals with Texas having the largest prison population and Florida following close behind with the third largest population of prisoners.<sup>198</sup> One would think that such large correctional departments, which had subjected prisoners to these kind of unhealthy and unconstitutional conditions before, would be more careful in creating comprehensive emergency plans but clearly this was not the case during Hurricanes Harvey and Irma.

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<sup>195</sup> Jay Root & Jolie McCullough, *As a result of Hurricane Harvey, 600 more Texas prisoners getting AC*, The Texas Tribune (Sept. 16, 2017), <https://www.texastribune.org/2017/09/16/harvey-600-texas-prisoners-getting-ac/>.

<sup>196</sup> Baptiste, *supra* note 174.

<sup>197</sup> Jones *supra* note 3.

<sup>198</sup> Gross *supra* note 188.

### 3.2 Hurricane Maria Leaves Inmates Calling for Help

While Puerto Rico was still recovering from Hurricane Irma, Hurricane Maria touched land in Puerto Rico on September 19, 2017 and left utter destruction in its wake.<sup>199</sup> The island is still recovering from the flooding, and many people in Puerto Rico are still without power.<sup>200</sup> Puerto Rico's emergency plans are based on guidelines from the Department of Homeland Security and the island's emergency preparedness and disaster management agency, but the island's prisons were still far from prepared for Hurricane Maria.<sup>201</sup> In what seems like the opposite of good planning, the prisons in Puerto Rico are "clustered around eight complexes across the island, most along the coast and near high-risk flood areas."<sup>202</sup> During and after Hurricane Maria, the powerless prisoners in Puerto Rico experienced similar issues and constitutional violations to the prisoners affected by Hurricanes Harvey and Irma. Nine-hundred of the more fortunate prisoners in Puerto Rico's prison in Rio Grande were evacuated before Maria hit the island.<sup>203</sup>

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<sup>199</sup> Miller, *supra*, note 162.

<sup>200</sup> Anna Flagg and Yolanda Martinez, *Puerto Rico Puts Its Prisons Near Flood Zones*, The Marshall Project (Sept. 21, 2017), <https://www.themarshallproject.org/2017/09/21/puerto-rico-puts-its-prisons-in-flood-zones>.

<sup>201</sup> Martinez, *supra* note 169.

<sup>202</sup> Flagg *supra* note 200.

<sup>203</sup> Taylor Dolven, *13 Puerto Rico Prisoners Escaped During Hurricane Maria*, Vice News (Sept. 27, 2017), [https://news.vice.com/en\\_us/article/bjd54w/13-puerto-rico-prisoners-escaped-during-hurricane-maria](https://news.vice.com/en_us/article/bjd54w/13-puerto-rico-prisoners-escaped-during-hurricane-maria).

Without power and supplies, over one thousand federal prisoners from Puerto Rico's lone Federal prison (MDC Guaynabo) were evacuated by the BOP to a correctional facility in Yazoo City, Mississippi after Hurricane Maria slammed Puerto Rico.<sup>204</sup> However, some prisoners who were not evacuated still managed to leave prison. During Hurricane Maria, thirteen prisoners escaped from the Bayamon complex near San Juan, and seven other prisoners also escaped during Maria in Aguadilla on the western part of the island.<sup>205</sup> However, Department of Corrections Secretary Erik Rolon Suarez had ordered prisoners to be removed from the building and said the escape of those seven prisoners is still under investigation.<sup>206</sup>

All of the prisons lost power after Hurricane Maria and there were reports of prisoners being given cold meals or simply bread to eat in the weeks after Maria leveled Puerto Rico.<sup>207</sup> There are also reports of correctional officers being forced to place five or six prisoners in a cell which was only designed to hold up to two inmates, after moving them to the second floor of a prison in Guayama, in order to prevent them from drowning.<sup>208</sup> News crews standing outside of Aguadilla Guerrero state prison recorded

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<sup>204</sup> Jimmie Gates, *State is Housing 1,200 Federal Prisoners from Puerto Rico*, The Clarion Ledger (October 18, 2017), <https://www.clarionledger.com/story/news/2017/10/18/state-housing-1-200-federal-prisoners-puerto-rico/777228001/>.

<sup>205</sup> Martinez, *supra* note 169.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

footage of inmates inside shouting for help from their cells, “desperately asking for water, food, and power”. The conditions in Puerto Rico mirror some of the unconstitutional living conditions prisoners were forced to live in during Hurricanes Katrina, Rita, Harvey, Irma, and a lack of planning, evacuations, and poor execution of emergency plans was the cause of these deprivations.

#### **4 RECOMMENDATIONS FOR IMPROVING PRISON EMERGENCY PREPAREDNESS FOR NATURAL DISASTERS**

From 2005 when Hurricane Rita hit Texas through 2017 when Hurricane Maria devastated Puerto Rico, prisoners who have failed to be evacuated during hurricanes have unfairly suffered the consequences of cruel and unusual punishment. This suffering is the result of a lack of emergency planning across the Nation’s prisons. This section of the paper suggests recommendations in the form of amending and passing new legislation as well as approaches using litigation.

##### **4.1 Compelling Reform Through 42 U.S.C.S § 1983**

As previously noted in this paper, the Eighth Amendment of the Constitution provides protection against the infliction of “cruel and unusual punishment,” and 42 U.S.C.S. § 1983 gives inmates the ability to bring suit for monetary damages and injunctive and declaratory relief when they believe that their Eighth Amendment rights

have been violated by prison officials.<sup>209</sup> For our purposes, a suit for injunctive relief will be far more useful in forcing prisons to change their policies and preparedness plans, than a suit for monetary damages would be. Although succeeding on a Section 1983 claim may be difficult to achieve due to a high burden of proof that defendants are required to show for deliberate indifference, a prisoner will have the best chance of success when challenging their conditions of confinement if he or she can satisfy the subjective element of the deliberate indifference standard by showing proof that the officials had knowledge of the risks and failed to act reasonably.<sup>210</sup>

When deciding whether a prison official showed deliberate indifference, the courts make an assessment into the official's state of mind at the time of the alleged offense.<sup>211</sup> However, courts have varied in how they approach the deliberate indifference standard, and in some cases the outcome depends on how the plaintiff has laid out his complaint.<sup>212</sup> According to *Farmer v. Brennan*, an official can be found liable under deliberate indifference and the Eighth Amendment when the official knows and disregards the clear risk to an inmates safety or health, "the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious

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<sup>209</sup> See *supra* Part II.A.

<sup>210</sup> *Id.*

<sup>211</sup> Wilson, *supra* note 76, at 302-03 (noting that courts look to a defendant's state of mind when assessing deliberate indifference).

<sup>212</sup> David J. Gottlieb, *Wilson v. Seiter: Less Than Meets the Eye*, Prisoners and the Law 2-33, 2-46 to 2-47 (Ira P. Robbins ed., 2008).

harm exists, and he must also draw the inference.”<sup>213</sup> However, if prison officials can prove to the court that they were unaware of an obvious risk or that they responded reasonably, they may not be held liable under Section 1983 for the harm that followed.<sup>214</sup> But in *Wilson v. Seiter* the Supreme Court noted that “the long duration of a cruel prison condition may make it easier to establish knowledge and hence some form of intent.”<sup>215</sup> This suggests that if Plaintiffs can demonstrate that prison officials were aware of unconstitutional prison conditions or plans because of lengthy or repeated conditions and failed to act, the officials can be held liable under Section 1983 claims.

Courts are supposed to be unbiased and most have no expertise in regard to prison emergency planning, but when evaluating Section 1983 claims, “they are instructed to limit their intrusion into prison administrators’ difficult jobs by allowing” them to create their own plans “for remedying unconstitutional conditions.”<sup>216</sup> However, the courts have plenty of power to toss aside this judicial restraint if there is a clear constitutional violation in need of an immediate fix.<sup>217</sup> Since courts have no expertise in

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<sup>213</sup> Farmer, *supra* note 71, at 837 (detailing that a prison official must be aware of fact of serious harm exists and also draw the inference).

<sup>214</sup> *Id.* At 844 (recognizing that if prison officials can prove they were not aware of risk they are not liable).

<sup>215</sup> Wilson, *supra* note 76, at 300.

<sup>216</sup> Lewis v. Casey, 518 U.S. 343, 362 (1996) (noting that the court gives adequate consideration to views of prison authorities); Robbins *supra* note 82, at 59.

<sup>217</sup> Bounds v. Smith, 430 U.S. 817, 832 (1977) (noting that judicial restraint is not an excuse to ignore legitimate claims); Robbins *supra* note 82, at 59.

planning, they can appoint experienced special masters to oversee reform and to ensure that prison conditions are in compliance with the constitution.<sup>218</sup> Courts have often used special masters to remedy inmate complaints and to enforce change in prisons across the country. For example, in *Madrid v. Gomez*, after the United States District Court for the Northern District of California found that prison officials had been deliberately indifferent in regard to inmates' physical and mental health care, the court appointed a special master to create a plan to remedy the unconstitutional conditions and ordered the prison officials to work in good faith with the special master.<sup>219</sup> Similarly, in 2000 the Washington Western District Court appointed a special master to monitor the progress of a correctional facility in remedying its unconstitutional conditions of confinement.<sup>220</sup>

Successfully using Section 1983 to establish that injuries from inadequate emergency plans constitute Eighth Amendment claims, would set strong precedents regarding these prison duties, and would be a method that involves less political turmoil, as opposed to the legislative route.<sup>221</sup> Also, judicial action recognizing these rights of

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<sup>218</sup> Robbins *supra* note 85, at 55.

<sup>219</sup> *Madrid v. Gomez*, 889 F. Supp. 1146 (1995) (detailing how courts appoint special masters to oversee reform).

<sup>220</sup> *Turay v. Selig*, 108 F. Supp. 2d 1148 (2000) (noting how a special master was appointed by the court to monitor the progress of a correctional facility).

<sup>221</sup> Robbins *supra* note 85, at 65.



prisoners may signal the other branches that this is a serious issue in need of further action to ensure the protections.<sup>222</sup>

## 4.2 Comprehensive Federal Plan for Prisons

There is no comprehensive emergency preparedness plan for prisons, and each state or even individual facility can have individual preparedness plans that vary in length and effectiveness.<sup>223</sup> Individual facilities need to have emergency plans that are tailored to their specific facilities and personnel. However, the responsibility for creating a comprehensive plan to protect prisoners during disasters lies with the federal government, because this is a national issue.<sup>224</sup> It is worth mentioning that ten days before Hurricane Harvey, President Trump signed an executive order which revoked directions that Obama created regarding the resilience of federal facilities.<sup>225</sup> This repealed Obama executive order would have required the federal government to take the risk of flooding and sea-level changes into account when building new infrastructure and rebuilding after disasters.<sup>226</sup>

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<sup>222</sup> *Id.*

<sup>223</sup> *See supra* Part II.C.

<sup>224</sup> Savilonis, *supra* note 94, at 60.

<sup>225</sup> Eliza Relman, *Trump reversed regulations to protect infrastructure against flooding just days before Hurricane Harvey*, Business Insider (Aug. 28, 2017), <http://www.businessinsider.com/trump-reversed-obama-flooding-regulations-before-hurricane-harvey-2017-8>.

<sup>226</sup> *Id.*

At this point, the Bureau of Prisons should be the agency tasked with creating a comprehensive plan. This would make sense because it would involve less coordination and familiarization with the correctional sector, as opposed to another government agency tasked with creating a comprehensive plan. However, an argument could also be made for FEMA because PKEMRA “states that the primary mission of FEMA is ‘to reduce the loss of life and property and to protect the Nation from all hazards, including natural disasters.’”<sup>227</sup> Prisons should have a comprehensive federal plan that outlines planning requirements so there is no confusion on how to act before, during, and after disaster strikes. The benefits of such a federal policy would far outweigh the costs (time to coordinate and implement, and money), and would include additional protections for prisoners’ civil rights, increased health and safety of incarcerated individuals, as well as less litigation and correctional officials that are better trained to protect prisoners.<sup>228</sup>

The wide variety of prison preparedness plans and training programs differ greatly from prison to prison.<sup>229</sup> The comprehensive federal plan should include mandatory training programs and requirements that increase both the types of training and the frequency of training for new recruits and high-level correctional officers. Some

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<sup>227</sup> Savilonis, *supra* note 94, at 68.

<sup>228</sup> *Id.* at 71.

<sup>229</sup> *See supra* Part II.C.

prisons don't even practice emergency drills.<sup>230</sup> So it would be helpful for a comprehensive federal plan to include a specific number of drills to be carried out each year for different types of emergencies. Prisons will also need funds to incorporate all of these changes and to carry out these trainings and drills.<sup>231</sup> This overhaul of the prison preparedness system would ensure that facilities are taking the same cohesive and committed approach to protecting the constitutional rights of prisoners.

### **4.3 Amend the Post Katrina Emergency Management Reform Act**

PKEMRA was created after Hurricane Katrina and makes it law that the government (through FEMA) has a responsibility to protect members of society by providing the resources necessary to save lives.<sup>232</sup> However, the biggest flaw with PKEMRA relevant to this paper is that it focuses on those with disabilities and has “absolutely no mention of prisons or prisoners.”<sup>233</sup> To better protect prisoners during emergencies and disasters, PKEMA should be amended to include prisons and prisoners. Congress could also expand the role of the FEMA Disability Coordinator that was

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<sup>230</sup> *Id.*

<sup>231</sup> Savilonis, *supra* note 94, at 73.

<sup>232</sup> *See supra* Part II.B.

<sup>233</sup> Savilonis, *supra* note 94, at 64.

created by PKEMA to include the coordination of emergency preparedness plans for incarcerated individuals.<sup>234</sup>

#### **4.4 Utilize Civil Rights of Institutionalized Persons Act More for Juvenile Prisoners**

CRIPA was created to protect the civil rights of individuals confined in state or locally operated prisons.<sup>235</sup> CRIPA gives the DOJ the power to investigate state facilities when they receive credible complaints about constitutional violations surrounding conditions of confinement.<sup>236</sup> CRIPA is an extremely useful tool for exposing unconstitutional conditions of confinement in correctional facilities and forcing them to correct these abuses.<sup>237</sup> However, there have been complaints that the DOJ has not been as aggressive in perusing CRIPA complaints when they come from incarcerated juveniles, even though “the statute was designed to address unconstitutional conditions...and specifically mentions juvenile facilities.”<sup>238</sup> This article recommends that the DOJ begins taking a closer look at complaints filed by juveniles, because children in

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<sup>234</sup> Hoffman, *supra* note 91, at 1541.

<sup>235</sup> See *supra* Part II.B.

<sup>236</sup> *Id.*

<sup>237</sup> Puritz *supra* note 128.

<sup>238</sup> *Id.*

prison had to endure the same unconstitutional conditions as adults during Hurricane Katrina.<sup>239</sup>

#### **4.5 Amend the Stafford Act to Include Protections for Prisons and Prisoners**

The Stafford Act created nondiscrimination mandate to protect vulnerable populations by authorizing federal assistance to states and other facilities during natural disasters.<sup>240</sup> The broad language of the Stafford Act provides federal assistance to public and private non-profit facilities and states that request additional assistance to keep vulnerable populations safe during times of disaster.<sup>241</sup> Unfortunately, similar to PKEMRA, the Stafford Act has makes no mention of prisons or prisoners, even though it is intended to protect vulnerable populations in need of assistance during emergency.<sup>242</sup> “Since the Stafford Act does not mention prisons, “it is easy to understand why prisons have continued to be disregarded in all phases of emergency management at the National level, as they have not been listed in the Stafford Act.”<sup>243</sup>

If prisoners’ rights are to be protected on the national level, then Congress needs to amend the Stafford Act to specifically include prisons under public and private non-

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<sup>239</sup> See *supra* Part I.C.

<sup>240</sup> See *supra* Part II.B.

<sup>241</sup> *Id.*

<sup>242</sup> Savilonis, *supra* note 94, at 66.

<sup>243</sup> *Id.*

profit facilities that are allowed to receive these federal services during natural disasters.<sup>244</sup> The Stafford Act includes pets, but makes no mention of prisoners.<sup>245</sup> The fact that the Stafford Act mentions pets but not prisoners evidences how some people care more about animals than people, and a result of this mindset is that several animals were treated with more care than prisoners, and evacuated before Hurricanes Katrina, and Irma touched land in Florida and Louisiana. In order to change the status quo and protect the constitutional rights of prisoners, Sec. 403 of the Stafford Act should also be amended by Congress to include mention of jails, prisons, and correctional facilities.<sup>246</sup>

#### **4.6 Amend NEPA Regulations and Guidance Guidelines to Include Considerations About the Environmental Effects Future Constructions Would Have on Their Inhabitants**

With the current backlash of anti-environmental regulation sentiment led by the President, the National Environmental Policy Act (NEPA) has become even more crucial (yet vulnerable) in protecting our environment. However, the environment is not the only thing in need of protection. Over the past few years, the EPA and other state agencies have been exposing violations all across the country for putting inmate health at

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 67.

<sup>246</sup> *Id.*

risk.<sup>247</sup> Prisoners constantly experience negative environmental effects due to the locations where prisons are built, and NEPA regulations should at least be amended to require agencies like the BOP to evaluate the consequences building federal facilities in certain areas may have on their future inhabitants.

In 2015 Congress approved \$444 million for the construction of a new federal prison on top of an old coal mine in Letcher County, Kentucky.<sup>248</sup> With the recent budget cuts to prison construction, the status of this new prison project is up in the air. As previously mentioned, Categorical Exclusions (CATEX) make renovations and expansions more difficult to regulate since NEPA does not require agencies to release EA's or EIS' on them.<sup>249</sup> The NEPA regulations should be amended to require EA's for major renovations or expansions, and when these EA's find that the proposed expansions would have a significant negative impact on the environment or humans housed in the facilities, an EIS should be required. Regardless of whether the plan for the proposed new prison in Kentucky occurs or not, the NEPA regulations should be amended to require both EA's and in certain situations, EIS' to include an investigation into how a proposed construction site could later harm the individuals who will inhabit it. These changes to the NEPA regulations could help with the problems that prisons built in

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<sup>247</sup> Prison Ecology Project, *Background on Mass Incarceration and the Environment*, Nation Inside, <https://nationinside.org> (last visited Feb. 2, 2018).

<sup>248</sup> Greenfield, *supra* note 137.

<sup>249</sup> See *supra* Part II.B.

dangerous areas encounter, both by regulating where they are built based on the effects the location may have on inmates, and by taking the environmental impacts of future renovations and expansions into account.

#### **4.7 Pass the Disaster Recovery Reform Act into Law**

With so many statutes that address preparedness and protection of rights during natural disasters and emergencies, so few actually mention prisoners. The expensive and deadly aftermath of last year's hurricane season may have finally caught the attention of Congress. Although it is still a bill in the House of Representatives, the Disaster Recovery Reform Act's goal is to improve disaster assistance to certain governmental organizations and vulnerable populations.<sup>250</sup> The Disaster Recovery Reform Act would make it the responsibility of the FEMA Administrator to identify evacuation routes during disasters and to evacuate special needs populations, including prisoners.<sup>251</sup> If passed, the Disaster Recovery Reform Act will add to the protections for the constitutional rights of prisoners and would also serve as an additional resource available to help evacuate prisoners during emergencies. Hopefully it becomes law later on this year in 2018.

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<sup>250</sup> *See supra* Part II.B.

<sup>251</sup> *Id.*



## 5 CONCLUSION

In 2005 after Hurricanes Katrina and Rita rocked the United States and left thousands of prisoners stranded, without food and water, or suitable living conditions, the nation was put on notice about the deficiencies in correctional facilities planning for natural disasters and the unconstitutional deprivation of rights endured by prisoners. Three years later when Hurricane Ike hit, prisons were still not prepared for the effects of strong hurricanes, and prisoners were again left stranded without adequate food water or health care. After these disasters and the constitutional abuses that were brought to light, one would think that prisons all across the country would be better prepared today for events like these. Sadly, this was not the case, and in 2017 when Hurricanes Maria, Harvey, and Maria came prisons were still not adequately prepared and the cycle of despair and neglect for prisoner safety continued.

This paper touched on some of the legal remedies that our society can use to end this unnecessary and unconstitutional suffering. While there has been progress over the 12 years since Katrina, there is still more work to be done. Correctional facilities need to train their officials and prepare plans for dealing with hurricanes, and also need to create better evacuation plans, or else prisoners will continue to suffer. Hopefully our nation's leaders in Congress have recognized the increased need to prevent events like these from occurring ever again, and take appropriate action in order to protect some of our nation's most vulnerable citizens.