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**LOCKED UP IN THE EYE OF THE STORM:
A CASE FOR HEIGHTENED LEGAL PROTECTIONS FOR
INCARCERATED PEOPLE DURING HURRICANES**

MAYA HABASH*

INTRODUCTION

When Hurricane Katrina struck New Orleans on August 29, 2005, the incarcerated people¹ of Orleans Parish Prison were abandoned.² As the water continued to rise in the prison buildings in the five days following the hurricane, deputies left their posts and fled, leaving behind hundreds of incarcerated people locked in their cells without food, water, electricity, or plumbing, and many standing in sewage-tainted water at least up to their chests.³ Put simply, this vulnerable community, whose survival was entirely in the hands of the government, was left to die. This display of apathy for incarcerated people was not an isolated incident—it has been repeated through several major hurricanes that the United States has experienced since Katrina.⁴

Incarcerated people have a legal right to safe and healthy conditions of confinement,⁵ but their rights are not properly secured.⁶ The current American system of upholding legal protections afforded to incarcerated people during major hurricanes is wholly inadequate, and has

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¹ This author understands words such as “inmate” or “prisoner” to be politically incorrect or offensive to some. For the purposes of this paper, this author will utilize the more neutral term “incarcerated people” as frequently as possible, only using “inmate” or “prisoner” for sentence clarity when necessary, or when referenced as such by the respective cited source.

² See, e.g., *Prison Conditions And Prisoner Abuse After Katrina*, ACLU, <https://www.aclu.org/other/prison-conditions-and-prisoner-abuse-after-katrina> (exploring the events that ensued at OPP when Hurricane Katrina hit).

³ *Id.*

⁴ See generally, e.g., Matthew Clarke, *In the Eye of the Storm: When Hurricanes Impact Prisons and Jails*, PRISON LEGAL NEWS (May 17, 2018), <https://www.prisonlegalnews.org/news/2018/may/17/eye-storm-when-hurricanes-impact-prisons-and-jails/>.

⁵ See *infra* Part II.B.

⁶ See *infra* Part III.

led to clear constitutional violations.⁷ As hurricanes continue to occur with higher rates of frequency and heightened severity,⁸ climate change will continue to become an increasingly urgent crisis of the modern world. The gross mistreatment of incarcerated people during these natural disasters should not subsist. In order to ensure the protection of incarcerated people in the future, the federal government must implement comprehensive legislation outlining standardized and expansive policies and procedures for the protection of this vulnerable community before, during, and after a hurricane.

This comment will first explore the full spectrum of risk to incarcerated people during a major hurricane by discussing the magnitude of threat that hurricanes present,⁹ accounts of the harrowing circumstances that incarcerated people have been placed in during past hurricanes,¹⁰ and why incarcerated people constitute a vulnerable population worthy of special considerations during a hurricane.¹¹ Then, this comment will explain how the Thirteenth Amendment forms the basis for the mass utilization of prison labor during an emergency, and how the experiences of incarcerated people during hurricanes highlight an unfair dichotomy between viewing them as a necessary labor force while simultaneously disregarding their safety needs.¹² From there, this comment will explain how these circumstances are constitutional violations of their Eighth Amendment rights.¹³ Next, this comment will discuss how existing legislation—the Stafford Act, the Post-Katrina Emergency Management Reform Act, followed by the Disaster Recovery Reform Act—has attempted to address the issue.¹⁴ This section will also expand on why these pieces of legislation have fallen short of providing adequate legal protection for incarcerated people. Lastly, this comment proposes further legislation that substantially builds upon what those acts have begun.¹⁵ Overall, this comment aims to establish why comprehensive federal legislation that focuses on the protection of incarcerated people during hurricanes is necessary, and what exactly should be put in it.

⁷ See *infra* Part II.B.

⁸ See *infra* Part I.A.

⁹ See *infra* Part I.

¹⁰ See *infra* Part I.B.

¹¹ See *infra* Part I.C.

¹² See *infra* Part II.A.

¹³ See *infra* Part II.B.

¹⁴ See *infra* Part III.A.,B.,C.

¹⁵ See *infra* Part IV.

I. WHERE HURRICANES AND INCARCERATED PEOPLE MEET¹⁶A. *The Magnitude of Hurricane Threat: Increasing Likelihood and Severity*

Of all recorded weather disasters in the history of the United States—including flooding, severe storms, and wildfires—hurricanes have caused the most destruction.¹⁷ The top ten costliest hurricanes in American history, all of which have taken place between 2004 and 2018, have cost over \$300 billion worth of estimated insured loss.¹⁸ For context, that yearly average of roughly \$21 billion alone would be enough to buy Medicaid for six million people.¹⁹ Overall, as theory and computer models have long suggested, hurricanes are becoming more intense, destructive, and unfortunately, also more frequent.²⁰

This hypothesis is corroborated by a recent analysis of satellite images dating to 1979, conducted by researchers from the National Oceanic and Atmospheric Administration (NOAA).²¹ The analysis showed that climate change has made hurricanes worldwide become much stronger over the past four decades.²² In fact, the likelihood of a hurricane developing into what experts constitute to be a “major hurricane”²³ has increased roughly five percent per decade.²⁴ Furthermore, according to NOAA’s 2019 Global Climate Survey, the combined temperature of Earth’s land and oceans has increased by 0.07°C (or 0.13°F) per decade

¹⁶ Part I.A will discuss the increasing likelihood and severity of hurricanes. Part I.B will explore the past experiences of incarcerated people during a hurricane. Finally, Part I.C will examine some of the key reasons that incarcerated people constitute a vulnerable community.

¹⁷ *Hurricane Costs*, NOAA, <https://coast.noaa.gov/states/fast-facts/hurricane-costs.html>, (last visited Dec. 22, 2020). 2020 marked the sixth consecutive year in which ten or more billion-dollar weather and climate disasters struck the United States. *Id.*

¹⁸ *Facts + Statistics: Hurricanes*, INS. INFO. INST., <https://www.iii.org/fact-statistic/facts-statistics-hurricanes>, (last visited Dec. 22, 2020). The \$300 billion of estimated insured loss is in 2020 dollars, which has been adjusted for inflation since the year the hurricane occurred. *Id.*

¹⁹ See Lindsay Koshgarian, *Six Things You Could Buy Instead of a Border Wall*, NAT’L PRIORITIES PROJECT, <https://www.nationalpriorities.org/blog/2017/02/13/six-things-you-could-buy-instead-border-wall/> (last visited Dec. 22, 2020).

²⁰ James P. Kossina et al., *Global Increase in Major Tropical Cyclone Exceedance Probability over the Past Four Decades*, 117 PROC. NAT’L ACAD. SCI. 11975, 11976 (2020).

²¹ *Id.* at 11975.

²² *Id.* at 11976.

²³ See *id.* (explaining that a “Saffir–Simpson category 3 or greater intensity [is referred to] as ‘major hurricane’ intensity regardless of geographic region. For our data, which are provided in 5-kt bins, major hurricane intensity is 100 kt or greater”).

²⁴ *Id.* at 29990.

on average since 1880.²⁵ Noteworthy, the average rate of increase since 1981 is 0.18°C (0.32°F)—more than twice as great.²⁶ Conceptualizing the global impact of small, seemingly trivial degree increases may be difficult. To provide perspective, “At 1.5 degrees Celsius warming, about fourteen percent of Earth’s population will be exposed to severe heatwaves at least once every five years, while at two degrees warming that number jumps to thirty-seven percent.”²⁷ Fractional increases are highly impactful. The world is clearly warming, and warmer waters provide more energy, fueling major hurricanes.²⁸ Physics suggests that as the world warms, these hurricanes are only going to get stronger.²⁹ Hurricanes are becoming more dangerous, and the issue will only continue to intensify.³⁰

B. The Experiences of Incarcerated People During Past Hurricanes

In addition to destruction, hurricanes have also cost hundreds of American lives.³¹ While the number of lives future hurricanes claim may be mitigated by the successful implementation of effective emergency measures, one community that is often neglected during emergencies is the incarcerated population.

On the Sunday before Hurricane Katrina struck, Marlin Gusman, the elected Sherriff of the Orleans Parish Sherriff’s Office, announced that the inmates at Orleans Parish Prison (OPP) would not be evacuated

²⁵ *Global Climate Report - Annual 2019*, NOAA, <https://www.ncdc.noaa.gov/sotc/global/201913> (last visited Dec. 22, 2020).

²⁶ *Id.*

²⁷ Alan Buis, *A Degree of Concern: Why Global Temperatures Matter*, NASA GLOBAL CLIMATE CHANGE (June 19, 2019), <https://climate.nasa.gov/news/2865/a-degree-of-concern-why-global-temperatures-matter/>.

²⁸ Henry Fountain, *Climate Change Is Making Hurricanes Stronger, Researchers Find*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/climate/climate-changes-hurricane-intensity.html>.

²⁹ Fountain, *supra* note 28.

³⁰ *See id.*

³¹ Between 2000-2019, there have been approximately 2,000 reported hurricane-related deaths in the U.S. INS. INFO. INST., *supra* note 18. In 2020, over 400 people lost their lives in the Atlantic hurricane season across the U.S., Central America, and the Caribbean Islands. *2020 Hurricane Season*, CTR. FOR DISASTER PHILANTHROPY (Dec. 1, 2020), <https://disasterphilanthropy.org/disaster/2020-atlantic-hurricane-season/>. It is unclear how many of those casualties were Americans. *See id.* (mentioning the casualties of each hurricane, and *sometimes* mentioning where the victims were from).

for the storm.³² Thousands of inmates³³ were placed on lockdown—either behind their cell doors or in their dorm-style housing units.³⁴ They were to be entirely powerless for days to come.³⁵ Soon after the storm arrived, all OPP buildings lost power, and the backup generators failed,³⁶ at which point all inmates were in the midst of complete darkness. With the harsh predictions of the storm and many of their families having already evacuated the city, inmates knew the worst was yet to come.³⁷ Once the power went out, deputies left their posts en masse.³⁸ Conditions deteriorated quickly. Sewage-infested water flooded the OPP buildings and rushed into the inmates' locked cells.³⁹ The water in the lower cells went up to the inmates' shoulders, leaving them locked in and screaming for help.⁴⁰ There were no guards in the control booths.⁴¹ There was no light, no windows, no air, no food, no water, and no medical attention whatsoever.⁴² These conditions persisted for days.⁴³ The OPP descended into proper chaos, and the incarcerated people of Orleans Parish Prison were effectively left to die in the storm.⁴⁴

³² NAT'L PRISON PROJECT OF THE ACLU ET AL., ABANDONED AND ABUSED: PRISONERS IN THE WAKE OF HURRICANE KATRINA 30 (2006), <https://journals.sagepub.com/doi/abs/10.1177/0306396807080069>.

³³ On the day the storm hit, OPP held somewhere between 6,375 and 8,000 prisoners, ranging in age from 10-73. *Id.* at 29. Due to discrepancies with who was included in the total count, such as evacuees from other prisons, media accounts range vastly about the total population of OPP at the time of Katrina. *Id.*

³⁴ *Id.* at 30.

³⁵ *Id.* at 9, 32.

³⁶ *Id.* at 32.

³⁷ See generally *id.* (making references to family members evacuating throughout the entire report).

³⁸ ACLU, *supra* note 32, at 32.

³⁹ ACLU, *supra* note 32, at 9.

⁴⁰ ACLU, *supra* note 32, at 39.

⁴¹ ACLU, *supra* note 32, at 39.

⁴² ACLU, *supra* note 32, at 39.

⁴³ ACLU, *supra* note 32, at 39; see also *New Orleans: Prisoners Abandoned to Floodwaters*, HUMAN RIGHTS WATCH (Sep. 21, 2005, 8:00 PM), <https://www.hrw.org/news/2005/09/21/new-orleans-prisoners-abandoned-floodwaters> (reporting that inmates at Templeman III, one of several buildings in the OPP compound, were left in the prison for four days before evacuation). Many dehydrated and hungry people had no choice but to drink the highly contaminated flood water or water that was backed up in the toilets. ACLU, *supra* note 32, at 39. Furthermore, proper medical care was entirely absent in the days immediately following the storm, leaving at least 3,000 people (over half of the OPP population), who required medication of some sort, with absolutely nothing. ACLU, *supra* note 32, at 39.

⁴⁴ Not everyone was evacuated. HUMAN RIGHTS WATCH, *supra* note 43. While there is no official count of how many OPP inmates lost their lives during the storm, 517 of them were unaccounted for in the aftermath, missing from the list of people evacuated from the jail. HUMAN

These experiences are only a glimpse of the very well-documented injustices that the incarcerated people of OPP faced in the midst and wake of Hurricane Katrina. Unfortunately, those experiences did not end at Katrina—they have been largely duplicated by the experiences of incarcerated people in various states during several major hurricanes in years following Katrina, including Hurricanes Rita, Ike, and Harvey.⁴⁵

C. Incarcerated People as a Vulnerable Population

Correctional facilities in the U.S. have not seemed to learn their lesson from these past disasters about requisite emergency preparedness and response measures. Incarcerated people are an inherently vulnerable population deserving of specifically allocated protections during a hurricane. Incarcerated people are already systematically a community with meager autonomy over their lives, but this limited autonomy takes on new heights during a hurricane. The existence of incarcerated people is put entirely in the hands of the government, who decides whether they are evacuated, and whether they have access to food, clean water, and medicine.⁴⁶

Incarcerated populations largely consist of indigent racial minorities, who are often disenfranchised in society in several ways. While Black Americans only represent thirteen percent of the American population overall, they represent thirty-three and thirty-four percent of the prison and jail populations, respectively.⁴⁷ In 2018, the imprisonment rate of Black men was 5.8 times that of their white counterparts,⁴⁸ and Black women were incarcerated 1.8 times more than white women.⁴⁹ Overall, Black people in the U.S. are incarcerated at much higher rates than white people, despite the fact that the white population is roughly

RIGHTS WATCH, *supra* note 43. Some inmates who were unable to get out of their cells broke windows to let air in, others jumped out of windows, and others set fire to blankets and hung them out of the windows to let others know they were still inside. HUMAN RIGHTS WATCH, *supra* note 43. It is unknown how many of those 517 people had died, but some inmates reported seeing bodies floating in the floodwaters as they were evacuating from the prison. HUMAN RIGHTS WATCH, *supra* note 43.

⁴⁵ See generally, e.g., Clarke, *supra* note 4.

⁴⁶ ACLU, *supra* note 32, at 32.

⁴⁷ JULIA ACKER ET AL., MASS INCARCERATION THREATENS HEALTH EQUITY IN AMERICA 3 (2019), https://www.rwjf.org/content/dam/farm/reports/issue_briefs/2018/rwjf450812.

⁴⁸ U.S. DEP'T OF JUST., PRISONERS IN 2018 16 (2020), <https://www.bjs.gov/content/pub/pdf/p18.pdf>.

⁴⁹ *Id.*

three times that of the Black population.⁵⁰ These racial disparities in our criminal justice system are not necessarily an indication that racial minorities are more likely to commit offenses. More concretely, they are a reflection of America's history of racial injustice that is fundamentally engrained in various aspects of the modern western world.⁵¹ These inequities have an impact on the socio-economic status of racial minorities at large.⁵² In the U.S., "minority racial groups are more likely to experience multidimensional poverty than their White counterparts."⁵³ These statistics are certainly reflected in the incarcerated population, as "men and women behind bars" in the U.S. have a "pre-incarceration median income that is [forty-one] percent lower than that of currently non-incarcerated people of similar ages."⁵⁴

In addition to being economically disadvantaged, largely due to institutionalized discrimination, racial minorities are more likely to

⁵⁰ See William H. Frey, *The Nation is Diversifying Even Faster Than Predicted, According to New Census Data*, BROOKINGS INST. (July 1, 2020), <https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted/> (saying that the 2019 Census showed that white people comprise 60.1% of the U.S. population, while Black people comprise about 18.5%).

⁵¹ See generally, e.g., *Criminal Justice Fact Sheet*, NAACP, <https://www.naacp.org/criminal-justice-fact-sheet/> (discussing racial inequities in policing and American criminal justice system at large); Michela Zonta, *Racial Disparities in Home Appreciation*, CTR. FOR AM. PROGRESS (July 15, 2019, 12:01 AM), <https://www.americanprogress.org/issues/economy/reports/2019/07/15/469838/racial-disparities-home-appreciation/> (discussing "Implications of the Racially Segmented Housing Market for African Americans' Equity Building and the Enforcement of Fair Housing Policies"); Kirsten Weir, *Inequality at School*, 47 MONITOR ON PSYCH., 42 (2016) (explaining factors behind, and evidence and implications of the racial disparity in the American education system, as well as possible interventions to reduce bias); Danyelle Solomon et al., *Systematic Inequality and Economic Opportunity*, CTR. FOR AM. PROGRESS (Aug. 7, 2019, 7:00 AM), <https://www.americanprogress.org/issues/race/reports/2019/08/07/472910/systematic-inequality-economic-opportunity/> (examining the historical roots of systematic inequality and its relationship with economic opportunity); Monique Tello, *Racism and Discrimination in Health Care: Providers and Patients*, HARV. HEALTH BLOG (Jan. 16, 2017, 9:30 AM), <https://www.health.harvard.edu/blog/racism-discrimination-health-care-providers-patients-2017011611015> (giving a broad overview of why certain groups of patients receive different care).

⁵² See generally, e.g., Terry-Ann Craigie et al., *Conviction, Imprisonment, and Lost Earnings*, BRENNAN CTR. FOR JUST., (2020), https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport_pdf.pdf (providing an analysis on "How Involvement With The Criminal Justice System Deepens Inequality").

⁵³ *Ethnic and Racial Minorities & Socioeconomic Status*, AM. PSYCHOL. ASS'N., <https://www.apa.org/pi/ses/resources/publications/minorities>. For example, "39 percent of African-American children and adolescents and 33 percent of Latino children and adolescents are living in poverty, which is more than double the 14 percent poverty rate for non-Latino, White, and Asian children and adolescents." *Id.* Furthermore, "African-American men working full-time earn only 72 percent of the average earnings of comparable Caucasian men and 85 percent of the earnings of Caucasian women." *Id.*

⁵⁴ Acker et al., *supra* note 47, at 3.

experience health disparities,⁵⁵ a reality that inherently seeps into the incarcerated population. In the U.S., “current and former inmates have significantly higher rates of communicable diseases . . . chronic health conditions . . . and psychiatric and substance use disorders” compared with people who have never been incarcerated.⁵⁶ Not all of these conditions are pre-incarceration—the act of being incarcerated itself has impacts on health, as evidenced by the fact that “most adult inmates are released from correctional facilities with more chronic medical problems than they had before admission.”⁵⁷ Furthermore, “a third of illness-related deaths in state prisons from 2001 to 2004 . . . resulted from conditions not present at the time of admission.”⁵⁸

Therefore, the lack of protection for incarcerated individuals during a hurricane inherently has the greatest impact on indigent communities of color and populations with disproportionately higher numbers of health concerns than the general population—overall, populations that are already largely disadvantaged in society. The incarcerated population in the U.S. is thus indubitably a vulnerable population worthy of special governmental protection during a natural disaster, especially considering that governmental actions in these circumstances are quite literally a matter of life or death. Improving health and safety protections during a hurricane would ensure that at least when in the direct hands of the government, the incarcerated population is protected from harm’s way.

⁵⁵ See, *Ethnic and Racial Minorities & Socioeconomic Status*, *supra* note 53 (“The relationship between SES, race and ethnicity is intimately intertwined. Research has shown that race and ethnicity in terms of stratification often determine a person’s socioeconomic status . . . Research indicates that there are large health disparities based on social status that are pervasive and persistent.”).

⁵⁶ Acker et al., *supra* note 47, at 6. Some of the communicable diseases include STI’s, HIV, hepatitis C, and tuberculosis, and the chronic health conditions include hypertension, diabetes, arthritis, and asthma. *Id.*

⁵⁷ Acker et al., *supra* note 47, at 6.

⁵⁸ Acker et al., *supra* note 47, at 6.

II. THE UTILIZATION OF INCARCERATED PEOPLE DURING AN EMERGENCY AND THEIR CONSTITUTIONAL RIGHTS⁵⁹

A. *The Thirteenth Amendment: The History and Modern-Day Use of Inmate Labor*

This section will explore the dissonance in the way that incarcerated people are heavily relied upon as a labor force for the implementation of emergency management procedures versus the way they are neglectfully treated during those emergencies themselves. The Thirteenth Amendment of the United States Constitution is the basis for why the U.S. has the authority to utilize incarcerated people as a labor force in many circumstances, including emergency management.⁶⁰ The Thirteenth Amendment states that “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”⁶¹

The Thirteenth Amendment, which includes an exception to slavery or involuntary servitude if it is “as a punishment for crime,”⁶² effectively created the institution of penal labor, making the criminal justice system one of the primary means of continuing legalized involuntary servitude of Black people as the end of slavery left a void in the labor market of Southern states.⁶³ In the commercial sector, for example, inmates work in textile, furniture, electronics, metals, graphics, and other services.⁶⁴ Their pay, however, is little to none, receiving a daily wage ranging from \$1.73 to \$8.63 for an average of 7.5 hours of work.⁶⁵ From there, “fifty percent of the inmate wages are garnished for court fines, child support, and victim restitution,” leaving the actual wage to be categorically negligible.⁶⁶

⁵⁹ Part II.A will discuss the history of inmate labor in America, made possible through the Thirteenth Amendment, and Part II.B will discuss the Eighth Amendment right against cruel and unusual punishment.

⁶⁰ See *infra* text accompanying notes 61-63.

⁶¹ U.S. CONST. amend. XIII, § 1.

⁶² *Id.*

⁶³ *Prison Labor and the Thirteenth Amendment*, EQUAL JUST. INITIATIVE (Feb. 1, 2016), <https://eji.org/news/history-racial-injustice-prison-labor/>.

⁶⁴ Tracy F. H. Chang & Douglas E. Thompkins, *Corporations Go to Prisons: The Expansion of Corporate Power in the Correctional Industry*, 27 LAB. STUD. J. 45, 56 (2002).

⁶⁵ *Id.*

⁶⁶ *Id.*

Incarcerated people do not only contribute to commercial profit—their labor is heavily utilized in emergency management as well. For example, inmates have doubled as firefighters in California since the 1940s, and according to the state’s fire agency, incarcerated people have comprised over twenty-two percent of the state’s 15,000+ wildfire fighters in recent years.⁶⁷ These inmates have proven to be crucial to the entire operation. In fact, due to early prison releases as a result of prison depopulation efforts to slow the spread of the COVID-19 pandemic, California experienced a shortage of firefighters to combat the 2020 wildfires⁶⁸—a fact that exemplifies how heavily governments rely on the use of inmate labor to take on natural disasters. Further illustration stems from the fact that thirty out of the forty-seven states analyzed in a 2020 study “had explicit instructions to use prisoners for emergencies and disasters.”⁶⁹ In those instructions, there were “at least thirty-four disaster-related tasks that states assign to incarcerated workers.”⁷⁰

However, wildfires are not the only natural disaster that this labor force is used for. Many states heavily use inmate labor in all four stages of the emergency management of a hurricane: preparedness, response, recovery, and mitigation.⁷¹ In the preparedness phase before a hurricane strikes, incarcerated people are often given tasks such as helping prepare for flooding by making and distributing sandbags, or cleaning and preparing shelters throughout their respective communities for

⁶⁷ Kevin Stark, *Coronavirus Pandemic Sidelines California’s Inmate Firefighters*, NPR (July 29, 2020, 10:46 AM), <https://www.npr.org/2020/07/29/896179424/coronavirus-pandemic-sidelines-californias-inmate-firefighters> (“In recent years, 3,500 of the state’s 15,500 wildfire fighters were inmates, according to the state’s fire agency, Cal Fire.”).

⁶⁸ *Id.* (stating that due to the pandemic, Gov. Gavin Newsom said California would have to hire over 800 additional seasonal firefighters to backfill the work of the inmate fire crew).

⁶⁹ J. Carlee Purdum, *Disaster Work Is Often Carried Out By Prisoners – For As Little As 14 Cents An Hour*, TEX. A&M TODAY (Sept. 15, 2020), <https://today.tamu.edu/2020/09/15/disaster-work-is-often-carried-out-by-prisoners-for-as-little-as-14-cents-an-hour/>. Delaware, New Jersey and Tennessee were not included in the analysis as their plans were not publicly available. *Id.*

⁷⁰ *Id.* Additionally, prisons are often relied on to produce valuable resource outputs in the wake of a hurricane, such as having inmates do laundry for people in emergency shelters, donating inmate-designated clothing items and relief supplies, such as long underwear, jackets, blankets, bottled water, and canned food, and relocating generators and backup lights from various correctional facilities to communities that may need them. See Corey Kilgannon, *Jailed and Jailers Pitched In Help After Storm*, N.Y. TIMES (Nov. 21, 2012), <https://www.nytimes.com/2012/11/22/nyregion/clothes-and-other-storm-aid-from-rikers-jail.html>.

⁷¹ See generally Carlee Purdum, *Hurricane Irma: Inmate Workers and Inmate All-Hazard Firefighters in Disasters*, NAT. HAZARDS CTR. (2020), <https://hazards.colorado.edu/quick-response-report/hurricane-irma-inmate-workers-and-inmate-all-hazard-firefighters-in-disasters> (discussing specifically Georgia’s usage of inmate labor during all stages of a natural disaster in Georgia, using the events of Hurricane Irma as an example).

potential evacuees.⁷² In the response phase after a hurricane hits, incarcerated people may be assigned to assist with search and recovery efforts.⁷³ Additionally, they are often an integral part of the vital task of clearing fallen trees and/or other debris off the roadways to ensure first responders can efficiently reach those in need.⁷⁴ During the recovery phase, incarcerated people often are used to continue debris clean-up efforts, potentially months after the hurricane has struck, as well as help to rebuild critical infrastructure, such as schools, in the affected communities.⁷⁵ And lastly, regarding mitigation efforts, inmates are often utilized for tasks such as keeping drainage ways clear of flood-causing debris, providing regular maintenance for emergency response fleet vehicles like ambulances and fire trucks, assisting with testing of emergency response equipment, and helping with routine maintenance.⁷⁶

Clearly, inmates are a vital community during emergencies. In turn, incarcerated people heavily depend on their respective governments to keep them safe during a natural disaster—something that time and time again, those governments have failed to do.⁷⁷ Thus, through the application of the Thirteenth Amendment, American history has established an unfair dichotomy of utilizing incarcerated people as a necessary labor force in the emergency management arena, while simultaneously ignoring them during the emergency itself, reducing them to a forgotten vulnerable population—case in point, hurricanes. Both of these realities cannot continue to co-exist if the United States is to call itself the executor of a just and rational system.

B. The Eighth Amendment: A Protection Against Cruel and Unusual Punishment

The injustices that incarcerated people have endured in the wake of hurricanes in the United States constitute a clear violation of their Eighth Amendment rights. The Eighth Amendment of the U.S.

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *Id.* After a hurricane or other natural disaster, first responders may need to restore utility services, allow additional evacuation if necessary, provide medical attention, etc. *Id.* The Director of Emergency Medical Services and Emergency Management of a Georgia county even expressed that a key lesson learned from Hurricane Matthew and applied ten years later during Hurricane Irma was the necessity of getting inmates out on the streets more quickly to ensure the roadways are cleared. *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See Purdum, supra note 69.*

Constitution reads: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁷⁸ For decades after the creation of the amendment, it was interpreted to entail only the prohibition of cruel and unusual sentences,⁷⁹ but the scope of this clause was expanded to apply to conditions inside of correctional facilities through the 1975 case of *Estelle v. Gamble*⁸⁰ before the Supreme Court.

In *Estelle*, the Supreme Court effectively included conditions of confinement as part of the scope of cruel and unusual punishment.⁸¹ In this case, an inmate had injured his back while performing a prison work assignment, and endured long-term pain despite being placed on various pain relievers.⁸² While his specific claim was denied, the Court nonetheless found that “[d]eliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’” proscribed in the Eighth Amendment.⁸³ This cause of action may apply “whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.”⁸⁴

This was further supported by the Supreme Court a few years later in *Rhodes v. Chapman*,⁸⁵ where the Court found that cruel and unusual punishment exists where incarcerated people are deprived of the “minimal civilized measure of life’s necessities.”⁸⁶ In this case, the state ordered a certain overcrowding prison to put two prisoners to a cell, which was more than the designed capacity.⁸⁷ While the Court found that double celling did not lead to the deprivation of essentials and was therefore not cruel and unusual, they still recognized that conditions of confinement are a valid focal point for Eighth Amendment claims.⁸⁸

Since both of those cases, the Supreme Court has continued to uphold the idea that the Eighth Amendment requires that what goes on

⁷⁸ U.S. CONST. amend. VIII.

⁷⁹ WILLIAM OMOROGIEVA, PRISON PREPAREDNESS AND LEGAL OBLIGATIONS TO PROTECT PRISONERS DURING NATURAL DISASTERS 15 (2018), <http://columbiaclimate-law.com/files/2018/05/Omorogieva-2018-05-Prison-Preparedness-and-Legal-Obligations.pdf>.

⁸⁰ 429 U.S. 97 (1976).

⁸¹ *Id.* at 101, 103–04.

⁸² *Id.* at 99–101.

⁸³ *Id.* at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169–73 (1976)).

⁸⁴ *Id.*

⁸⁵ 452 U.S. 337 (1981).

⁸⁶ *Id.* at 347.

⁸⁷ *Id.* at 339–40, 343.

⁸⁸ *Id.* at 351–52.

inside of correctional facilities must be humane, and that incarcerated people must be provided with basic human needs.⁸⁹ In *Farmer v. Brennan*,⁹⁰ the responsibility of ensuring humane conditions specifically centered on prison officials. This case involved a transgender woman who claimed to have been beaten and raped after she was placed in the general population of a male prison.⁹¹ The Court found that prison officials may be liable for violating the cruel and unusual punishment clause if they have showed a “deliberate indifference” to a substantial risk of serious harm, which is met when the official was subjectively aware of that risk and proceeded to disregard it.⁹² Prison officials must ensure that incarcerated people receive adequate food, clothing, shelter, and medical care.⁹³ Furthermore, they “must take reasonable measures to guarantee the safety of inmates.”⁹⁴

Therefore, it is clear that cruel and unusual punishment can be met through the conditions of one’s confinement. Despite the fact that prison officials have seen the tragedy that hurricanes bring to correctional facilities time and time again, modern-day inmates still have gone days and sometimes weeks after a hurricane without basic human necessities and medical care.⁹⁵ Under the authority of these aforementioned Supreme Court cases, these inmates likely have valid claims⁹⁶ to sustain findings of Eighth Amendment violations.

III. THE INADEQUACY OF PRESENT-DAY STATUTORY PROTECTIONS⁹⁷

While using judicial remedies may provide some relief to inmates, it is not guaranteed. Incarcerated people may not even recognize

⁸⁹ Omorogieva, *supra* note 79, at 15–16.

⁹⁰ 511 U.S. 825 (1994).

⁹¹ *Id.* at 828–30.

⁹² *Id.* at 828.

⁹³ *Id.* at 832.

⁹⁴ *Id.*

⁹⁵ *See supra* Part I.B.

⁹⁶ There are two primary claims they can likely bring. The first is a claim under 42 U.S.C. §1983, which is used to bring civil action for the deprivation of rights. 42 U.S.C. §1983. Additionally, an incarcerated person can petition the court under 28 U.S.C. § 2254, which is used to file a writ of habeas corpus, in this case, regarding the conditions of their confinement. 28 U.S.C. § 2254.

⁹⁷ Part III.A will discuss the Stafford Act, the main federal emergency assistance legislation in the U.S, which makes no mention of incarcerated populations. Part III.B will discuss the Post Katrina Emergency Management Reform Act, which still makes no mention of incarcerated

that their rights are being violated or have access to the resources necessary to pursue their cases. Furthermore, the court system is timely, meaning justice may come too late. There must be a more secure legislative scheme in place that better safeguards their rights to begin with, so that incarcerated people do not have to rely on the uncertainty of the justice system and its outcomes. The current emergency management legal scheme falls short of ensuring basic human necessities and protections for incarcerated people in the wake of a hurricane, and as of now, there is no comprehensive federal legislation that mandates emergency planning procedures for correctional facilities.⁹⁸ This section will explore existing legislation and will propose the groundwork for its expansion.

*A. The Stafford Act: Comprehensive Emergency Assistance
Legislation that Makes No Mention of Incarcerated
Populations*

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act)⁹⁹ is the federal statute that provides the legal authority for the federal government to aid states during declared emergencies, including natural disasters. The Act identifies various authorities that are designated to carry out certain disaster management activities at all phases of a disaster, from preparedness to recovery, including but not limited to evacuation procedures, housing accommodations, mitigation efforts, coordination of relief organizations, and disaster grant requirements.¹⁰⁰ One section of the Stafford Act is a nondiscrimination mandate for disaster assistance, which provides regulations for “equitable and impartial relief operations”¹⁰¹ of all people, regardless of their race, color, religion, nationality, sex, age, disability, English proficiency, or economic status.¹⁰² Theoretically, this should include

populations. Lastly, Part III.C will explore the Disaster Recovery Reform Act, which makes a small mention, but is not enough to rectify the injustices that incarcerated people face during natural disasters.

⁹⁸ The federal Bureau of Prisons (BOP) has the authority to “designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise.” 18 U.S.C. § 3621(b). This essentially provides the BOP with statutory authority to contract with the private sector. However, neither the statute nor the BOP outline exactly what these minimum standards are.

⁹⁹ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207.

¹⁰⁰ *See id.*

¹⁰¹ *Id.* § 5151.

¹⁰² *Id.*

incarcerated people. However, there is not a single explicit mention of incarcerated people anywhere in the Act.¹⁰³

The Act defines both public and private non-profit facilities that are protected under the Act.¹⁰⁴ Included in these definitions are rehabilitation, medical, emergency, childcare, homeless shelters, senior-citizen shelters, food banks, and “facilities that provide health and safety services of a governmental nature.”¹⁰⁵ Many of these facilities have something in common: The people they are meant to serve are often comprised of vulnerable communities who have disabilities, need medical care, are low-income, and most importantly, whose safety, health, and well-being often is in the hands of the government, especially in an emergency situation.¹⁰⁶ Despite correctional facilities in fact providing health and safety services of a governmental nature, the protection of incarcerated people is not specifically promulgated in this definition.¹⁰⁷ This is an example of the harsh reality that the well-being of incarcerated people as a whole is broadly neglected in emergency management legislation.

Furthermore, the Stafford Act also has an Essential Assistance provision that dictates that federal agencies may “provide assistance essential to meeting immediate threats to life and property resulting from a major disaster. . .”¹⁰⁸ This includes general federal assistance, medicine, food and other consumables, and work and services to save lives and protect property.¹⁰⁹ The section regarding work and services to save lives and protect property specifically includes the “provision of rescue, care, shelter and essential needs” to “(i) individuals with household pets and service animals; and (ii) to such pets and animals.”¹¹⁰ The statute takes the opportunity to prioritize pets, but yet again, there is no mention of incarcerated people in an otherwise ideal place in the Act to include them.¹¹¹ Overall, the lack of a clear allocation of rights to incarcerated

¹⁰³ *Id.* §§ 5151–5207.

¹⁰⁴ 42 U.S.C. § 5122(10)–(11).

¹⁰⁵ *Id.* § 5122(11).

¹⁰⁶ See also Erin J. Greten & Ernest B. Abbott, *Representing States, Tribes, and Local Governments Before, During, and After a Presidentially-Declared Disaster*, 48 URB. LAW. 489, 489 (2016) (“In the aftermath of a disaster, it is critical for local governments to take rapid action to save lives, protect property, and protect the public health and safety. Communities do so through actions such as ordering evacuations, establishing shelters. . . and taking actions necessary to ensure the provision of police, medical, fire, and utility services.”).

¹⁰⁷ See 42 U.S.C. § 5122(11)(B).

¹⁰⁸ *Id.* § 5170b(a).

¹⁰⁹ See *id.* § 5170b(a).

¹¹⁰ *Id.* § 5170b(a)(3)(J)(i)–(ii).

¹¹¹ *Id.*

people under the Stafford Act makes clear why they have “continued to be disregarded in all phases of emergency management at the National level.”¹¹²

*B. The Post-Katrina Emergency Management Reform Act: Still,
No Mention of Incarcerated Populations*

The Post-Katrina Emergency Management Reform Act (PKEMRA)¹¹³ was enacted in 2006 to “address various shortcomings identified in the preparation for and response to Hurricane Katrina.”¹¹⁴ The PKEMRA enacts changes to the Federal Emergency Management Agency’s (FEMA) organizational and management structure, but also includes legislative reforms to inadequate policies made apparent during Katrina.¹¹⁵ The intent behind the PKEMRA was to create a streamlined form of communication between FEMA and the President in order to “bypass bureaucratic obstacles that got in the way during Hurricane Katrina and delayed FEMA’s mission to reduce the loss of life and property during emergency situations.”¹¹⁶ Ultimately, the PKEMRA supports FEMA’s primary mission by instructing the Administrator to “lead the Nation’s efforts to prepare for, protect against, respond to, recover from, and mitigate against the risk of natural disasters, acts of terrorism, and other man-made disasters . . .”¹¹⁷

One area of reform that the PKEMRA heavily focuses on is the specialized needs of individuals with disabilities.¹¹⁸ The PKEMRA “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.”¹¹⁹

According to the Center for American Progress, people with disabilities are excessively overrepresented in American correctional

¹¹² OMOROGIEVA, *supra* note 79, at 55 (quoting Melissa A. Savilonis, Prisons and Disasters (Dec. 2013) (Ph.D. of Law and Policy, Northwestern University) (on file at Northwestern University)).

¹¹³ Post-Katrina Emergency Reform Act of 2006, Pub. L. 109-295, 120 Stat. 1394-1463 (2006).

¹¹⁴ U.S. GOV’T ACCOUNTABILITY OFF., GAO-09-59R, ACTIONS TO IMPLEMENT THE POST-KATRINA ACT 2 (2008).

¹¹⁵ *Id.*

¹¹⁶ OMOROGIEVA, *supra* note 79, at 26–27.

¹¹⁷ Post-Katrina Emergency Reform Act, Pub. L. 109-295, 120 Stat. 1396 (2006).

¹¹⁸ GAO, *supra* note 114, at 2; *see also* Post-Katrina Emergency Reform Act, Pub. L. 109-295, 120 Stat. 1355 (2006).

¹¹⁹ OMOROGIEVA, *supra* note 79, at 26.

facilities.¹²⁰ The Bureau of Justice Statistics reported that incarcerated people in state and federal prisons are three times more likely to have a disability than non-incarcerated people, and that number jumps to four times more likely for jail populations.¹²¹ Additionally, despite the fact that nearly one in twenty-five American adults has a serious mental illness,¹²² about one in five prison inmates has a serious mental illness.¹²³ However, despite the heavy overlap between the disabled community and the incarcerated community, and despite the PKEMRA's heavy focus on ensuring that disabled people are safe and prioritized during a natural disaster, the PKEMRA, like the Stafford Act, makes no specific mention of incarcerated people.¹²⁴

Like the Stafford Act, the PKEMRA can possibly be interpreted to include incarcerated people, despite any specific protections, because the government must be prepared to efficiently coordinate the distribution of resources necessary to save lives and protect property, including adequate food, water, medical care, and shelter.¹²⁵ Those who are incarcerated are still members of the American population, and correctional facilities are nonetheless legally responsible for their welfare. Thus, incarcerated people are entitled to these protections and basic necessities, despite continually not receiving them.

¹²⁰ Rebecca Vallas, *Disabled Behind Bars*, CTR. FOR AM. PROGRESS (July 18, 2016, 12:01 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2016/07/18/141447/disa-bled-behind-bars/>; see also *supra* Part I.C (discussing health disparities in the incarcerated population).

¹²¹ Vallas, *supra* note 120. The most commonly reported disabilities for those in correctional facilities are cognitive, such as Down syndrome, autism, dementia, intellectual disabilities, and learning disorders. Vallas, *supra* note 120.

¹²² *Mental Health Facts in America*, NAMI, <https://www.nami.org/nami/media/nami-media/infographics/generalmhfacts.pdf>.

¹²³ Vallas, *supra* note 120.

¹²⁴ See Post-Katrina Emergency Reform Act, Pub. L. 109-295, 120 Stat. 1355 (2006).

¹²⁵ See Post-Katrina Emergency Reform Act § 503(c)(4)(A)(a)(9)(C) (defining response actions as “conducting emergency operations to save lives and property through positioning emergency equipment, personnel, and supplies, through evacuating potential victims, through providing food, water, shelter, and medical care to those in need, and through restoring critical public services.”). In addition to response acts, such as providing food and other basic necessities, incarcerated people are entitled to acts of mitigation, preparedness, and recovery by the government. See § 503 (c)(4)(A)(a)(9)(A-D). Mitigation acts include “sustained actions to reduce or eliminate long-term risks to people and property from hazards and their effects.” § 503(c)(4)(A)(a)(9)(A). Preparedness includes “planning, training, and building the emergency management profession to prepare effectively for, mitigate against, respond to, and recover from any hazard.” § 503(c)(4)(A)(a)(9)(B). Lastly, recovery includes “rebuilding communities so individuals, businesses, and governments can function on their own, return to normal life, and protect against future hazards.” § 503(c)(4)(A)(a)(9)(D).

C. The Disaster Recovery Reform Act: One Small Step in the Right Direction

The Disaster Recovery Reform Act (DRRA)¹²⁶ was enacted by Congress in 2018, and is the most comprehensive emergency management reform legislation since the Post-Katrina Emergency Management Reform Act.¹²⁷ The DRRA itself was created as an amendment to the Stafford Act.¹²⁸ Some of the reforms that the DRRA seeks to address are: “a larger and more reliable funding stream for pre-disaster mitigation, expanded assistance for individuals and households, and support for states, localities, tribes, and territories (SLTTs) to develop their own emergency management capabilities.”¹²⁹

Out of the Stafford Act, the PKEMRA, and the DRRA, the DRRA is the first piece of legislation to explicitly make mention of incarcerated people. The DRRA mandates that the respective FEMA Administrator must identify evacuation routes during natural disasters, with special consideration of certain populations, including prisoners.¹³⁰ Other populations grouped into this category included people in schools, daycare centers, mobile home parks, nursing homes, and “other long-term care facilities, and detention centers.”¹³¹ Something that members of these groups have in common with incarcerated people is that they are populations that often cannot take care of themselves on their own accord.¹³² The inclusion of prisoners as a population worthy of special consideration when developing evacuation plans is an indication that at least some members of Congress may have begun to recognize this gap in legislation of the protection of incarcerated people.

However, any special considerations of incarcerated people in the DRRA are limited to that one mention, and it is not enough. A notable missed opportunity to include these considerations is in the definition of private non-profits that federal assistance reaches to. The DRRA reads that the Stafford Act is amended by inserting “food banks” into the definition of private non-profits.¹³³ As previously mentioned, correctional facilities are not included in this definition, despite being

¹²⁶ Disaster Recovery Reform Act of 2018, Pub. L. 115-254, § 1201-1246, 132 Stat. 3186, 3438-3469 (2018).

¹²⁷ FEMA, DISASTER RECOVERY REFORM ACT (DRRA) ANNUAL REPORT iv (2019).

¹²⁸ Disaster Recovery Reform Act § 1215.

¹²⁹ FEMA, *supra* note 127, at iv.

¹³⁰ Disaster Recovery Reform Act § 1209(b)(1)(B)(ii).

¹³¹ *Id.*

¹³² *See supra* Part I.C (discussing how and why the incarcerated population is a vulnerable community).

¹³³ Disaster Recovery Reform Act § 1214.

“facilities that provide health and safety services of a governmental nature.”¹³⁴ This amendment highlights that despite Congress having the clear ability to add facilities to this definition, solidifying their protection under the Stafford Act, they have neglected to apply this effort toward incarcerated people.¹³⁵

IV. THE PATH FORWARD: COMPREHENSIVE FEDERAL LEGISLATION¹³⁶

While the DRRRA takes a step forward in recognizing incarcerated people as a vulnerable community that needs protection during a natural disaster, it does not go far enough. Additionally, the DRRRA was created as an amendment to the Stafford Act.¹³⁷ With hurricanes continuing to occur with increased likelihood and severity,¹³⁸ it is both

¹³⁴ See *supra* Part III.A (discussing the Stafford Act).

¹³⁵ While Congress did not include thorough, meaningful protections for incarcerated people when forming the PKEMRA and the DRRRA, congressional reviews shed light on whether Congress has considered incarcerated people in the post-implementation effectiveness of these acts. Unfortunately, congressional reviews of both the PKEMRA and the DRRRA still make no mention of the health and safety of incarcerated people during natural disasters. See *PKEMRA Implementation: An Examination of FEMA's Preparedness and Response Mission: Hearing Before the Subcomm. on Emergency Comm'n., Preparedness, and Response of the H. Comm. on Homeland Sec.*, 111th Cong. (2009); see also, *Disaster Preparedness: DRRRA Implementation and FEMA Readiness: Hearing Before the Subcomm. on Econ. Dev. Pub. Bldgs. and Emergency Mgmt. of the H. Comm. on Transp. and Infrastructure*, 116th Cong. (2019). Correctional facilities in general are not mentioned at all except for two inconsequential comments. The first is that the PKEMRA review says that in order to prevent fraud in the distribution of disaster aid, “FEMA implemented checks in the National Emergency Management Information System (NEMIS) that flag ‘high risk’ addresses such as check cashing stores, mail drops, cemeteries, and jails.” *PKEMRA Implementation: An Examination of FEMA's Preparedness and Response Mission: Hearing Before the Subcomm. on Emergency Comm'n., Preparedness, and Response of the H. Comm. on Homeland Sec.*, 111th Cong. 36 (2009). The second mention of correctional facilities in these reviews is in the congressional review of the DRRRA, in which the spokesperson for the National Association of Counties says that counties are “uniquely positioned to mitigate the impacts of disasters before they occur,” because they are major owners of public infrastructure, including 2,500 jails. *Disaster Preparedness: DRRRA Implementation and FEMA Readiness: Hearing Before the Subcomm. on Econ. Dev. Pub. Bldgs. and Emergency Mgmt. of the H. Comm. on Transp. and Infrastructure*, 116th Cong. 50 (2019). (statement of Hon. James Gore, Supervisor, Sonoma County, California, on behalf of the National Association of Counties). Clearly, neither of these mentions have to do with how successful these acts have been at safeguarding the well-being of incarcerated people during natural disasters.

¹³⁶ This section will discuss the need for comprehensive federal legislation on this issue, and what should be included in it.

¹³⁷ FEMA, *supra* note 127, at 1.

¹³⁸ See *supra* Part I.A (discussing the fact that hurricanes are going to continue occurring with increased intensity and frequency).

impractical and ineffective to continue creating legislation that tacks on protections for incarcerated people bit by bit after every major hurricane.

It is true that individual correctional facilities have made some progress, as evidenced by the increase in emergency plans across the majority of the correctional sector nationwide.¹³⁹ For example, the ACLU holds the Nebraska Emergency plan as a “comprehensive set of policies that provide for a coordinated emergency response in the event of a natural disaster.”¹⁴⁰ The plan is under the Nebraska Department of Correctional Services, and along with including a series of checklists for pre, during, and post hurricane procedures, it entails policies that detail the following: delegation of responsibilities during an emergency, criteria to decide whether to evacuate, sending and receiving institutions in the event of an evacuation, inclusion of which facilities can hold special needs prisoners if evacuated, and what to do in the event that facilities do not evacuate but rather choose to “defend in place.”¹⁴¹

However, despite any individual state or local plans such as that of Nebraska’s, as shown by the experience of incarcerated people during twenty-first century hurricanes,¹⁴² some major improvements still ought to be made across the board in training, procedures, evacuation considerations, and access to resources. Federal and state governments ought to be held more accountable from the beginning, rather than having incarcerated people go through the court system to fight for their rights under the Eighth Amendment. Judicial actions might be necessary in the meantime, and amending the Stafford Act, the PKEMRA, and the DRRRA to include more in-depth protections would be helpful as well. Furthermore, the emergency plans that already exist at individual facilities should certainly continue, as they are tailored to the specific needs of that facility in terms of size, personnel, level of security needed, etc. However, the long-term solution must be rooted in comprehensive federal legislation that outlines the policies and procedures that correctional facilities’ officials are required to undergo to keep incarcerated people safe in the event of a natural disaster. Pursuant to the Spending Clause, despite the proposed legislation being at the federal level, state facilities can still be enticed to abide if the US government conditions federal

¹³⁹ OMOROGIEVA, *supra* note 79, at 35 (citing Ira P. Robbins, *Lessons from Hurricane Katrina: Prison Emergency Preparedness as a Constitutional Imperative*, 42 U. MICH. J.L. REFORM 1, 13 (2008)).

¹⁴⁰ ACLU, *supra* note 32, at 27.

¹⁴¹ ACLU, *supra* note 32, at 27.

¹⁴² See *supra* Part I.B (discussing the experiences of incarcerated people during Katrina); see also generally, Clarke, *supra* note 4.

grant funds to state governments "on recipients taking or refraining from certain actions."¹⁴³ In this case, such action would be implementing the proposed reforms.¹⁴⁴ The benefits of having such a plan would be the standardization of emergency drill training and expectations during a natural disaster, with individual correctional facility plans providing additional, rather than the sole or the replacement, tailored guidelines as needed.

The making of a quality emergency operations plan must include considerations of all types. In 2005, the National Institute of Corrections (NIC), as part of the U.S. Department of Justice, published a guide entitled "A Guide to Preparing for and Responding to Prison Emergencies."¹⁴⁵ Amongst several things, this guide contains a self-audit checklist of questions that a correctional facility should review in the event of an emergency, and then more specifically, in the event of a natural disaster.¹⁴⁶ These self-audit guidelines are just that—they are merely guidelines and are unenforceable. So, a facility operations director may very well choose not to consider them, which is why it is important to make them required under this proposed statutory law, rather than just suggested considerations under an optional NIC guideline.

With guidance from the self-audit questions in the NIC Guide, the proposed comprehensive legislation ought to include standards for the following required areas for consideration that help to facilitate readiness:¹⁴⁷ (1) emergency generators (access and adequacy, sufficient fuel, capacity to run critical equipment safely for extended periods of time, training of staff to operate them manually if necessary, etc.); (2) offsite

¹⁴³ CONG. RESEARCH SERV., R44797, THE FEDERAL GOVERNMENT'S AUTHORITY TO IMPOSE CONDITIONS ON GRANT FUNDS I (2017).

¹⁴⁴ There are limitations on the exercise of the Spending Clause power, as evidenced by *South Dakota v. Dole* before the Supreme Court. 483 U.S. 203. In addition to holding that the legislation in question must be in pursuit of the "general welfare," the Court established four requirements that any conditions attached to the receipt of federal fund grants must meet. CONG. RESEARCH SERV., *supra* note 143. The conditions must: "(1) be unambiguously established so that recipients can knowingly accept or reject them; (2) be germane to the federal interest in the particular national projects or programs to which the money is directed; (3) not violate other provisions of the Constitution, such as the First Amendment or the Due Process or Takings Clauses of the Fifth Amendment; and (4) not cross the line from enticement to impermissible coercion, such that states have no real choice but to accept the funding and enact or administer a federal regulatory program." *Id.*

¹⁴⁵ See Jeffrey A. Schwartz & Cynthia Barry, *A Guide to Preparing for and Responding to Prison Emergencies*, NAT'L. INST. CORRECTIONS (2005), <https://s3.amazonaws.com/static.nicic.gov/Library/020293.pdf>.

¹⁴⁶ *Id.* at 1–28 (providing the Natural Disaster/HAZMAT/Fire Self-Audit Checklist).

¹⁴⁷ See generally *id.*; see also ACLU, *supra* note 32, at 20–21 (outlining important considerations for what makes a good emergency plan).

evacuations (having a plan, criteria to determine whether evacuation is needed, potential destinations and evacuation routes, specific transportation alternatives, security procedures during evacuation, securing inmate records if necessary both inside and outside the facility, providing medical services during and after evacuation, meal services, considerations of disabled inmates, bedding arrangements, security arrangements, etc.); (3) medical services (ensuring staff are trained to provide emergency care if needed, adequate number of medical resources, medicine for those who need it, etc.); (4) flood and hurricane disasters (designation of vulnerable areas and equipment in the event of rising water, plan to move necessary equipment to safety, alternate housing for inmates in flood-likely zones, access to portable water pumps, prepared supply of food, water, portable toilets, portable lighting, and blankets, access to medicine, drills and other necessary training for staff, etc.). Other general considerations include routine disaster response training and drills for staff, mutual aid agreements with outside agencies to coordinate response efforts, a plan to operate under reduced staffing, desert island operations planning, and the long-term supply of security and survival necessities.¹⁴⁸

Overall, an enactment of comprehensive policies and procedures of this sort would allow state and federal correctional facilities to take a unified approach to natural disaster management, and thus, to the protection of the health and safety of incarcerated people, effectively upholding their constitutional rights—a governmental duty regardless.

V. CONCLUSION

Incarcerated people have a legal right under the Constitution to be kept in safe and healthy conditions of confinement that do not threaten their overall well-being.¹⁴⁹ The incarcerated community is not at liberty to make the independent decisions necessary to protect themselves during natural disasters or otherwise—their lives are entirely at the mercy of the government.¹⁵⁰ As it stands now, inmates' rights are not being upheld with the aggressive will that the law demands, leaving a vulnerable subset of our population—who are often already members

¹⁴⁸ See generally Schwartz & Barry, *supra* note 145 (providing Emergency Preparedness and Natural Disaster/HAZMAT/Fire self-audit checklists); see also ACLU, *supra* note 32, at 20–21 (outlining important considerations for what makes a good emergency plan).

¹⁴⁹ See *supra* Part II.B (discussing Eighth Amendment protections against cruel and unusual punishment).

¹⁵⁰ See *supra* Part I.C (discussing how and why the incarcerated population is a vulnerable community).

of one or more marginalized communities¹⁵¹—to suffer serious and unconstitutional threats to their health and safety in the face of a hurricane.¹⁵² Our current statutory regime does not do enough to protect inmates' constitutional rights,¹⁵³ and as climate change continues to become more vigorous, hurricanes are not going anywhere.¹⁵⁴ Prisons and jails across the nation have proven themselves inept to respond to and recover from natural disasters, failing in their core duties.¹⁵⁵ Without swift federal oversight, this dangerous trend will only continue. The only sustainable solution to ensure protections for incarcerated people across the nation is the implementation of comprehensive legislation that standardizes encompassing policies and procedures for the protection of the incarcerated at all stages of any natural disaster, including and notably, hurricanes.¹⁵⁶

¹⁵¹ See *supra* Part I.C (discussing how and why the incarcerated population is a vulnerable community).

¹⁵² See *supra* Part I.B (discussing the experiences of incarcerated people during Katrina); see also *supra* Part II.B (discussing why their experiences constitute Eighth Amendment violations).

¹⁵³ See *supra* Part III (discussing the Stafford Act, Post-Katrina Emergency Management Reform Act, and Disaster Recovery Reform Act, and how they fall short of providing protections for incarcerated people during a natural disaster).

¹⁵⁴ See *supra* Part I.A (discussing the fact that hurricanes are going to continue occurring with increased intensity and frequency).

¹⁵⁵ See *supra* Part I.B (discussing the experiences of incarcerated people during past hurricanes).

¹⁵⁶ See *supra* Part IV (proposing comprehensive federal legislation to ensure that the constitutional rights of incarcerated people are safeguarded during a hurricane).