

NOTHING BUT A FIRE DRILL: CARCERAL EVACUATION PROCEDURES AND U.S. PRIVATE PRISONS IN THE ERA OF CLIMATE CHANGE

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ABSTRACT

In the era of climate change, those incarcerated in U.S. prisons are becoming increasingly vulnerable to the ever-growing risks posed by climate disasters. Private prisons—once envisioned as a solution to the crisis of mass incarceration—exacerbate these existing vulnerabilities, complicating the carceral landscape and enhancing the threat that those incarcerated face as a result. While existing literature advocates for the development of emergency preparedness in prisons in general, there remains a need for clearly outlined standards for carceral evacuation plans, especially alongside consideration of the unique challenges posed by privately-run facilities. This Note outlines the necessary elements for such prison evacuation plans, proposing a standard that would make carceral evacuations both constitutionally sufficient and safer for those incarcerated.

* J.D., Columbia Law School. The author thanks her Note advisors, Professor Michael Gerrard and Professor Brett Dignam, her Note editor Devyn Helsing, and the editorial staff of the *Columbia Human Rights Law Review* for their support and invaluable feedback.

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INTRODUCTION

In August 2017, as Hurricane Harvey made landfall in the United States, multiple Texas prisons flooded.¹ While several facilities in the Houston area evacuated, moving thousands of incarcerated individuals to different facilities across the region, the men at the Southeast Texas Transitional Center (STTC) had no choice but to remain behind.² A gated parole facility run by the private prison corporation GEO Group, the STTC grants the individuals housed there some freedoms relative to those in prison, but leaving during the hurricane was not one.³ Thus, as the floodwaters rose, the men at the STTC moved their belongings to higher floors and aided those among them with medical conditions, waiting for four days before being evacuated.⁴ GEO Group representatives claim that facility staff were fully present and on-site, but those incarcerated at the facility maintain that the facility abandoned them.⁵ One man recounted the inhumane conditions he and fellow incarcerated individuals experienced: “It was a total disaster . . . they left us there to fend for ourselves.”⁶

Whether experiencing extreme heat, wildfire smoke, or the hurricane-induced flooding described above, those incarcerated are no stranger to the threat of climate disasters. They differ from the rest of the population, however, in their ability to prepare for such events.

1. See John Washington, *After Harvey, Texas Inmates Were Left in Flooded Prisons Without Adequate Water or Food*, NATION (Oct. 13, 2017), www.thenation.com/article/archive/after-harvey-texas-inmates-were-left-in-flooded-prisons-without-adequate-water-or-food [https://perma.cc/PRY8-64X4] (detailing Texas inmates’ experience during and after Hurricane Harvey and an alleged pattern of neglect); see also Hanna Kozłowska, *What Happens to Prison Inmates When Natural Disaster Strikes?*, QUARTZ (Aug. 30, 2017), qz.com/1066036/hurricane-harvey-in-texas-what-happens-to-prison-inmates-when-natural-disaster-strikes [https://perma.cc/WJK7-S7X7] (detailing how certain prisons did and did not evacuate during Hurricane Harvey and the resulting flooding).

2. Katie Rose Quandt, *Out of Prison, Into Alt-Prison*, IN THESE TIMES (Apr. 15, 2020), <https://inthesetimes.com/article/prison-reentry-halfwayhouse-incarceration-parole-geo-corecivic> [https://perma.cc/534Z-BKYM].

3. *Id.*

4. *Id.*

5. Keri Blakinger, *Lawsuit: Private Prison Contractor Abandoned Parolees at Flooded Halfway House During Harvey*, HOUSTON CHRON. (Aug. 22, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Lawsuit-Private-prison-contractor-abandoned-14365055.php> [https://perma.cc/3C2U-8KSQ].

6. *Id.*

As federal agencies and state governments slowly adapt to the realities of climate change by publishing emergency planning guides or enacting related legislation, those behind bars are left subject to the whim of the public or private correctional system where they find themselves incarcerated. Over the past several years, legislators have attempted to address the issue of emergency preparedness and evacuation planning in federal prisons.⁷ A standalone bill on the issue has been introduced in Congress numerous times, but has failed to become law.⁸ Without a coordinated emergency preparedness scheme across U.S. correctional facilities, incarcerated individuals continue to face serious risks as a result of climate disasters, especially those held within private facilities such as the STTC.

This Note attempts to address this neglect and explores the specific risks faced by those incarcerated in private facilities, providing the tools necessary for carceral institutions to effectively prepare for climate disasters and any corresponding evacuations. Part I of this Note explores the history and background of private prisons within the greater context of incarceration in the United States and provides an overview of the dangers that climate change presents to the incarcerated population, with examples from recent history. Part II evaluates the lack of standardized evacuation planning across carceral systems, reviewing the applicability of legislation in a set of states where private prison use is relatively high. This Part also analyzes the risks unique to private prisons, discussing the various systems of monitoring and oversight and

7. Correctional Facility Disaster Preparedness Act of 2020, S. 4748, 116th Cong. (2020); Correctional Facility Disaster Preparedness Act of 2021, S.2592, 117th Cong. (2021); *see also* Press Release, Rep. Ted W. Lieu, Rep Lieu Introduces Bill to Improve Disaster Preparedness in Federal Prisons (Jun. 7, 2022), lieu.house.gov/media-center/press-releases/rep-lieu-introduces-bill-improve-disaster-preparedness-federal-prisons [<https://perma.cc/L95J-5HPL>] (announcing Congressman Lieu's introduction of the Correctional Facility Disaster Preparedness Act to better prepare federal prisons for natural disasters and public health emergencies).

8. These measures were later added as an amendment to the National Defense Authorization Act of 2023. *See* Press Release, JustLeadershipUSA, Correctional Facility Disaster Preparedness Act Passes in the House of Representatives (July 15, 2022), jlsa.org/media-release/correctional-facility-disaster-preparedness-act-passes-in-the-house-of-representatives [<https://perma.cc/74RG-RKNW>] (announcing the passage of the Correctional Facility Disaster Preparedness Act). But they were ultimately dropped from the bill. *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395 (2022) (detailing the final defense authorization bill excluding measures relating to carceral procedures).

providing a snapshot of what private facility contracts look like in relation to emergency planning. Finally, Part II explores the applicability of Eighth Amendment jurisprudence to evacuation planning. Part III then expands on this analysis to suggest legally necessary elements for carceral evacuations, drawing on industry standards and empirical data. It also briefly explores the benefits of decarceration within the emergency planning context.⁹

I. BACKGROUND

Private prisons emerged in their modern form against the backdrop of mass incarceration in the United States, presented as a solution to overcrowding even as they have complicated the carceral landscape. The issue of climate change further complicates this landscape, with repeated instances of municipalities and carceral staff abandoning those incarcerated during climate disasters. This Part explores the relationship between U.S. private prisons and the greater carceral industry, including the concerns specific to these facilities. Taking these concerns into account, this Part then outlines the distinct threat posed by climate change to those who are incarcerated. Such background is necessary for understanding both the significance of and the potential behind improved carceral evacuation planning in the era of climate change.

A. Private Prisons

In 2022, the U.S. incarcerated population grew from the year before for the first time in a decade.¹⁰ By the end of that year, U.S. federal, state, and private prisons held around 1.2 million people.¹¹ While the rate of incarceration has decreased somewhat in past years, today's number of incarcerated persons can be traced to the

9. This Note uses humanizing language such as “incarcerated person” when referring to those who are incarcerated, rather than “inmate” or “prisoner.” It is important to note that many of the sources cited or directly quoted use the latter language, however, and such quoted material will reflect this difference.

10. E. ANN CARSON & RICH KLICKOW, BUREAU OF JUST. STAT., U.S. DEPT OF JUST., PRISONERS IN 2022 – STATISTICAL TABLES 1 (2023) [hereinafter CARSON & KLICKOW, PRISONERS IN 2022], <https://bjs.ojp.gov/library/publications/prisoners-2022-statistical-tables> [https://perma.cc/8L93-5J6C].

11. *Id.* The number of jurisdictions with incarcerated population counts exceeding capacity measures also increased in 2022. *Id.* at 35–36.

incarceration boom that occurred during the late twentieth century.¹² Due to a variety of policy changes, sentencing practices, and prosecutorial trends, the number of people incarcerated in the United States increased rapidly in the 1980s, leaving the carceral system scrambling to find enough facilities to meet the growing demand.¹³ The human cost of this expansion is alarming; while the state prison population rose only 1% from 2001 to 2018, the number of state prison deaths increased 44% within the same time period, with an increasing proportion of those deaths attributed to unnatural causes such as suicide, homicide, and accidents.¹⁴ The costs associated with incarcerating this many people similarly rose, with “[c]orrection expenditures increas[ing] 423%, from \$40 to \$209 per U.S. resident,” between the years of 1982 and 2003.¹⁵

Unsurprisingly, this rapid increase in the number of those incarcerated resulted in a proliferation of overcrowding complaints, with numerous incarcerated individuals bringing lawsuits against the facilities that held them.¹⁶ By 1985, courts had ordered prisons in

12. Pew Charitable Trs., *Public Safety, Public Spending: Forecasting America’s Prison Population 2007–2011*, 19 FED. SENT’G REP. 234, 234 (2007).

13. See STEPHANIE MINOR-HARPER, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., STATE AND FEDERAL PRISONERS, 1925–85, at 2 (1986), [bjs.ojp.gov/library/publications/state-and-federal-prisoners-1925-85](https://perma.cc/8W5L-VCNC) [<https://perma.cc/8W5L-VCNC>] (comparing the statistical increases in the incarceration rate over several decades); see also John Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth Is Wrong, and Where We Can Go from Here*, 26 FED. SENT’G REP. 265, 265 (2014) (challenging the conventional narratives attributing prison growth to the War on Drugs and other systemic factors).

14. E. ANN CARSON, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., MORTALITY IN STATE AND FEDERAL PRISONS, 2001–2018 – STATISTICAL TABLES 1 (2021), <https://bjs.ojp.gov/library/publications/mortality-state-and-federal-prisons-2001-2018-statistical-tables> [<https://perma.cc/ET52-VQNY>]. Deaths due to drug intoxication have risen 611%, while deaths as a result of homicide or suicide have risen 208% and 85%, respectively. Leah Wang & Wendy Sawyer, *New Data: State Prisons Are Increasingly Deadly Places*, PRISON POL’Y INITIATIVE (2021), https://www.prisonpolicy.org/blog/2021/06/08/prison_mortality [<https://perma.cc/7CJ5-W98C>].

15. KRISTEN A. HUGHES, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003, at 2 (2006), <https://bjs.ojp.gov/content/pub/pdf/jeeus03.pdf> [<https://perma.cc/5JWV-LWNJ>].

16. See generally, e.g., *Costello v. Wainwright*, 397 F. Supp. 20 (M.D. Fla. 1975) (subsequent history omitted) (concerning a suit in which plaintiffs sought closure of facility to additional entrants as well as reduction in prison population to acceptable levels); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976) (subsequent history omitted) (concerning a suit in which plaintiffs sought relief

two-thirds of states to correct conditions that were in violation of the Eighth Amendment.¹⁷ By the early 1990s, forty states were under court orders to correct unconstitutional prison conditions and reduce overcrowding.¹⁸

Private prisons originally emerged as one solution to the growing burden of housing incarcerated individuals in the United States, which currently has the largest private prison population in the world.¹⁹ After a 1982 case finding unconstitutional conditions of overcrowding in Tennessee prisons,²⁰ and a subsequent federal order to limit the state's prison population,²¹ the Corrections Corporation of America (hereinafter "CCA," or "CoreCivic" as they are branded nowadays) offered to assume control of the state's prison system in return for the state's annual operation cost.²² Though this particular bid proved unsuccessful, Tennessee's governor supported it, helping to popularize the idea of private prisons as a solution to overcrowding.²³ This marked the inception of the U.S. private prison

under 42 U.S.C. §1983 for prisons' failure to protect them from violence resulting from serious overcrowding); Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980) (subsequent history omitted) (concerning a suit in which plaintiffs brought constitutional claim due to overcrowded and unsanitary conditions in Texas prisons).

17. DONNA SELMAN & PAUL LEIGHTON, PUNISHMENT FOR SALE: PRIVATE PRISONS, BIG BUSINESS, AND THE INCARCERATION BINGE 40, 42 (2010).

18. Off. of Just. Programs, *Forty States Currently Under Court Orders to Improve Prison Conditions, Alleviate Crowding, ACLU Reports*, U.S. DEPT OF JUST., <https://www.ojp.gov/ncjrs/virtual-library/abstracts/forty-states-currently-under-court-orders-improve-prison-conditions> [https://perma.cc/64PY-Q3H2]; see generally MARC MAUER, SENT'G PROJECT, AMERICANS BEHIND BARS: THE INTERNATIONAL USE OF INCARCERATION, 1992-93 (1994), <https://www.prisonpolicy.org/scans/sp/abb.pdf> [https://perma.cc/2NV6-KZVL] (placing the U.S. prison population in the context of international trends in incarceration).

19. KARA GOTSCH & VINAY BASTI, SENT'G PROJECT, CAPITALIZING ON MASS INCARCERATION: U.S. GROWTH IN PRIVATE PRISONS 1, 5 (2018), <https://www.sentencingproject.org/reports/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons> [https://perma.cc/E3KF-SZ3N].

20. Grubbs v. Bradley, 552 F. Supp. 1052, 1131 (M.D. Tenn. 1982).

21. SELMAN & LEIGHTON, *supra* note 17, at 61-62.

22. SHANE BAUER, AMERICAN PRISON: A REPORTER'S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT 49 (2018). Corrections Corporation of America rebranded to "CoreCivic" in 2016.

23. *Id.*; see also Dudley Clendinen, *Tennessee and U.S. Courts in a Dispute over Crowded Prisons*, N.Y. TIMES (Nov. 15, 1985), <https://www.nytimes.com/1985/11/15/us/tennessee-and-us-court-in-a-dispute-over-crowded-prisons.html> (on file with the *Columbia Human Rights Law Review*)

in its modern form.²⁴ However, issues emerged from the start. Following the opening of the first private prison in 1984,²⁵ many early private prison contracts were vague, with restrictions and requirements implemented only as problems arose.²⁶ Though private prisons were envisioned as a remedy for overcrowded facilities, there were immediate concerns over the abdication of governmental responsibility and the potential constitutional violations that might result.²⁷

Private prisons vary in type, ranging from a state hiring a private company to operate a pre-existing facility to a private company constructing an entirely new facility and then contracting with the state to house incarcerated individuals.²⁸ Regardless of form, they are incredibly contentious for a variety of reasons, including issues of safety. A 2016 Department of Justice (DOJ) Inspector General review of privately-operated facilities (or “contract prisons,” as they are referred to in the report) revealed that, per capita, contract prisons had more safety and security incidents in most key areas as compared to Federal Bureau of Prisons (BOP) facilities.²⁹ The report concluded that “the BOP needs to improve how it monitors

(discussing the then-governor’s proposal to lease the state’s prison system to CCA in response to the capacity issues).

24. See Sydney Young, *Capital and the Carceral State: Prison Privatization in the United States and United Kingdom*, HARV. INT’L REV. (Sept. 23, 2020), <https://hir.harvard.edu/us-uk-prison-privatization> [https://perma.cc/4N48-8EPF] (noting that sixty-six private prisons opened in the six years following the opening of Tennessee’s first private prison in 1984).

25. *Id.*

26. SELMAN & LEIGHTON, *supra* note 17, at 101.

27. See, e.g., David Vise, *Private Company Asks for Control of Tenn. Prisons*, WASH. POST (Sept. 22, 1985), <https://www.washingtonpost.com/archive/business/1985/09/22/private-company-asks-for-control-of-tenn-prisons/16ad4122-915a-4acc-bb21-c74c0c4b270d> (on file with the *Columbia Human Rights Law Review*) (considering the concerns that would come with privatization such as granting quasi-judicial powers to private actors).

28. JAMES AUSTIN & GARRY COVENTRY, DEP’T OF JUST., EMERGING ISSUES ON PRIVATIZED PRISONS 69 (2001), <https://www.ojp.gov/pdffiles1/bja/181249.pdf> [https://perma.cc/JR7J-JR92].

29 OFF. OF THE INSPECTOR GEN., DEP’T OF JUST., REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS 14 (2016) [hereinafter OIG, REVIEW OF BOP MONITORING], <https://pausebuttonforddsfiveyearplan.org/docs/2-Bibliography/2016,%208-1-DoJ%20Report%20on%20Privatization%20of%20Prisons.pdf> [https://perma.cc/C2KA-95RC].

contract prisons in several areas.”³⁰ This aligns with the perception of those who are incarcerated; a 2023 study of perceived quality of public versus private prisons found that incarcerated men in private facilities “reported lower staffing levels,” which could contribute to “a reliance on extreme tactics for maintaining order, such as solitary confinement” and fuel the proliferation of “unsafe prison environments.”³¹ CoreCivic, the corporation with the most carceral facilities, is no stranger to safety concerns.³² The same report found that, of the major private prison corporations, CoreCivic had the highest rates of fights and assaults among incarcerated individuals between the years 2011 and 2014.³³

The concerns surrounding private prisons are manifold. Men held in private prisons are more likely to be isolated from family and friends on the outside.³⁴ A 2021 study of Mississippi private prisons showed that individuals incarcerated in private prisons “serve about 4 to 7 percent larger fractions of their sentences, or 85 to 90 extra days for the average prisoner,” potentially due to heightened use of infractions as a disciplinary measure.³⁵ Some states have discontinued their reliance on private prison systems, but still many others maintain their contracts, incarcerating thousands of people in private prisons.³⁶ Additionally, scholars have questioned for some time the contention that private prisons have lower costs than public

30. *Id.*

31. Andrea Montes et al., *Private Versus Public Incarceration: Incarcerated Individuals’ Experiences and Perceptions of Environmental Quality*, 69 CRIME & DELINQ. 2765, 2784 (2023) [hereinafter Montes et al., *Private Versus Public Incarceration*]; see also Curtis R. Blakely & Vic W. Bumphus, *Private and Public Sector Prisons—A Comparison of Select Characteristics*, 68 FED. PROB. J. 27, 29 (2004) (reporting lower salary levels, lower training requirements, and higher turnover rates of staff in private prisons as compared to public institutions).

32. *About Us*, CORECIVIC, [www.corecivic.com/about](https://perma.cc/2HLG-DQKJ) [https://perma.cc/2HLG-DQKJ]. According to CoreCivic’s website, it also believes itself to be “the largest private owner of real estate used by U.S. government agencies.” *Id.*

33. OIG, REVIEW OF BOP MONITORING, *supra* note 29, at 15. The 2016 DOJ report was released just prior to when Corrections Corporation of America rebranded to “CoreCivic,” so the acronym “CCA” is used throughout.

34. Montes et al., *Private Versus Public Incarceration*, *supra* note 31, at 2784.

35. Anita Mukherjee, *Impacts of Private Prison Contracting on Inmate Time Served and Recidivism*, 13 AM. ECON. J. 408, 411, 434 (2021).

36. KIRSTEN M. BUDD, SENT’G PROJECT, PRIVATE PRISONS IN THE UNITED STATES 1–2 (2023), <https://www.sentencingproject.org/app/uploads/2024/02/Private-Prisons-in-the-United-States.pdf> [https://perma.cc/2BEM-BQKK].

prisons—a common justification for their usage.³⁷ A 2001 review of comparative studies between private and public prisons found that savings on cost had “not materialized to the extent promised by the private sector.”³⁸ More recent reviews support this assertion as well.³⁹

Perhaps relatedly, there has been a significant decrease in the number of people imprisoned in private facilities in the last ten years.⁴⁰ The federal government has, at times, phased out the use of private prisons for offices that fall under the umbrella of the DOJ, evidenced by the termination of all BOP private prison contracts in 2022.⁴¹ Nonetheless, private prisons remain a prosperous industry in the United States.⁴² In 2022, 7.4% of the state and federal incarcerated populations, or just over ninety thousand people, were

37. See, e.g., Travis C. Pratt & Jeff Maahs, *Are Private Prisons More Cost-Effective than Public Prisons? A Meta-Analysis of Evaluation Research Studies*, 45 CRIME & DELINQ. 358, 364–67 (1999) (reporting the findings of a meta-analysis that private prisons are not more cost-effective than public ones); Dina Perrone & Travis C. Pratt, *Comparing the Quality of Confinement and Cost-Effectiveness of Public Versus Private Prisons: What We Know, Why We Do Not Know More, and Where to Go from Here*, 83 PRISON J. 301, 315 (2003) (“[T]he existing cost comparisons offer little in the way of firm conclusions about whether turning over the responsibility of managing prisons to the private sphere will result in any substantial and/or consistent cost savings.”).

38. AUSTIN & COVENTRY, *supra* note 28, at 29.

39. See, e.g., LAUREN-BROOKE EISEN, *INSIDE PRIVATE PRISONS: AN AMERICAN DILEMMA IN THE AGE OF MASS INCARCERATION* 176 (2017) (“The results are inconclusive. At best, private and public prisons perform roughly the same.”).

40. BUDD, *supra* note 36, at 2.

41. Press Release, Fed. Bureau of Prisons, *BOP Ends Use of Privately Owned Prisons* (Dec. 1, 2022), https://www.bop.gov/resources/news/20221201_ends_use_of_privately_owned_prisons.jsp [<https://perma.cc/5LG7-VMMH>]. The termination of these contracts came in response to an Executive Order from the Biden administration, citing private facilities’ substandard “levels of safety and security” for both those incarcerated as well as facility staff. Exec. Order No. 14006, 86 Fed. Reg. 7483, 7483 (Jan. 29, 2021). The use of private prisons by the BOP has proven politically temperamental, as a previous move to eliminate such contracts by the Obama administration was reversed during Trump’s first presidency. See Eric Lichtblau, *Justice Department Keeps For-Profit Prisons, Scrapping an Obama Plan*, N.Y. TIMES (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/us/politics/justice-department-private-prisons.html> (on file with the *Columbia Human Rights Law Review*).

42. As one example, GEO Group reported an annual revenue of approximately \$1.54 billion from state and federal carceral facility contracts in 2023, which made up 64% of its overall revenue of \$2.41 billion. GEO GRP., 2023 GEO ANNUAL REPORT 1 (2023), <https://investors.geogroup.com/static-files/501de409-907a-493d-90c5-041c341b8b52> [<https://perma.cc/3CNT-XA8Z>].

kept in private prison facilities.⁴³ The large majority of individuals detained by Immigration and Customs Enforcement (ICE) remain housed in private facilities,⁴⁴ continuing a trend from the past twenty years of the federal government incarcerating those detained by (what is now) ICE in private prisons.⁴⁵ The use of private prisons by the BOP has also proven politically fickle, suggesting their potential reemergence during future administrations.⁴⁶

B. The Risks Posed by Climate Change to Those Incarcerated

Climate change has increased the frequency, duration, and severity of hazardous weather events.⁴⁷ The risk to human life depends on the vulnerability and adaptability of affected populations.⁴⁸ Those with a reduced “[adaptive] capacity” and lower

43. CARSON & KLUCKOW, PRISONERS IN 2022, *supra* note 10, at 26 tbl.14.

44. Eunice Cho, *More of the Same: Private Prison Corporations and Immigration Detention Under the Biden Administration*, AM. C.L. UNION (Oct. 5, 2021), <https://www.aclu.org/news/immigrants-rights/more-of-the-same-private-prison-corporations-and-immigration-detention-under-the-biden-administration> [https://perma.cc/8B94-PJR2].

45. SELMAN & LEIGHTON, *supra* note 17, at 112; *see also* Clyde Haberman, *For Private Prisons, Detaining Immigrants is Big Business*, N.Y. TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/us/prisons-immigration-detention.html> (on file with the *Columbia Human Rights Law Review*) (noting that a “key function” of for-profit prisons is housing those in immigration detention contexts); GOTSCH & BASTI, *supra* note 19, at 5 (reporting that 73% of all people in immigration detention in the fiscal year of 2017 were confined in private facilities).

46. A previous move to eliminate BOP private prison contracts during the Obama administration was reversed during the first Trump administration. *See* Eric Beech, *U.S. Reverses Obama-Era Move to Phase Out Private Prisons*, REUTERS (Feb. 23, 2017), <https://www.reuters.com/article/idUSKBN1622NM> [https://perma.cc/7VTK-9898] (“Attorney General Jeff Sessions said the Obama policy impaired the government’s ability to meet the future needs of the federal prison system.”). A similar reversal took place at the outset of the second Trump administration. *See* Exec. Order No. 14148, 90 Fed. Reg. 8237, 8238 (Jan. 20, 2025).

47. Sonia I. Seneviratne et al., *Weather and Climate Extreme Events in a Changing Climate*, in INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS 1513, 1517 (Valérie Masson-Delmotte et al. eds., 2021), <https://www.ipcc.ch/report/ar6/wg1> [https://perma.cc/TT92-GEJQ].

48. Jim Skea et al., *Summary for Policymakers*, in INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE 3, 42 (Priyadarshi R. Shukla et al. eds., 2022) [hereinafter IPCC, CLIMATE CHANGE 2022], <https://www.ipcc.ch/report/ar6/wg3> [https://perma.cc/PM3U-934Y].

“access to resources” will be those most adversely affected by climate disasters.⁴⁹ As an extremely vulnerable population, those who are incarcerated have been and will continue to be disproportionately impacted by climate disasters. When such disasters strike, the incarcerated population is often the last concern, reflected by the growing number of Eighth Amendment challenges to the conditions resulting from this disregard.⁵⁰

Many factors contribute to the risk posed by climate change to those incarcerated. One issue is the general health of the incarcerated population. Carceral facilities contribute to the deterioration of the incarcerated population’s health in many ways, including accelerated aging,⁵¹ with one 2017 study concluding that “prisoners report worse health than their noninstitutionalized counterparts.”⁵² Incarcerated individuals at age fifty or above—which as of 2022 accounted for 24.2% of the prison population⁵³—are much more likely to suffer from a disability or one or more chronic health conditions.⁵⁴ A 2012 study found that, of those incarcerated in local, state, and federal facilities, 40% reported presently suffering from a chronic medical condition.⁵⁵

49. ALLISON R. CRIMMINS ET AL., U.S. GLOB. CHANGE RSCH. PROGRAM, REPORT-IN-BRIEF: FIFTH NATIONAL CLIMATE ASSESSMENT 138 (Allison R. Crimmins et al. eds., 2023), <https://toolkit.climate.gov/NCA5> [<https://perma.cc/UTF6-HUXX>]. “Adaptive capacity” is defined as “[t]he ability . . . to adjust to potential damage, to take advantage of opportunities or to respond to consequences.” IPCC, CLIMATE CHANGE 2022, *supra* note 48, annex I at 1794. “Vulnerability” can be defined as “[t]he propensity or predisposition to be adversely affected . . . including sensitivity or susceptibility to harm.” *Id.* annex I at 1816.

50. See, e.g., *Gates v. Cook*, 376 F.3d 323, 334, 339–40 (5th Cir. 2004) (reaffirming injunctions against the defendant prison after plaintiff challenged death row prison conditions as a violation of the Eighth Amendment in part because of extreme heat). Eighth Amendment jurisprudence is discussed further in Sections II.D and III.A, *infra*.

51. See Farah Acher Kaiskowitz et al., *Caring for the Rapidly Aging Incarcerated Population: The Role of Policy*, 49 J. GERONTOLOGICAL NURSING 7, 7–9 (2023) (documenting the structural factors and care practices that lead to accelerated aging among the incarcerated population).

52. Kathryn M. Nowotny et al., *Racial Disparities in Health Conditions Among Prisoners Compared with the General Population*, 3 SSM – POPULATION HEALTH 487, 493 (2017).

53. CARSON & KLUCKOW, PRISONERS IN 2022, *supra* note 10, at 22 tbl.10.

54. Brie A. Williams et al., *Addressing the Aging Crisis in U.S. Criminal Justice Healthcare*, 60 J. AM. GERIATRIC SOC’Y 1150, 1151 (2012).

55. LAURA MARUSCHAK & MARCUS BERZOFSKY, BUREAU OF JUST. STAT., DEP’T OF JUST., MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES, 2011–12, at 1 (2015), www.bjs.gov/content/pub/pdf/mpsfpi1112.pdf [<https://perma.cc/Q7UJ-YE94>].

The same survey found that 30% of those incarcerated in prisons reported having hypertension, while 15% reported suffering from asthma or arthritis.⁵⁶

The racial discrimination and disparities that are inherent to the criminal legal system likely further exacerbate the vulnerability of the incarcerated population during climate disasters. Not only does race influence how communities feel the effects of climate change and environmental disasters,⁵⁷ such systemic racism similarly manifests in how those incarcerated are treated during disaster events.⁵⁸ Furthermore, while the disproportionate impact that mass incarceration has had on communities of color is well-studied,⁵⁹ some research suggests that private prisons incarcerate an even more disproportionate percentage of people of color.⁶⁰ Such disparities

56. *Id.* at 3 tbl.1.

57. *See, e.g.*, Connor Maxwell, *America's Sordid Legacy on Race and Disaster Recovery*, CTR. FOR AM. PROGRESS (Apr. 15, 2018), <https://www.americanprogress.org/article/americas-sordid-legacy-race-disaster-recovery> [<https://perma.cc/2BGA-MCJD>] (“Too often, public officials fail to make the necessary investments in preparedness and resilience solutions, then place savings and corporate profits over the health and well-being of residents of color.”); Christopher W. Tessum et al., *Inequity in Consumption of Goods and Services Adds to Racial-Ethnic Disparities in Air Pollution Exposure*, 116 PROC. NAT'L ACAD. SCI. 6001, 6002–03 (2019) (finding that communities of color are disproportionately affected by air pollution exposure); Bev Wilson, *Urban Heat Management and the Legacy of Redlining*, 86 J. AM. PLAN. ASS'N 443, 443 (2020) (describing a study finding that high surface temperatures in cities tracks areas previously targeted for disinvestment).

58. NAT'L PRISON PROJECT, AM. C.L. UNION, ABANDONED AND ABUSED: ORLEANS PARISH PRISONERS IN THE WAKE OF HURRICANE KATRINA 17 (2006) [hereinafter ACLU, ABANDONED AND ABUSED], <https://www.aclu.org/publications/abandoned-abused-complete-report> [<https://perma.cc/CKU8-PF6V>].

59. *See* Joe Palazzolo, *Wide Racial Divide in Sentencing*, WALL ST. J. (2013), <https://www.wsj.com/articles/SB10001424127887324432004578304463789858002> (on file with the *Columbia Human Rights Law Review*) (detailing findings that Black men are sentenced to prison sentences that are on average 20% longer than those of white men); ASHLEY NELLIS, SENT'G PROJECT, MASS INCARCERATION TRENDS 6 (2024), <https://www.sentencingproject.org/reports/mass-incarceration-trends> [<https://perma.cc/TPQ9-VN7X>] (reporting that nearly seven in ten people in prison are people of color).

60. For salient examples of such research, see Andrea N. Montes et al., *Racial and Ethnic Divides in Privatized Punishment: Examining Disparities in Private Prison Placements*, 37 JUST. Q. 930 (2019); Christopher Petrella, *The Color of Corporate Corrections, Part II: Contractual Exemptions and the Overrepresentation of People of Color in Private Prisons*, 3 RADICAL CRIMINOLOGY 81 (2014).

undoubtedly heighten the risk posed by climate disasters to marginalized groups.

Finally, the location of carceral facilities similarly contributes to the risk faced by those who are incarcerated. After a surge in prisons built in rural areas in the 1980s and 1990s,⁶¹ a 2017 study found that rural towns host a disproportionate number of correctional facilities, particularly state prisons.⁶² Rural communities are also generally more vulnerable to the effects of climate change, partly due to isolation and the availability of resources, indicating an inherent level of increased vulnerability for those incarcerated in rural facilities.⁶³ A 2022 study which mapped counties with high incarceration rates and high climate disaster susceptibility corroborated the concern that the effects of climate change will be felt unevenly.⁶⁴ Furthermore, a 2010 study found that “towns with racial and economic disadvantage disproportionately build prisons.”⁶⁵ All of these factors suggest a heightened spatial vulnerability to carceral facilities.

61. Tracy Huling, *Building a Prison Economy in Rural America*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 261, 263 (Marc Mauer & Meda Chesney-Lind eds., 2002).

62. SONYA R. PORTER ET AL., *CTR. FOR ADMIN. RECS. RSCH. & APPLICATIONS, CORRECTIONAL FACILITY AND INMATE LOCATIONS: URBAN AND RURAL STATUS PATTERNS* 9 (2017), <https://www.census.gov/library/working-papers/2017/adrm/carra-wp-2017-08.html> [<https://perma.cc/DWV3-FEVK>]. A survey of carceral facilities built during the early 1990s found that job development was a “driving force” behind rural and small-town communities building new prisons. Calvin L. Beale, *Rural Prisons: An Update*, 11 *RURAL DEV. PERSPS.* 25, 27 (1996); see also Peter T. Kilborn, *Rural Towns Turn to Prisons to Reignite Their Economies*, *N.Y. TIMES* (Aug. 1, 2001), <https://www.nytimes.com/2001/08/01/us/rural-towns-turn-to-prisons-to-reignite-their-economies.html> (on file with *Columbia Human Rights Law Review*) (describing the role that the private prison industry can play in the economic development of rural towns).

63. 2 DAVID R. REIDMILLER ET AL., *U.S. GLOB. CHANGE RSCH. PROGRAM, REPORT-IN-BRIEF: FOURTH NATIONAL CLIMATE ASSESSMENT* 89, 123 (David R. Reidmiller et al. eds., 2018), https://www.pr-ccc.org/wp-content/uploads/2023/06/NCA4_Report-in-Brief-english.pdf [<https://perma.cc/53J2-KTJP>].

64. See generally Kristen N. Cowan et al., *Overlapping Crises: Climate Disaster Susceptibility and Incarceration*, 19 *INT’L J. ENV’T. RSCH. & PUB. HEALTH* 7431 (2022) (examining how climate disaster susceptibility and county-level density of incarceration overlap).

65. John Eason, *Mapping Prison Proliferation: Region, Rurality, Race and Disadvantage in Prison Placement*, 39 *SOC. SCI. RSCH.* 1015, 1026 (2010).

Among the states that substantially rely on private prisons, climate change poses a variety of threats.⁶⁶ In the Southeast, scientists expect extreme heat and increased flooding, with the number of “extreme rainfall events” on the rise and a concomitant increase in the likelihood of compromised drinking water systems.⁶⁷ In the Northern Great Plains, climate change poses an increased threat to energy infrastructure and the power grid, in addition to more heavy precipitation events.⁶⁸ Flooding is similarly a concern in the Southern Great Plains, in addition to extreme weather events such as hurricanes.⁶⁹ Though the science is still developing, experts have linked changes in the occurrence of tornado events—particularly common in the Southern Great Plains—to climate change.⁷⁰ For states in the Southwest, a major concern is the increased occurrence of wildfires.⁷¹ The amount of land burned by wildfires between 1984 and 2015 “was twice what would have burned” without climate change.⁷²

Further illustrative of the threat faced by those incarcerated is the lack of comprehensive federal legislation addressing emergency response in carceral facilities. Both the Robert T. Stafford Disaster Relief and Emergency Assistance Act⁷³ and Post Katrina Emergency Management Reform Act⁷⁴—two central federal laws dedicated to emergency management and disaster relief—fail to address the unique risks faced by incarcerated populations and correctional

66. States that heavily rely on private prisons for housing their incarcerated populations include Montana (49.4%), Tennessee (28.8%), Oklahoma (18.7%), New Mexico (30.6%), and Arizona (28.8%). CARSON & KLUCKOW, PRISONERS IN 2022, *supra* note 10, at 26–27 tbl.14.

67. 2 DAVID R. REIDMILLER ET AL., U.S. GLOB. CHANGE RSCH. PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT: IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES 141, 150, 154 (David R. Reidmiller et al. eds., 2018), <https://repository.library.noaa.gov/view/noaa/19487> [https://perma.cc/D8UV-BE6P].

68. *Id.* at 66, 149–50.

69. *Id.*

70. *Id.* at 98.

71. *Id.* at 1096.

72. *Id.* at 1115.

73. Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. 100-707, 102 Stat. 4689 (1988) (codified as amended at 42 U.S.C. §§ 5121–5207).

74. Post-Katrina Emergency Management Reform Act, Pub. L. No. 109–295, 120 Stat. 1394 (2006).

facilities in any sense.⁷⁵ The Stafford Act was recently amended by the Community Disaster Resilience Zones Act, signed into law in December 2022, but this amendment still neglected to mention those incarcerated.⁷⁶

Like the story about the hurricane flooding in Texas facilities noted in the Introduction, there have been many notorious instances of incarcerated people being subjected to horrific conditions during climate disasters, with facility authorities often failing to provide adequate measures to relieve their suffering or abandoning them entirely.⁷⁷ During Hurricane Harvey, those incarcerated in other Texas facilities reported knee-level floodwater and a lack of adequate food or water.⁷⁸ Near the flooded Brazos River, some facilities *did* ultimately evacuate, but in a seemingly haphazard manner.⁷⁹ Many incarcerated individuals were taken to other facilities that were already under a federal emergency order as a result of air-conditioning issues.⁸⁰ An incarcerated individual who experienced the hurricane while held in a maximum security facility in Kenedy, Texas contended that, “if the storm comes through, I don’t think they gonna

75. WILLIAM OMOROGIEVA, SABIN CTR. FOR CLIMATE CHANGE L., PRISON PREPAREDNESS AND LEGAL OBLIGATIONS TO PROTECT PRISONERS DURING NATURAL DISASTERS 27–28, 53 (2018), https://scholarship.law.columbia.edu/sabin_climate_change/80/ [<https://perma.cc/9E6S-9EQF>].

76. Community Disaster Resilience Zones Act of 2022, Pub. L. No. 117-255, 136 Stat. 2363 (2022)

77. See, e.g., Washington, *supra* note 1 (reporting on the “horrifying, inhumane conditions in ravaged facilities” across Texas following Hurricane Harvey).

78. *Id.* The Texas Department of Criminal Justice disputes these claims. Yolanda Martinez et al., *Prisons and the Deluge*, MARSHALL PROJECT (Oct. 20, 2017), www.themarshallproject.org/2017/10/20/prisons-and-the-deluge [<https://perma.cc/V89J-QCRF>]; see also Daniel Gross, *Weathering a Hurricane in Prison*, NEW YORKER (Sept. 8, 2017), <https://www.newyorker.com/sections/news/weathering-a-hurricane-in-prison> [<https://perma.cc/757F-4DXX>] (describing the hurricane from the perspective of Sherrard Williams, currently serving a life sentence).

79. For reporting on the sporadic and uneven evacuations of incarcerated persons during Hurricane Harvey, see Washington, *supra* note 1; Kozłowska, *supra* note 1; Quandt, *supra* note 2; Blakinger, *supra* note 5. As one illustrative example, those incarcerated at Southeast Texas Transitional Center were left to fend for themselves to deal with the rising floodwaters in the prison. Quandt, *supra* note 2.

80. Gabrielle Banks, *Texas Prisons Take Hit from Harvey, Complaints of Water, Sewage Problems Surface*, CHRON. (Sept. 4, 2017), www.chron.com/news/houston-texas/article/Texas-prisons-take-hit-from-Harvey-complaints-of-12172438.php [<https://perma.cc/CUN9-EZWY>].

concentrate too much on you. They're gonna worry about the officers first."⁸¹

Most notably, six hundred incarcerated people were abandoned for four days in Orleans Parish Prison during Hurricane Katrina before they were rescued from the floodwaters.⁸² In advance of the storm, a sheriff notably remarked that there was no plan to evacuate those imprisoned, claiming instead that "we're going to keep our prisoners where they belong."⁸³

Even in instances when incarcerated individuals *are* evacuated during climate events, haphazard planning presents new dangers. In September 2020, when Oregon prisons moved incarcerated individuals to other facilities due to the growing threat of wildfires, many evacuated individuals went without mattresses, sufficient water, and basic protections against Covid-19 infection.⁸⁴ The unique vulnerability of those who are incarcerated thus compounds the risks presented by climate disasters, even when the decision to evacuate is made. Journalist Juan Moreno Haines, who is currently incarcerated in California's San Quentin prison, put it plainly: "Climate change isn't arriving, it's already happening . . . [and] for the 2.3 million . . . in prisons and jails, the impacts are more severe."⁸⁵

81. Gross, *supra* note 78.

82. *New Orleans: Prisoners Abandoned to Floodwaters*, HUM. RTS. WATCH (Sept. 21, 2005), www.hrw.org/news/2005/09/21/new-orleans-prisoners-abandoned-floodwaters [<https://perma.cc/M9QA-WXY6>]; see generally ACLU, ABANDONED AND ABUSED, *supra* note 58 (detailing an in-depth study of the experiences of those trapped in Orleans Parish Prison during the hurricane); Ira P. Robbins, *Lessons from Hurricane Katrina: Prison Emergency Preparedness as a Constitutional Imperative*, 42 U. MICH. J.L. REFORM 1 (2008) (considering the constitutional duties that the prison administrators failed to uphold during Hurricane Katrina).

83. *New Orleans Mayor, Louisiana Governor Hold Press Conference*, CNN (Aug. 28, 2005), <https://transcripts.cnn.com/show/bn/date/2005-08-28/segment/04> [<https://perma.cc/4W2Q-9TP7>].

84. Tim Arango & Nicholas Bogel-Burroughs, *For Prisoners in the West, the Virus and the Wildfires Are Colliding Threats*, N.Y. TIMES (Sept. 18, 2020), <https://www.nytimes.com/2020/09/14/us/prisons-fires-coronavirus.html> (on file with the *Columbia Human Rights Law Review*).

85. Juan Moreno Haines, *Imprisoned with Climate Change*, KNEE DEEP TIMES (Mar. 22, 2023), <https://www.kneedeep.com/imprisoned-with-climate-change> [<https://perma.cc/RX3B-V5XK>].

II. THE STATE OF CARCERAL EMERGENCY PLANNING

Amidst the rising concern of climate change-induced natural disasters, the criminal legal system has approached the issue of emergency planning in an uncoordinated manner at best—a reality evidenced by the wide variation in preparedness among both public and private carceral facilities. State legislation and industry codes demonstrate various levels of concern for the incarcerated population during such disasters, as well as a widespread lack of fully developed evacuation plans. This Part will investigate the standard of emergency preparedness and evacuation planning for carceral facilities in the United States, the additional concerns unique to private prisons that necessitate such planning, and the legal challenges that facilities are exposed to as a result.

A. Correctional Industry Standards

Gaining a comprehensive picture of correctional facilities' actual emergency preparedness is complicated by security concerns and the related restriction of data. The available impressions are nonetheless bleak. A 2022 review of state governmental and departments of corrections emergency management plans found that, of the states with publicly shared plans, only 15% included procedures for the evacuation and safety of incarcerated individuals.⁸⁶ Of the departments of corrections with publicly available emergency management plans, only 35% of those plans included procedures for *protecting* incarcerated individuals during disasters.⁸⁷ That being said, a 2005 National Institute of Corrections (NIC) report suggests the number may be much higher, with twenty-five out of thirty-four state and federal corrections departments assessed “indicat[ing] that they had specific response plans for offsite evacuation.”⁸⁸ However,

86. Morgan Maner et al., *Where Do You Go When Your Prison Cell Floods? Inadequacy of Current Climate Disaster Plans of US Departments of Correction*, 112 AM. J. PUB. HEALTH 1382, 1383 (2022).

87. *Id.* The review found that many departments of corrections include references to incarcerated individuals in regard to the labor they perform during disaster events. *Id.* at 1382–83. This focus is mirrored in publicly available state plans: “The most common mentions of incarcerated individuals were in the context of labor.” *Id.* at 1382.

88 JEFFREY A. SCHWARTZ & CYNTHIA BARRY, NAT’L INST. OF CORR., A GUIDE TO PREPARING FOR AND RESPONDING TO PRISON EMERGENCIES 195 (2005) [hereinafter SCHWARTZ & BARRY, GUIDE TO PRISON EMERGENCIES], <https://www.ojp.gov/ncjrs/virtual-library/abstracts/guide-preparing-and-responding-prison-emergencies-self-audit> [<https://perma.cc/VD3N-HE39>].

there is no indication of the scope of these plans, and the report itself notes that “offsite evacuation is a very easy concept but a very complex and challenging reality.”⁸⁹

Even for facilities with emergency and evacuation plans in place, actual *preparation* for an evacuation through drills and training remains an issue. A 2023 study of state carceral facilities that had undergone an evacuation in response to a slow-onset disaster found that few facilities engaged in any sort of practice evacuations.⁹⁰ Even for fire emergencies, which is the emergency most commonly addressed in industry policies,⁹¹ drills are neglected and those incarcerated are left in danger as a result.⁹²

In 2005, the NIC released a guide intended to “help state departments of corrections evaluate their readiness” for dealing with prison emergencies.⁹³ While the NIC guide represents a significant effort towards increasing safety in carceral institutions, its positive impact is hindered by many prison officials’ lack of familiarity with or awareness of the guide.⁹⁴ Furthermore, the criteria listed in the guide

89. *Id.*

90. Carl Dement, *Coordinating the Chaos: An Evaluation of Carceral Evacuations*, 103 PRISON J. 541, 545 (2023).

91. *See, e.g.*, AM. CORR. ASS’N, PERFORMANCE BASED STANDARDS AND EXPECTED PRACTICES FOR ADULT CORRECTIONAL INSTITUTIONS 87, 91 (5th ed. 2021) [hereinafter ACA, PERFORMANCE BASED STANDARDS], https://hcsoc.hawaii.gov/wp-content/uploads/2024/02/Perf-Based-Stds_Adult-Corr.-Inst.-5th-ed_March-2021_SECURE.pdf [https://perma.cc/HLP6-U2VY] (recommending written policies, procedures, and practices for the prevention and prompt control of fire).

92. For example, after a fire broke out at the Riker’s Island facility in New York, the Department of Corrections conducted a review that “revealed a series of lapses in protocol.” Hurubie Meko, *Rikers Detainees Were Kept Locked in Cells After Fire Broke Out*, N.Y. TIMES (Dec. 23, 2023), <https://www.nytimes.com/2023/12/23/nyregion/rikers-island-fire-report.html> (on file with the *Columbia Human Rights Law Review*). “Staff members had failed to conduct weekly and monthly fire safety audits; correction officers stopped doing their required 30-minute tours for two hours on that day; and the department’s two Fire Safety Unit officers on duty were unreachable for several minutes.” *Id.*

93. SCHWARTZ & BARRY, GUIDE TO PRISON EMERGENCIES, *supra* note 88, at v–vi.

94. Martinez et al., *supra* note 78 (citing Melissa A. Savilonis, Prisons and Disasters (2013) (LP.D thesis, Northeastern University) (surveying carceral facilities on their disaster preparedness)).

are optional to implement, undoubtedly causing variation in how the NIC guide is utilized or followed across facilities.⁹⁵

The American Correctional Association (ACA), the entity responsible for the accreditation of carceral facilities,⁹⁶ publishes a list of both mandatory and nonmandatory standards, or expected practices, for facilities to meet. For accreditation from the ACA, facilities must satisfy all mandatory standards and 90% of non-mandatory standards.⁹⁷ While there are several “mandatory” standards pertaining to evacuation plans, they mostly require that a plan exists, and are so generalized as to be without value for carceral staff attempting to design an actual emergency plan that is constitutionally sufficient.⁹⁸ A 2016 supplement to the standards includes an expected practice of requiring evacuation drills, but it is non-mandatory.⁹⁹ Though vague in regards to emergency planning, these standards have proven consequential, as they have been woven into many state laws regarding prisons,¹⁰⁰ and courts may consider such standards in their reasoning on constitutional conditions of confinement.¹⁰¹

The legal weight of these standards is troubling when considered alongside the ACA’s association with the private prison industry. For example, the rise of leading private prison corporation CoreCivic is intrinsically linked to the influence of the ACA. One of the founders of CoreCivic went on to become president of the ACA in

95. SCHWARTZ & BARRY, GUIDE TO PRISON EMERGENCIES, *supra* note 88, at 12 (“NIC’s objective [is] providing ‘food for thought’ to help state and local agencies conduct their own evaluations . . .”).

96. See *Commission on Accreditation for Corrections*, AM. CORR. ASS’N, <https://www.aca.org/certifications-and-accreditation/commission-on-accreditation> [<https://perma.cc/G4TS-XP7H>] (noting that ACA’s Commission on Accreditation for Correction is “the official arbiter of accreditation status for all facilities and agencies”).

97. *Standards: ACA Standards*, AM. CORR. ASS’N, https://www.aca.org/ACA_Member/ACA/ACA_Member/Standards_and_Accreditation/StandardsInfo_Home.aspx [<https://perma.cc/5UQL-UDGH>].

98. ACA, PERFORMANCE BASED STANDARDS, *supra* note 91, at 91–92.

99. AM. CORR. ASS’N, 2016 STANDARDS SUPPLEMENT 321 (2016), www.aca.org/ACA/ACA_Member/Standards_and_Accreditation/StandardsInfo_Home [<https://perma.cc/X7J9-2NQQ>].

100. For examples of state laws that provide standards for prison evacuations, see TENN. CODE ANN. § 41-24-106 (West 2021); OKLA. STAT. ANN. tit. 57, § 563.2(L) (West 2024); MONT. CODE ANN. § 53-30-604 (1)(b) (West 2021).

101. See, e.g., *Spotts v. United States*, 613 F.3d 559, 571 (5th Cir. 2010) (discussing how the mandatory ACA standards that the plaintiffs alleged were violated imposed no duties that were violated by the decision not to evacuate).

the 1980s, a position through which he was able to advocate for privatization; CoreCivic also later hired a former ACA Director of Accreditation, and the company's 1986 IPO specifically touted their ability to work with ACA standards.¹⁰² Today, the company credits one of its founders with helping to "establish the standards of correctional care . . . upheld by the American Correctional Association and its members,"¹⁰³ and in 2022 they received an average score of 99.5% across those of their facilities that underwent ACA accreditation.¹⁰⁴ This relationship reflects a general collaboration between private prisons and the entity otherwise tasked with regulating and monitoring such facilities.¹⁰⁵

Yet current federal guidelines are incapable of filling the gap left by the ACA. There are twenty-nine "vital functions" that federally-contracted private facilities must meet in order to satisfy performance of their contracts, ranging from healthcare access to availability of recreational programming.¹⁰⁶ Of these, "[maintaining] an adequate level of emergency readiness" is the only requirement relating to emergency preparedness, with no explanation of what is "adequate."¹⁰⁷ A 2001 report by the Bureau of Justice Assistance is similarly vague. Recommending a variety of "sample contract

102. BAUER, *supra* note 22, at 48, 259.

103. CORECIVIC, 2022 ANNUAL REPORT 4 (2023) [hereinafter CORECIVIC, 2022 REPORT], <https://ir.corecivic.com/static-files/d5cfae6e-5f62-4683-87a6-af4f6a4f7abf> [https://perma.cc/M755-5NXT].

104. *Id.* Geo Group, the next-largest private prison corporation, reported an average score of 99.4% across thirteen facilities it manages. GEO GRP., 2022 ANNUAL REPORT 2 (2022) [hereinafter GEO GRP., 2022 REPORT], <https://investors.geogroup.com/static-files/85141548-c469-43ca-ad2b-c55e5ea1081b> [https://perma.cc/E726-U882]. Shane Bauer, a journalist who reported undercover on a CoreCivic facility from 2014 to 2015, suggests this revolving door has generated inaccurate accreditation scores for CoreCivic in the past. BAUER, *supra* note 22, at 261. Bauer reports:

[In 2012,] a riot erupted in a low-security CCA prison in Mississippi over inadequate health care and poor food. A guard was beaten to death. Four years after the riot, the federal Bureau of Prisons found that little had changed: The prison was understaffed, the staff were inexperienced, and very few spoke Spanish, despite the fact that most of the inmates were from Mexico. The ACA audit during that time gave the prison a perfect score.

Id.

105. SELMAN & LEIGHTON, *supra* note 17, at 96–97.

106. OIG, REVIEW OF BOP MONITORING, *supra* note 29, at 6, 51–52.

107. *Id.* at 51.

performance standards,” the report only suggests that private facilities have a plan in place and that they provide a copy to the jurisdiction’s department of corrections, without any specification as to how that plan might look.¹⁰⁸

B. State Codes

State laws on emergency planning and the corresponding correctional department policies present a range of requirements regarding evacuation plans and private prisons, illustrating a lack of uniformity. Among states with extensive reliance on private prisons,¹⁰⁹ many of which are considered among the “most vulnerable” to impacts of climate change,¹¹⁰ the laws and policies are equally varied. While not necessarily binding, state codes are considered by courts in determining which conditions of confinement might violate the Eighth Amendment.¹¹¹ For the purposes of concision and analytical clarity, this Section will examine the codes of just five states that rely heavily on private prisons: Montana, New Mexico, Tennessee, Arizona, and Oklahoma.

Montana serves as a useful starting point. Montana law requires written emergency procedures in any private prison contract proposal,¹¹² including information on exit routes, floor plans, and how to release those incarcerated from locked areas.¹¹³ Beyond this, the private facility’s emergency response plan must comply with “the department’s emergency preparedness plan.”¹¹⁴ However, it is unclear what further specifications those plans include, as emergency and

108. AUSTIN & COVENTRY, *supra* note 28, at 77.

109. See *supra* note 66 for the list of states.

110. The states of Tennessee, Oklahoma, New Mexico, and Arizona are all considered among the most vulnerable to the effects of climate change. JOHNS HOPKINS UNIV. & TR. FOR AMERICA’S HEALTH, CLIMATE CHANGE AND HEALTH: ASSESSING STATE PREPAREDNESS 8 tbl.1 (2021), www.tfah.org/report-details/climate-change-health-assessing-state-preparedness [<https://perma.cc/5DQZ-E4KP>].

111. See *Williams v. Edwards*, 547 F.2d 1206, 1214 (5th Cir. 1977) (“State codes also are a valuable index into what levels of decency the public, expressing itself through the Legislature, is prepared to pay for.”); *Gates v. Collier*, 501 F.2d 1291, 1302 (5th Cir. 1974) (considering the Mississippi requirements for proper care, treatment, and feeding as state standards that the prison did not meet).

112. MONT. CODE ANN. § 53-30-605 (2)(iii) (West 2023).

113. MONT. ADMIN. R. 20.27.233 (1999).

114. *Id.*

evacuation plans are not publicly accessible from the Montana Department of Corrections.¹¹⁵

By contrast, New Mexico and Tennessee provide only minimal standards. New Mexico law only specifically mandates an emergency response plan for carceral facilities when a private prison contains ten or more incarcerated individuals transferred from another state.¹¹⁶ One statute also requires that facilities have rules for evacuation in the case of fire specifically.¹¹⁷ Representative of a trend in correctional policies, the only New Mexico Corrections Department policy relating to emergency planning and response pertains to fire.¹¹⁸ Tennessee possesses no relevant statute regarding specific emergency procedures or evacuation plans in carceral facilities. However, carceral facility inspections authorized under section 41-4-140 of the Tennessee Code require the *existence* of emergency evacuation plans.¹¹⁹ These plans must be incorporated into the facility's manual and facility employees must be familiar with it.¹²⁰

Arizona provides a more comprehensive regulatory regime. Arizona state law mentions emergencies and corrections in the context of authorizing furlough for incarcerated individuals to provide disaster aid during state emergencies,¹²¹ and enables the Director of the Department of Corrections to declare an emergency and authorize relocation of those incarcerated if necessary.¹²² However, the statutes

115. *Policies*, MONT. DEPT OF CORR., www.cor.mt.gov/Policy [<https://perma.cc/WV88-KMUD>].

116. N.M. STAT. ANN. § 33-15-3(A)(4) (West 2024).

117. *Id.* § 33-2-14.

118. N.M. CORR. DEP'T, CD-160100 FIRE SAFETY (2015), <https://www.cd.nm.gov/wp-content/uploads/2023/12/CD-160100.pdf> [<https://perma.cc/X64K-GCRK>]. Other policies can be found at *Policies*, N.M. CORR. DEP'T, www.cd.nm.gov/policies [<https://perma.cc/ZFC8-W7FS>].

119. TENN. CODE ANN. § 41-4-140(a)(1) (West 2021); *see also* TENN. CORR. INST., CHAPTER 1400-01: MINIMUM STANDARDS FOR LOCAL ADULT CORRECTIONAL FACILITIES 13 (2018) [hereinafter TCI, MINIMUM STANDARDS], www.tn.gov/tci/inspections.html [<https://perma.cc/6UDA-4EV3>] (spelling out the emergency evacuation plan requirement in Tennessee).

120. TCI, MINIMUM STANDARDS, *supra* note 119, at 13.

121. ARIZ. REV. STAT. ANN. § 41-1604.11 (2022). Arizona opened several new private prisons in 2022, raising the number of people incarcerated in private facilities in the state by 32%. CARSON & KLUCKOW, PRISONERS IN 2022, *supra* note 10, at 26.

122. ARIZ. REV. STAT. ANN. § 41-1609 (2024).

lack detail beyond specific notification requirements.¹²³ Arizona Department of Corrections policies go a bit further in outlining a chain of command for emergency planning. A Fire, Safety, and Life Administrator collects evacuation information from facilities and collaborates with the Emergency Preparedness Administrator for “fire/emergency evacuation and response planning.”¹²⁴ An Occupational Safety Consultant “coordinate[s] the completion of the Emergency Action/Fire Prevention Action Plan” and submits it to the Fire, Safety, and Life Administrator every February.¹²⁵ In private facilities, the plan is submitted to the warden, who determines how to share it.¹²⁶ Evacuation instructions must be in accordance with both the National Incident Management System (NIMS)¹²⁷ and the Arizona Incident Command System (ICS);¹²⁸ however, NIMS does not mention carceral facilities, and the ICS only dictates that an emergency plan be maintained, that facilities establish relationships with necessary local partners, and that facility staff train to respond to emergencies.¹²⁹ Beyond the directive that the safety of those incarcerated should be “ensure[d]”¹³⁰ and not “compromised,”¹³¹ there are no detailed requirements for what constitutes an adequate emergency response or evacuation plan.¹³² Detail is only provided in the context of incarcerated workers.¹³³ In short, despite its more comprehensive regulatory regime, Arizona law and administrative

123. *See, e.g., id.* § 41-1609(E) (providing that the director “may declare an emergency for acts of God, natural catastrophes, prison riots and overcrowding” and setting forth detailed guidelines on notification requirements).

124. ARIZ. DEP’T OF CORR., REHAB. & REENTRY, DEPARTMENT ORDER MANUAL: 404 – FIRE, SAFETY AND LOSS PREVENTION 3–4 (2022), <https://www.corrections.az.gov/department-orders-policy> (on file with the *Columbia Human Rights Law Review*) [hereinafter ADCRR, FIRE, SAFETY AND LOSS PREVENTION].

125. *Id.* at 10.

126. *Id.*

127. *See generally* FED. EMERGENCY MGMT. AGENCY, NATIONAL INCIDENT MANAGEMENT SYSTEM (3rd ed. 2018), <https://www.fema.gov/emergency-managers/nims> [<https://perma.cc/ZMF2-3PRX>] (outlining national emergency response instructions and guidance).

128. ARIZ. DEP’T OF CORR., REHAB. & REENTRY, DEPARTMENT ORDER MANUAL: 706 – INCIDENT COMMAND SYSTEM (ICS) 1 (2023), <https://www.corrections.az.gov/department-orders-policy> [<https://perma.cc/2RGF-ZATC>] [hereinafter ADCRR, INCIDENT COMMAND SYSTEM].

129. *Id.* at 1, 8.

130. *Id.* at 7.

131. ADCRR, FIRE, SAFETY AND LOSS PREVENTION, *supra* note 124, at 26.

132. ADCRR, INCIDENT COMMAND SYSTEM, *supra* note 128, at 7.

133. *Id.*

standards provide little to no detail on what private prisons must include in an emergency response or evacuation plan.

Of those states heavily reliant on private prisons, Oklahoma presents a potential model for emergency preparedness in both public and private carceral facilities. Oklahoma law requires that private facilities “prepare a written emergency plan and mutual aid agreement between the private prison facility and state and local law enforcement agencies.”¹³⁴ Private facilities must obtain annual approval from the Department of Corrections for these plans, and the plans must be “adequate to protect the public.”¹³⁵ This suggests that legislators were likely more concerned about events that could threaten the public, such as escapes or riots, rather than emergency events that would threaten those incarcerated; however, the Department of Corrections has both a detailed emergency plan¹³⁶ and an emergency plan specific to private prisons.¹³⁷ Though they do not delineate plan specifics, the policies collectively lay out clear steps for notification, delegation of authority, post-event debrief, and training and drills; these policies also indicate an awareness of the likely disasters that facilities in that region could face.¹³⁸ In other words, Oklahoma law and policy provides some substantive guidance to facilities and encourages necessary adaptation without being overly vague. In so doing, Oklahoma surpasses the requirements of other states and provides a potential model for emergency preparedness in all U.S. prisons, whether public or private.

134. OKLA. STAT. ANN. tit. 57, § 563.2(D)(4) (West 2023).

135. *Id.* § 563.3(B)(1).

136. This plan is laid out in OKLA. CORR., OP-050102 DEPARTMENTAL AND FACILITY EMERGENCY PLANS FOR RIOTS, DISTURBANCES, UTILITY FAILURES AND MAJOR DISASTERS FOR STATE OPERATED FACILITIES (2022), <https://oklahoma.gov/doc/organization/quality-assurance/auditing-and-compliance/policies-and-procedures/emergency-plans-05.html> [<https://perma.cc/GZD6-7EBW>].

137. This plan may be found in OKLA. CORR., OP-052001 EMERGENCY PROCEDURES FOR PRIVATE PRISONS (2021), <https://oklahoma.gov/doc/organization/quality-assurance/auditing-and-compliance/policies-and-procedures/emergency-plans-05.html> [<https://perma.cc/GZD6-7EBW>].

138. *Id.* at 6–20, 26–27. For example, the plan for emergencies in private prisons defines an emergency as including “[m]ajor disasters such as fire, tornado, or other acts of nature.” *Id.* at 3.

C. Planning and Private Prisons

1. Private Facility Risks

In addition to the lack of standardized emergency planning across corrections departments, those incarcerated in privately-owned carceral facilities face additional risks unique to private prisons. Private prisons often focus on minimizing expenses by reducing labor costs,¹³⁹ suggesting diminished protections for incarcerated folks during disasters and evacuations. In addition to private prisons having a lower proportion of correctional officers to incarcerated individuals as compared to public prisons, a 2004 study found that correctional officers were on average paid less at private prisons and went through fifty-eight fewer hours of training; the study also found that private prisons had a 28% higher staff turnover rate than public prisons.¹⁴⁰ Such staffing issues contribute to fears of an “every man for himself” scenario where those incarcerated are left behind by correctional officers.¹⁴¹

Not only is there a risk of lower staffing levels, but the way private prisons earn money also encourages fuller facilities. Many private prisons derive their revenue from government payments based on the number of those incarcerated.¹⁴² As a result, some contracts include provisions requiring that the state provide a certain number of incarcerated individuals to be housed, with the stipulation that the government would pay for any empty beds below that number.¹⁴³ Not only does this reduce the safety of those incarcerated

139. AUSTIN & COVENTRY, *supra* note 28, at 16.

140. Blakely & Bumphus, *supra* note 31, at 29; *see also* BAUER, *supra* note 22, at 55 (discussing the history of the American penal system and its roots in commercial interests).

141. Christopher Blackwell, *Wildfires Are a Dire Threat to Incarcerated People Like Me*, NATION (Aug. 28, 2023), www.thenation.com/article/society/wildfires-prisons-dangers [https://perma.cc/B89J-ZNHT].

142. AUSTIN & COVENTRY, *supra* note 28, at 16.

143. *See* Chris Kirkham, *Private Prison Corporation Offers Cash in Exchange for State Prisons*, HUFFPOST (Feb. 14, 2012), https://www.huffpost.com/entry/private-prisons-buying-state-prisons_n_1272143 [https://perma.cc/JUZ8-QTVA] (revealing that Corrections Corporation of America is seeking management contracts that guarantee their prisons will remain at least 90% full); *see also* IN THE PUB. INT., CRIMINAL: HOW LOCKUP QUOTAS AND “LOW-CRIME TAXES” GUARANTEE PROFITS FOR PRIVATE PRISON CORPORATIONS 2 (2013), <https://inthepublicinterest.org/criminal-how-lockup-quotas-and-low-crime-taxes-guarantee-profits-for-private-prison-corporations> [https://perma.cc/D4TU-VZKM] (finding that 65% of private prison contracts include occupancy guarantees).

by maintaining high ratios between incarcerated individuals and facility staff,¹⁴⁴ it also incentivizes ongoing incarceration. Unsurprisingly, CoreCivic referred to pandemic-era occupancy restrictions as “limit[ing] our ability to increase overall revenue” and “negatively impact[ing] our financial performance” in its 2022 annual report.¹⁴⁵ Ultimately, the profit focus of private prisons likely creates a structural unwillingness to employ procedures that would increase the safety of incarcerated individuals but cost the facility more in the long run.¹⁴⁶

Nevertheless, the interconnectedness of private prison corporations poses one potential advantage for private facilities in implementing emergency planning. If a single corporation runs multiple facilities within one region, it increases the likelihood that, were one facility to evacuate into the other, the same filing and computer system would be used across the two facilities. This would allow for the easier transfer of incarcerated individuals and the handling of associated financial resources.¹⁴⁷ A 2023 study recommending strategies for more successful carceral evacuations indicated that coordination and centralized policies throughout a state reduce conflict and confusion.¹⁴⁸ Even so, the addition of private prisons to the carceral landscape presents a drawback in emergency planning, as having competing organizations in the form of private corporations undoubtedly complicates this landscape.

2. Supervision of Private Facilities

The variation in government supervision of private facilities further complicates the capacity for ensuring adequate emergency preparedness and evacuation planning. Of the states that heavily rely on private prisons,¹⁴⁹ Oklahoma’s supervision of private facilities seems the most comprehensive; the Oklahoma Department of Corrections employs a contract monitor, an additional monitor

144. See Montes et al., *Private Versus Public Incarceration*, *supra* note 31, at 2784 (noting that understaffed prisons “can create unsafe prison environments for both incarcerated individuals and staff”).

145. CORECIVIC, 2022 REPORT, *supra* note 103, AT 5.

146. See Dement, *supra* note 90, at 554 (detailing recommended safety procedures).

147. *Id.* at 546, 552.

148. *Id.* at 555.

149. See *supra* note 66 and accompanying text for a list of the states that most rely on private prisons.

specific to medical operations, and an audit team to oversee private prisons.¹⁵⁰

Other states similarly employ monitors but fall short on providing the same standards for monitoring private facilities. Although Arizona employs a Contract Beds Regional Operation Director who must “monitor, evaluate and support private prisons” and assure compliance with their contracts with the state,¹⁵¹ there are no available specifics on the reports submitted or the frequency of monitoring. Furthermore, inspection under the Department’s Quality Assurance and Improvement Program has to be specifically incorporated into a private facility’s contract in order to be applicable to that facility.¹⁵² Similarly, New Mexico’s Corrections Department employs a contract monitor responsible for ensuring compliance at all facilities.¹⁵³ However, the Department only requires the appointment of “quality assurance managers” at publicly operated facilities,¹⁵⁴ indicating a lower standard for monitoring private facilities.

Other states fall somewhere in between. Montana’s Department of Corrections conducts routine facility audits and has contract monitors on-site;¹⁵⁵ state law indicates that there are annual

150. See OKLA. STAT. ANN. tit. 57, § 563.3(D) (West 2023) (requiring contract monitoring); *id.* tit. 57, § 561(Q) (requiring a designated contract monitor); OKLA. CORR., OP-030401 PRIVATE PRISON MONITORING REQUIREMENTS 2, 5 (2022), <https://oklahoma.gov/doc/organization/quality-assurance/auditing-and-compliance/policies-and-procedures/facility-operations-03.html> [<https://perma.cc/K3FU-DT2M>] (detailing monitoring requirements including the need for a medical monitor and an audit team).

151. *Office of the Deputy Director: Contract Beds*, ARIZ. DEP’T OF CORR., REHAB. & REENTRY, <https://corrections.az.gov/office-deputy-director/contract-beds> [<https://perma.cc/7SGG-YUJV>].

152. ARIZ. DEP’T OF CORR. REHAB. & REENTRY, DEPARTMENT ORDER MANUAL: 606 – QUALITY ASSURANCE AND IMPROVEMENT (QA&I) PROGRAM (2022), corrections.az.gov/departments-orders-policy [<https://perma.cc/B83G-QLUF>].

153. See EISEN, *supra* note 39, at 227 (discussing different states’ contract monitor requirements); see also N.M. CORR. DEP’T, CD-024600 OPERATIONS MONITORING 2 (2016) [hereinafter NMCD, OPERATIONS MONITORING], <https://www.cd.nm.gov/policies> [<https://perma.cc/6UDA-4EV3>] (requiring a contract monitor).

154. NMCD, OPERATIONS MONITORING, *supra* note 153, at 2 (requiring a contract monitor).

155. See Travia Forte, *Montana’s DOC May Extend Contract with CoreCivic*, KULR 8 (Mar. 22, 2023), <https://www.kulr8.com/news/montanas-doc-may-extend-contract-with-corecivic/article> [<https://perma.cc/J3VR-K7QK>] (discussing several allegations brought against a CoreCivic facility in Montana and suggesting they have not successfully monitored for safety).

inspections¹⁵⁶ and requires that private prison contracts allow access for compliance auditing.¹⁵⁷ Tennessee's Commissioner of the Department of Correction submits, at minimum, a yearly report to the state legislature on private prisons' contract performance.¹⁵⁸

These monitoring standards are somewhat complicated by the issue of incarcerated individuals being transferred between private facilities in different states. In practice, such transfers have already created further obstacles to states' ability to supervise private prisons.¹⁵⁹ Transfers resulting from an emergency evacuation in another state would likely add even more layers of complexity to an already convoluted landscape.

Proper evaluation of private facilities' safety is also difficult due to the relative lack of data. In their comprehensive 2021 report on prison mortality rates, the Bureau of Justice Statistics (BJS) combines data on mortality in state private prisons with public prison data,¹⁶⁰ masking potential disparities. Further frustrating attempts to evaluate the safety of private prisons, BJS only began recording data on deaths in private *federal* facilities in 2015; therefore, that data is largely excluded from the 2021 report, as it covers total prison deaths between 2001 and 2019.¹⁶¹ Perhaps to remedy this scarcity of information, recently proposed legislation in the U.S. House of Representatives would subject private prisons at the federal level to the Freedom of Information Act.¹⁶² Though this bill has been introduced without being passed numerous times since it was first

156. MONT. CODE ANN. § 53-30-606(10) (West 2023).

157. *Id.* § 53-30-608(5).

158. TENN. CODE ANN. § 41-24-109 (West 2021) (requiring annual reporting on performance by all individuals and entities contracting with the state to facilitate the operation of prisons).

159. *See, e.g.*, Jonathan Ambarian, *Montana Sends First Group of Inmates to Arizona*, KTVH (Nov. 16, 2023), <https://www.ktvh.com/news/montana-sends-first-group-of-inmates-to-arizona> [<https://perma.cc/A45E-5UDJ>] (discussing Montana legislators' response to the transfer of thirty inmates to a private facility in Arizona).

160. E. ANN CARSON, BUREAU OF JUST. STAT., MORTALITY IN STATE AND FEDERAL PRISONS, 2001–2019 – STATISTICAL TABLES 2 (2021), <https://bjs.ojp.gov/library/publications/mortality-state-and-federal-prisons-2001-2019-statistical-tables> [<https://perma.cc/E67B-9XL2>].

161. *Id.*

162. Press Release, Rep. Jamie Raskin, Raskin, Cardin Introduce Legislation to Improve Transparency and Accountability in Private Prisons (June 14, 2023), <https://www.raskin.house.gov/2023/6/raskin-cardin-introduce-legislation-to-improve-transparency-and-accountability-in-private-prisons> [<https://perma.cc/U7EG-M9AM>].

introduced in 2005,¹⁶³ it represents growing concern over the lack of accountability for private prisons. Similar initiatives exist at the state level.¹⁶⁴

3. Sample Private Facility Contracts

Finally, understanding the current state of evacuation planning in private prisons necessitates an assessment of actual facility contracts and the emergency preparedness that goes into them. Gaining access to such contracts is unsurprisingly difficult; however, an appraisal of an available few reveals a general neglect for emergency preparedness, and evacuation is again only mentioned in the context of fires. A 1997 contract between Tennessee and CCA mentions only evacuations for fires under the section concerning “Safety and Emergency Procedure.”¹⁶⁵ A form contract between Tennessee and Hardeman County Correctional Corporation also only mentions evacuation in regard to fire safety; however, section 5.6(a) of the contract dictates that the corporation must submit an emergency plan for natural disasters to the state in order for the contract to be accepted.¹⁶⁶ A 2009 contract between Nashville and CCA does the same.¹⁶⁷ A more recent¹⁶⁸ CoreCivic “inmate handbook” details evacuations only to the extent that there is a posted route in the unit and establishes that incarcerated individuals are to follow the commands of staff, which optimistically suggests facility staff are trained for the evacuations.¹⁶⁹ While these contract examples are not

163 For example, the bill was introduced as Private Prison Information Act of 2005, H.R. 1806, 109th Cong. (2005).

164. See EISEN, *supra* note 39, at 128–34 (discussing both federal and state-level initiatives).

165. CONTRACT BETWEEN STATE OF TENNESSEE DEPARTMENT OF CORRECTION AND CORRECTIONS CORPORATION OF AMERICA § 5.6 (1997), www.prisonlegalnews.org/news/publications/cca-and-tdoc-tn-sccc-contract-agreement-1997 [<https://perma.cc/5LEP-X2HG>].

166. INCARCERATION AGREEMENT BY AND BETWEEN STATE OF TENNESSEE, DEPARTMENT OF CORRECTIONS AND HARDEMAN COUNTY § 5.6 (2002), <https://www.prisonlegalnews.org/news/publications/incarceration-agreement-by-and-between-tndoc-and-hardeman-county-2002> [<https://perma.cc/LYB2-JDJT>].

167. CORRECTIONS CORPORATION OF AMERICA MANAGEMENT CONTRACT § 4.4 (2009), www.prisonlegalnews.org/news/publications/cca-management-contract-2009 [<https://perma.cc/BJG2-WZRM>].

168. There is no date attached to the document, but it is presumably no older than 2016, as that is when CCA rebranded as CoreCivic.

169. CORECIVIC, INMATE/DETAINEE ORIENTATION TO TALLAHATCHIE CORRECTIONAL FACILITY HANDBOOK 49,

necessarily representative of all private prison contracts due to their age and isolation to the southeastern United States, they align with the trend within industry and state standards of focusing mainly on fire emergencies and establishing evacuation procedures only generally.

D. Eighth Amendment Challenges

A prison without sufficient evacuation plans would likely be in violation of the conditions required by the Eighth Amendment, enabling those incarcerated in state private prisons to bring a lawsuit under section 1983.¹⁷⁰ Even though the “comprehensive planning” required for proper prison maintenance normally should be the duty of the legislature, courts step in when needed to “protect constitutional rights.”¹⁷¹ If the requirements for section 1983 are met,¹⁷² an individual can seek injunctive relief for any violations of the Eighth Amendment,¹⁷³ along with monetary damages.¹⁷⁴

The Eighth Amendment extends beyond excessive physical punishment or torture to cover the “conditions of confinement” inside of a prison,¹⁷⁵ forbidding punishment that consists of the

<https://www.prisonlegalnews.org/news/publications/corecivic-tutwiler-inmate-tccf-handbook> [<https://perma.cc/DB86-TT3F>].

170. Section 1983 enables individuals to bypass sovereign immunity and sue government officials for constitutional rights violations. 42 U.S.C. § 1983. The ability of those incarcerated in *federal* private prisons to bring claims against individuals, such as a facility’s warden, is likely barred by *Minnecci v. Pollard*. See *Minnecci v. Pollard*, 565 U.S. 118, 132 (2012) (holding that *Bivens* was unavailable as a form of relief against private prison employees). However, there is still the potential to bring claims against the private corporation running the facility. See, e.g., *id.* (noting that incarcerated individuals may seek a remedy under state tort law against private prison personnel).

171. *Procunier v. Martinez*, 416 U.S. 396, 405–06 (1974).

172. See *What Are the Elements of a Section 1983 Claim?*, THOMSON REUTERS: LEGAL BLOG (June 13, 2022), <https://legal.thomsonreuters.com/blog/what-are-the-elements-of-a-section-1983-claim/> [<https://perma.cc/HT7R-UGKQ>] (explaining the elements of a section 1983 claim, including that plaintiff must allege that “a person subjected the plaintiff to conduct that occurred under color of state law” and “this conduct deprived the plaintiff of rights, privileges, or immunities guaranteed under the U.S. Constitution or federal law”).

173. *Farmer v. Brennan*, 511 U.S. 825, 846 (1994).

174. 42 U.S.C. § 1982.

175. *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (“Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.”); see also *Gates v. Collier*, 501 F.2d 1291, 1300–01 (5th Cir. 1974) (“The prohibition against cruel and unusual punishment . . . is not

“unnecessary and wanton infliction of pain.”¹⁷⁶ There is not a “fixed meaning” for what constitutes “wanton infliction”; it should “be determined with ‘due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.’”¹⁷⁷ For example, safety hazards in incarcerated individuals’ housing units, including “a lack of adequate firefighting equipment,” have been held to be one of the factors constituting a violation of the Eighth Amendment.¹⁷⁸

In determining an Eighth Amendment violation, there is both an objective and a subjective requirement: that the harm be sufficiently serious and that the prison official inflicting such punishment have the requisite state of mind.¹⁷⁹ Under the objective requirement, what is sufficiently serious “draw[s] its meaning from the evolving standards of decency.”¹⁸⁰ For example, “adequate food, clothing, shelter, and medical care, and [reasonable safety]” have collectively been listed as necessary conditions of “humane . . . confinement” for incarcerated people.¹⁸¹ Furthermore, conditions can still be violative of the Eighth Amendment even if the harm has not yet occurred.¹⁸² In alleging a failure to prevent harm, an incarcerated individual needs to show that they are “incarcerated under conditions posing a *substantial risk* of serious harm.”¹⁸³

The subjective requirement of the Eighth Amendment necessitates that prison officials demonstrate deliberate indifference to such harm.¹⁸⁴ Deliberate indifference means “knowingly and unreasonably disregarding” a risk to incarcerated individuals.¹⁸⁵ Prison officials charged with violating the Eighth Amendment must have had actual *knowledge* of the risk; however, this knowledge can

limited to specific acts . . . but is equally pertinent to general conditions of confinement that may prevail at a prison.”).

176. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

177. *Wilson v. Seiter*, 501 U.S. 294, 302 (1991) (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)).

178. *Gates*, 501 F.2d at 1300.

179. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *see also* *Helling v. McKinney*, 509 U.S. 25, 32 (1993) (discussing the deliberate indifference standard in the context of failing to address incarcerated individuals’ medical needs).

180. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

181. *Farmer*, 511 U.S. at 832.

182. *Id.* at 845.

183. *Id.* at 834 (emphasis added).

184. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

185. *Farmer*, 511 U.S. at 846.

be proven with circumstantial evidence.¹⁸⁶ The Supreme Court has likened this standard to “subjective recklessness as used in the criminal law.”¹⁸⁷ Timing may play a role here, as the “long duration of a cruel prison condition” can simplify showing knowledge and intent on the part of officials.¹⁸⁸

Proper evacuation procedures, as a “reasonable measure[] to guarantee the safety” of those who are incarcerated,¹⁸⁹ undeniably fall within the net of protection required by the Eighth Amendment. Inadequate planning for climate disasters is enough of a risk “even where no serious physical injury results,”¹⁹⁰ as “subjecting individuals to a *risk* of future harm” is sufficient for raising Eighth Amendment claims.¹⁹¹

Considering the ever-increasing threat of climate change and the recent focus on community resilience and societal support in the context of crisis preparedness,¹⁹² it would be in line with “the evolving standards of decency” to require proper evacuation standards for those held in prison under the Eighth Amendment.¹⁹³ Even when “society cannot yet completely agree on the resolution of these issues,”¹⁹⁴ the Supreme Court has found it “odd” to withhold relief for those incarcerated amongst “unsafe, life-threatening condition[s]” just because they have not yet been harmed.¹⁹⁵ Thus, even though climate change remains a contentious issue and a solution has not yet been

186. *Id.* at 842. For example, the Fourth Circuit found that the extent of academic literature “describing and quantifying the adverse mental health effects of prolonged solitary confinement” amounted to circumstantial evidence of the risk of harm for the purposes of prison officials’ knowledge. *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019), *as amended* (May 6, 2019).

187. *Id.* at 839.

188. *Wilson v. Seiter*, 501 U.S. 294, 300 (1991).

189. *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984).

190. *Randle v. Alexander*, 960 F. Supp.2d 457, 473 (S.D.N.Y. 2013).

191. *Baze v. Rees*, 553 U.S. 35, 49 (2008).

192. See Christopher Flavelle, *As Climate Shocks Worsen, U.S. Disaster Agency Tries a New Approach to Aid*, N.Y. TIMES (Jan. 19, 2024), <https://www.nytimes.com/2024/01/19/climate/fema-disaster-aid-climate.html> (on file with the *Columbia Human Rights Law Review*) (discussing FEMA’s other climate crisis preparedness efforts); see also Fed. Emergency Mgmt. Agency, *Resilience Analysis and Planning Tool (RAPT)*, U.S. DEPT OF HOMELAND SEC. (Dec. 2023), <https://www.fema.gov/about/reports-and-data/resilience-analysis-planning-tool> [<https://perma.cc/Z5JE-BZE3>] (providing resources including information on community resilience indicators, infrastructure, and hazards).

193. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

194. *Helling v. McKinney*, 509 U.S. 25, 28 (1993).

195. *Id.* at 33.

collectively reached, it would be “unreasonably endanger[ing]” those incarcerated to maintain unprepared facilities¹⁹⁶ in light of the risk of climate disasters explored above.¹⁹⁷

Those incarcerated, and their safety, are the responsibility of the state,¹⁹⁸ “if the authorities fail” to prepare adequate evacuation plans for a carceral facility, their safety “needs will not be met.”¹⁹⁹ Furthermore, facilities are not relieved of such duties merely for lacking sufficient funds. Many federal circuits have held that having insufficient funding to develop, practice, and execute a satisfactory evacuation plan does not automatically protect facilities from resulting legal challenges on constitutional grounds.²⁰⁰

Though there is limited jurisprudence directly concerning this issue, lower courts have indicated that failing to “alleviate” unsafe conditions by failing to evacuate incarcerated individuals for several hours plausibly shows the requisite state of mind of deliberate indifference.²⁰¹ This requires a conscious awareness of the risk of

196. *Id.* at 35; *see also* *Weems v. United States*, 217 U.S. 349, 378 (1910) (“The clause of the Constitution, in the opinion of the learned commentators, may be therefore progressive, and is not fastened to the obsolete, *but may acquire meaning as public opinion becomes enlightened by a humane justice . . .*”) (emphasis added).

197. *See supra* Section I.B (examining the risks associated with climate change to prisons in different U.S. regions).

198. *See Estelle v. Gamble*, 429 U.S. 97, 104 & n.9 (1976) (“[I]t is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself.” (quoting *Spicer v. Williamson*, 132 S.E. 291, 293 (N.C. 1926))).

199. *Id.* at 103.

200. *See, e.g., Ramos v. Lamm*, 639 F.2d 559, 573 n.19 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (“The lack of funding is no excuse for depriving inmates of their constitutional rights.”); *Gates v. Collier*, 501 F.2d 1291, 1319–20 (5th Cir. 1974) (rejecting the appellants’ argument that they lacked sufficient funds and noting that “[w]here state institutions have been operating under unconstitutional conditions and practices, the defenses of fund shortage and the ability of the district court to order appropriations by the state legislatures, have been reject by the federal courts”); *Campbell v. McGruder*, 580 F.2d 521, 540 (D.C. Cir. 1978) (“As for the defendants’ claim that they are bound by financial constraints, we join our sister Circuits in holding that while such considerations may be relevant, they can by no means be determinative.”); *Smith v. Sullivan*, 611 F.2d 1039, 1043–44 (5th Cir. 1980) (“It is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement.”); *Rozecki v. Gaughan*, 459 F.2d 6, 8 (1st Cir. 1972) (“Nor can it be any excuse for continuous . . . inhumane treatment . . . that the representatives of the state were doing the best they could.”).

201. *See, e.g., Garcia v. Fischer*, 2016 WL 297729, at *1, *7 (S.D.N.Y. Jan. 22, 2016) (finding “deliberate indifference to an unreasonably dangerous condition of

climate disasters to those incarcerated; it can be expected that prison officials are aware of this risk due to the state statutes and correctional policies discussed in Part II.²⁰² Therefore, states should keep in mind that poor emergency preparedness within carceral facilities could expose them to liability under the Eighth Amendment. However, it is worth noting for those incarcerated that while “fail[ure] to comply with the state standards” can be a “significant” factor in considering whether a facility has violated the Eighth Amendment,²⁰³ failure to follow such standards, “without more, does not state a constitutional violation.”²⁰⁴ Accordingly, any Eighth Amendment legal challenge brought in response to inadequate emergency preparedness, including in relation to climate change, likely requires additional, particularized evidence demonstrating the potential or experienced harms resulting from such failures to comply.

III. EVACUATION PLAN RECOMMENDATIONS

In order to be successful, carceral evacuation plans must ultimately be tailored to the specific population and capacity of individual facilities, as well as to the particular disasters that may threaten the region where they are located.²⁰⁵ Nonetheless, there are

confinement” where prison personnel failed to call the fire department or begin evacuating plaintiffs until several hours after the risk of heavy smoke inhalation became apparent).

202. See *supra* Sections II.A–B (discussing statutes and correctional policies in five states). For example, the Supreme Court in *Farmer v. Brennan* found that circumstantial evidence allows for “a factfinder [to] conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.” *Farmer v. Brennan*, 511 U.S. 825, 842 (1994). This standard suggests that any facilities already affected by a climate disaster or resulting evacuation, whether directly or indirectly (e.g., contemplated evacuation or had incarcerated individuals transferred to that facility from another that had evacuated) would easily meet this consciousness of risk requirement.

203. *Gates*, 501 F.2d at 1302.

204. *Vela v. Pinney*, No. 2:13-CV-004, 2013 WL 1948127, at *1, *4 (S.D. Tex. Apr. 3, 2013), *report and recommendation adopted*, No. 2:13-CV-00004, 2013 WL 1949535 (S.D. Tex. May 9, 2013).

205. See WILLIAM OMOROGIEVA, SABIN CTR. FOR CLIMATE CHANGE L., PRISON PREPAREDNESS AND LEGAL OBLIGATIONS TO PROTECT PRISONERS DURING NATURAL DISASTERS 51 (2018), https://scholarship.law.columbia.edu/sabin_climate_change/80/ [<https://perma.cc/9E6S-9EQF>]; PENAL REFORM INT’L, NATURAL HAZARDS AND PRISONS: PROTECTING HUMAN RIGHTS OF PEOPLE IN PRISON IN DISASTER PREVENTION, RESPONSE AND RECOVERY 11 (2021),

basic elements that merit consideration and inclusion in any proposed plan. This Part will present the necessary elements of a template evacuation plan based on industry standards, case law analysis, and empirical studies. Incorporation of these elements into a facility's emergency planning could be required by municipalities in negotiating future private prison contracts, and the resulting plans could theoretically be implemented by both private and public carceral facilities going forward.

A. Industry Evacuation Recommendations

Facilities should consult industry-wide emergency planning standards to the extent possible when crafting an evacuation plan, as courts consider such manuals and standards when providing examples of constitutional conditions of confinement.²⁰⁶ The American Correctional Association provides broad evacuation guidance for facilities.²⁰⁷ While the standards providing such guidance lack detail,²⁰⁸ they advise establishing a set system for housing incarcerated individuals at an alternative location, offering special consideration for those with medical concerns, and incorporating a straightforward measure for quickly unlocking cells when commencing an evacuation.²⁰⁹ They also stress the importance of staff training and quarterly evacuation drills.²¹⁰

Facilities should similarly consult the National Institute of Corrections' voluntary "self-audit checklist" on preparing for natural disasters.²¹¹ The checklist includes an assessment of whether the facility has "evacuation and relocation plans, alternative sites

<https://www.penalreform.org/resource/natural-hazards-and-prisons-protecting-human-rights> [<https://perma.cc/H7RD-2QGG>].

206. See, e.g., *Jordan v. Fitzharris*, 257 F. Supp. 674, 683–84 & n.12 (N.D. Cal. 1966) (concluding that certain standards set forth in guides published by the ACA or similar manuals would satisfy the minimum standards required by the Eighth Amendment).

207. This guidance is specifically provided in standards 5-ACI-3B-11 and 5-ACI-3B-12. ACA, PERFORMANCE BASED STANDARDS, *supra* note 91, at 91–92.

208. See *supra* Section II.A (discussing the shortcomings of the ACA's current accreditation standards vis-à-vis emergencies).

209. ACA, PERFORMANCE BASED STANDARDS, *supra* note 91, at 91–92.

210. *Id.* at 91. Relatedly, states may consider contractually requiring that private facilities provide wages and training on par with public carceral facilities in the same region. *Id.* at 27.

211. SCHWARTZ & BARRY, GUIDE TO PRISON EMERGENCIES, *supra* note 88, at ND-1. See *supra* Section II.A for more about the NIC's guide for facilities.

selected, and arrangements and agreements for natural disasters.”²¹² While it lacks specific elements for a plan, the NIC also issued a similar guide for jails, which *inter alia* analyzes the Florida Department of Corrections’ evacuation during Hurricane Andrew.²¹³ This analysis suggests more specific evacuation plan elements, such as having a dedicated vehicle for transporting food as well as ensuring an adequate number of staff are willing to remain with those incarcerated during a disaster, rather than tend to their own homes or families.²¹⁴ Importantly, a 2023 study found that officials at carceral facilities use these guides infrequently; when they do, it is primarily for emergencies *not* requiring an evacuation.²¹⁵ By incorporating these guides into their institutional practices, both private and public prisons could take concrete steps towards protecting the lives of incarcerated persons from climate disasters.

B. Jurisprudence

Eighth Amendment jurisprudence and cases concerning carceral facility conditions provide insight into the specific constitutional requirements applicable to any proposed evacuation plan. Security concerns likely prevent evacuating incarcerated individuals to typical emergency shelters alongside the nonincarcerated population, so plans will have to consider an appropriate alternate location. Those incarcerated in certain jurisdictions, such as the Southern District of New York, are “entitled” to have their “basic human needs” met, including among other things “food, clothing, shelter, medical care, and reasonable safety.”²¹⁶ Circuit courts in related cases have held this to include nutritionally adequate meals at adequate intervals,²¹⁷ safe drinking

212. SCHWARTZ & BARRY, GUIDE TO PRISON EMERGENCIES, *supra* note 88, at ND-2.

213. JEFFREY A. SCHWARTZ & CYNTHIA BARRY, NAT’L INST. OF CORR., A GUIDE TO PREPARING FOR AND RESPONDING TO JAIL EMERGENCIES 169–72 (2009), https://www.nationaljailacademy.org/_documents/resources/jail-leaders/jail-emergencies.pdf [<https://perma.cc/8W5F>].

214. *Id.* at 171–72.

215. Dement, *supra* note 90, at 556.

216. Randle v. Alexander, 960 F. Supp. 2d 457, 470 (S.D.N.Y. 2013) (citation omitted).

217. See, e.g., Dearman v. Woodson, 429 F.2d 1288, 1290 (10th Cir. 1970) (holding that a complaint alleging refusal to provide food to the incarcerated plaintiff for over fifty hours adequately stated a cause of action under § 1983); Adams v. Mathis, 458 F. Supp. 302, 308 (M.D. Ala. 1978), *aff’d*, 614 F.2d 42 (5th Cir. 1980) (“The failure to properly prepare and serve nutritionally adequate food

water,²¹⁸ access to toilets if confinement in a new location lasts more than a few hours,²¹⁹ and adequate bedding for any sustained displacement.²²⁰ As such, “deprivations of essential food, medical care, or sanitation” can rise to the level of Eighth Amendment violations.²²¹ Relatedly, the Court of Appeals for the Second Circuit determined it would be against “civilized standards of humane decency” for an incarcerated individual “to be deprived of the basic elements of hygiene such as soap and toilet paper.”²²² Collectively, these cases suggest a constitutional minimum standard that every prison must meet when evacuating incarcerated populations.

Facilities should consider the layout of the location to which they would evacuate, as well as the organization of incarcerated individuals in that space. The case law demonstrates that the capability for those incarcerated to hurt one another is a salient

to inmates who, due to their confinement, are unable to seek alternative sources of nutrition constitutes a violation of the inmates’ Eighth and Fourteenth Amendment rights.” (citation omitted)); *see also* ACA, PERFORMANCE BASED STANDARDS, *supra* note 91, at 145–47 (setting out the provision of nutritionally balanced meals that meet government health codes as a performance standard for correctional institutions).

218. *See* Walker v. Hickenlooper, 627 F. App’x 710, 714–15 (10th Cir. 2015) (holding that plaintiff did plausibly allege a prison warden’s knowledge of water contamination and failure to provide safe drinking water as an Eighth Amendment violation).

219. *See* Palmer v. Johnson, 193 F.3d 346, 352 (5th Cir. 1999) (holding that the failure to provide plaintiff access to a toilet while being held at a work site overnight constitutes a “deprivation of basic elements of hygiene” that does violate the Eighth Amendment); LaReau v. MacDougall, 473 F.2d 974, 978 (2d Cir. 1972) (reversing a District Court dismissal of Eighth Amendment claims and holding that plaintiff’s disciplinary confinement in a “strip cell” lacking an adequate toilet “fall[s] below the irreducible minimum of decency required by the Eighth Amendment”); Gates v. Cook, 376 F.3d 323, 334 (5th Cir. 2004) (describing the conditions on death row including nonfunctioning toilets as constituting an Eighth Amendment violation). *But see* Anderson v. Cnty. of Kern, 45 F.3d 1310, 1314 (9th Cir.), *opinion amended on denial of reh’g*, 75 F.3d 448 (9th Cir. 1995) (reversing the lower court and finding that the short-term deprivation of stand up toilets in safety cells for those who are “mentally disturbed or suicidal” is constitutionally justifiable, but noting that such conditions, if prolonged, could be a violation). Toilets that actually have the capacity for *flushing* may be a further requirement. Jordan v. Fitzharris, 257 F. Supp. 674, 676–77 (N.D. Cal. 1966).

220. *See, e.g.*, Landfair v. Sheahan, 878 F. Supp. 1106, 1112 (N.D. Ill. 1995) (noting that the failure to provide adequate bedding such that an incarcerated person contracts a serious disease would satisfy the objective prong for establishing an Eighth Amendment violation).

221. Rhodes v. Chapman, 452 U.S. 337, 348 (1981).

222. Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967).

concern when considering what creates unconstitutional conditions.²²³ Evacuation plans should avoid placing individuals into spaces with a “physical layout” that heightens the possibility for violence or illicit activity,²²⁴ or into any other conditions that “increase violence among inmates.”²²⁵ In one prison, “insufficient cell space . . . to segregate dangerous prisoners from the rest of the inmate population” was one factor contributing to the Fifth Circuit finding the prison violative of the Eighth Amendment.²²⁶ Plans should ensure that, if incarcerated individuals are evacuated to another location, they meet the “generally accepted correctional” requirement mandating “a minimum of 50 square feet of living area” per individual.²²⁷

Existing case law also suggests that carceral facilities must be attuned to the individual characteristics of their populations during emergency evacuations. Special consideration should be given to evacuating and housing those with particular needs, such as elderly individuals or those with disabilities.²²⁸ Additionally, plans should strive to ensure adequate lighting at any receiving location.²²⁹ The longer the displacement of incarcerated individuals from their typical facility lasts, the more critical the conditions of their confinement in an alternate location become.²³⁰

C. Literature

Empirical studies and qualitative data provide further insight into an ideal evacuation plan for carceral facilities. In addition to the requirements established through the case law, evacuation plans

223. See, e.g., *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (“[T]he medical care a prisoner receives is just as much a ‘condition’ of his confinement as . . . the protection he is afforded against other inmates.”); *Ramos v. Lamm*, 639 F.2d 559, 567–74 (10th Cir. 1980) (holding that an incarcerated person has a right to adequate conditions of sanitation and food but also protection against violence and threats); *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1988) (finding an entire prison system violated the Eighth Amendment due to indifference to incarcerated persons’ physical safety concerns).

224. *Ramos*, 639 F.2d at 573.

225. *Rhodes*, 452 U.S. at 348.

226. *Williams v. Edwards*, 547 F.2d 1206, 1211 (5th Cir. 1977).

227. *Id.* at 1215 n.8 (quoting *Gates v. Collier*, 390 F. Supp. 482, 486 (N.D. Miss. 1975)).

228. *Pugh v. Locke*, 406 F. Supp. 318, 324–25 (N.D. Ala. 1976).

229. See *Jordan v. Fitzharris*, 257 F. Supp. 674, 676 (N.D. Cal. 1966) (condemning confinement in a cell with no source of interior lighting).

230. *Hutto v. Finney*, 437 U.S. 678, 686 (1978) (“It is equally plain, however, that the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards.”).

should include a clear chain of command,²³¹ the ability for communication with attorneys and loved ones,²³² contingency plans for the continuation of programming if an evacuation could potentially persist for an extended period of time,²³³ and adequate materials for correctional officers and staff to safely carry out their roles.²³⁴

The concern about correctional officers and staff neglecting their posts during disaster events²³⁵ could be mitigated through specific staff training materials and exercises developed with staff members' families in mind.²³⁶ In order to address the concerns over violence among those incarcerated, facilities can utilize existing housing rosters for arranging transportation and temporary bed assignments in order to maintain familiarity between incarcerated individuals after relocation.²³⁷ This is especially important as the impact of being transferred to a new facility during an evacuation is itself likely to increase instances of misconduct by those who are transferred.²³⁸ In order to keep track of those incarcerated when moving in between locations, facilities should invest in a simple means of tracking incarcerated persons such as a wristband system.²³⁹

231. A 2023 study found that disputes over control and hierarchy among facilities or departments was common. Dement, *supra* note 90, at 548. This issue could prove even more complicated for communications between state and private facilities.

232. Virtual access to attorneys is one relatively straightforward solution to this concern. *Id.* at 551, 554.

233. See PENAL REFORM INT'L, NATURAL HAZARDS AND PRISONS: PROTECTING HUMAN RIGHTS OF PEOPLE IN PRISON IN DISASTER PREVENTION, RESPONSE AND RECOVERY 17 (2021), <https://www.penalreform.org/resource/natural-hazards-and-prisons-protecting-human-rights> [<https://perma.cc/H7RD-2QGG>].

234. *Id.* at 18.

235. See Blackwell, *supra* note 141 (noting the mindset of guards not staying in the face of a disaster).

236. See Dement, *supra* note 90, at 549 (describing the importance of having a plan for family care in case of a disaster so carceral administrators are able to staff facilities adequately).

237. *Id.* at 549, 555.

238. See Alex Kigerl & Zachary Hamilton, *The Impact of Transfers Between Prisons on Inmate Misconduct: Testing Importation, Deprivation, and Transfer Theory Models*, 96 PRISON J. 232, 251 (2016) ("The added stress of being exposed to unfamiliar and new inmates, with less time to acclimatize to the current environment, is shown to exacerbate tendencies to engage in serious misconduct.").

239. Dement, *supra* note 90, at 546.

Prisons would have to make additional preparations depending on the anticipated natural disasters and the region where a facility is located. For example, for regions where extreme heat is a paramount concern, evacuation plans should consider the cooling capabilities of any receiving location; when temperatures are in the high nineties or above, merely providing incarcerated individuals with electric fans would be insufficient for preventing heat-induced illnesses.²⁴⁰ When there is a chance of incarcerated individuals being evacuated over lengthy distances, plans should consider determining “emergency respite sites” where individuals can access water and restrooms along the route to an alternate location.²⁴¹

D. Decarceration

Finally, carceral emergency evacuations would be improved by a reduction in the number of those actually incarcerated. Fewer people held within carceral facilities means fewer people to coordinate during an evacuation when disaster strikes.²⁴² There are both economic and environmental reasons to lower the number of those incarcerated as well; prisons are costly to operate,²⁴³ and the number of those incarcerated has been found to be significantly linked with a state’s fossil fuel emissions.²⁴⁴ Private prison corporations themselves seem to be anticipating a reduction in the incarcerated population, diversifying their offered services to now encompass reentry as

240. Nat’l Ctr. for Env’t Health (U.S.), *Frequently Asked Questions (FAQ) About Extreme Heat*, CDC STACKS (June 1, 2012), https://www.cdc.gov/heat-health/about/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fextreme-heat%2Fprevention%2Findex.html [<https://perma.cc/5SMP-4P3M>].

241. FED. EMERGENCY MGMT. AGENCY, DEP’T OF HOMELAND SEC., PLANNING CONSIDERATIONS: EVACUATION AND SHELTER-IN-PLACE 9 (2019), <https://www.fema.gov/sites/default/files/2020-07/planning-considerations-evacuation-and-shelter-in-place.pdf> [<https://perma.cc/TZ73-4APB>].

242. See Dement, *supra* note 90, at 555 (discussing procedures by which administrators reduced headcount during the Covid-19 pandemic); DANIEL W.E. HOLT, SABIN CTR. FOR CLIMATE CHANGE L., HEAT IN U.S. PRISONS AND JAILS: CORRECTIONS AND THE CHALLENGE OF CLIMATE CHANGE 73–74 (2015), https://scholarship.law.columbia.edu/sabin_climate_change/124 [<https://perma.cc/N4A5-JNTP>] (pointing out that one key adaptation strategy is “reducing the size of the incarcerated population”).

243. See Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers*, 25 FED. SENT’G REP. 68, 70 (2012) (arguing that “clos[ing] parts of facilities or entire prisons [is] an essential step toward cost savings”).

244. Julius A. McGee et al., *Locked into Emissions: How Mass Incarceration Contributes to Climate Change*, 8 SOC. CURRENTS 1, 11–12 (2020).

well.²⁴⁵ Nonetheless, the process of decarceration faces various barriers, from the logistical to the political.²⁴⁶ Though such barriers are beyond the scope of this Note, they necessarily limit the applicability of a decarceration-centric strategy.

CONCLUSION

Proper evacuation procedures and policies for carceral facilities are essential to ensuring the safety of the incarcerated population during natural disasters. The stories in Part I illustrate the impact that such policies can have, and the increasing threat posed by climate change underscores the salience of this issue.²⁴⁷ In addition, developing and enacting effective evacuation plans would reduce liability for carceral institutions. If facilities were to have a detailed, practiced plan in place, it would likely be “impossible” for incarcerated individuals to allege cruel and unusual punishment on this basis.²⁴⁸ Even if evacuations are not perfectly implemented, such emergency planning would reduce facilities’ liability while increasing the safety of incarcerated individuals during natural disasters.²⁴⁹

The Renz Correctional Center’s 1993 evacuation demonstrates the necessity of such emergency planning. Though emergency supplies were ultimately “inadequate for the length and severity of the emergency,” the “fine-tuned” evacuation plans and advanced planning of the Missouri facility led to cooperation and a successful evacuation of all incarcerated individuals during the 1993

245. EISEN, *supra* note 39, at 34–35; *see also* GEO GRP., 2022 REPORT, *supra* note 104, at 1 (illustrating that 11% of revenues come from reentry services); CORECIVIC, 2022 REPORT, *supra* note 103, at 10–11 (reporting the company’s recent focus on reentry).

246. Saptarishi Bandopadhyay & Joshua R. Coene, *Disaster Risk in the Carceral State*, 42 STAN. ENV. L.J. 171, 231–35 (2023); *see generally* Ben Grunwald, *Toward an Optimal Decarceration Strategy*, 33 STAN. L. & POL’Y REV. 1 (2022) (outlining and evaluating decarceration strategies).

247. *See supra* Section I.B (framing the issue of prison evacuation strategies in the context of climate change).

248. *See, e.g.*, *Helling v. McKinney*, 509 U.S. 25, 36 (1993) (“[T]he adoption of the smoking policy . . . will bear heavily on the inquiry into deliberate indifference.”). As such, the mere adoption of a policy might insulate facilities from Eighth Amendment claims.

249. *See Farmer v. Brennan*, 511 U.S. 825, 844 (1994) (“Prison officials . . . may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted.”).

Midwest floods.²⁵⁰ The facility was ultimately lost, but there were no injuries or lives lost,²⁵¹ undoubtedly attributable to the evacuation plans in place.

Though the federal government has at times reduced its reliance on private prisons, and many states notably reliant on private prisons are following suit,²⁵² “[t]he reality is that use of private prisons will continue” at least for some time,²⁵³ especially as their use is influenced by national politics.²⁵⁴ Thus, corrections departments contracting with private corporations should ensure that such contracts require comprehensive and efficient evacuation planning. As the carceral system in general, differing across states and operated by various entities, has proven slow to respond to emergencies,²⁵⁵ requiring such evacuation plans from the outset will help ensure adequate protection of those incarcerated. Furthermore,

250. SCHWARTZ & BARRY, GUIDE TO PRISON EMERGENCIES, *supra* note 88, at 289–91; *see also* Christine Jackson, *The Life and Death of Renz Prison*, VOX MAG. (Apr. 1, 2015), https://www.voxmagazine.com/news/features/the-life-and-death-of-renz-prison/article_3fd4eec5-99d0-5802-ad62-4f79661dd49b.html [<https://perma.cc/NR7V-WQWX>] (detailing the evacuation of Renz Correction Center due to flooding).

251. SCHWARTZ & BARRY, GUIDE TO PRISON EMERGENCIES, *supra* note 88, at 289.

252. *See, e.g.*, Keaton Ross, *Oklahoma Aims to Take Over Private Prisons*, OKLA. WATCH (Sept. 5, 2023), <https://oklahomawatch.org/newsletter/oklahoma-aims-to-take-over-private-prisons> [<https://perma.cc/3JRW-NDLL>] (describing Oklahoma’s attempts to reduce reliance on private facilities); Morgan Lee, *New Mexico Shrinks Reliance on For-Profit Prison Operators*, AP NEWS (Aug. 11, 2012), <https://apnews.com/article/joe-biden-health-prisons-new-mexico-coronavirus-pandemic-44962e196c6fbe1c67c8e53ad103f2e1> [<https://perma.cc/E35N-5CPW>] (explaining New Mexico’s state takeover of three quarters of private prison facilities).

253. SELMAN & LEIGHTON, *supra* note 17, at 127. The costs of private prisons extend in other ways as well: even as states work to assume control of private prisons, they may find themselves on the hook for renting such facilities from the private corporation that previously ran it. *See* Joshua Bowling, *Sticker Shock*, SEARCHLIGHT N.M. (Nov. 3, 2022), <https://searchlightnm.org/sticker-shock/> [<https://perma.cc/S8U3-NBWW>] (describing the state facing a \$217 million bill for rent on converted facilities).

254. *See* Beech, *supra* note 46 (noting the Trump administration’s reversal of the Obama administration’s attempts to reduce reliance on private prisons).

255. *See, e.g.*, Tiana Herring & Maanas Sharma, *States of Emergency: The Failure of Prison System Responses to COVID-19*, PRISON POL’Y INITIATIVE (Sept. 1, 2021), https://www.prisonpolicy.org/reports/states_of_emergency.html [<https://perma.cc/HJ62-UAXJ>] (documenting the insufficient responses of prison facilities to the Covid-19 pandemic).

considering current trends of federal private prison usage,²⁵⁶ these recommendations may become increasingly relevant for those detained in immigration detention facilities as well.²⁵⁷

256. See Brian Bennett, *Biden, Who Campaigned on Closing For-Profit Migrant Detention Centers, Still Relies on Them Amid Border Surge*, TIME (Jan. 1, 2024), www.time.com/6550047/joe-biden-immigration-private-prisons [https://perma.cc/GD62-SEHP] (discussing the heavy use of private detention facilities for all detention including immigration-related detention).

257. See Cho, *supra* note 44 (condemning the Biden administration's continued reliance on private facilities for immigration detention—facilities which have been found to be understaffed with poor conditions).