

NO RIGHT WITHOUT LEGAL REMEDY: PRISONERS BARRED FROM RECOVERY ON CONDITIONS OF CONFINEMENT CLAIMS POST-NATURAL DISASTER

Abstract: The American carceral system imprisons nearly 2,000,000 individuals in jails and prisons throughout the country. As the climate crisis worsens and the number of natural disasters continues to rise, those individuals are in mortal peril. What happens to incarcerated people when treacherous winds and unprecedented floods hit? Due to non-existent and ineffective prison evacuation procedures, incarcerated individuals are left to drown behind the bars of their cells. Whether this systemic problem constitutes cruel and unusual punishment under the Eighth Amendment remains unclear. Supreme Court jurisprudence over the last seventy-five years surrounding such claims has evolved, but the Court-implemented subjective deliberate indifference standard has only increased ambiguity as to what constitutes that type of punishment. With the passage of the Prison Litigation Reform Act, prisoners and pretrial detainees face increased obstacles to bringing constitutional violation claims. This Note reviews the legal framework within which prisoners and pretrial detainees bring claims of cruel and unusual punishment against officials within the carceral system. This Note argues that the subjective deliberate indifference standard bars recovery for state prisoner-plaintiffs on claims of unconstitutional conditions of confinement post-natural disaster and thus should be abandoned. In abandoning the subjective prong of the standard, justice for prisoners experiencing constitutional violations would no longer be illusory. This Note further argues that the abandonment of the subjective component would incentivize officials to create and execute evacuation plans for their prisons in the face of a natural disaster.

INTRODUCTION

“If you stay here . . . you will die.”¹ These words rang in the ears of Floridians located in mandatory evacuation zones as Hurricane Milton lurked on the horizon in early October 2024.² While citizens fled and made calculated

¹ Madeleine Marr, ‘If You Stay Here, You Will Die:’ Florida Fire Chief Sounds Alarm as Milton Approaches, MIA. HERALD, <https://www.miamiherald.com/news/state/florida/article293673929.html> [<https://perma.cc/RSH7-FV3J>] (Oct. 8, 2024).

² See Oliver Holmes & Edward Helmore, *Floridians Warned ‘You Are Going to Die’ if They Don’t Evacuate as Milton Nears*, THE GUARDIAN (Oct. 8, 2024), <https://www.theguardian.com/us-news/2024/oct/08/us-florida-mexico-hurricane-milton-tampa-bay-storm> [<https://perma.cc/VSK6-RKAB>] (quoting Ron DeSantis in regard to the potential deadly consequences of failing to evacuate in specific areas); see also Kim Luciani & Cheryl McCloud, *Do You Know if You Live in a Florida Evacuation Zone? Here’s How to Find Out*, HERALD-TRIB. (Oct. 6, 2024), <https://www.heraldtribune.com/>

survival choices, the vulnerable people imprisoned in Florida prisons and jails sat trapped, awaiting their promised deaths.³ The prisoners in Manatee County Jail were experiencing the same fear that prisoners in Orleans Parish Prison (OPP) experienced during Hurricane Katrina nineteen years earlier.⁴

Awaiting trial, a man imprisoned in the OPP during Hurricane Katrina recounted the events that befell him and his peers after the levee broke in 2005.⁵

story/weather/hurricane/2024/10/06/florida-evacuation-zones-flood/75545045007/ [https://perma.cc/3BEY-QS3K] (explaining that a zone system is utilized to designate which areas are going to be impacted the worst by incoming storms and identifying Zone A as the most vulnerable zone whose residents need to evacuate first).

³ See Li Zhou, *These Floridians Couldn't Flee Hurricane Milton. They're Incarcerated.*, VOX (Oct. 10, 2024), <https://www.vox.com/climate/377272/hurricane-milton-florida-jails-prisons-manatee-pinellas-lee> [https://perma.cc/GK64-B23L] (differentiating Floridian prisoners' situation from the civilian population and highlighting their vulnerability as a result of not being able to evacuate); Richard Luscombe, *Traffic and Trepidation as Floridians Scramble to Flee Hurricane Milton's Path*, THE GUARDIAN (Oct. 8, 2024), <https://www.theguardian.com/us-news/2024/oct/08/florida-hurricane-milton-evacuation> [https://perma.cc/M32E-L33K] (describing the traffic and escape efforts of Floridians right before Hurricane Milton). For the purposes of this Note, incarcerated people will be referred to as "prisoners." See Lawrence Bartley, *I Am Not Your 'Inmate'*, MARSHALL PROJECT, <https://www.themarshallproject.org/2021/04/12/i-am-not-your-inmate#:~:text=The%20goal%20was%20to%20do,Powell%20of%20Chillicothe%20Correctional%20Center> [https://perma.cc/BW3J-NRS2] (detailing the different terms used to describe the incarcerated population). Although terms like "inmate," "prisoner," and "convict" all fail to acknowledge the personhood of incarcerated individuals, many prefer the term "prisoner." See *id.* (expressing the reductive nature of other terms compared to "prisoner"). "Prisoner" is a neutral alternative to other terms. See Christopher Zoukis, *Inmates, Prisoners, and Convicts: What's the Difference?*, ELIZABETH FRANKLIN BEST, APP. & FED. CRIM. L. (May 13, 2013) <https://federalcriminaldefenseattorney.com/inmates-prisoners-convicts-difference/#:~:text=Best%20political%20practice%20says%20that,as%20the%20term%20inmate%20would> [https://perma.cc/NH22-BL3X] (explaining the term "prisoner" to be more widely accepted as a neutral alternative to other words, like "convict" or "inmate"). "Prisoner" simply denotes that the person is imprisoned rather than assigning any demeaning characteristics to incarcerated persons. *Id.* Furthermore, this Note uses the term "pretrial detainees" to refer to individuals detained while awaiting their trial. See COLUM. HUM. RTS. L. REV., A JAILHOUSE LAWYER'S MANUAL 1196 (13th ed. 2024) (differentiating that pretrial detainees are individuals who have not yet been convicted).

⁴ See Radha Patel, *Left Behind: Natural Disasters and Vulnerable Incarcerated Populations*, U. MIA. RACE & SOC. JUST. L. REV. (Nov. 11, 2024), https://race-and-social-justice-review.law.miami.edu/left-behind-natural-disasters-and-vulnerable-incarcerated-populations/#_edn31 [https://perma.cc/LC5F-3V7J] (specifying that the Manatee County Jail in Florida was not evacuated despite public officials designating its area as a danger zone requiring evacuation); Eamin Z. Heanoy & Norman R. Brown., *Impact of Natural Disasters on Mental Health: Evidence and Implications*, HEALTHCARE, Sep. 2024, at 12–13 (discussing the emotional toll that severe natural disasters, specifically hurricanes, can take on people); see also *Excerpts of Letters from Prisoners Abandoned to Katrina*, HUM. RTS. WATCH (Oct. 30, 2005), <https://www.hrw.org/news/2005/10/30/excerpts-letters-prisoners-abandoned-katrina> [https://perma.cc/XJ5G-S4PZ] (containing letters and testimony from the people incarcerated in OPP during Hurricane Katrina). Due to the fear of retribution for their testimony, the people incarcerated during Hurricane Katrina have largely remained anonymous, identifying themselves only by the prison that they were in and the conditions that they experienced. See *id.* (containing anonymized testimony with redacted names and addresses).

⁵ See *Summaries of 400 Testimonials from Inmates Incarcerated at Orleans Parish Prison During Hurricane Katrina*, ACLU (Jan. 11, 2006), <https://www.aclu.org/documents/summaries-400->

As the lights went out, darkness fell over the jail, and the water began to rise.⁶ Trapped in his cell, the contaminated flood water made it all the way up to his neck.⁷ As fires broke out in the jail, his fears intensified.⁸ His story was just one of thousands of women, children, and men incarcerated in the prison complex at that time.⁹

As the climate crisis continues to worsen, natural disasters—especially hurricanes—are multiplying at an unprecedented rate.¹⁰ All too often, the most vulnerable populations, notably prisoners, are left behind during these natural disasters.¹¹

Part I of this Note details a background of failed prison evacuations, the effect of the deepening climate crisis on the prison population, and the legal backdrop for prisoners' 42 U.S.C. § 1983 claims for unconstitutional conditions of confinement.¹² Part II examines the likelihood of succeeding on a 42 U.S.C. § 1983 claim for conditions of confinement violations post-natural disaster by discussing the Prison Litigation Reform Act (PLRA), and the subjective deliberate indiffer-

testimonials-inmates-incarcerated-orleans-parish-prison-during-hurricane-katrina [https://perma.cc/45RE-G5SM] (containing the testimony of Inmate #5, among others, whose story is referenced herein).

⁶ See *id.* (illustrating Inmate #5's experience post-Katrina); see also Justin Berk & Lauren Brinkley-Rubinstein, *Know the Difference Between Jail and Prison? Both Are Associated with Risk of Death*, 114 AM. J. PUB. HEALTH 852, 852 (2024), <https://pmc.ncbi.nlm.nih.gov/articles/PMC11306615/pdf/AJPH.2024.307777.pdf> [https://perma.cc/Y286-H94N] (highlighting jails as more temporary facilities where prisons typically incarcerate individuals for longer, multi-year sentences); CALVIN JOHNSON, MATHILDE LAISNE & JON WOOL, VERA INST. OF JUST., JUSTICE IN KATRINA'S WAKE: CHANGING COURSE ON INCARCERATION IN NEW ORLEANS 5–6 (2015), <https://www.prisonpolicy.org/scans/vera/justice-in-katrinawake.pdf> [https://perma.cc/Y356-BHFJ] (explaining why the name Orleans Parish Prison is misleading because it functions as a prison but is technically a jail). Orleans Parish Prison (OPP) was used functionally as both a prison and a jail by being both a short-term and a long-term detention facility. *Id.*

⁷ See *Summaries of 400 Testimonials from Inmates Incarcerated at Orleans Parish Prison During Hurricane Katrina*, *supra* note 5 (referencing Inmate #5's testimony).

⁸ *Id.*

⁹ See *id.* (including 400 testimonials from prisoners incarcerated in OPP at that time); see also NAT'L PRISON PROJECT OF THE ACLU ET AL., ABANDONED & ABUSED: COMPLETE REPORT 9 (2006), https://www.laaclu.org/app/uploads/2017/05/2006_Report_OPP_Katrina_2.pdf [https://perma.cc/AE3D-SZXH] (confirming that there were thousands of prisoners in OPP during Katrina).

¹⁰ See UNITED NATIONS 75, THE CLIMATE CRISIS—A RACE WE CAN WIN 1–2, https://www.un.org/sites/un2.un.org/files/2020/01/un75_climate_crisis.pdf [https://perma.cc/DDL9-ZT7G] (analyzing the increasing severity of natural disasters); see also James Ashworth, *Climate Change Reaching Unprecedented Levels as Records Tumble*, NAT'L HIST. MUSEUM (Oct. 24, 2023), <https://www.nhm.ac.uk/discover/news/2023/october/climate-change-reaching-unprecedented-levels-records-tumble.html> [https://perma.cc/9FFY-PRTC] (establishing the effects of climate change as unprecedented, landing the world in uncharted territory with record highs).

¹¹ See Nazish Dholakia, *When Disasters Strike, Incarcerated People Are Often Left Behind—Then Tasked with Dangerous Cleanup*, VERA INST. JUST. (Oct. 18, 2024), <https://www.vera.org/news/when-disasters-strike-incarcerated-people-are-often-left-behind-then-tasked-with-dangerous-cleanup> [https://perma.cc/R4HA-5E4S] (detailing the plight of incarcerated individuals during catastrophic weather events).

¹² See *infra* notes 15–119 and accompanying text.

ence standard.¹³ Finally, Part III argues that the subjective judicially-created deliberate indifference standard should be abandoned as it creates an insurmountable hurdle for prisoners and pretrial detainees to bring 42 U.S.C. § 1983 claims based on deplorable conditions of confinement post-natural disaster.¹⁴

I. HISTORICAL AND LEGAL BACKGROUND OF PRISONER-PLAINTIFF CONSTITUTIONAL CLAIMS

When is punishment considered cruel and unusual?¹⁵ “Cruel and unusual punishment” is a term of art that the Supreme Court has struggled to define for decades.¹⁶ The Eighth Amendment protects against it, but confusion surrounds what exactly it is.¹⁷ Today, scholars endeavor to understand how to apply the standard to a modern society.¹⁸

Section A of this Part provides a historical account of how natural disasters have impacted prisoners and the present state of prison evacuation procedures and regulations.¹⁹ Section B of this Part explores the Supreme Court’s Eighth Amendment jurisprudence in reference to cruel and unusual punishment.²⁰

A. Prisoners Amidst the Climate Crisis: Illustrations from Past Failed Emergency Evacuations

There are 1,664 prisons and 3,116 local jails in the United States.²¹ With more than 4,780 correctional facilities in this country and nearly two million

¹³ See *infra* notes 126–171 and accompanying text.

¹⁴ See *infra* notes 172–226 and accompanying text.

¹⁵ See Bryan A. Stevenson & John F. Stinneford, *The Eighth Amendment: Common Interpretation*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-viii/clauses/103> [<https://perma.cc/A6PG-VX7R>] (pondering the mystery of the interpretation of the Eighth Amendment).

¹⁶ See Benjamin Wittes, *What is “Cruel and Unusual”?*, HOOVER INST. (Dec. 1, 2005), <https://www.hoover.org/research/what-cruel-and-unusual> [<https://perma.cc/E6C3-3W98>] (likening the Supreme Court’s cruel and unusual punishment jurisprudence to a train wreck).

¹⁷ See *id.* (asserting the elasticity of the Supreme Court’s view of what is considered cruel and unusual punishment).

¹⁸ See Bryan Stevenson, *The Eighth Amendment: A Contemporary Perspective*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-viii/clauses/103> [<https://perma.cc/2555-8JLX>] (emphasizing the need to consider cruel and unusual punishment in light of modern punishments that did not previously exist); see also Rachel Leah Arco, *When Conditions of Confinement Lead to Violence: Eighth Amendment Implications of Inter-Prisoner Violence*, 20 HOUS. J. HEALTH L. & POL’Y. 411, 417–18 (2021) (discussing that, at present, the standard for distinguishing what constitutes a conditions of confinement violation is uncertain which leads to enhanced protections for corrections officials).

¹⁹ See *infra* notes 21–64 and accompanying text.

²⁰ See *infra* notes 65–119 and accompanying text.

²¹ See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL’Y INITIATIVE (Mar. 14, 2024), <https://www.prisonpolicy.org/reports/pie2024.html#:~:text=Together%2C%20these%20systems%20hold%20over,centers%2C%20state%20psychiatric%20hospitals%20>

incarcerated people, the United States' rate of imprisonment per capita is higher than any other country.²² The prison population comprises 0.7% of the country's population, yet there is no comprehensive federal legislation that governs emergency management procedures for correctional institutions.²³ Climate change, now known as the climate crisis, has continued to cause severe and dangerous weather events.²⁴ As the effects of the climate crisis continue to worsen, the incarcerated population is at a graver risk of death and danger should jails or prisons fail to implement sufficient evacuation protocols.²⁵

C%20and [https://perma.cc/Q4QL-NF8F] (painting a picture of the United States carceral system as complex, expansive, and costly).

²² *Id.*; see Emily Windra, *States of Incarceration: The Global Context 2024*, PRISON POL'Y INITIATIVE (June 2024), <https://www.prisonpolicy.org/global/2024.html> [https://perma.cc/5Q58-M2FP] (explaining the appalling statistic that in the United States, "every single state incarcerates more people per capita than most nations").

²³ See Peter Wagner & Wanda Bertram, "What Percent of the U.S. Is Incarcerated?" (*And Other Ways to Measure Mass Incarceration*), PRISON POL'Y INITIATIVE (Jan. 16, 2020), <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/> [https://perma.cc/KAG8-65MW] (providing that, among other pertinent statistics regarding the prison population, one person out of every one hundred people is incarcerated); see also 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, 1382 (2022) (stating that there are no federal laws or plans that dictate how to properly and safely evacuate prisons during natural disasters).

²⁴ See *Climate Change Impacts Grip Globe in 2024*, WORLD METEOROLOGICAL ORG. (Dec. 30, 2024), <https://wmo.int/media/news/climate-change-impacts-grip-globe-2024> [https://perma.cc/2SBB-JWET] (signifying the gravity of the heat-breaking records in 2024 after numerous record-breaking years for increasing temperature); *2024 Was the World's Warmest Year on Record*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Jan. 10, 2025), <https://www.noaa.gov/news/2024-was-worlds-warmest-year-on-record#:~:text=Antarctic%20sea%20ice%20coverage%20second%20lowest%20on%20record%2C%20behind%202023&text=It's%20official:%202024%20was%20the,2024%20annual%20global%20climate%20report>: [https://perma.cc/4EBT-K2QU] (solidifying 2024 as the hottest year since 1850); ADAM LEA & NICK WOOD, TROPICAL STORM RISK, EXTENDED RANGE FORECAST FOR NORTH ATLANTIC HURRICANE ACTIVITY IN 2025, at 1 (Dec. 10, 2024) <https://www.tropicalstormrisk.com/docs/TSRATLForecastDecember2025.pdf> [https://perma.cc/XM5Y-U6RU] (charting the projected weather events set to occur in 2025).

²⁵ See Cynthia Golembeski et al., *Climate Change and Incarceration*, THINK GLOB. HEALTH (Apr. 29, 2022), <https://www.thinkglobalhealth.org/article/climate-change-and-incarceration> [https://perma.cc/HH5P-SGZG] (labeling incarcerated people as "disproportionately susceptible" to the conditions of climate change); *Prisons in Crises: Natural Hazards and Extreme Weather*, PENAL REFORM INT'L, <https://www.penalreform.org/global-prison-trends-2021/special-focus-2021-prisons-in-crises/natural-hazards-and-extreme-weather/> [https://perma.cc/TUU4-ESNV] (discussing the necessity of having disaster risk plans for vulnerable populations, especially prisoners). Prisoners are some of the most vulnerable populations because they encounter a double threat: the natural disaster itself and its resulting conditions of confinement. See *Prisons in Crises: Natural Hazards and Extreme Weather*, *supra* (envisioning the resulting problems within carceral facilities should the prisoners not be evacuated in the face of a natural disaster). Medical supplies and care could be substantially impacted post-disaster, leading to dangerous conditions for prisoners with pre-existing conditions or co-morbidities. *Id.*; see also Yvaine Ye, *How Prisons Fall Short in Protecting the Incarcerated from Climate Disasters*, UNIV. COLO. BOULDER (Nov. 7, 2024), <https://www.colorado.edu/today/2024/11/07/how-prisons-fall-short-protecting-incarcerated-climate-disasters#:~:text=In%20many%20cases%2C%20the%20authors,Planning%20E:%20Nature%20and%20Space> [https://perma.cc/C32Z-T848] (discussing inadequate policies, procedures, and infrastructure in prisons as the reason that prisoners are especially

Subsection 1 discusses the historical realities of failures to evacuate prisons post-natural disasters.²⁶ Subsection 2 examines the current available legislative protections for prisoners in natural disasters, as well as the current state of prison emergency evacuation plans and procedures.²⁷

1. Unlearned Lessons from Past Disasters: Katrina, Harvey, Helene, and Milton

The American Civil Liberties Union (ACLU) extensively documented the real-world implications of a prison emergency evacuation failure in OPP post-Hurricane Katrina.²⁸ Generally regarded as one of the worst hurricanes in American history, Hurricane Katrina hit New Orleans in August of 2005.²⁹ While reports of civilians dying quickly swept the news, the plight of the prisoners living in OPP flew under the radar.³⁰ When the hurricane hit, the corrections officers largely fled the prisons, leaving the prisoners alone in the storm.³¹ Over the next

vulnerable to the effects of natural disasters); Benika Dixon, J. Carlee Purdum, & Tara Goddard, *Jails and Prisons Often Fail to Protect Incarcerated People During Natural Disasters*, THE CONVERSATION (Nov. 12, 2024), <https://theconversation.com/jails-and-prisons-often-fail-to-protect-incarcerated-people-during-natural-disasters-241209#:~:text=Although%20incarcerated%20people%20are%20locked,evacuating%20or%20securing%20their%20belongings> [<https://perma.cc/M3Y4-KY2E>] (emphasizing how difficult it is to evacuate prisons and thereby how important it is to have proper plans and protocols in place).

²⁶ See *infra* notes 28–51 and accompanying text.

²⁷ See *infra* notes 52–64 and accompanying text.

²⁸ See Press Release, ACLU of Louisiana, ACLU Report Details Horrors Suffered by Orleans Parish Prisoners in Wake of Hurricane Katrina (Aug. 10, 2006), <https://www.aclu.org/press-releases/aclu-report-details-horrors-suffered-orleans-parish-prisoners-wake-hurricane-katrina> [<https://perma.cc/Y7TM-RUMW>] (providing an overview of the report documenting the experiences of incarcerated individuals in OPP following the storm).

²⁹ See Paul South, *Remembering Katrina: 20 Years Later*, CIVIL AIR PATROL (Aug. 29, 2025), <https://www.cap.news/remembering-katrina-20-years-later/> [<https://perma.cc/JCX3-56DK>] (discussing the damage caused by Hurricane Katrina); see also Ira P. Robbins, *Lessons from Hurricane Katrina: Prison Emergency Preparedness as a Constitutional Imperative*, 42 UNIV. MICH. J.L. REFORM 1, 7 (2008) (describing the evacuation mandate and severity of the hurricane).

³⁰ See NAT'L PRISON PROJECT OF THE ACLU ET AL., *supra* note 9 (reviewing the headlines following the disaster as focusing on almost every population except for incarcerated persons).

³¹ See *id.* at 9, 32 (providing testimony and a detailed description of the corrections officers leaving the prison during the hurricane). OPP is a complex of twelve facilities with approximately 6,500 prisoners incarcerated there at any given time. *Id.* at 13. According to the prisoners' testimony, staff had disappeared in all but three of the buildings: Conchetta, Templeman IV, and some floors in the HOD facility. *Id.* at 32. Because there were no staff members, prisoners were locked in cells that quickly filled with contaminated water. *Id.* at 38. They did not have access to food or clean water. *Id.* Some of the prisoners were able to break free from their cells and help their fellow inmates so they could go to higher levels of the prison to avoid drowning, but others were not able to escape. See *id.* at 51 (describing attempts to break free from cells and free others from drowning); *Summaries of 400 Testimonials from Inmates Incarcerated at Orleans Parish Prison During Hurricane Katrina*, *supra* note 5 (containing 400 testimonials of prisoners during Katrina). One individual explained that while at OPP, he “had neither food nor water. His dorm filled with smoke, which made it very difficult to breathe. He and the other inmates were screaming for help, but the deputies did not remain on their

several days, the contaminated water from the broken levee continued to rise in the locked prison cells.³² With no way to evacuate, prisoners screamed to fellow prisoners in higher cells in a desperate effort to escape the rising water.³³ During Hurricane Katrina, a myriad of individuals, including: juveniles, pretrial detainees, individuals charged with misdemeanors or petty crimes, and individuals convicted of felonies, were all trapped in OPP.³⁴

Despite best efforts to calculate the death toll, the final total of incarcerated individuals who died as a result of the disaster is still unknown.³⁵ The ACLU has been met with opacity from the prison deputies regarding any evacuation plan they may have had, the death toll of the prisoners, and the abandonment of the facilities by corrections officers.³⁶

posts, and they did not come to help the inmates.” *Summaries of 400 Testimonials from Inmates Incarcerated at Orleans Parish Prison During Hurricane Katrina*, *supra* note 5.

³² See generally *Summaries of 400 Testimonials from Inmates Incarcerated at Orleans Parish Prison During Hurricane Katrina*, *supra* note 5 (containing testimony regarding the chest-high water flooding from multiple incarcerated individuals in various facilities within OPP during the hurricane).

³³ See *id.* (containing testimonials of prisoners during Katrina highlighting the realities inside the prison); see also *New Orleans: Prisoners Abandoned to Floodwaters*, HUM. RTS. WATCH (Sep. 21, 2005), <https://www.hrw.org/news/2005/09/21/new-orleans-prisoners-abandoned-floodwaters> [<https://perma.cc/5L3K-2AMN>] (quoting Earrand Kelly, an individual incarcerated in the facility, on the severity of the flooding and the prisoners drowning in their cells). The people who were incarcerated at OPP said that when they were eventually evacuated, “they saw bodies floating in the floodwaters.” *Id.* Earrand Kelly explained that the water started rising all the way to his neck. *Id.* He said, “[w]e was [sic] calling down to the guys in the cells under us, talking to them every couple of minutes. They were crying, they were scared. The one that I was cool with, he was saying ‘I’m scared. I feel like I’m about to drown.’ He was crying.” *Id.*

³⁴ See Nat’l Prison Project of the ACLU, *Abandoned & Abused: Prisoners in the Wake of Hurricane Katrina*, 49 RACE & CLASS 81, 83 (2007), [https://cretschmd.psych.ucla.edu/nola/volunteer/Empirical Studies/Abandoned%20and%20abused%20-%20prisoners%20in%20the%20wake%20of%20hurricane%20katrina.pdf](https://cretschmd.psych.ucla.edu/nola/volunteer/Empirical%20Studies/Abandoned%20and%20abused%20-%20prisoners%20in%20the%20wake%20of%20hurricane%20katrina.pdf) [<https://perma.cc/B4T5-6BE4>] (stating that most of the people incarcerated in OPP were in pre-trial detention). In pre-trial detention, one has not yet been convicted of a crime and is awaiting trial. *Id.* at 83. Two of the facilities in OPP housed juveniles. *Id.* More than half of the individuals imprisoned at OPP were there due to unpaid fines or fees, parking violations, or public drunkenness. *Id.*

³⁵ See *id.* at 62 (stating that the sheriff “has consistently stated that there were no deaths at OPP during the storm and the subsequent evacuation” though both the deputies and the prisoners reported that there were). According to the same report, however, many incarcerated individuals and the staff members who stayed behind acknowledge that they witnessed deaths as a result of the hurricane. *Id.*; see also Press Release, ACLU of Louisiana, *ACLU Seeks Information on the Fate of 6,500 New Orleans Prisoners* (Sep. 28, 2005), <https://www.aclu.org/press-releases/aclu-seeks-information-fate-6500-new-orleans-prisoners> [<https://perma.cc/7GVZ-9RSY>] (detailing the legal efforts that the ACLU undertook in the wake of the disaster to determine the fates of the unaccounted-for individuals from OPP as well as to determine the prison evacuation procedure).

³⁶ See Press Release, *supra* note 35 (seeking more information from the OPP as to what, if any, emergency procedures were in place as OPP had previously refused to provide that information). The ACLU filed a Freedom of Information Act request to obtain evacuation plans and death counts from the hurricane. *Id.*

Following Hurricane Katrina, prisons were not evacuated in numerous hurricanes, including Hurricanes Rita, Ike, and Irene.³⁷ The horrors that befell the prisoners in Texas during Hurricane Ike closely mirrored those of Katrina.³⁸ Twelve years later, in 2017, America saw yet another example of this failure of the prison system in Texas during Hurricane Harvey.³⁹ The winds and floods were so powerful that the water supply system to the city was disabled, yet three state prisons and one federal prison in Beaumont, Texas, were not evacuated.⁴⁰ Prisoners reported the deaths of other prisoners as a result of

³⁷ See Matt Clarke, *In the Eye of the Storm: When Hurricanes Impact Prisons and Jails*, PRISON LEGAL NEWS (May 17, 2018), <https://www.prisonlegalnews.org/news/2018/may/17/eye-storm-when-hurricanes-impact-prisons-and-jails/> [<https://perma.cc/NK7J-HZSL>] (reviewing historical examples of failed prison evacuations throughout the last two decades). In Hurricane Rita, the Beaumont Correctional Institution, a federal prison, was not evacuated which resulted in over 400 people trapped there during and after the hurricane. *Id.* Because Beaumont is a federal prison, the prisoners were able to bring suit under the Federal Tort Claims Act (FTCA), though the prisoners lost that lawsuit due to the discretionary exception clause of the FTCA. *Id.* In Hurricane Ike, the prisoners in Galveston County Jail sat trapped, experiencing similar conditions to those at OPP: unavailable medical treatment, no electricity, lack of food and clean water, and rooftops that were caving in. *Id.* Prisoners in the Galveston County Jail brought suit against the prison officials for constitutional violations. *Id.* Three years later, in Hurricane Irene, Rikers Island in New York was not evacuated because the jail had not been assigned to an evacuation zone despite the surrounding areas all being in evacuation zones one and two. See *id.* (highlighting that Rikers Island was not evacuated in either Hurricane Irene or in Hurricane Sandy, and that there were no plans on how to evacuate the prison); see also Elizabeth Spitzenberger, *Cruel, but Not Unusual: The Increasingly Frequent Practice of Failing to Evacuate Prisoners During Natural Disasters*, FORDHAM UNIV. ENV'T L. REV. (Jan. 20, 2025), <https://fordhamlawelr.org/?p=1854> [<https://perma.cc/9HHK-R7CQ>] (emphasizing the commonality of refusing to evacuate prisons and disregarding the safety of the people imprisoned within).

³⁸ See Desiree Evans, *Report Criticizes Galveston Sheriff's Decision not to Evacuate County Jail*, INST. FOR S. STUD. (Sep. 16, 2009), <https://www.facingsouth.org/2009/09/report-criticizes-galveston-sheriffs-decision-not-to-evacuate-county-jail-during-ike.html> [<https://perma.cc/AXT2-48EA>] (reporting on the conditions of confinement for prisoners post-Ike). Even though Galveston County was subject to a mandatory evacuation, the Galveston County jail was not evacuated prior to the hurricane. *Id.* Like in other hurricanes, there were overflowing toilets and no water access. *Id.* The conditions were so dire, and the emergency was so pressing, that "[t]he animal shelter down the street was evacuated, but they didn't evacuate people at the jail" *Id.* The prisoners in Hurricane Ike explained that they thought they were going to die due to severe dehydration and resulting illness, thinking of those that were incarcerated at OPP. *Id.* Whereas most of the correctional officers were evacuated, the prisoners were left behind in rising flood waters, no food, and no power. See Gary Hunter, *Prisoners Not Evacuated, Parolees Rounded Up as Hurricanes Hit*, PRISON LEGAL NEWS (Sep. 15, 2009), <https://www.prisonlegalnews.org/news/2009/sep/15/prisoners-not-evacuated-parolees-rounded-up-as-hurricanes-hit/> [<https://perma.cc/2XQ4-CLQT>] (describing the conditions that resulted in twenty-two lawsuits filed in state court).

³⁹ See *Texas Prisoners Are Facing Horrid Conditions After Hurricane Harvey & Retaliation for Reporting Them*, DEMOCRACY NOW! (Sep. 8, 2017), https://www.democracynow.org/2017/9/8/texas_prisoners_are_facing_horrid_conditions [<https://perma.cc/2R78-EDL5>] (reporting on the prisoners who were not evacuated during Hurricane Harvey).

⁴⁰ See *id.* (describing that the prisoners in those facilities were left for days without water and with minimal food, wading in contaminated water and feces, and using the restroom in little bags so as not to contaminate their limited water supply).

the conditions during the crisis.⁴¹ There were not enough staff on site to evacuate the facilities before the storm took full effect and left the prison without food or water.⁴² More than 8,000 individuals were left in their cells to weather the floods, despite the state evacuating five other prisons.⁴³

Notwithstanding numerous historical examples of the tragedies that occur when prisons are not evacuated, it happened again in 2024 in both Hurricane Helene and Hurricane Milton.⁴⁴ Hurricane Helene hit North Carolina in September of 2024, causing unprecedented damage and floods.⁴⁵ The hurricane hit Mountain View Correctional hard, resulting in a loss of power for five days without access to drinking water and with very limited food rations.⁴⁶ As a result of the power outage, prisoners were forced to live amidst flooding cells and overflowing toilets.⁴⁷ A neighboring prison, Avery-Mitchell, was evacuated one day prior to Mountain View, but the prisoners there had also endured four days of these conditions.⁴⁸

⁴¹ See *id.* (citing the testimony of the wife of an individual imprisoned at the Beaumont Correctional Institution, wherein she states that the prisoners at Beaumont were emailing her from inside the prison that people were dying at the institution).

⁴² See *id.* (explaining that prisons were unable to evacuate due to insufficient staffing); see also John Washington, *After Harvey, Texas Inmates Were Left in Flooded Prisons Without Adequate Water or Food*, THE NATION (Oct. 13, 2017), <https://www.thenation.com/article/archive/after-harvey-texas-inmates-were-left-in-flooded-prisons-without-adequate-water-or-food/> [<https://perma.cc/TT56-VW89>] (describing the state of the Beaumont prison throughout the hurricane). Texas prisoners had previously been unevacuated after Hurricane Rita in 2005. See Washington, *supra* (describing the failure to evacuate the Beaumont prison in Hurricane Rita as well); Jolie McCullough, *Texas Congressman Concerned About Beaumont Prisoners After Harvey*, TEX. TRIB. (Sep. 11, 2017), <https://www.texastribune.org/2017/09/11/texas-congressman-why-didnt-beaumont-prisons-didnt-evacuate/> [<https://perma.cc/YR4U-EHF6>] (voicing concerns about the results of the failure to evacuate).

⁴³ See Washington, *supra* note 42 (stating the amount of people left in the prisons); see also Kalhan Rosenblatt, *Harvey Prompts 5 Texas Prisons to Evacuate Nearly 6,000 Inmates*, NBC NEWS (Aug. 29, 2017), <https://www.nbcnews.com/storyline/hurricane-harvey/harvey-prompts-5-texas-prisons-evacuate-nearly-6-000-inmates-n797086> [<https://perma.cc/9GYY-CZYJ>] (explaining that there was adequate staff and timing to evacuate some prisons).

⁴⁴ See Dixon et al., *supra* note 25 (remarking upon the failure to evacuate prisons during both hurricanes in 2024).

⁴⁵ See Schulyer Mitchell, *Hurricane-Struck North Carolina Prisoners Were Locked in Cells with Their Own Feces for Nearly a Week*, THE INTERCEPT (Oct. 4, 2024), <https://theintercept.com/2024/10/04/hurricane-helene-north-carolina-mountain-view-prison/> [<https://perma.cc/ZFR7-94GR>] (detailing the extensive flood damage that resulted from the hurricane); ROY COOPER, OFF. OF STATE BUDGET & MGMT., HURRICANE HELENE RECOVERY 5 (2024), <https://www.osbm.nc.gov/hurricane-helene-dna/open> [<https://perma.cc/X43E-266T>] (citing Hurricane Helene as the cause of historic flooding, unprecedented damage, and other novel consequences).

⁴⁶ See Mitchell, *supra* note 45 (describing the conditions in the Mountain View Correctional facility based on discussions with loved ones of men incarcerated in the facility).

⁴⁷ *Id.*

⁴⁸ See *id.* (explaining the evacuation plan of Avery-Mitchell versus that of Mountain View).

Two weeks later, Hurricane Milton made landfall in Florida.⁴⁹ As the mayor of Florida announced that if Floridians did not evacuate, they were going to die, Manatee County Jail refused to do so, even though it was in the most vulnerable evacuation zone.⁵⁰ Despite the urging of the public county safety director, the mayor, and other government officials, the prison officials still refused to evacuate the jails.⁵¹

2. The Reality of Prison Emergency Evacuation Procedures and Existing Federal Legislation

Presently, no federal regulatory scheme provides comprehensive relief or oversight to prisoners during natural disasters.⁵² Although the American Correctional Association (ACA) dictates that carceral facilities have written plans designed with the help of medical professionals, it does not impose any substantive requirements for these plans.⁵³ Prison administrators and high-ranking officials are the ones responsible for creating and maintaining these procedures as well as deciding whether to evacuate in an emergency.⁵⁴ Because there are

⁴⁹ See Alex Sundby et al., *Hurricane Milton Leaves Path of Destruction Across Florida, at Least 24 Dead*, CBS NEWS, <https://www.cbsnews.com/live-updates/hurricane-milton-2024/> [<https://perma.cc/MFL6-AMZL>] (Oct. 14, 2024) (detailing when and how hard Hurricane Milton hit Siesta Key, Florida). Florida jails and prisons refused to evacuate the prison population. See Gloria Oladipo, *Several Florida Jails and Prisons Refuse to Evacuate Ahead of Hurricane Milton*, THE GUARDIAN (Oct. 9, 2024), <https://www.theguardian.com/us-news/2024/oct/09/inmate-evacuation-hurricane-milton-jail-prison-florida> [<https://perma.cc/6GNL-APFF>] (discussing the choice not to evacuate several prisons).

⁵⁰ See Oladipo, *supra* note 49 (reiterating the statements of public safety officials in regard to the cruciality of evacuating in zone A).

⁵¹ *Id.*

⁵² See Maner et al., *supra* note 23, at 1382 (establishing that there is no unified federal procedure for relief or oversight).

⁵³ See AM. CORR. ASS'N, PERFORMANCE-BASED STANDARDS AND EXPECTED PRACTICES FOR ADULT CORRECTIONAL INSTITUTIONS 91–93 (5th ed. 2021) (ebook), <https://user-3imepyw.cld.bz/Perf-Based-Stds-Adult-Corr-Inst-5th-ed-March-2021/79> [<https://perma.cc/KW52-5ZJ9>] (defining the standard for emergency response plans imposed by the American Correction Association on their corrections institutes). The parameters for a fire evacuation are listed under “Evacuation Procedures” and “natural or man-made disasters” are evaluated under the “Threats to Security” section. *Id.* It specifically emphasizes the importance of a written plan, communicated to all personnel, outlining what media outlets should be informed, while failing to include any parameters as to how comprehensive the plans should be as well as whether they should be available to the prisoners themselves. *Id.* Notably, the provision entitled “Threats to Security” includes written procedures for use in situations that threaten the security of the institution as opposed to anything having to do with protection of prisoners or maintenance of prisoner safety. *Id.*

⁵⁴ See MORRIS THIGPEN ET AL., NAT'L INST. OF CORR., A GUIDE TO PREPARING FOR AND RESPONDING TO JAIL EMERGENCIES 64–66 (2009), https://www.nationaljailacademy.org/_documents/resources/jail-leaders/jail-emergencies.pdf [<https://perma.cc/8TMP-SXMD>] (allocating certain responsibilities in a natural disaster to the sheriff's staff and central office). The National Institute of Corrections released a checklist for prisons to self-audit and determine the adequacy of their emergency response procedures. *Id.*

no substantive requirements, prison emergency evacuation plans continue to fall short.⁵⁵

Although legislation was enacted in the wake of these natural disasters to prepare for and respond to future hurricanes for the general public, much of the legislation fails to mention the prison population.⁵⁶ Before the Disaster Reform Recovery Act, enacted in 2018, no disaster relief legislation explicitly referenced the prison population in its protections.⁵⁷ Neither the Post-Katrina Emergency Reform Act nor the Robert T. Stafford Disaster Relief and Emergency Assistance Act provide any guidance on how prisons should evacuate their populations in cases of emergency.⁵⁸ The Disaster Recovery Reform Act, written as an amendment to the Robert T. Stafford Act, states that the Federal Emergency Management Agency should develop and guide local and state authorities on identifying routes for evacuations.⁵⁹ For the first time, this Act

⁵⁵ See JB Nicholas, 'Just Leave Them to Die,' THE APPEAL (Feb. 22, 2019), <https://theappeal.org/mdc-brooklyn-jail-prison-emergency-preparedness/> [<https://perma.cc/PR8L-QA8K>] (noting that there are no emergency plans in place for a variety of situations while specifically describing the conditions in the Metropolitan Detention Center Brooklyn after an electrical fire and resulting power outage). There is no national, federal plan and, as a result, most prisons and jails do not have any emergency evacuation procedures in place. See *id.* (discussing prisoners left to die or left in horrible conditions because prisons do not have sound emergency planning). During Hurricane Irene, Rikers Island was not evacuated as the Department of Corrections for New York City had "no hypothetical evacuation plan for the roughly 12,000 [prisoners] that the facility may house on a given day." See Jean Casella & James Ridgeway, *Locked Up and Left Behind: Hurricane Irene and the Prisoners on New York's Rikers Island*, SOLITARY WATCH (Aug. 26, 2011), <https://solitarywatch.org/2011/08/26/locked-up-and-left-behind-new-yorks-prisoners-and-hurricane-irene/> [<https://perma.cc/59E3-8CRG>] (reviewing the landscape of Rikers Island and its increased susceptibility to hurricanes).

⁵⁶ See Maya Habash, Comment, *Locked Up in the Eye of the Storm: A Case for Heightened Legal Protections for Incarcerated People During Hurricanes*, 21 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 137, 149–50 (2021) (highlighting the inadequacies in the existing legislation for natural disasters).

⁵⁷ See Disaster Recovery Reform Act of 2018, Pub. L. No. 115-254, § 1209(b)(B)(ii), 132 Stat. 3186, 3441–42 (2018) (altering the definition of special needs populations to include those in detention centers and prisons); Habash, *supra* note 56, at 154 (reviewing the importance of the first piece of legislation to acknowledge "incarcerated people" within its text).

⁵⁸ See generally Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, 120 Stat. 1344 (incorporating no reference to prisoners or incarcerated people). The Act speaks extensively about establishing evacuation plans for specific individuals including those with "disabilities or special needs; with limited English proficiency; or who might otherwise have difficulty in obtaining such information." *Id.* § 512(b)(5)(A)–(C); Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5207 (2006) (containing no stated protections for incarcerated people). The Act has a "Nondiscrimination in Disaster Assistance" clause requiring that all regulations necessary for personnel carrying out federal assistance in the wake of a natural disaster must act in a non-discriminatory manner for a variety of protected statuses. 42 U.S.C. § 5151. The clause does not include incarceration as a protected status. See *id.* (failing to list incarceration in the enumeration of protected classes). The only use of the word "prison" within the Stafford Act is in reference to utilizing prison labor to restore and repair damaged facilities. *Id.* § 5172(2)(B); see also Habash, *supra* note 56, at 153 (stating the failure to mention to incarcerated people in both the Post-Katrina Emergency Management Reform Act of 2006 and the Stafford Act).

⁵⁹ See Disaster Recovery Reform Act of 2018, Pub. L. No. 115-254, § 1209(b)(B)(ii), 132 Stat. 3186, 3441–42 (expanding the Stafford Act wherein the special needs populations were only listed as

specifically highlights the need to evacuate certain special needs populations, including prisons and detention centers.⁶⁰

Despite the Disaster Recovery Reform Act and accompanying guidance emphasizing the importance of a collective effort amongst various agencies, studies show that Emergency Managers are failing to work with correctional officials on evacuation strategies.⁶¹ Further, as of 2022—four years after the Disaster Reform Recovery Act was enacted—a study conducted across fifty corrections departments showed that thirty-three did not have emergency management plans.⁶² Out of the seventeen that did have emergency plans, only six had any mention of prisoner safety.⁶³ Rather, the study concluded that most of the emergency evacuation plans in existence predominantly focused on utilizing prisoner labor instead of ensuring prisoner safety during natural disasters.⁶⁴

B. Conditions of Confinement: 42 U.S.C. § 1983 Claims Under the Eighth and Fourteenth Amendments

Two amendments to the U.S. Constitution—the Eighth Amendment, which prohibits cruel and unusual punishment, and the Fourteenth Amendment, which protects due process rights—serve as the backdrop for constitu-

individuals with special needs or disabilities to include other populations, including prisoners); 42 U.S.C. § 5192–5196f (listing individuals with disabilities or other special needs as the populations that the Federal Emergency Management Agency should aid with evacuation guidelines and plans). The resulting implementation guidance was released in July 2019. *See* U.S. DEP’T OF HOMELAND SEC., PLANNING CONSIDERATIONS: EVACUATION AND SHELTER IN PLACE 1, 11 (2019), https://www.fema.gov/sites/default/files/2020-07/fema_DRRRA-1209-planning-considerations-evacuation-shelter-in-place_guide.pdf [<https://perma.cc/F7ZV-2D7E>] (requiring a joint operation between Federal Agencies and State and Local corrections officials to evacuate jails and prisons); *see also* Habash, *supra* note 56, at 154 (referencing the novelty of including prisoners in the text of the legislation).

⁶⁰ Disaster Recovery Reform Act of 2018 § 1209(b)(B)(ii) (describing the special needs populations as those in prisons, nursing homes, schools, the elderly, and other long term detention centers).

⁶¹ *See* Carl E. Dement, *Public Administration in Disasters: Integrating Emergency Management into Jail and Prison Preparedness*, 84 PUB. ADMIN. REV. 56, 56–64, 62 (2023) (concluding that the carceral officials for numerous jails and prisons across the study did not work with the Office of Emergency Management to create evacuation plans). This study focused on areas and correctional officials/emergency management officials that experienced a major disaster from 2020–2021. *Id.* at 58–59. The results from the forty-one interviews with emergency management and correctional officials showed that emergency management officials in rural jurisdictions, despite understanding the importance of conducting risk assessments, had not actually done so for prison population. *Id.* at 59. Furthermore, even those who did conduct risk assessments found that prisoners were not a vulnerable population and did not see the actual jail/prison as being an infrastructure that emergency managers had to consider. *Id.* Because of this, the emergency management officials did not work with the carceral officials. *Id.* Zero of the twenty-four carceral officials that were interviewed had even thought about turning to the office of emergency management for help and were thereby completely unaware of support that could have been made available to them from the office of emergency management. *Id.* at 60.

⁶² *See* Maner et al., *supra* note 23, at 1382 (compiling data from a study regarding a nationwide assessment of emergency management plans from the Department of Corrections).

⁶³ *Id.*

⁶⁴ *Id.*

tional deprivation claims brought by pretrial detainees and prisoners regarding their conditions of confinement.⁶⁵ The conditions faced by prisoners will continue to intensify as the climate crisis worsens.⁶⁶ Without food, water, and electricity, they are left in untenable and unlivable conditions.⁶⁷ The legal recourse that prisoners can use is governed by 42 U.S.C. § 1983, the Eighth and Fourteenth Amendments, and the Prison Reform Litigation Act.⁶⁸

A prisoner can bring a civil claim against either a correction officer specifically or a correctional institution as an entity for a violation of their civil rights under 42 U.S.C. § 1983.⁶⁹ For prisoners to bring a claim against a state actor for a constitutional violation, they first had to be granted standing in federal court, which initially posed a barrier to litigation.⁷⁰ In 1962, in *Robinson v.*

⁶⁵ See U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”); *id.* amend. XIV, § 1 (establishing the right to due process).

⁶⁶ See Maner et al., *supra* note 23, at 1384 (reviewing the effect that climate change will have on worsening conditions of confinement for prisoners).

⁶⁷ See *Texas Prisoners Are Facing Horrid Conditions After Hurricane Harvey & Retaliation for Reporting Them*, *supra* note 39 (discussing the conditions that result post-natural disasters in prisons, specifically in Hurricane Harvey); *Summaries of 400 Testimonials from Inmates Incarcerated at Orleans Parish Prison During Hurricane Katrina*, *supra* note 5 (containing testimony from prisoners regarding the lack of food and clean drinking water after Hurricane Katrina).

⁶⁸ See § 1983 (establishing a federal legal cause of action for civil rights violations claims); U.S. CONST. amend. VIII (banning cruel and unusual punishment); *id.* amend. XIV, § 1 (enshrining substantive due process rights); Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (laying out the requirements for prisoners to bring a federal claim under 42 U.S.C. § 1983).

⁶⁹ See § 1983 (establishing the statutory basis for bringing a civil rights claim). Title 42 of U.S.C. § 1983 was landmark legislation that established legal recourse for constitutional violations after the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments. See Lenora M. Lapidus, *What Good Is the Constitution if You Can’t Enforce It in Court?*, ACLU (Sep. 17, 2008), <https://www.aclu.org/news/smart-justice/what-good-constitution-if-you-cant-enforce-it-court> [<https://perma.cc/4RQB-WA3S>] (explaining the impact of legal remedies for civil rights violations and the establishment of that cause of action thanks to 42 U.S.C. § 1983). Although claims against a corrections officer can be brought under 42 U.S.C. § 1983, in order to bring suit against a prison itself as a municipal facility, one must allege “an institutional policy or custom of inadequately protecting and supervising detainees.” See *Soto v. Brooklyn Corr. Facility*, 80 F.3d 34, 35 (2d Cir. 1996) (distinguishing between the requirements for claims against an institution versus an officer under 42 U.S.C. § 1983); see also *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 663–64 (1978) (overruling precedent and holding that local governments and municipal corporations are subjected to liability under 42 U.S.C. § 1983). In a landmark decision, in 1971, the Supreme Court created a right of action against federal officials for violating constitutional rights. See generally *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389–98 (1971) (establishing the necessity of creating legal recourse for the protection of an established constitutional right). This Note will discuss solely 42 U.S.C. § 1983 claims which are federal actions brought against state and local officials and not *Bivens* claims which are federal actions brought against federal officials. § 1983; 403 U.S. at 389–98.

⁷⁰ See Jake Kobrick, *Eighth Amendment Prison Litigation*, FED. JUD. CTR., <https://www.fjc.gov/history/spotlight-judicial-history/eighth-amendment-prison-litigation> [<https://perma.cc/X4MD-9C29>] (discussing the necessity of having standing to bring a claim in federal court); § 1983 (codifying the right to sue corrections officers or correctional institutions for deprivation of constitutional rights);

California, the Supreme Court applied the Eighth Amendment to the states, granting prisoners the ability to sue state prisons in federal court.⁷¹ The first case wherein a prisoner brought a 42 U.S.C. § 1983 in federal court against a state prison was in 1964 in *Cooper v. Pate*, two years after *Robinson*.⁷²

Subsection 1 provides an in-depth look at the evolution of the deliberate indifference standard.⁷³ Subsection 2 examines the nuances in how pre-trial detainees versus post-conviction prisoners are treated under the law.⁷⁴ Subsection 3 considers the affirmative defenses available to prisoners under the PLRA.⁷⁵

1. Objective or Subjective: The Evolution of the Deliberate Indifference Intent Standard

The framers failed to define what exactly constitutes cruel and unusual punishment under the Eighth Amendment, requiring the Supreme Court to try to create metrics to assess when a punishment meets that threshold.⁷⁶ Cruel and unusual punishments *could* be interpreted to mean anything that offends the standard of decency; however, these terms are historically interpreted dynamically.⁷⁷ What is clear is that punishments are considered cruel and unusual when they involve the “unnecessary and wanton infliction of pain,” or when the punishment is “grossly disproportionate” in relation to the crime’s severity.⁷⁸

Standing, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining standing as “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right”).

⁷¹ See 370 U.S. 660, 675 (1962) (stating that the Fourteenth Amendment applies to state actors allowing federal claims to be made against them under the Eighth Amendment); Kobrick, *supra* note 70 (establishing that *Robinson v. California* permitted prisoners in state institutions to bring suit under Eighth Amendment claims).

⁷² See *Cooper v. Pate*, 378 U.S. 546, 546 (1964) (presiding upon a federal claim brought by an incarcerated individual against a state petitioner); *Robinson*, 370 U.S. at 661 (stating that the Eighth Amendment’s prohibition on cruel and unusual punishment applies to the states by way of the Fourteenth Amendment); see also Kobrick, *supra* note 70 (asserting *Cooper* as the first case in which an Eighth Amendment claim was brought against a state prison post-*Robinson*).

⁷³ See *infra* notes 76–102 and accompanying text.

⁷⁴ See *infra* notes 103–116 and accompanying text.

⁷⁵ See *infra* notes 117–119 and accompanying text.

⁷⁶ See Richard J. Dunn, *The Eighth Amendment and Prison Conditions: Shocking Standards and Good Faith*, 44 FORDHAM L. REV. 950, 952–53 (1976) (detailing the difficulties in effectively applying the prohibition of cruel and unusual punishment as stated in the Eighth Amendment due to imprecise boundaries dictating what “cruel” and “unusual” punishment truly is).

⁷⁷ See *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (explaining that the punishments and conditions that could constitute cruel and unusual punishment are not static and have evolved over time); see also *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (citing a dynamic and flexible approach to what constitutes cruel and unusual punishment under the Eighth Amendment).

⁷⁸ See *Gregg*, 428 U.S. at 173 (forbidding wanton and unnecessary punishment in considering it cruel and unusual); see also *Rhodes v. Chapman*, 452 U.S. 337, 346–47 (1981) (declaring wanton and unnecessary punishment and grossly disproportionate punishment as constituting cruel and unusual punishment).

Since 1964, the Supreme Court has made decisions regarding overcrowding in prisons, prison healthcare access, excessive force, and correction officer culpability.⁷⁹ Executing intellectually disabled individuals and sentencing juveniles to life without parole are the two punishments consistently barred by the Supreme Court under Eighth Amendment protections.⁸⁰ Aside from those two instances, the Supreme Court's Eighth Amendment jurisprudence has been an evolving mosaic introducing differing judicially-created and enforced standards for what comprises a constitutional deprivation in various circumstances.⁸¹

In 1976, in *Estelle v. Gamble*, the Supreme Court first created the deliberate indifference standard.⁸² There, the prisoner-plaintiff brought suit against corrections officers and the corrections department's medical director for their continued failure to provide adequate medical care after a workplace prison injury.⁸³ The Court held that, to have a cognizable 42 U.S.C. § 1983 claim of cruel and unusual punishment, a prisoner must allege that a corrections officer

⁷⁹ See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that prisoners' rights can be violated by inadequate medical care); *Rhodes*, 452 U.S. at 348–49 (holding that overcrowding mitigation procedures housing two prisoners in one cell did not violate the Eighth Amendment as there was no infliction of needless pain and essential needs of the prisoners were met); *Wilson v. Seiter*, 501 U.S. 294, 299 (1991) (establishing a culpability requirement on the part of prison officials in order to find a constitutional violation of the Eighth Amendment); *Hudson v. McMillian*, 503 U.S. 1, 4 (1992) (holding that a prisoner's right against cruel and unusual punishment can be violated even without suffering serious injury); *Helling v. McKinney*, 509 U.S. 25, 35 (1993) (holding that it is possible that exposure to environmental hazards can constitute an Eighth Amendment violation); *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (analyzing the deliberate indifference standard to mean that the officer "was subjectively aware of the risk"); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that "in the light of our 'evolving standards of decency,'" it would be cruel and unusual to sentence intellectually disabled individuals to death); *Hope v. Pelzer*, 536 U.S. 730, 733 (2002) (finding that a prisoner suffered cruel and unusual punishment at the hands of prison guards handcuffing him to a hitching post); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding that it is cruel and unusual punishment to sentence a juvenile to life without parole for a non-homicide crime); *Brown v. Plata*, 563 U.S. 493, 545 (2011) (finding that, due to overcrowding in prisons, it was impossible to ensure adequate access to medical and mental healthcare, thereby constituting cruel and unusual punishment).

⁸⁰ See *Atkins*, 536 U.S. at 321 (holding that sentencing intellectually disabled individuals to death is unconstitutional under the prohibition of cruel and unusual punishment); *Graham*, 560 U.S. at 78–81 (establishing that a juvenile cannot, under the Eighth Amendment, be sentenced to life without parole for a non-homicide crime).

⁸¹ See *Estelle*, 429 U.S. at 102–05 (citing an evolution of the standard in deciding Eighth Amendment cases); see also *supra* note 79 and accompanying text (detailing the constitutional violations claims that have come before the Supreme Court).

⁸² See 429 U.S. at 106 (outlining the deliberate indifference standard).

⁸³ *Id.* at 99–101. Estelle was injured while working for the prison. *Id.* at 99. Subsequently, he called out of work due to severe back pain, and he was brought in front of the disciplinary committee for calling out too frequently. *Id.* at 100–01. The facility then placed him in solitary confinement where he asked for medical assistance due to chest pains. *Id.* at 101. His complaint cited continued instances wherein the corrections officers refused to allow him to see the prison doctor and the inadequate medication that he received from the prison's medical providers. *Id.* at 99–102.

demonstrated “deliberate indifference” to a serious medical need.⁸⁴ This could be in the form of harmful behavior or omissions.⁸⁵ In this ruling, the *Estelle* Court, however, did not explicitly define the parameters of the test it created.⁸⁶

Since *Estelle*, the Supreme Court has waffled on the level of intent that a corrections officer must have to be culpable for an Eighth Amendment violation.⁸⁷ In 1981, in *Rhodes v. Chapman*, the Supreme Court made its first attempt to apply the deliberate indifference concept as articulated in *Estelle* to a conditions of confinement claim.⁸⁸ The Supreme Court utilized an objective standard in evaluating an officer’s conduct and specifically did not require a subjective standard for cruel and unusual punishment.⁸⁹ After *Rhodes*, in 1991, in *Wilson v. Seiter*, the Supreme Court re-evaluated the deliberate indifference standard and rejected the contention that systemic conditions of confinement claims could be evaluated using a solely objective framework.⁹⁰ *Wilson* not only established the parameters of the subjective intent standard but also defined what specifically comprises a claim for conditions of confinement.⁹¹ In *Wilson*, the prisoner-plaintiff alleged that numerous confinement conditions violated his rights against cruel and unusual punishment, including unsanitary bathrooms, overcrowded cells, temperature issues, and inedible food.⁹²

⁸⁴ *Id.* at 104–06. Justice Stevens’s dissent in *Estelle* protests the intent standard, asserting that confinement conditions can be cruel and inhumane regardless of how they came to be. *Id.* at 116–17 (Stevens, J., dissenting). He states that the motivation and subjective intent of the individual who committed the constitutional violation should not be the basis of a cognizable 42 U.S.C. § 1983 claim but rather the nature of the harm inflicted. *Id.*

⁸⁵ *See id.* at 106 (allowing for both intentional behavior and omissions to be considered under the deliberate indifference standard).

⁸⁶ *See id.* at 106–07 (stating the standard without stating specific parameters of how to meet that standard).

⁸⁷ *See* Philip M. Genty, *Confusing Punishment with Custodial Care: The Troublesome Legacy of Estelle v. Gamble*, 21 VT. L. REV. 379, 380 (1996) (describing the evolution of the intent standard post-*Estelle* as “a tug-of-war”).

⁸⁸ *See* 452 U.S. 337, 353–54 (1981) (expressing that many lower courts had previously grappled with the level of intent necessary for a cognizable 42 U.S.C. § 1983 claim on the basis of unconstitutional conditions of confinement). This was the first case wherein the Supreme Court definitively decided how to assess a corrections officers’ liability under the Eighth Amendment bar on cruel and unusual punishment for conditions of confinement claims. *Id.*

⁸⁹ *See id.* at 346 (establishing that objective factors should be relied upon in the analysis of whether the punishment was cruel and unusual, electing not to use an intent requirement in the deliberate indifference standard); *see also* *Wilson v. Seiter*, 501 U.S. 294, 299 (1991) (discussing that, although *Rhodes* relied on an objective standard to establish deliberate indifference, it did not foreclose the imposition of a subjective intent requirement).

⁹⁰ *See* 501 U.S. at 299–300 (rejecting the plaintiff’s (and the United States as *amicus curiae*’s) argument that conditions need not inherently possess an intent requirement to be considered cruel and unusual, especially in situations of systemic treatment). The punishment remains cruel and unusual regardless of the determining cause. *Id.* at 300.

⁹¹ *See id.* at 304–05 (outlining what constitutes a legitimate conditions of confinement claim).

⁹² *Id.* at 296–97. In evaluating his claim, the Court clarified that confinement conditions cannot be evaluated overall when there is no deprivation of a specific need. *Id.* at 304. According to the *Wilson* Court, more than one confinement condition can be examined in tandem only if one compounds the

In 1994, in *Farmer v. Brennan*, the Supreme Court outlined the complete test for determining a cognizable 42 U.S.C. § 1983 claim as it had previously attempted to in *Estelle* and *Wilson*.⁹³ The *Farmer* Court clarified that the deliberate indifference standard has two prongs: the objective prong, stating that the conditions must pose a risk of serious harm; and the subjective prong, requiring a showing that the corrections officer was aware of that serious risk of harm and disregarded it.⁹⁴ Here, the Court established a bright-line rule to define what constituted the requisite mens rea on behalf of the corrections officer.⁹⁵ The Court further held that prisoner-plaintiffs must demonstrate that corrections officers both had the facts to support a conclusion of excessive risk and *actually* drew the inference that there was excessive risk.⁹⁶

A salient example of the Court's evolving perspective in regards to Eighth Amendment violations can be seen in the Court's handling of double-celling in *Rhodes* and *Brown v. Plata*.⁹⁷ In *Rhodes*, the Supreme Court held that overcrowd-

effects of the other. *Id.* Warmth is one such example provided by the court—the lack of provided blankets and a freezing cell are two conditions that work together to exacerbate the deprivation of a specific need [warmth]. *Id.*

⁹³ See 511 U.S. 825, 835–38 (1994) (outlining the deliberate indifference test to adopt a criminal standard of recklessness and thereby imposing a subjective requirement to constitutional violation claims).

⁹⁴ *Id.* at 837. See generally Brittany Glidden, *Necessary Suffering? Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1823–37 (2012) (reviewing both prongs of the deliberate indifference standard).

⁹⁵ See *Farmer*, 511 U.S. at 836–37 (explicating the recklessness standard). Previously, the standard as articulated in *Wilson* included a test that required more than negligent behavior and less than knowledge to hold correctional officers liable for certain conduct. 501 U.S. at 304–05. Somewhere in between negligence and knowledge lies recklessness and in *Farmer* the Court had to define which standard of recklessness (criminal or civil) would dictate the intent requirement for deliberate indifference. 511 U.S. at 836, 839–40. While the criminal standard, which respondents in this case requested, dictates that a corrections officer would have to be aware of the risk he disregarded, the civil standard provides that the risk could be known to the officer or *should* be known to the officer. *Id.* at 836–37 (emphasis added). Adopting the civil law standard of recklessness would thereby create an objective standard, relying on the reasonable person's knowledge rather than the criminal law standard requiring personal knowledge of the risk. *Id.*

⁹⁶ See *Farmer*, 511 U.S. at 836–41 (refuting the plaintiff's request to adopt the civil law objective recklessness standard in favor of the criminal law subjective recklessness standard as the definition of deliberate indifference). The Court discusses the text of the Eighth Amendment, holding that a textual reading of the Amendment condemns punishment, not solely conditions in a prison, and without a subjective intent to inflict punishment, the Eighth Amendment is not triggered. *Id.* at 837–38. The Court relies on the *Wilson* decision as well as numerous subsequent decisions that affirm the subjective intent requirement as a necessary element to prove an Eighth Amendment constitutional violation. *Id.* at 838–39. The *Farmer* Court further held that the subjective standard was dictated by the Eighth Amendment and thereby refused to allow for an objective standard of recklessness. *Id.* at 837–39.

⁹⁷ See *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (representing the opinion of the Supreme Court in 1981 regarding double-celling due to prison overcrowding); *Brown v. Plata*, 563 U.S. 493, 502 (2011) (representing the subsequent opinion of the Supreme Court in 2011 establishing overcrowding in that instance as unconstitutional).

ing in prisons by housing two inmates in a single cell was not unconstitutional.⁹⁸ The Court maintained that the “double-celling” practice did not constitute an Eighth Amendment violation because it did not cause deprivation of an essential, specific need.⁹⁹ In 2011, in *Brown*, however, the Supreme Court re-visited its stance regarding overcrowding procedures.¹⁰⁰ In *Brown*, unlike in *Rhodes*, the Court found that overcrowding led to “unsanitary and unsafe conditions” that made proper mental and medical health care inaccessible in the prison.¹⁰¹ The *Brown* Court referenced specific instances where inmates were forced to stand in their own urine or were confined without access to bathroom facilities.¹⁰²

2. Pre-Trial Detainees: Adopting an Objective or Subjective Standard

42 U.S.C. § 1983 allows pre-trial detainees, like prisoners, to bring claims against corrections institutions and/or correctional officers for constitutional violations.¹⁰³ Despite this similarity, there is a discrepancy between the treatment of the two categories of incarcerated persons under the Constitution.¹⁰⁴ The application of the deliberate indifference standard differs for each group due to the separate constitutional amendments under which their claims are evaluated.¹⁰⁵ Post-conviction prisoners are subject to the protections of the Eighth

⁹⁸ See 452 U.S. at 348 (holding that there was no violation of the Eighth Amendment in forcibly housing two prisoners in one cell due to overcrowding in the prison).

⁹⁹ See *id.* at 347–50 (holding that it was not the Court’s role to dictate how the prisons dealt with unanticipated overcrowding so long as the overcrowding did not lead to deprivation of a specific need and, in this case, it did not). While there was reduced access to educational and vocational programming, no violence increased nor were essential needs withheld from prisoners. *Id.* at 348. Therefore, this could not rise to the level of a constitutional violation. *Id.*

¹⁰⁰ See 563 U.S. at 502 (establishing that overcrowding created confinement conditions that violated the Eighth Amendment due to inadequate access to health care).

¹⁰¹ See *id.* (holding that the Eighth Amendment was violated because the conditions constituted “severe and unlawful treatment of prisoners” due to the lack of healthcare availability). The Court stated, “[a] prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.” *Id.* at 511.

¹⁰² See *id.* at 504–06 (narrating the extensive reality of the facts of the case and the conditions of confinement that the California prisoners were subjected to due to overcrowding). Not only were prisoners temporarily subjected to these types of conditions, but one prisoner was observed as standing in his cage for a full day, catatonic and in a pool of his own urine. *Id.* at 504. The prison had a steep prisoner suicide rate as a result of severely deficient medical treatment. *Id.* While waiting for any available treatment, prisoners would wait in a cage for numerous hours with up to fifty other sick prisoners. *Id.*

¹⁰³ See § 1983 (establishing the statutory claim under which pre-trial detainees can bring claims).

¹⁰⁴ See *Amdt14.S1.5.6.4 Prisoners and Procedural Due Process*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-5-6-4/ALDE_00013770/ [<https://perma.cc/4Q2G-2NEH>] (describing the differing protections afforded to pre-trial detainees versus post-conviction prisoners under the Eighth and Fourteenth Amendments).

¹⁰⁵ See *Detention*, BLACK’S LAW DICTIONARY, *supra* note 70 (defining pre-trial detention as “[t]he holding of a defendant before trial on criminal charges either because the established bail could not be posted or because release was denied”); COLUM. HUM. RTS. L. REV., *supra* note 3 at 1196 (explaining that a pre-trial detainee is an individual who has been charged and arrested for a crime and

Amendment barring cruel and unusual punishment, while pre-trial detainees *should be* subject to the enhanced protections of the Fourteenth Amendment because they have not yet had their day in court.¹⁰⁶ Although the Fourteenth Amendment prohibits the punishment of a pretrial detainee, since 1979, courts have held that pretrial detainees can be subjected to certain conditions of confinement if those conditions are reasonably related to a non-punitive and legitimate governmental goal.¹⁰⁷ In 1979, in *Bell v. Wolfish*, the Supreme Court held that pretrial detainees are entitled to stronger protections than those that are only comporting with modern decency standards, as is the case with prisoners.¹⁰⁸

In 2017, in *Kingsley v. Hendrickson*, the Supreme Court held that an excessive force claim brought by a pre-trial detainee should be evaluated under an objective reasonableness standard.¹⁰⁹ In *Kingsley*, the pretrial detainee

is being kept in a jail awaiting); *see also* U.S. CONST. amend. XIV, § 1 (assuring pretrial detainees' rights to due process); *id.* amend. VIII (prohibiting punishments considered cruel and unusual); Andrew M. Robie, Comment, *The Doctor Must See You Now: The Sixth Circuit Clarifies Deliberate Indifference Standard for Pre-Trial Detainees*, 84 OHIO ST. L.J. SIXTH CIR. REV. 1, 2 (2023) (explaining the constitutional protections afforded to pre-trial detainees versus post-conviction prisoners); Noah Speitel, Note, *Holding the Big House Accountable: The Sixth Circuit Concludes a Pretrial Detainee's Fourteenth Amendment Deliberate Indifference Claim Is a Wholly Objective Determination*, 68 VILL. L. REV. 699, 701–02 (2023) (framing the pre-trial detainee's Fourteenth Amendment rights as protecting them from any punishment prior to their day in court, which is distinct from a post-conviction prisoner's Eighth Amendment rights).

¹⁰⁶ *See* U.S. CONST. amend. XIV, § 1 (establishing the due process clause that entitles individuals to a trial before incurring punishment at the state's hands); *id.* amend. VIII (encompassing the rights of individuals who have already had due process of law and are subject to the punishments inflicted by the state); *see also* Due Process, BLACK'S LAW DICTIONARY, *supra* note 70 (defining Due Process as "[t]he conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case"); *Kingsley v. Hendrickson*, 576 U.S. 389, 400 (2015) (distinguishing between cases brought by pre-trial detainees under the Fourteenth Amendment and cases brought by prisoners under the Eighth Amendment because pre-trial detainees are not subject to punishment in any form); *Bell v. Wolfish*, 441 U.S. 520, 531 (1979) (holding that the proper legal recourse for pre-trial detainees is in the Due Process Clause as opposed to the Eighth Amendment); *Amdt14.S1.5.4.1. Overview of Procedural Due Process in Civil Cases*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-5-4-1/ALDE_00013750/ [<https://perma.cc/5N9G-TQN4>] (highlighting the substantive due process protections and requirements).

¹⁰⁷ *See Bell*, 441 U.S. at 539 (holding that an action reasonably related to a legitimate governmental objective is not punishment, whereas an action unrelated to a legitimate governmental objective is punishment under the Fourteenth Amendment when inflicted on pretrial detainees). The Court differentiated between conditions of confinement due to the regulatory functions of the detainment center that did not amount to constitutional "punishment" and conditions that rose to the level of punishment as prohibited in the constitution. *Id.* at 538. The Court cautioned against second-guessing the judgment of the corrections officers and asserted the importance of giving them slack as there are no simple solutions for many of the everyday issues that arise within the prison walls. *Id.* 547–48.

¹⁰⁸ *See id.* at 531 (distinguishing between prisoners and pretrial detainees based on the constitutional protections they are afforded).

¹⁰⁹ *See* 576 U.S. at 395–96 (holding that, aside from proving that the officer's conduct was purposeful, knowing or potentially reckless, the plaintiff was not responsible for proving the "defendant's

plaintiff had been tased while handcuffed after refusing to remove a piece of paper from a light within his cell.¹¹⁰ The Supreme Court chose to endorse an objective standard in pretrial excessive force claims, relying on precedent, the workability of the standard, and the adequate protection for corrections officers that it affords.¹¹¹

Since *Kingsley*, circuit courts have grappled with the level of subjective intent required to bring constitutional claims—other than excessive force claims—against corrections officers.¹¹² Looking in particular at conditions of confinement claims, the Second Circuit has adopted an objective standard, whereas the Eleventh Circuit relies on a subjective one.¹¹³ In 2017, in *Darnell v. Pineiro*, the Second Circuit joined the Ninth Circuit in extending the *Kings-*

state of mind”). Prior to *Kinglsey*, circuit courts were split on what level of intent was applicable to pretrial detainees’ §1983 claims for excessive force. *See id.* at 395 (differentiating the Second and Eleventh Circuits from the Sixth and Ninth Circuits); *see also* Kate Lambroza, Note, *Pretrial Detainees and the Objective Standard After Kingsley v. Hendrickson*, 58 AM. CRIM. L. REV. 429, 431 (2021) (highlighting that the circuit split occurred after *Kingsley* introduced the objective standard as a mechanism for interpreting pre-trial detainees’ claims as opposed to the subjective standard recognized by circuit courts).

¹¹⁰ *See* 576 U.S. at 392 (describing the conduct that the plaintiff alleged violated his constitutional rights). After tasing him, the corrections officers left him in his cell, still handcuffed, for fifteen minutes. *Id.*

¹¹¹ *See id.* at 398–400 (discussing the reasons for adopting an objective reasonableness standard as opposed to requiring some form of subjective intent). The Court held that this standard works in practice because it had already been incorporated in the jury instructions in some circuits. *Id.* The Court also relied on the intel that carceral facilities tailored the training of their officers to an objective standard. *Id.* Further, the Court relied on *Bell* and held that the *Bell* standard should not have a subjective component when applied. *Id.* at 399. Lastly, the Court held that a corrections officer’s rights were still adequately protected under an objective reasonableness analysis supposing they were acting in good faith. *Id.*

¹¹² *See id.* at 395–96 (holding that an objective standard will be applied to excessive force cases brought under 42 U.S.C. § 1983). The circuit courts have evaluated the objective standard against the backdrop of several different claims brought under 42 U.S.C. § 1983 including conditions of confinement and failure to protect claims since the Supreme Court’s ruling regarding excessive force cases. *See* Lambroza, *supra* note 109, at 431 (reviewing that circuit courts are split on each of those claims, with at least one circuit championing the objective standard and one advocating for the subjective standard); Speitel, *supra* note 105, at 703 (examining the Sixth Circuit’s objective standard approach post-*Kingsley*); Shad M. Brown, Note, *Giving Due Process Its Due: Why Deliberate Indifference Should Be Confined to Claims Arising Under the Cruel and Unusual Punishment Clause*, 27 WASH. & LEE J.C.R. & SOC. JUST. 649, 699 (2021) (explaining that, although the actual requirements to pivot from an objective to a subjective standard of review are minute, they may mean the difference between a successful and unsuccessful path to recourse).

¹¹³ *See Darnell v. Pineiro*, 849 F.3d 17, 32–34 (2d Cir. 2017) (adopting an objective test); *De Veloz v. Miami-Dade County*, 756 F. App’x 869, 877–78 (11th Cir. 2018) (adopting a subjective test). The *Darnell* court held that knowledge of the substantial risk of harm must be objective. 849 F.3d at 32–34; *see also De Veloz*, 756 F. App’x at 877–78 (applying a subjective standard requiring that culpability can only be met if the defendant had *subjective* knowledge that the substantial risk of harm existed). The *De Veloz* court held that solely showing that a reasonable person should or would have known of the substantial risk of harm was insufficient to meet the culpability requirement. 756 F. App’x at 877–78.

ley holding to apply to conditions of confinement cases, highlighting the importance of upholding objective considerations in determining whether corrections officers violated pretrial detainees' rights.¹¹⁴ This is in contrast with the Eleventh Circuit's 2018 holding in *De Veloz v. Miami-Dade County*, where it ruled that pretrial detainees and prisoners must be subject to the same subjective deliberate indifference standard, despite the differing constitutional amendments governing their treatment.¹¹⁵ This landscape remains ambiguous.¹¹⁶

3. The Prison Litigation Reform Act: Defense to a 42 U.S.C. § 1983 Action

In response to a 42 U.S.C. § 1983 claim, a defendant can raise the defense of a prisoner's failure to comply with the PLRA.¹¹⁷ In 1996, after the *Farmer* Court's decision requiring a culpable state of mind on behalf of a prison official in a 42 U.S.C. § 1983 case, Congress passed the PLRA, creating new requirements that a prisoner or pretrial detainee must satisfy before they are permitted to bring a claim.¹¹⁸ The PLRA endeavors to protect corrections officers from excessive, baseless claims made by prisoners or pretrial detain-

¹¹⁴ See 849 F.3d at 35–36 (agreeing with the Ninth Circuit that the *Kingsley* holding not only extended beyond claims of excessive force, but also that the protections of the Fourteenth Amendment proscribe an objective test). The *Darnell* court overturned its own precedent from seven years prior wherein it had held that the subjective indifference test should apply both to prisoners under the Eighth Amendment and pretrial detainees under the Fourteenth Amendment. 849 F.3d at 33–35. The court's basis for overruling the use of the subjective deliberate indifference test was that pretrial detainees and prisoners are entitled to differing protections and therefore applying the same standard does not adequately ensure the enhanced protections of the Fourteenth Amendment. *Id.* at 34.

¹¹⁵ See 756 F. App'x at 876 (holding that, despite the enhanced protections determined by other circuit courts to apply to pretrial detainees, the two groups should be treated identically under the subjective deliberate indifference standard).

¹¹⁶ See COLUM. HUM. RTS. L. REV., *supra* note 3 at 1217–18 (describing the evolution of the subjective versus objective intent standards for pretrial detainees in litigating constitutional claims after *Kingsley*); see also Samantha M. Davis, Note, *The Punishment of Cruel and Unusual Conditions: Extending the Purely Objective Standard Adopted in Kingsley v. Hendrickson to Claims of Deliberate Indifference*, 39 TOURO L. REV. 1353, 1354 (2024) (describing the circuit courts that have adopted a subjective approach to the deliberate indifference standard for pretrial detainees).

¹¹⁷ See § 1983 (establishing the basis for a constitutional rights claim as well as the potential remedies that a plaintiff can seek); Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (mandating requirements for bringing federal suit as a prisoner-plaintiff).

¹¹⁸ See generally Prison Litigation Reform Act (enacting requirements for incarcerated individuals to bring Eighth Amendment claims against prison officials and institutions). The Prison Litigation Reform Act (PLRA) defines prisoner as anyone who is "incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." *Id.* § 7(h). This is a definition that encapsulates both pretrial detainees and post-conviction prisoners. See *id.* (defining "prisoner" as including someone accused of or convicted of specific violations). Specifically in regard to a claim of unconstitutional prison conditions, the PLRA states that no litigation can ensue under 42 U.S.C. § 1983 until all available administrative remedies have been tried. *Id.* § 7(a).

ees.¹¹⁹ First, a prisoner must follow the grievance procedure in effect at the prison, which typically requires explaining the claim to a prison official.¹²⁰ Failure to follow every stage of the prison grievance procedure provides the corrections officers with an affirmative defense to a constitutional deprivation claim, which will likely result in the claim being dismissed without prejudice.¹²¹

Second, the PLRA requires that court fees always be paid by the prisoner-plaintiff even if he/she is proceeding *in forma pauperis*.¹²² The court filing fee for a 42 U.S.C. § 1983 complaint is \$350.00.¹²³ For an indigent prisoner who makes cents per hour, this filing fee is prohibitive and punitive.¹²⁴ As a result, prisoners are often precluded from bringing meritorious claims.¹²⁵

¹¹⁹ See Melissa Benerofe, Note, *Collaterally Attacking the Prison Litigation Reform Act's Application to Meritorious Prisoner Civil Litigation*, 90 FORDHAM L. REV. 141, 153 (2021) (reiterating the purpose and objectives of the PLRA); see also Joshua Manson, *Impunity for Law Enforcement Must End. That Includes Officers in Jails and Prisons*, THE APPEAL (July 23, 2020), <https://theappeal.org/impunity-for-law-enforcement-must-end-that-includes-officers-in-jails-and-prisons/> [<https://perma.cc/JD29-J3QW>] (highlighting the combined protections of qualified immunity and the PLRA as essentially indemnifying corrections officers from most claims).

¹²⁰ See generally ACLU, KNOW YOUR RIGHTS, THE PRISON LITIGATION REFORM ACT (PLRA), https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf [<https://perma.cc/2G6X-8AH3>] (educating prisoners on what they need to do under the PLRA in order to bring a federal civil rights claim and explaining the exhaustion of administrative remedies requirement of the PLRA in regard to how it actually impacts prisoners and pre-trial detainees); see also *Claim*, BLACK'S LAW DICTIONARY, *supra* note 70 (defining "Claim" as "[t]he assertion of an existing right" and "[a] demand for money, property, or a legal remedy to which one asserts a right").

¹²¹ See Prison Litigation Reform Act § 7(a) (establishing the required components for prisoners of successfully filing a claim); ACLU, *supra* note 120 (describing the outcome of a case when a prisoner has not properly followed the procedures in the PLRA as dismissal without prejudice); Erica Cagliero, Note, *Someone Must Carry the Burden: Interpreting the Prison Litigation Reform Act's Exhaustion Requirement*, 65 B. C. L. REV. 653, 654–55 (2024) (providing an example of a case that was dismissed as a result of failure to adhere to the exhaustion requirement within the PLRA); see also *Dismissal*, BLACK'S LAW DICTIONARY, *supra* note 70 (defining "dismissal without prejudice" as "[a] dismissal that does not bar the plaintiff from refiling the lawsuit within the limitations period").

¹²² See Prison Litigation Reform Act § 804(a) (describing the requirements around the payment of all court filing fees, including the permissive option to create a payment plan over time with prisoners' commissary money if granted *in forma pauperis* status); see also Walker Newell, Note, *An Irrational Oversight: Applying the PLRA's Fee Restrictions to Collateral Prisoner Litigation*, 15 CUNY L. REV. 53, 57 (2011) (stating that "[b]y restricting the ability of prisoners to litigate as poor persons . . . federal and state governments have created an effective barrier to accessing the legal system"); Benerofe, *supra* note 119 at 162 (differentiating indigent prisoner-plaintiffs from other indigent plaintiffs under the PLRA). See generally ACLU, *supra* note 120 (educating prisoners on what they need to do under the Prison Litigation Reform Act to bring a federal civil rights claim). When a civilian plaintiff files a lawsuit and is granted *in forma pauperis* status, they do not have to pay the filing fee; however, even when a prisoner-plaintiff is granted *in forma pauperis* status, they still have to eventually pay the filing fee in installments. Benerofe, *supra* at 162.

¹²³ See 28 U.S.C. § 1914(a) (assigning \$350.00 as the filing fee for civil actions).

¹²⁴ See Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html [<https://perma.cc/P4ZF-FRP5>] (highlighting why the revocation of indigent fee waivers for prisoners makes filing constitutional violation claims

II. LITIGATION ON CONDITIONS OF CONFINEMENT POST-NATURAL DISASTER

Thus far, all 42 U.S.C. § 1983 cases brought after natural disasters have failed.¹²⁶ After Hurricane Katrina, despite the conditions described in Part I, many prisoners brought and lost lawsuits against the prison officials at the OPP.¹²⁷ These cases were dismissed for failure to state a claim, frivolity, or lack of jurisdiction.¹²⁸ After Hurricane Ike, again, prisoners brought and lost lawsuits against prison officials despite horrifying conditions.¹²⁹ These exam-

“out of reach” for many prisoners). There are two types of jobs in prison: industry jobs and non-industry jobs. *See* Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL’Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [<https://perma.cc/QY7J-72BB>] (providing data regarding available vocations and compensation for prisoners). Non-industry jobs are jobs that are not in state-owned businesses and are therefore not correctional industry jobs. *Id.* On average, in a non-industry job in prison, prisoners make between fourteen and sixty-three cents per hour. *Id.* To make \$350.00, they would have to work between 556 and 2,500 hours on average—depending on how much they earn—to be able to afford the filing fee. *See id.* (detailing the high and low hourly salaries for incarcerated individuals in non-industry jobs). In an industry job, which only about six percent of prisoners have, they could earn up to \$1.41 per hour. *Id.* Assuming that they put every penny they make toward the filing fee, the requirement that prisoners pay the entire \$350.00 filing fee means that it could take them over seventy-two weeks working forty hours a week to earn enough money. *See id.* (establishing the high and low average wages for incarcerated people).

¹²⁵ Benerofe, *supra* note 119, at 144.

¹²⁶ *See* William Omorogieva, Student Paper, *Prison Preparedness and Legal Obligations to Protect Prisoners During Natural Disasters*, SABIN CTR. FOR CLIMATE CHANGE L., May 2018, at 1, 19 (describing the varying lawsuits brought post Hurricane Katrina that failed as they were considered frivolous, failed to state a claim, or there was a lack of jurisdiction); *see also* Smith v. Gusman, Civil Action No. 06-4095, 2007 WL 914171, at *1, *13 (E.D. La. Mar. 23, 2007) (stating that there were thirteen cases brought post-Katrina).

¹²⁷ *See e.g.*, *Smith*, 2007 WL 914171, at *13 (referencing thirteen cases brought immediately post-Katrina); *Duhaney v. Gusman*, Civil Action No. 06–3518, 2009 WL 302162, at *1 (E. D. La. Feb. 2, 2009) (dismissing the case as a result of failing to allege facts that constituted deliberate indifference); *Anders v. Gusman*, Civil Action No. 06–2898, 2009 WL 1269232, at *2–4 (E.D. La. May 5, 2009) (same); *Bridges v. Gusman*, Civil Action No. 06–4444, 2007 WL 2362335, at *2–6 (E.D. La. Aug. 15, 2007) (same).

¹²⁸ *See supra* note 127 and accompanying text; *infra* note 143 and accompanying text (specifically citing to cases brought post-Hurricane Katrina and explaining why each case was dismissed); Omorogieva, *supra* note 126, at 19–20 (stating why certain claims were denied and providing an overview of each claim and dismissal).

¹²⁹ *See Collins v. Homestead Corr. Inst.*, 452 Fed. App’x 848, 851–52 (11th Cir. 2011) (failing to find that the prisoner-plaintiff alleged sufficient harms); *Pomier v. Leonard*, Civil Action No. G-10-121, 2012 WL 12877852, at *1–2 (S.D. Tex. Oct. 31, 2012), *aff’d*, 532 F. App’x 553 (5th Cir. 2013) (dismissing a pretrial detainees case for failure to meet the appropriate standard); *Hazel v. Bell*, Civil Action No. 9:08cv216, 2010 WL 1038743, at *5, *22 (E.D. Tex. Jan. 8, 2010) (recounting the conditions of confinement post-Hurricane Ike, though not specifically a post-Ike conditions of confinement claim); *see also* Colin Guy, *After Nine Months, Close to 80 Percent of Prison Lawsuits Filed Over Ike Dismissed*, BEAUMONT ENTER. (June 17, 2009), <https://www.beaumontenterprise.com/news/article/after-nine-months-close-to-80-percent-of-prison-742955.php> [<https://perma.cc/G3KT-D5ZJ>] (describing numerous additional cases brought in the wake of Hurricane Ike and that were subsequently dismissed).

ples do not provide an exhaustive list, but they are illustrative of a greater, disastrous phenomenon.¹³⁰

To file and succeed on a deprivation of civil rights claim for conditions of confinement, every prisoner or pretrial detainee must first comply with the PLRA.¹³¹ After meeting those threshold requirements, the prisoner-plaintiff has a cognizable claim only if they satisfy a couple of components set forth under 42 U.S.C. § 1983 and the relevant case law.¹³² The prisoner-plaintiff must show that: (1) a state actor was personally involved in the acts causing the alleged deprivation of their constitutional rights *or* that a causal connection exists between the official's act and the alleged constitutional violation; (2) that the conditions of confinement were, in fact, serious enough to rise to a constitutional violation; and (3) meet the subjective elements of the deliberate indifference standard.¹³³ In confinement conditions like those post-Hurricane Katrina, one would thereby have to argue that the corrections officers knew that the conditions could lead to a substantial risk of harm *and* that they actually perceived that risk.¹³⁴ As a pre-trial detainee, the plaintiff would be subject to a subjective or objective standard, contingent on which court has jurisdiction over the case.¹³⁵ There has *never* been a successful 42 U.S.C. § 1983 conditions of confinement claim as a result of a failure to evacuate post-natural disaster.¹³⁶

¹³⁰ See Omorogieva, *supra* note 126, at 6–14 (showcasing a variety of natural disasters in which prisoners were not evacuated and their legal claims did not succeed); see also *infra* note 143 and accompanying text. As recent as 2022, individuals subjected to cruel conditions post-hurricane are being denied relief on constitutional violations claims. See Cardenas-Meneses v. Ma'at, No. 21-cv-1643, 2022 WL 496871, at *3–4 (W.D. La. Jan. 19, 2022) (dismissing the case for failing to meet the deliberate indifference standard).

¹³¹ See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803(7)(a) 110 Stat. 1321, 1321–71 (1996) (detailing the requirement of prisoners to exhaust all available administrative remedies prior to bringing a 42 U.S.C. § 1983 claim); Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) (establishing the deliberate indifference standard for 42 U.S.C. § 1983 actions).

¹³² See ACLU, *supra* note 120 (educating prisoners on what they need to do under the Prison Litigation Reform Act to bring a federal civil rights claim); see also Newell, *supra* note 122, at 57 (stating that “by restricting the ability of prisoners to litigate as poor persons . . . federal and state governments have created an effective barrier to accessing the legal system”).

¹³³ See Farmer v. Brennan, 511 U.S. 825, 837 (1994) (establishing the elements of the deliberate indifference test that must be satisfied for a prisoner-plaintiff to be successful in bringing a claim for a violation of his constitutional rights).

¹³⁴ See *id.* (creating the elements of the deliberate indifference standard); Robbins, *supra* note 29, at 25–29 (discussing the applicability of the deliberate indifference standard to claims of unconstitutional conditions of confinement post-natural disaster).

¹³⁵ See Lambroza, *supra* note 109, at 431 (highlighting the circuit split regarding which standard should be applied to pretrial detainees with regard to various claims, with at least one circuit championing the objective standard and one advocating for the subjective standard); see also *supra* note 112 and accompanying text (listing which jurisdictions uphold a subjective standard, and which uphold an objective standard for pretrial detainees' deliberate indifference analysis).

¹³⁶ See, e.g., Smith v. Gusman, Civil Action No. 06-4095, 2007 WL 914171, at *4–5 (E.D. La. Mar. 23, 2007) (citing to conditions of confinement cases that were dismissed for various reasons); *infra* notes 127–129 and accompanying text (citing additional cases that were dismissed post-natural

Section A of this Part reviews the affirmative defense of failure to comply with the PLRA that can be raised by state actors in response to a 42 U.S.C. § 1983 claim.¹³⁷ Section B highlights the critical importance of naming the right state actor within a prisoner-plaintiff's complaint.¹³⁸ Section C addresses the application of the deliberate indifference standard to episodic conditions of confinement occurring post-natural disaster.¹³⁹ Section D evaluates the differing treatment of pretrial detainees and whether they are entitled to enhanced constitutional safeguards.¹⁴⁰

A. Conditions of Confinement Claims: Defeating the PLRA Affirmative Defense

Despite the stringent requirements of the PLRA, many prisoner-plaintiffs have still been able to bring suit under 42 U.S.C. § 1983.¹⁴¹ As discussed above, the PLRA requires that prisoners first exhaust all administrative remedies and pay the filing fee of a lawsuit in full (or proceed *in forma pauperis*).¹⁴² As evidenced by the number of 42 U.S.C. § 1983 cases brought by prisoner-plaintiffs, specifically the cases post-Katrina and post-Ike, it is possible for prisoner-plaintiffs to still bring suit under the PLRA.¹⁴³

disaster); *supra* note 143 and accompanying text (citing more cases from Katrina that were dismissed).

¹³⁷ See *infra* notes 141–143 and accompanying text.

¹³⁸ See *infra* notes 144–150 and accompanying text.

¹³⁹ See *infra* notes 152–162 and accompanying text.

¹⁴⁰ See *infra* notes 163–171 and accompanying text.

¹⁴¹ See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803(7)(a) 110 Stat. 1321, 1321–71 (1996) (stating, in relevant part, that prisoners must exhaust all administrative remedies prior to bringing a constitutional violation suit against a corrections officer).

¹⁴² See *id.* (imposing strict requirements on prisoners before they are able to bring suit in federal court); see also ACLU, *supra* note 120, at 1–2 (expressing the requirement of exhausting administrative remedies and complying with grievance procedures within the prison). Even if a prisoner-plaintiff is indigent and eligible for *in forma pauperis* status, s/he needs to be on a payment plan to eventually pay his/her court costs. See Benerofe, *supra* note 119, at 161–63 (emphasizing how prohibitive paying these court costs can be); Prison Litigation Reform Act § 804(a) (outlining the fee structure and requirements for bringing a constitutional violation claim). Prisoners must work together with the prison administration to provide the court with details of the prisoner's commissary account. ACLU, *supra* note 120, at 2. The prisoner must pay twenty percent of either the average balance in the commissary account in the previous six months or, if greater, the average of the deposits to the commissary account in the previous six months. *Id.*; see also Newell, *supra* note 122, at 57 (outlining the restrictive payment plan options).

¹⁴³ See *Smith v. Gusman*, Civil Action No. 06-4095, 2007 WL 914171, at *1, *4 (E.D. La. Mar. 23, 2007) (listing the other cases that were brought by prisoner-plaintiffs in the aftermath of Hurricane Katrina) (citing *Kennedy v. Gusman*, Civil Action No. 06-5274, 2007 WL 782192, at *2–3 (E.D. La. Mar. 13, 2007)); *Wright v. Gusman*, Civil Action No. 06-5768, 2007 WL 519159, at *3 (E.D. La. Feb. 15, 2007) (stating that plaintiff did not sufficiently allege that Gusman acted with deliberate indifference); *Deselles v. Gusman*, No. CIV A 06-4136, 2007 WL 121833, at *1 (E.D. La. Jan. 11, 2007) (granting Louisiana's motion to dismiss on the grounds that the plaintiff failed to state a claim); *Hill v. Gusman*, No. CIVA 06-527, 2006 WL 3760454, at *3 (E.D. La. Dec. 18, 2006) (holding that plaintiff

B. Naming the Right Defendant: Personal Involvement of State Actors

In 2008, in *Smith v. Gusman*, a prisoner in OPP sued Sheriff Marlin Gusman, the Orleans Parish Sheriff.¹⁴⁴ The claim failed because the plaintiff did not specifically allege that the sheriff personally subjected Smith to the conditions.¹⁴⁵

A state actor, such as a sheriff, a prison administrator, or a corrections officer, can only be found personally liable “if he ‘was personally involved in the acts causing the deprivation of his constitutional rights or a causal connection exists between an act of the official and the alleged constitutional violation.’”¹⁴⁶ Certain state actors, though not all of them, are responsible for establishing emergency evacuation plans, deciding whether to evacuate, and for corrections officers, whether to abandon their posts during and after the storm.¹⁴⁷

failed to adequately allege Sheriff Gusman’s personal involvement); *Holmes v. Gusman*, No. Civ.A.06 3245, 2006 WL 3469555, at *3 (E.D. La. Nov. 28, 2006) (same); *Dean v. Gusman*, No. Civ.A.06 3243, 2006 WL 3469558, at *3–4 (E.D. La. Nov. 28, 2006) (finding that both plaintiff did not show a constitutional violation nor did he properly allege the personal involvement of Gusman); *Lopez v. Gusman*, No. Civ.A.06 3048, 2006 WL 3469559, at *3–5 (E.D. La. Nov. 28, 2006) (same); *Bright v. Gusman*, No. Civ.A.06 2782, 2006 WL 3469560, at *6 (E.D. La. Nov. 28, 2006) (same); *Tate v. Gusman*, 459 F. Supp. 2d 519, at 522–25 (E.D. La. 2006) (evaluating and ultimately dismissing a pretrial detainee’s claims against Sheriff Gusman for failure to state a claim); *Galo v. Blanco*, No. Civ.A. 06-4290, 2006 WL2860851, at *4 (E.D. La. Oct. 4, 2006) (dismissing the plaintiff’s claim as frivolous); *Charles v. Sheriff Orleans Parish*, No. Civ.A. 06-0053, 2006 WL 2604613, at *7 (E.D. La. Sep. 6, 2006) (same); *Hayes v. Gusman*, Civil Action No. 06-504, 2006 WL 1985464, at *4 (E.D. La. June 22, 2006) (same); *Gauff v. Gusman*, Civil Action No. 06-0842, 2006 WL 2460753, at *4 (E.D. La. June 12, 2006) (same); *Collins v. Homestead Corr. Inst.*, 452 Fed. App’x 848, 851–52 (11th Cir. 2011) (dismissing a pretrial detainee’s claim post-hurricane); *Pomier v. Leonard*, Civil Action No. G-10-121, 2012 WL 12877852, at *1–2 (S.D. Tex. Oct. 31, 2012), *aff’d*, 532 F. App’x 553 (5th Cir. 2013) (same).

¹⁴⁴ See 2007 WL 914171, at *1, *4 (stating that the plaintiff brought his claim against the criminal sheriff alleging unconstitutional conditions of confinement in OPP after Hurricane Katrina). The conditions that he experienced included lack of access to a telephone, adequate medical care, uncontaminated drinking water, and food. *Id.* at *4. Plaintiff further alleges that the flood waters caused him nerve damage. *Id.*

¹⁴⁵ See *id.* at *5–6 (explaining the reasoning for the dismissal as to the inadequacies in the alleged actions in the complaint). The *Smith* court also discussed the other suits that had been brought against Sheriff Gusman after Hurricane Katrina for unconstitutional conditions of confinement. *Id.* at *4–5. The court explained that each of the other twelve claims was also dismissed. *Id.*

¹⁴⁶ *Gauff*, 2006 WL 2460753, *1–*2 (citing *Douthit v. Jones*, 641 F.2d 345, 346 (5th Cir. 1981)) (emphasis added). Thus, the standard requires that an act of the official is either causally tied to the alleged unconstitutional conditions of confinement or the person was directly involved in those conditions. *Id.* at *2; see *Collins v. Homestead Corr. Inst.*, 452 Fed. App’x 848, 851 (11th Cir. 2011) (holding that the lower court’s award of Summary Judgment to the defendants was correct because the plaintiffs did not name parties that were directly at fault for the evacuation conditions). The court said that because the named defendants were neither responsible nor aware of the alleged deprivations, there was not a sufficient showing under 42 U.S.C. § 1983. *Id.*

¹⁴⁷ See THIGPEN ET AL., *supra* note 54 at 64–66 (assigning evacuation procedure planning and decision making to the sheriff’s office and correctional staff); see also NAT’L PRISON PROJECT OF THE ACLU ET AL., *supra* note 9, at 23 (stating that Sheriff Gusman was responsible for the ultimate decision whether to evacuate and outlining his choice not to do so); see also U.S. DEP’T OF HOMELAND

In 2012, in *Fulton v. Upton*, the U.S. District Court for Texas was again confronted with the same issue: whether the corrections officers acted with deliberate indifference toward the prisoners in the wake of a natural disaster.¹⁴⁸ In *Fulton*, the court also looked to whether the named defendant state actor—the prison warden—could be held personally liable.¹⁴⁹ Ultimately, the warden was the wrong individual to name because he was not responsible for deciding whether the prison should evacuate nor was he one of the officers on site post-disaster; therefore, the claim could not succeed.¹⁵⁰ Despite Smith, *Fulton*, and other prisoner-plaintiffs' failure to allege that personal conduct from the named defendant resulted in the conditions of confinement, future litigants could bring claims naming the correct defendants.¹⁵¹

C. How Cruel and Unusual: Episodic Conditions of Confinement and Deliberate Indifference

For conditions of confinement to violate the Eighth Amendment constitutional protections against cruel and unusual punishment, the conditions must be serious enough to offend “the evolving standards of decency.”¹⁵² In 2020, in *Taylor v. Riojas*, the Supreme Court held that the corrections officers could not have thought that housing the plaintiff in the Texas prison would be constitutional because the conditions of confinement there were found to be so deplor-

SEC., *supra* note 59 (highlighting that carceral officials are responsible for having evacuation plans and making evacuation decisions).

¹⁴⁸ See No. 1:11-CV-32, 2012 WL 3984547, at *6–8 (E.D. Tex. July 24, 2012) (deciding as to whether the prisoner-plaintiff's lawsuit under *Bivens* had merit). Although this case was a *Bivens* claim made against a federal correctional complex, the 42 U.S.C. § 1983 requirements under the deliberate indifference standard require a similar showing of deliberate indifference. *Id.* at *5. The *Fulton* court found that Upton's actions were neither made to violate *Fulton*'s constitutional protections nor disregard those protections. *Id.* at *8.

¹⁴⁹ See *id.* at *7 (reasoning that the warden did not have the authority to decide whether to evacuate the prison and thereby could not be held personally liable as he was not responsible).

¹⁵⁰ *Id.* The court held that the plaintiff failed to show that the defendant acted with deliberate indifference and, in the absence of that, the court could not deny the defendant's motion and granted summary judgment. *Id.* This case is distinct because Upton, as well as the correctional staff on site, made extensive mitigation efforts to protect the prisoners in the wake of the storm. See *id.* (describing the efforts that Upton made to protect the prisoners). He ensured that there was sanitary drinking water and food for them as well as designed a system to adequately flush the toilets while cutting off access to the city water supply to preserve the uncontaminated water. *Id.*

¹⁵¹ See *Smith*, 2007 WL 91417, at *5 (stating that the lawsuit failed because Smith failed to allege specific, personal conduct from Sheriff Gusman sufficient to advance a 42 U.S.C. § 1983 claim); *Fulton*, 2012 WL 3984547, at *6–8 (showing that the lawsuit failed because the plaintiff did not properly allege personal conduct from the named defendant); *supra* note 143 and accompanying text.

¹⁵² See *Estelle v. Gamble*, 429 U.S. 97, 102–05 (1976) (clarifying that Eighth Amendment violations only occur when the indifference “offend[s] ‘evolving standards of decency’” (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958))); *Dulles*, 356 U.S. at 100–01 (1958) (describing cruel and unusual punishment to be offensive to basic levels of decency); see also *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (reaffirming the same).

able.¹⁵³ The plaintiff described the conditions of his cell as covered in feces with inadequate draining mechanisms for bathroom facilities, causing sewage to back up into the cell.¹⁵⁴

The conditions that have been found to offend human decency include: lack of access to toilets, clean water, food, and basic necessities.¹⁵⁵ Although each of the post-hurricane cases presents similar and often identical conditions to *Taylor* and *Brown*, courts have consistently held that the seriousness of these conditions is not sufficient in a post-natural disaster context.¹⁵⁶ In 1996, in *Hare v. City of Corinth*, the Fifth Circuit decided that episodic acts or omissions, like conditions post-natural disaster, can only cause a constitutional violation if the official acted with deliberate indifference.¹⁵⁷

Thus, the final stage of analysis on a 42 U.S.C. § 1983 claim is whether the state actor acted with deliberate indifference.¹⁵⁸ Several courts have stated that, even though the prisoner-plaintiff did not properly allege that the named defendant was personally liable, if they had, the prisoner-plaintiff further failed

¹⁵³ See 592 U.S. 7, 8–9 (2020) (discussing the plainness of the horrible conditions as clear to the corrections officers).

¹⁵⁴ See *id.* at 7–8 (detailing the conditions that the prisoner was subjected to). Over the period of six days, the plaintiff was placed in two different cells. *Id.* The plaintiff was initially housed in a cell that had feces all over it from floor to ceiling. *Id.* Worried that, as a result of the feces, his food would be contaminated, he did not eat anything over the course of four days. *Id.* After this, he was transferred to another cell in which the drain was clogged, and he attempted to hold in his urine for a full day. *Id.* Unsuccessful in holding his urine, the drain overflowed, and he was forced to sleep naked amidst the sewage backing up in his cell. *Id.*

¹⁵⁵ See, e.g., *id.* at 8–9 (detailing conditions experienced by prisoners to include prison cells dripping with feces due to inadequate draining mechanisms with excess sewage); *Brown v. Plata*, 563 U.S. 493, 502 (2011) (citing unsanitary and unsafe conditions for prisoners within the prison).

¹⁵⁶ See *Pomier v. Leonard*, Civil Action No. G-10-121, 2012 WL 12877852, at *1–2 (S.D. Tex. Oct. 31, 2012), *aff'd*, 532 F. App'x 553 (5th Cir. 2013) (describing the unlivable conditions of confinement in Texas post-hurricane); *Tate v. Gusman*, 459 F. Supp. 2d 519, 521 (E.D. La. 2006) (highlighting, in specific, the high water levels submersing the prisoners); *Kennedy v. Gusman*, Civil Action No. 06-5274, 2007 WL 782192, at *2 (E.D. La. Mar. 13, 2007) (providing an example of the conditions of confinement post-Katrina, echoing that of the other 12 cases that failed); see also *Taylor*, 592 U.S. at 8–9 (articulating similar conditions to those post-hurricane of feces overflowing in the cells, contaminated food, and lack of access to proper bathroom facilities); *Brown*, 563 U.S. at 502 (showcasing conditions of unsanitary bathroom access and inadequate medical care due to overcrowding).

¹⁵⁷ See 74 F.3d 633, 643 (5th Cir. 1996) (concluding “that a state jail official’s constitutional liability to pretrial detainees for episodic acts or omissions should be measured by a standard of subjective deliberate indifference as enunciated by the Supreme Court in *Farmer*”). Although the plaintiff was a pretrial detainee, the court emphasized that the *Farmer* subjective deliberate indifference standard was applicable to both pretrial detainees and post-conviction prisoners. See *id.* (asserting no distinction between the rights afforded to post-conviction prisoners and pretrial detainees, thus holding alleged violations of that right to the same subjective standard).

¹⁵⁸ See *Farmer v. Brennan*, 511 U.S. 825, 835–38 (1994) (articulating that state actors can only be found liable under 42 U.S.C. § 1983 if the plaintiff can demonstrate that they acted with deliberate indifference to a basic, necessary need of the plaintiff); *Robbins*, *supra* note 29, at 25 (establishing the deliberate indifference standard as the last hurdle to prisoner-plaintiff recovery under § 1983).

to assert anything more than negligent conduct on behalf of the actor.¹⁵⁹ In order to allege more than negligent conduct, one must establish that there was a substantial risk of harm and that the defendant drew that conclusion for him/herself.¹⁶⁰ Historically, courts have found that the actions of state actors post-natural disaster have not risen to this level of subjective indifference.¹⁶¹ Despite the devastating conditions in prisons post-hurricane, the court's attachment to the subjective prong of the deliberate indifference standard prohibits prisoner-plaintiffs from receiving relief from the court.¹⁶²

D. Unrealized Enhanced Protections for Pretrial Detainees

Under the Fourteenth Amendment, pretrial detainees are allegedly entitled to greater protections than post-conviction prisoner-plaintiffs as they have not

¹⁵⁹ See *Kennedy*, 2007 WL 782192, at *2 (agreeing with the defendant that, “even if plaintiff could show that Gusman was in fact personally involved, the claims against him still should be dismissed because it cannot be shown that he acted with deliberate indifference”); *Wright v. Gusman*, Civil Action No. 06-5768, 2007 WL 519159, at *1–3 (E.D. La. Feb. 15, 2007) (same). The court agreed with the defendant in most of the cases brought post-Katrina. See *Kennedy*, 2007 WL 782192, at *3–4 (discussing the court’s reasoning that the plaintiffs could not show the state actor acted with deliberate indifference in the post-Katrina lawsuits). This included the *Smith* court, which held that, even if the sheriff were found personally liable, the plaintiff did not assert that the sheriff exhibited anything more than negligent conduct in failing to protect him from the aftermath of the hurricane. See *Smith v. Gusman*, Civil Action No. 06-4095, 2007 WL 914171, at *6 (E.D. La. Mar. 23, 2007) (holding that because the plaintiff asserted mere negligence claim, the court could not find that it rose to conduct made with deliberate indifference; see also *Brooks v. Gusman*, Civil Action No. 06-5753, 2009 WL 511997 at *3–4 (E.D. La. Mar. 2, 2009) (dismissing plaintiff’s claim with prejudice because he did not allege that Gusman was personally liable, nor did the conditions of confinement rise to the level of deliberate indifference).

¹⁶⁰ See *Kennedy*, 2007 WL 782192, at *6 (holding that “the fact that an argument could perhaps be made that Gusman should have taken more effective precautions to prepare for the hurricane and its aftermath does not mean that he intentionally violated the inmates’ rights by failing to do so”). Although that might have been true pre-Katrina, now it has been demonstrated that due to the extreme dangers that result from failing to have emergency evacuation plans in place and failing to take precautions during natural disasters, the behavior rises from negligence or gross negligence to recklessness. See *Farmer*, 511 U.S. at 835–37 (establishing recklessness as the relevant standard for determining deliberate indifference); *Robbins*, *supra* note 29, at 27–29 (describing the severity of the harms suffered post-Katrina as objectively apparent). Unlike other case law in this area, the *Fulton* court found that the corrections officers and the warden in that specific case had not abandoned the prisoners but rather had taken preventative measures to mitigate the conditions of confinement post-Hurricane Ike. See No. 1:11-CV-32, 2012 WL 3984547, at *7 (E.D. Tex. July 24, 2012) (describing the advanced planning to ensure prisoners had access to food and water during the state of emergency).

¹⁶¹ *Robbins*, *supra* note 29, at 25 (demonstrating that the deliberate indifference standard has thus far barred all suits post-natural disaster).

¹⁶² See *id.* (asserting the subjective indifference standard as the highest barrier to relief in these specific cases); see also Nicole Einbinder & Hannah Beckler, ‘Deliberate Indifference’: The Supreme Court Standard That Requires Prisoners to Prove Mindset to Win Eighth Amendment Claims, *BUS. INSIDER* (Dec. 21, 2024), <https://www.businessinsider.com/how-business-insider-investigated-the-state-of-the-eighth-amendment-2024-12> [<https://perma.cc/QXE7-2A2D>] (reviewing cases and conducting a comprehensive analysis to find that the various hurdles including high intent standards, weakened constitutional protections for prisoners).

yet had their day in court.¹⁶³ Because pretrial detainees still enjoy the presumption of innocence, they are not supposed to be subjected to the same conditions that convicted prisoners are.¹⁶⁴ That said, pretrial detainee-plaintiffs' suits have also consistently failed under this legal framework because they are being subjected to the same stringent requirements as post-conviction prisoners under the subjective deliberate indifference standard.¹⁶⁵

In 2012, in *Pomier v. Leonard*, a pretrial detainee-plaintiff brought a 42 U.S.C. § 1983 suit against prison officials for the conditions of confinement post-Hurricane Ike in Texas.¹⁶⁶ No clean water was available; Pomier was unable to use a toilet or a shower for many days, and the toilets were overflowing

¹⁶³ See Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009, 1037–38 (2013) (pointing out that, although the presumption of innocence is an important factor in determining the conditions that a pretrial detainee should be subjected to, only the dissents in notable case law have emphasized that presumption).

¹⁶⁴ See David Gorlin, Note, *Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417, 420 (2009) (summarizing that pretrial detainees should be entitled to enhanced protections because they are presumed innocent and thereby should not be punished). Pretrial detainees are only imprisoned because "they cannot afford their pretrial freedom." See Ryan Ballogg, Ryan Callihan & Jessica De Leon, *Manatee County Jail Put Inmates in Danger Near Piney Point, Florida ACLU Lawsuit Says*, BRADENTON HERALD, <https://www.bradenton.com/news/local/article250477161.html#storylink=cpy-> [<https://perma.cc/Q8YY-69FH>] (Apr. 7, 2021) (documenting the dangers incurred by the prisoners and pre-trial detainees in the Manatee County Jail when it failed to evacuate from the hurricane). The ACLU filed suit alleging constitutional violations from cruel and unusual conditions of confinement. *Id.* The people in pretrial detention come from the "poorest strata of society." See OPEN SOC'Y JUST. INITIATIVE, PRESUMPTION OF GUILT: THE GLOBAL OVERUSE OF PRETRIAL DETENTION 34 (2014), <https://www.justiceinitiative.org/uploads/de4c18f8-ccc1-4eba-9374-e5c850a07efd/presumption-guilt-09032014.pdf> [<https://perma.cc/BS62-SPEZ>] (demonstrating that often, individuals who are detained pretrial are only detained because they cannot afford bail or bond). Not only is pretrial detention a side effect of poverty, but pretrial detention also disproportionately affects Black individuals, Indigenous individuals, and People of Color (BIPOC). See Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL'Y INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/ [<https://perma.cc/KAJ6-MN8S>] (explaining that more than sixty percent of the population incarcerated in jails are pretrial detainees). There is a significantly higher population of BIPOC individuals than white individuals. *Id.* Compared to white defendants, Black young, male defendants "are about 50% more likely to be" held prior to trial and receive bail amounts that are twice as high as the bail set for white defendants. *Id.*

¹⁶⁵ See *Pomier v. Leonard*, Civil Action No. G-10-121, 2012 WL 12877852, at *2–4 (S.D. Tex. Oct. 31, 2012), *aff'd*, 532 F. App'x 553 (5th Cir. 2013) (dismissing petitioner's case because he could not meet the *Farmer* threshold of indifference); *Tate v. Gusman*, 459 F. Supp. 2d 519, 521 (E.D. La. 2006) (same); *Glenn v. Louisiana*, Civil Action No. 08–4817, 2009 WL 382680, at *3–5 (demonstrating another example of a pretrial detainee's claims being dismissed under Section 1983 post-natural disaster).

¹⁶⁶ See 532 F. App'x at 553–54 (evaluating pretrial prisoner-plaintiff's claim under 42 U.S.C. § 1983 as to his conditions of confinement). The plaintiff detailed the conditions post-Hurricane Ike in detail; being without potable water, cells flowing with urine and feces, no bathroom access, and no working electricity. *Pomier*, 2012 WL 12877852, at *1–2. Despite *Pomier*'s status as a pretrial detainee, the court evaluated his claims under the *Farmer* deliberate indifference standard. *Pomier*, 532 F. App'x at 553–55. The case also highlights that the defendants named herein were not empowered to make the decision on whether to evacuate the prisons and thus could not be causally responsible. *Id.*

with urine and feces for almost two weeks.¹⁶⁷ The court consistently highlighted that the devastation was due to unprecedented events.¹⁶⁸ The court of appeals affirmed the lower court's decision.¹⁶⁹

In 2009, in *Tate v. Gusman*, one of the numerous cases brought against Sheriff Gusman post-hurricane Katrina, the Louisiana Eastern District Court found the pretrial detainee's claim to be frivolous.¹⁷⁰ The court held that the plaintiff did not specifically allege that Gusman was personally liable, and even if he had, Gusman's behavior was merely negligent and could not meet the heightened requirements under the deliberate indifference standard.¹⁷¹

¹⁶⁷ See *Pomier*, 2012 WL 12877852, at *1–2. (describing conditions of confinement similar to those in other hurricane litigation since and including litigation post Hurricane Katrina).

¹⁶⁸ See *id.* at *2 (mitigating the jail's failure to evacuate by emphasizing the unprecedented nature of this disaster). The court stated that, "the defendants were faced with the extraordinary situation of a hurricane, the size of which has not been seen in Galveston since 1900, and the significant disruptions which come along with such a force of nature." *Id.*; see also *Pomier*, 532 Fed. App'x at 553–55 (reinforcing the district court's discussion of the unprecedented nature of this hurricane and holding that it was possible that the sheriff made a judgment call that it was safer to shelter in place than evacuate).

¹⁶⁹ See *Pomier*, 532 Fed. App'x at 553–55 (discussing that, because *Pomier* did not make a showing that the sheriff acted with deliberate indifference, the case had to be dismissed). The Fifth Circuit further highlighted that (1) the hurricane was unprecedented, so the sheriff had to make a judgment call on whether to evacuate, and (2) that *Pomier* alleged no actual injury from the conditions of confinement. *Id.* The court agreed with the lower court holding that the conditions described by *Pomier* "arose due to the virtually unprecedented effects of a major hurricane and the defendants' decision not to evacuate the jail." See *id.* at 553–54 (establishing a causal link between the conditions of confinement post natural disaster and the decision of the sheriff not to evacuate). This case highlights the way in which pretrial detainees are treated in the wake of natural disasters in the Fifth Circuit. See *id.* (holding that the standard for evaluating pretrial-prisoner-plaintiff was the *Farmer* standard according to *Hare v. City of Corinth*, and not the *Bell v. Wolfish* standard (first citing *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996); and then citing *Bell v. Wolfish*, 441 U.S. 520 (1979)). This affirms the Fifth Circuit's adoption of the subjective deliberate indifference standard for pretrial detainees' conditions of confinement claims post-natural disaster. *Id.*; see *Hare*, 74 F.3d at 639 (dictating the *Farmer* subjective deliberate indifference standard as the proper standard in times of episodic acts or omissions by prison officials).

¹⁷⁰ See 459 F. Supp. 2d 519, 521 (E.D. La. 2006) (identifying Mr. Tate as a pretrial detainee incarcerated in the Winn Correctional Center on possession charges). Tate explains the conditions in the prison immediately following the flooding post-Katrina. *Id.* He states that the drainage system was clogged and the flooding began to submerge the prisoners. *Id.* As sixty prisoners clustered together in the gym, they alternated positions to take turns being submerged in the water. *Id.* The sheriffs "panicked and left the inmates stranded without supervision . . . they had no medication, food or drinking water." *Id.*

¹⁷¹ *Id.* at 524. The court stated that the plaintiff did not assert that Sheriff Gusman personally exhibited deliberate indifference to his needs nor did he allege that the sheriff was involved in the evacuation. *Id.* The court's opinion specifically highlighted that Hurricane Katrina was "the largest natural disaster that the United States has experienced in its history." *Id.* Although this was true and the argument that this was an unprecedented disaster that they could not expect had merit, the same could not be said today in the wake of how many natural disasters have occurred. See Robbins, *supra* note 29, at 25–28 (asserting that today there is ample evidence to show an objective danger from hurricanes to prisons and prisoners).

III. NATURAL DISASTERS AND FAILED EMERGENCY EVACUATIONS CALL FOR AN ABANDONMENT OF THE SUBJECTIVE DELIBERATE INDIFFERENCE STANDARD

A legal right without recourse is not a right.¹⁷² In order to give prisons a legitimate incentive to have and implement comprehensive emergency evacuation plans, prisoners and pretrial detainees need to have legal recourse such that the prisons face consequences.¹⁷³ Currently, the subjective deliberate indifference standard poses an insurmountable hurdle for prisoners and pretrial detainees who are subjected to devastating conditions during and after natural disasters.¹⁷⁴ The deliberate indifference standard is antiquated and ill-equipped to handle the increasing safety concerns of the climate crisis.¹⁷⁵ By abandoning the subjective element of the deliberate indifference standard, a constitutional violation claim for conditions of confinement due to failure to evacuate could be successful.¹⁷⁶ Furthermore, adopting an objective intent component instead of the subjective deliberate indifference standard would not expose corrections officers to too much liability because they are already protected by the PLRA.¹⁷⁷

Section A of this Part discusses the adequate protections in place for corrections officers.¹⁷⁸ Section B discusses the failure of constitutional violations lawsuits brought by prisoners as a result of conditions of confinement caused by

¹⁷² See Tina Lu, Note, *A Right Without a Remedy Is No Right at All: A Case for Why AB 1844 Requires a Remedial Scheme and What It Might Be*, 10 HASTINGS BUS. L.J. 225, 239 (2014) (illustrating that without a remedy, a legal right is no more than a wish); see also Brenna Helppie-Schneider, Note, *Toxic Confinement: Can the Eighth Amendment Protect Prisoners from Human-Made Environmental Health Hazards?*, 110 NW. U. L. REV. 647, 676 (2016) (emphasizing the importance of having a proper remedy when there is a violation of rights).

¹⁷³ See Andrew Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 185–86 (2011) (demonstrating that civil liability deters tortious and bad conduct). Misconduct is deterred by the threat of potential civil liability).

¹⁷⁴ See Robbins, *supra* note 29, at 25–28 (discussing applicability of the deliberate indifference standard to the unique circumstances of conditions of confinement claims post-natural disaster); see also Einbinder & Beckler, *supra* note 162 (describing the subjective prong of the deliberate indifference standard to require “ineffable” proof of a corrections officer’s inner intent). The subjective deliberate indifference standard in 42 U.S.C. § 1983 suits is very difficult to meet. Einbinder & Beckler, *supra* note 162.

¹⁷⁵ See Arco, *supra* note 18, at 417 (stating that the subjective standard created and upheld by precedent is “vague” and “impractical”); *Prisons in Crises: Natural Hazards and Extreme Weather*, *supra* note 25 (highlighting the increasing concerns of global warming and climate change on incarcerated populations); Smith v. Gusman, Civil Action No. 06-4095, 2007 WL 914171, at, at *4–5 (E.D. La. Mar. 23, 2007) (demonstrating numerous examples of suits in this particular litigation context that have not succeeded).

¹⁷⁶ See Robbins, *supra* note 29, at 28 (affirming that the objective prong of the deliberate indifference standard should be satisfied based on the conditions in OPP post-Hurricane Katrina).

¹⁷⁷ See Manson, *supra* note 119 (discussing the elaborate protections that the PLRA provides for law enforcement officers that almost, in tandem with qualified immunity and intent standards, raise to the level of complete immunity).

¹⁷⁸ See *infra* notes 181–195 and accompanying text.

natural disasters.¹⁷⁹ Section C discusses the crucial importance of legal recourse and protection for pre-trial detainees and prisoners.¹⁸⁰

A. Unbalanced Protection: Reorienting the Scales of Justice

Courts are often forced to balance the competing interests of maintaining compelling government interests and protecting prisoners' constitutional rights—as it stands, that balance does not exist.¹⁸¹ The predominant rationale for maintaining a subjective element of the deliberate indifference standard is the attempt to balance those scales to ensure the autonomy of corrections officers.¹⁸² Historically, courts have created fail-safe mechanisms to protect corrections officers from litigation brought against them for performing their jobs, which has effectively extinguished prisoners' rights in certain circumstances.¹⁸³ As evidenced from the existing case law, should a prisoner-plaintiff attempt to bring a claim against an individual who was not responsible, the claim will fail.¹⁸⁴ If the prisoner-plaintiff does not allege sufficiently serious harm, the claim will fail.¹⁸⁵ At every juncture, the corrections officers are insulated from culpability.¹⁸⁶ The motivation behind these protections is to encourage corrections officers to be able to act and maintain public safety in prisons without fear that each act will result in a lawsuit against them.¹⁸⁷

Corrections officers are further shielded from liability by the high standards imposed by the PLRA on prisoner-plaintiffs.¹⁸⁸ In having to exhaust all

¹⁷⁹ See *infra* notes 196–205 and accompanying text.

¹⁸⁰ See *infra* notes 206–226 and accompanying text.

¹⁸¹ See Glidden, *supra* note 94 (balancing the Eighth Amendment requirements of protecting competing interests between the government and prisoners).

¹⁸² See *Rhodes v. Chapman*, 452 U.S. 337, 361–62 (1981) (Brennan, J., concurring) (emphasizing the importance of construing the doctrine to defer to prison officials in saying, “courts have been especially deferential to prison authorities ‘in the adoption and execution of policies and practices that in their judgment, are needed to preserve internal order and discipline and to maintain institutional security’” (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979))).

¹⁸³ See *Harlow v. Fitzgerald*, 457 U.S. 800, 813–16 (1982) (extending the protections of qualified immunity to public officials to shield them from unnecessary litigation prohibiting them from successfully performing the discretionary duties of their profession with all due latitude). See generally Prison Litigation Reform Act of 1995, Pub. L. No. 104–134, 110 Stat. 1321 (1996) (providing barriers to litigation against corrections officers).

¹⁸⁴ See *supra* notes 144–151 and accompanying text (highlighting case law wherein cases were dismissed for failure to allege personal culpability of the correct, responsible official).

¹⁸⁵ See *supra* notes 152–156 and accompanying text (discussing the necessary severity of the conditions suffered by prisoners for case viability).

¹⁸⁶ See *supra* notes 142–171 and accompanying text (reviewing all of the protections for carceral officials and their continued lack of legal consequence).

¹⁸⁷ See *Harlow*, 457 U.S. at 813–16 (discussing the importance of balancing the rights of individuals to sue public officials with making sure that officials are not too scared of lawsuits that they fail to properly perform their vocational duties).

¹⁸⁸ See *Manson*, *supra* note 119 (asserting that the PLRA is a protective mechanism shielding corrections officers from civil liability).

administrative remedies and pay high fees, prisoner-plaintiffs are dissuaded from bringing fruitless claims and are even prevented from successfully bringing meritorious claims.¹⁸⁹ The stated purpose of the PLRA is to do just this—shield corrections officers from prisoner-plaintiffs filing excessive and baseless constitutional claims against them.¹⁹⁰

The hesitation to adopt an objective standard is also for this very reason: to protect the vocational latitude of corrections officers.¹⁹¹ However, the Supreme Court said it best in *Kingsley*, “the use of an objective standard adequately protects an officer who acts in good faith.”¹⁹² In addition to the objective standard, thanks to the PLRA, corrections officers would still have ample and robust protections against prosecution.¹⁹³ An objective standard would not open the floodgates to meritless suits against corrections officers because the other hurdles in place to protect them would only be surmountable under legitimate circumstances.¹⁹⁴ The objective standard would reorient the balance of the two interests: it would still uphold protections for corrections officers while giving prisoners an opportunity to reclaim a semblance of their constitutional rights.¹⁹⁵

¹⁸⁹ See ACLU, *supra* note 120 (stating the repercussions of filing a frivolous claim); see also Benerofe, *supra* note 119, at 153–54 (discussing barring baseless claims as a critical component of the Prison Litigation Reform Act). Although it deters frivolous lawsuits and claims, the PLRA also curtails meritorious claims against corrections officers. Benerofe, *supra* note 119, at 154.

¹⁹⁰ See Benerofe, *supra* note 119, at 153 (examining the motivations for creating and maintaining the PLRA).

¹⁹¹ See *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (“Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.”).

¹⁹² 576 U.S. 389, 399–400 (2015). The Court in *Kingsley* reviewed the likelihood of good faith claims defeating the objective standard. *Id.* Ultimately, the Court emphasized that the combination of qualified immunity protections and the court’s duty to consider the difficult decisions involved in prison management makes it a slim possibility that frivolous suits will prevail past the objective evaluation. *Id.*

¹⁹³ See Benerofe, *supra* note 119 at 144 (reviewing how the PLRA’s stringent requirements have reduced lawsuits, and thus correctional officers are protected); see also *supra* notes 117–119 and accompanying text (outlining the hurdles created by the PLRA in service of protecting corrections officers from claims without merit).

¹⁹⁴ See Benerofe, *supra* note 119, at 153 (illustrating that only meritorious suits, and sometimes not even those, can successfully surpass the protections of the PLRA); *Kingsley*, 576 U.S. 400 (“It is unlikely (though theoretically possible) that a plaintiff could overcome these hurdles where an officer acted in good faith.”).

¹⁹⁵ See Glidden, *supra* note 94 (discussing the balancing act between the government interests and prisoners’ rights). This balance could be reoriented with the abandonment of the subjective standard. See *id.* (referencing the importance of balancing two interests).

*B. Failure of the Subjective Deliberate Indifference Test to
Constitute a Legitimate Cause of Action*

Under a subjective test, litigation for constitutional violations, specifically conditions of confinement claims, has been and will continue to be unsuccessful.¹⁹⁶ The objective prong, requiring a showing of risk of significantly serious harm, could be met in a conditions of confinement case post-natural disaster.¹⁹⁷ A record of dangerous and unlivable conditions of confinement resulting from a lack of an emergency evacuation plan in a natural disaster should objectively demonstrate that it would be deliberately indifferent not to evacuate.¹⁹⁸ It is evident that these conditions—trapping someone amidst contaminated, rising waters in locked cells overflowing with human feces—would and should offend the bounds of human decency.¹⁹⁹ Prisoner suits, however, will surely continue to fail to demonstrate what a certain corrections officer believed prior to the natural disaster.²⁰⁰ As it stands, only one percent of all cases evaluated under the deliberate indifference standard have prevailed since it was enunciated in *Farmer*, and none of those cases have been unconstitutional conditions of confinement claims post-natural disaster.²⁰¹

Our civil legal system exists to ensure fair and just settlement of disputes.²⁰² Currently, that justice does not exist for prisoner victims of failed evacuations in the face of natural disasters.²⁰³ While being forced to endure unconstitutional and often avoidable conditions of confinement due to failures

¹⁹⁶ See Robbins, *supra* note 29, at 30 (establishing that, despite the risks post-hurricane being plainly obvious, a prison official can still shield himself by feigning ignorance or misunderstanding of those risks).

¹⁹⁷ See *id.* at 25 (suggesting that the objective prong could be met in cases where prisons failed to evacuate due to the severity of the resulting and historical conditions of confinement).

¹⁹⁸ See *id.* at 27–28 (considering the objective standard in the case of OPP and finding it to likely be satisfied due to the egregious nature of the conditions post Hurricane Katrina).

¹⁹⁹ See *Estelle v. Gamble*, 429 U.S. 97, 102–05 (1976) (quantifying deliberate indifference as offending “evolving standard of decency” (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958))).

²⁰⁰ See Robbins, *supra* note 29, at 25 (stating that the subjective prong of the deliberate indifference standard poses the biggest hurdle to successful claims for prisoner-plaintiffs post natural disaster).

²⁰¹ See *Study Finds Just 1% of Prisoner’s Eighth Amendment Claims succeed*, PRISON LEGAL NEWS (May 1, 2025), <https://www.prisonlegalnews.org/news/2025/may/1/study-finds-just-1-prisoners-eighth-amendment-claims-succeed/#:~:text=The%20SCOTUS%20ruling%20in%20Farmer,I%20didn't%20know.%E2%80%9D> [<https://perma.cc/B8E4-S7NZ>] (explicating how virtually impossible success on the merits is in a post-*Farmer* world on constitutional claims).

²⁰² See Thomas W. Merrill, *Fair and Impartial Adjudication*, 26 GEO. MASON L. REV. 897, 897 (2019) (establishing the purpose of the civil legal system as a fair and just process for legally resolving disputes).

²⁰³ See *id.* (describing the purpose of the civil system of law); Einbinder & Beckler, *supra* note 162 (highlighting the nearly impossible nature of succeeding on the subjective indifference prong); see also, e.g., *Smith v. Gusman*, Civil Action No. 06-4095, 2007 WL 914171, at *4–5 (E.D. La. Mar. 23, 2007) (referencing thirteen cases wherein prisoner-plaintiffs’ claims were dismissed for claims of constitutional violations in conditions of confinement post natural disasters).

to evacuate, prisoners are deprived of any legal recourse.²⁰⁴ Justice is merely illusory for prisoners under these circumstances when their right to due process functionally disappears.²⁰⁵

C. Legal Consequences for Unconstitutional Actions Incentivize Prisons to Create Comprehensive Emergency Evacuation Plans

If there is no legitimate legal recourse for prisoners, corrections officers will be able to continue to act with impunity in the face of these natural disasters.²⁰⁶ The law instills a fear of consequences for unlawful behaviors and acts as a deterrent to those very behaviors.²⁰⁷ The purpose of having causes of action in civil litigation is to ensure that tortfeasors are held liable for their wrongs and to condemn behavior that offends our norms.²⁰⁸ Without consequences, corrections officers will continue to leave prisoners for dead.²⁰⁹

By abandoning the subjective deliberate indifference standard, prisoner-plaintiffs will finally have a path to potentially bring successful 42 U.S.C. § 1983 actions.²¹⁰ As a result, corrections officers will have to realize that they are not, in fact, above the law.²¹¹ Creating consequences is integral to affecting

²⁰⁴ See, e.g., *Smith*, 2007 WL 914171, at *4–5 (reviewing numerous failed claims brought under these facts based on conditions post-Katrina); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (stating that “in situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees”). This opinion highlights the importance of having some avenue for the protection of constitutional rights and recovery from constitutional violations; hence, it is important to possess legal recourse. See *Harlow*, 457 U.S. at 814 (discussing the cruciality of rights protection and recovery).

²⁰⁵ See *Amdt14.Sl.5.4.1. Overview of Procedural Due Process in Civil Cases*, *supra* note 106 (describing prisoners’ entitlement to procedural due process and how that is defined in civil litigation).

²⁰⁶ See *Manson*, *supra* note 119 (evidencing that, as of now, corrections officers largely act with impunity and without fear of legitimate consequences). As there is no legal accountability for officers’ misconduct, corrections officers can continue to brutalize prisoners. *Id.*; see also *THE STRIKE*, PBS, at 52:12–52:36 (JoeBill Muñoz & Lucas Guilkey, 2025) (identifying litigation as the instrument that created change in prison policies, hence demonstrating the cruciality of legal recourse).

²⁰⁷ See *Popper*, *supra* note 173, at 185 (referring to the importance of civil consequences as mechanisms of regulating and bettering human behavior). Judicial decisions dictate consequences which act as a deterrent effect and thereby create behavioral norms. *Id.* at 185–86.

²⁰⁸ *Id.* at 186.

²⁰⁹ See *id.* at 192 (discussing the deterrence power of civil liability, establishing punishment and deterrence as intertwined elements). If deterrence requires punishment, then to deter corrections officers’ behavior, officers must fear certain punishment for unconstitutional behavior. See *id.* (stating that deterrence and punishment cannot be separated as a rational actor will be deterred from behavior that will result in punishment); see also *Manson*, *supra* note 119 (highlighting that lacking legitimate consequences emboldens corrections officers to commit misconduct); *THE STRIKE*, *supra* note 206, at 52:12–52:36 (upholding legal consequences as the most influential tool for changing prison policies).

²¹⁰ See *Robbins*, *supra* note 29, at 25 (identifying the subjective prong of the deliberate indifference standard as the biggest hurdle that a prisoner-plaintiff will have to overcome; thereby by removing it, there is likely a path to a successful claim).

²¹¹ See *Popper*, *supra* note 173, at 202 (explaining that legal consequences create fundamental incentives for better behavior from individuals); see also *Manson*, *supra* note 119 (highlighting the

change for negative behavior.²¹² As it stands, neither enacted nor proposed legislation has created effective incentives for prisons to evacuate.²¹³ By instilling a fear of personal, legal culpability, corrections officers will have a legitimate incentive to review their policies and create an actionable emergency evacuation plan.²¹⁴ When natural disasters strike, widespread panic and fear ensue.²¹⁵ In the face of panic, rational thinking often goes out the window as corrections officers scramble to save themselves and abandon the prisoners they serve to die in their cells.²¹⁶

Prisoners, unlike corrections officers and other civilians, do not have the luxury of protecting themselves and evacuating on their own.²¹⁷ Because they are wholly dependent on the carceral system for their food, restrooms, and all aspects of their daily lives, prisoners are at the mercy of corrections officers.²¹⁸

Despite the Disaster Recovery Reform Act providing the first basis for including prisoners in a national disaster relief scheme, and the ACA mandating that a written emergency plan exist, there are no explicit standards of care or incentives to create substantive emergency evacuation plans for prisons.²¹⁹ By providing a tangible incentive for corrections officers to create and implement

impunity with which corrections officers conduct their day to day activities and violations of prisoners' constitutional rights).

²¹² See Popper, *supra* note 173, at 202 (highlighting civil consequences as influential on human behavior).

²¹³ See Spitzenberger, *supra* note 37 (covering the continuous failure to evacuate prisons in 2025, despite federal legislation or regulations).

²¹⁴ See THE STRIKE, *supra* note 206 at 52:12–52:36 (explaining that the litigation is solely what forced the prisons and corrections officers to look at their policies and make changes to them). The Department of Corrections had high employee turnover so there was a lack of consistency in both making new policies and changing/amending old policies. *Id.* A gang investigator at the California prisons explained, “any major change . . . was litigation driven, meaning lawsuits forced us to take a look at the policy.” *Id.* at 52:27–52:38; see also Popper, *supra* note 173, at 186 (noting that legal consequences incentivize individuals to make change to their behaviors to reduce vulnerability to civil liability).

²¹⁵ See generally Heanoy & Brown, *supra* note 4 (discussing at length the trauma resulting from panic and fear in the wake of natural disasters).

²¹⁶ See Luscombe, *supra* note 3 (describing a first-hand account of how severe the scramble and panic was as civilians evacuated hurricane Milton). When the hurricane hit, hundreds of thousands of people flooded the streets and highways desperate to escape the incoming deadly storm. *Id.*; see also NAT'L PRISON PROJECT OF THE ACLU ET AL., *supra* note 9, at 9, 32 (establishing that the corrections officers fled OPP during Hurricane Katrina).

²¹⁷ See Dixon et al., *supra* note 25 (describing that prisoners are considered “out of sight, out of mind” and do not get evacuated nor do they have the autonomy to evacuate themselves like other citizens do).

²¹⁸ See Habash, *supra* note 56, at 142 (discussing the vulnerable position that prisoners are in by being completely dependent on corrections officers for their every need).

²¹⁹ See Disaster Recovery Reform Act of 2018, Pub. L. No. 115-254, § 1209(b)(B)(ii), 132 Stat. 3441–42 (2018) (introducing prison population as a special needs population in need of protections and relief plans); AM. CORR. ASS'N, *supra* note 53, at 91–93 (mandating some sort of written emergency evacuation plan without any comprehensive guidelines or checks and balances).

emergency evacuation plans, this course of action could be successful where other solutions have failed.²²⁰

Critics may argue that in adopting an objective standard, courts would be infringing on the rights of the prison to govern their institutions as they see fit.²²¹ The fundamental tension omnipresent in prison litigation is who should be running the prison system.²²² Opponents of court intervention assert that it is not the judiciary's role to dictate how prison administrators do their job, while proponents highlight the imperative of the court to intervene to maintain the constitutional safeguards provided to prisoners.²²³ Fundamentally, due to the powerful language of the PLRA, corrections officers are already excessively protected against frivolous claims and given unduly wide discretion to conduct their prisons as they see fit.²²⁴ In considering this tension, the *Brown v. Plata* Court said, "[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration."²²⁵ In balancing that potential and considering the pre-established

²²⁰ See Habash, *supra* note 56, at 149–50, 154–55 (reviewing other proposed and implemented solutions to remedying failed prison evacuations indicating why they have failed to remedy this issue); see also THE STRIKE, *supra* note 206, at 52:12–52:36 (reviewing legal recourse as incentivizing corrections facilities to look at their policies).

²²¹ See *Bell v. Wolfish*, 441 U.S. 520, 539 (1979) (emphasizing the importance of upholding the values of the Constitution while maintaining the integrity of the correctional system to operate prisons as they see fit); see also *Rhodes v. Chapman*, 452 U.S. 337, 351–52 (1981) (advocating for the importance of allowing courts and corrections facilities to each operate with autonomy, without overbearing interference by the court under the guise of constitutional remedies).

²²² See *Brown v. Plata*, 563 U.S. 493, 559 (2011) (Scalia, J., dissenting) (touching upon the conflict between prison administrators and the courts in terms of who has the expertise to run a prison and who should be running the prisons); see also *Rhodes*, 452 U.S. at 354 (Brennan, J., concurring) (stating that courts have historically been cognizant of entrusting the task of running prisons to prison administration rather than to courts). The *Rhodes* opinion also highlights that, on the other hand, the “inhumanity of conditions in American prisons has been thrust upon the judicial conscience.” *Id.* (quoting *Inmates of Suffolk Cnty. Jail v. Eisenstadt*, 360 F. Supp. 676, 684 (Mass. 1973), *aff’d*, 494 F.2d 1196 (1st Cir. 1974)).

²²³ See *Brown*, 563 U.S. at 511 (discussing that courts have a responsibility to protect the constitutional rights of prisoners even if in doing so, it would get involved in the administration of the prison). But see *id.* at 559 (Scalia, J., dissenting) (reemphasizing the importance of allowing the prison administration to run the prison without ill-equipped court involvement).

²²⁴ See *supra* notes 183–195 and accompanying text (highlighting the obstacles to filing a claim and the fail-safes baked into the court system that prohibit prisoner-plaintiffs from filing excess or baseless claims).

²²⁵ See 563 U.S. at 511 (emphasizing the importance of a balancing between maintaining the autonomy of the corrections institutions and ensuring that constitutional violations are not going unaddressed by courts). The *Brown* Court, like Justice Brennan’s *Rhodes* concurrence, placed an emphasis on the protection of the prisoners and upholding their constitutional protections. See *id.* (reminding courts not to shrink from their responsibilities to ensure prisoners constitutional rights even if it would interfere with the prison administration); *Rhodes*, 452 U.S. at 354 (Brennan, J., concurring) (highlighting the importance of judicial intervention as “indispensable” in protecting prisoners from violations of their constitutional rights).

protections for the prison, the severity of unredressed constitutional violations calls for the implementation of a solely objective indifference standard.²²⁶

CONCLUSION

If corrections officers and prison administrators feel that they can act, or fail to act, with impunity in the face of devastating natural disasters, they seemingly would be correct. Prisoners have no successful avenue for legal recourse in response to the Eighth Amendment violations that occur post-natural disaster because the deliberate indifference standard bakes in an unachievable showing of subjective intent on behalf of corrections officers. By abandoning the subjective prong of the judicially-created deliberate indifference standard, corrections officers and prison administrators would still be protected to a large degree, but prisoner-plaintiffs would also have an opportunity to litigate their claims. This would start to balance the scales of the competing interests of protecting legitimate government interests *and* protecting the rights of all Americans, including prisoners. In addition, the potential that corrections officers could be found liable under 42 U.S.C. § 1983 would serve as an incentivizing mechanism for prisons, encouraging them to create emergency evacuation plans and to actually implement those plans during a time of crisis. As the climate crisis worsens and natural disasters continue to proliferate at unprecedented rates, the dangers to prisoners worsen. Abandoning the subjective deliberate indifference standard is the key to preventing more egregious unconstitutional conditions and certain death for prisoners.

SAMANTHA G RAYMOND

²²⁶ See *Rhodes*, 452 U.S. at 359 (Brennan, J., concurring) (stating “courts have emerged as a critical force behind efforts to ameliorate inhumane conditions. Insulated as they are from political pressures, and charged with the duty of enforcing the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost”); see also Glidden, *supra* note 94 (outlining the cruciality of balancing prisoners’ rights under the constitution and maintaining legitimate compelling government interests).