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# Lessons from Hurricane Katrina: Prison Emergency Preparedness as a Constitutional Imperative

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# LESSONS FROM HURRICANE KATRINA: PRISON EMERGENCY PREPAREDNESS AS A CONSTITUTIONAL IMPERATIVE†

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*Hurricane Katrina was one of the worst natural disasters ever to strike the United States, in terms of casualties, suffering, and financial cost. Often overlooked among Katrina's victims are the 8,000 inmates who were incarcerated at Orleans Parish Prison (OPP) when Katrina struck. Despite a mandatory evacuation of New Orleans, these men and women, some of whom had been held on charges as insignificant as public intoxication, remained in the jail as the hurricane hit, and endured days of rising, toxic waters, a lack of food and drinking water, and a complete breakdown of order within OPP. When the inmates were finally evacuated from OPP, they suffered further harm, waiting for days on a highway overpass before being placed in other correctional institutions, where prisoners withstood exposure to the late-summer Louisiana heat and beatings at the hands of guards and other inmates. Finally, even as the prison situation settled down, inmates from the New Orleans criminal justice system were marooned in correctional institutions throughout the state, as the judicial system in New Orleans ceased to function.*

*The resulting effects were both tragic and unconstitutional, as the suffering at OPP could have been prevented. This Article asserts that prison administrators have a constitutional duty to plan for emergencies, and argues that the failures of New Orleans officials to do so violated prisoners' Sixth and Eighth Amendment rights, as well as internationally recognized human rights standards. With the wealth of training and planning materials available to prison officials and the knowledge of possible emergencies, it is unconscionable for prisons to have nonexistent or inadequate plans. Assessing change through litigation and legislation, this Article advocates a mixed approach, using judicial and legislative remedies for the abhorrent violations of well-established prisoners' rights. The Article recommends that states develop mechanisms, such as emergency courts, to enable the administration of justice to resume promptly following serious natural or man-made disasters. Prisons and courts should internalize the lessons of Hurricane Katrina, which demonstrated the consequences of inadequate preparation and planning for prisoners' safety during and after a major emergency.*



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## INTRODUCTION

As the American citizenry continually gains awareness of the likelihood of natural disasters, terrorist attacks, and other emergencies, as well as the serious consequences of government inaction, a strong movement urging emergency preparedness has grown.[1] The importance of this movement is undeniable, but as is often the case, the interests of one subset of Americans—prisoners—have been largely ignored in the conversation. Emergency preparedness is a topic of particular relevance in the correctional context because, unlike other Americans, prisoners have been deprived of their ability to care for themselves. When prisoners' safety is not planned for, the results are both tragic and unconstitutional.

Hurricane Katrina provides an illustration of how inadequate emergency planning can lead to unnecessary suffering and death. The Orleans Parish Prison (OPP),[2] for example, had inadequate or nonexistent emergency plans for ensuring prisoners' safety when Katrina struck.[3] Consider the story of Tyrone Lewis, an inmate with

1. The federal government in particular has strongly promoted emergency preparedness programs through the Department of Homeland Security and one of its components, the Federal Emergency Management Agency (FEMA). *See* About Ready, http://www.ready.gov/america/about/index.html (last visited Aug. 28, 2008); FEMA, Plan Ahead, http://www.fema.gov/plan/index.shtm (last visited Aug. 28, 2008) (providing preparation advice for many kinds of emergencies, from nuclear explosions and terrorist attacks to earthquakes and landslides). The government provides extensive emergency information on a variety of subject matters, such as how to care for pets during an emergency and how to protect business records. FEMA, Information for Pet Owners, http://www.fema.gov/plan/prepare/animals.shtm (last visited Aug. 28, 2008); FEMA, Protect Your Property or Business from Disaster, http://www.fema.gov/plan/prevent/howto/index.shtm (last visited Aug. 28, 2008). While all of this information is valuable, with so much attention paid to the details of emergency planning it is problematic that the federal government has not focused more on preparing correctional institutions for emergencies.

2. Despite its name, OPP primarily serves the function of a county jail. Before Hurricane Katrina, on average sixty percent of OPP's population had been arrested on "attachments, traffic violations, or municipal charges—typically for parking violations, public drunkenness, or failure to pay a fine." ERIC BALABAN & TOM JAWETZ, ABANDONED & ABUSED: ORLEANS PARISH PRISONERS IN THE WAKE OF HURRICANE KATRINA 13 (2006), *available at* http://www.aclu.org/pdfs/prison/oppreport20060809.pdf. The ACLU published a subsequent report detailing the problems examined in ABANDONED & ABUSED. ACLU, BROKEN PROMISES: 2 YEARS AFTER KATRINA (2007), *available at* http://www.aclu.org/pdfs/prison/brokenpromises_20070820.pdf [hereinafter BROKEN PROMISES].

3. The extent of emergency planning at OPP prior to Hurricane Katrina is unknown, because OPP officials provided only a two-page, *undated* document entitled "Orleans Parish Criminal Sheriff's Department Hurricane/Flood Contingency Plan" in response to information requests by the ACLU. BALABAN & JAWETZ, *supra* note 2, at 124–26. The Louisiana Department of Public Safety and Corrections does not maintain emergency plans for locally run prisons like OPP. *Id.* at 139. Nonetheless, it has said it would refuse to turn over such documents even if it possessed them, citing exceptions to the Louisiana Public Records Act. *Id.*

a pacemaker. He and his family had complained of inadequate medical attention for a year prior to Katrina.[4] Like other inmates, Lewis was stuck in OPP for days after Katrina, where he was forced to stand in chest-high floodwaters for long periods of time and received no sustenance or hydration.[5] When Lewis and other inmates were finally removed from OPP, they stood in the sun for hours without a chance to rinse off the contaminated floodwaters.[6]

Three days after Katrina hit, Lewis was transferred to Winn Correctional Center, where Lewis's cellmate heard him complain of chest pains.[7] The deputy reportedly responded, "Fuck you nigger, we're not doing shit for you niggers from New Orleans."[8] Lewis's condition deteriorated, but he was not admitted to a hospital for two weeks; he died three days after admission.[9] Lewis's family did not learn of his death until a month later.[10] In the meantime, Lewis was laid to rest not by his family, but by prison staff who buried him at a burial ground for unclaimed prisoner remains.[11]

Lewis's story is just one of many tales of pain and suffering from OPP prisoners. Many OPP inmates were deprived of food and water.[12] Others were unable to receive essential medication or medical attention.[13] Some were attacked by their fellow prisoners because the prison did not have enough guards to watch over the inmates.[14] Prisoners were trapped in their cells as floodwaters rose around

4. *Id.* at 44.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. BALABAN & JAWETZ, *supra* note 2, at 44 (citing Michael Perlstein, *Grave Concern*, TIMES-PICAYUNE (New Orleans), Mar. 12, 2006, at 1).

10. *Id.*

11. *Id.*

12. *Id.* at 39. Although different facilities took (or failed to take) different measures to feed inmates, it is clear that few inmates were adequately fed or hydrated. *Id.* In one facility, there was flooding in the kitchen in which all the food was stored. *Id.* In another facility, prisoners were apparently denied food, although prison guards and their families were given bread and fruit. *Id.* In a third facility, inmates were told to drink toilet water when they complained of dehydration and hunger. *Id.* New Orleans's Sheriff Marlin Gusman, however, claims that his staff served more than 20,000 meals a day to prisoners and had enough food to feed all the prisoners throughout the hurricane. *Id.* at 72. Inmates have not corroborated this version of the events.

13. *Id.* at 39–40 (stating that, following the storm, many prisoners were deprived of their HIV medications).

14. For example, one guard at an OPP facility stated, "I couldn't do a proper security check to make sure everyone was alright because I was the only one on the floor." BALABAN & JAWETZ, *supra* note 2, at 45. Many inmates, moreover, reported seeing various fights break out during the storm. *Id.* Pearl Cornelia Bland, a prisoner convicted of possession of drug paraphernalia and who was only one day from her release to a halfway house, was brutally beaten by a group of female inmates. *Id.* at 46. Yet, when other prisoners told the guards to break up the fight, they reportedly declined to help, saying "let them kick her ass." *Id.*

them.[15] More had to endure abuse from prison guards who were not adequately trained in handling emergency situations.[16] These harms were as much a result of OPP's inadequate emergency planning and preparation as the result of the natural disaster itself.

The grounds for asserting the need for prison emergency planning transcend moral concerns (though moral concerns are obviously present, and important in themselves). This Article maintains that prison administrators have a constitutional duty to plan for emergencies and that the failure to create an emergency plan that ensures "the minimal civilized measure of life's necessities"[17] violates prisoners' Eighth Amendment rights.[18] Prison officials are legally obligated to protect inmates from serious threats of harm and to provide food, water, and medical care.[19] While natural disasters and other emergencies constrain officials in their ability to perform some of these duties, the failure to plan for foreseeable emergencies ignores prisoners' constitutional rights. Consequently, administrators can be said to have acted with the "deliberate indifference" necessary for a court to find an Eighth Amendment violation.[20] Where a court finds a constitutional violation, it may order injunctive relief to ensure that correctional institutions have a plan to prevent unnecessary suffering and deaths when a future disaster strikes.

The failure to create adequate prison emergency plans also implicates the Sixth Amendment's Speedy Trial Clause[21] and

15. *Id.* at 35 (relating the story of the female inmates at the Templeman II facility who were forced to remain in their dorm even though it was flooded with four feet of water). The inmates reported that they were forced to urinate and defecate into the floodwater that surrounded them. *Id.*

16. *Id.* at 53–54 (recounting how some inmates who inquired about their families or about getting food were shot with beanbags, beaten, and sprayed with mace).

17. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

18. *See infra* Part III.A (arguing that a failure to adequately prepare an emergency plan constitutes deliberate indifference sufficient to establish an Eighth Amendment violation and to sustain a claim under 42 U.S.C. § 1983).

19. *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976) (noting that legislation has codified the common law principle that "'it is but just that the public be required to care for the prisoner, who cannot by reason of deprivation of his liberty, care for himself'" (quoting Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926))).

20. *See generally id.* at 104 (establishing deliberate indifference as the requisite state of mind to find that a prison administrator violated a prisoner's Eighth Amendment right to adequate medical care). The deliberate indifference standard has since been held to be the appropriate test for judging whether prison officials have violated prisoners' Eighth Amendment rights in all cases involving conditions of confinement and failure to prevent harm to inmates. Wilson v. Seiter, 501 U.S. 294, 303 (1991).

21. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

fundamental human rights concerns.[22] Inadequate emergency plans often mean that prisoners awaiting trial are forced to wait months, and maybe years, after a disaster strikes.[23] If emergency planning can ensure prompter trials through better record preservation and communication, as well as through procedures to keep the courts open, then such planning should be required as a matter of policy.

Moreover, although it is not necessarily binding legal authority, international human rights law also supports the practice of emergency planning in correctional institutions to prevent human rights violations, even in extraordinary circumstances.[24] The United Nations Standard Minimum Rules for the Treatment of Prisoners, for example, requires not only that prisoners receive adequate food, water, and medical care,[25] but also that institutional personnel and leaders be trained and tested regarding their abilities to operate a penal institution humanely and safely.[26]

Finally, inadequate emergency plans for prisons may also threaten the rights of outsiders.[27]

Part I of this Article examines emergency planning at the Orleans Parrish Prison prior to Hurricane Katrina.[28] This Part questions whether plans were in existence prior to Hurricane Katrina, and argues that, even assuming plans were in place, they were inadequate because they lacked a specific command structure

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22. *See infra* Part III.C (arguing that the lack of emergency planning contravenes established international human rights standards).

23. *See infra* notes 352–54 and accompanying text (indicating the varying lengths of time that some detainees awaited trial).

24. *Cf.* George E. Edwards, *International Human Rights Law Violations Before, During, and After Hurricane Katrina: An International Law Framework for Analysis*, 31 T. MARSHALL L. REV. 356 (2006) (cataloging international human rights law, both binding and non-binding upon the United States, that can be used to analyze the rights that were violated in the aftermath of Hurricane Katrina).

25. Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/6/1, annex I, approved by E.S.C. Res. 663C, U.N. ESCOR, 24th Sess., Supp. No. 1 at 11, U.N. Doc. E/3048 (July 31, 1957), *amended by* E.S.C. Res. 2076, U.N. ESCOR, 62d Sess., Supp. No. 1 at 35, U.N. Doc. E/5988 (May 13, 1977), *available at* http://www.unhchr.ch/html/menu3/b/h_comp34.htm [hereinafter SMRs].

26. *Id.* arts. 46–47, 50.

27. The lack of proper plans endangers public safety because inmates may escape. Without adequate planning to preserve the institution's records and to ensure that there are sufficient personnel to apprehend escapees, the public is put at great risk. When Hurricane Katrina struck OPP, for example, the prison staff could not contain all of the inmates. The sheriff's office issued fourteen fugitive arrest warrants for possible escapees. *See* Michael Perlstein, *Fourteen Escape Prison in Katrina Chaos: Gusman Originally Claimed All Accounted For*, TIMES-PICAYUNE (New Orleans), Nov. 19, 2005, at 1.

28. *See infra* Part I (contending that OPP's emergency plan, if it existed, was insufficient to deal with a disaster of the magnitude of Hurricane Katrina).

and were insufficiently flexible to adapt to a broad range of emergencies.[29] As a point of comparison, Part I considers the Nebraska Emergency System, which is an example of a comprehensive, flexible emergency plan.[30]

Part II discusses prison emergency preparation and response in prisons in general.[31] Emergency preparation has substantially expanded in recent years, but the importance of emergency training, drills, and exercises, coupled with the resources now available to prisons, heighten the need for prison administrators to continue to increase their efforts in preparing for emergencies.[32] Further, the threat of terrorist activity adds to the natural emergencies that could affect prisons and prisoners.

Part III argues that failure to plan adequately for emergencies such as Hurricane Katrina implicates the Sixth and Eighth Amendments, as well as international human rights standards.[33] This Part claims that inadequate emergency planning constitutes an Eighth Amendment violation, and likely gives prisoners a valid cause of action under 42 U.S.C. § 1983. Further, the Sixth Amendment and human rights concerns support a requirement of emergency plans in prisons.[34] Part III also considers how Hurricane Katrina implicated the Speedy Trial Act.

Part IV of the Article makes recommendations on how prison emergency planning should be promoted, or required, through spreading public awareness, adjudication, legislation, and regulation.[35] This Part concludes that a combination of litigation and legislation is the most effective way to ensure that prison emergency planning at least meets, and hopefully exceeds, constitutional requirements.[36]

There are many other issues in the aftermath of Hurricane Katrina that affect the criminal justice system, but which will not be

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29. *See infra* Part I.

30. *See infra* Part I.B.

31. *See infra* Part II (detailing general trends in prison emergency planning, from the adoption of emergency plans to staff and correctional officer training and drills, in preparation for emergencies ranging from natural disasters to terrorism).

32. *See* JEFFREY A. SCHWARTZ & DAVID WEBB, HURRICANES KATRINA AND RITA AND THE LOUISIANA DEPT. OF PUBLIC SAFETY AND CORRECTIONS: A CHRONICLE AND CRITICAL INCIDENT REVIEW 82 (2006), *available at* http://www.abanet.org/crimjust/katrinanicreport.pdf (finding that Louisiana officials provided insufficient emergency preparedness training to prison staff).

33. *See infra* Part III (explaining the standards for prisoner claims under 42 U.S.C. § 1983, the Eighth Amendment, and the Sixth Amendment, and applying these standards to the situation in OPP following Hurricane Katrina).

34. *See infra* Part III.

35. *See infra* Part IV.

36. *See id.*

addressed in this Article. Some of these issues include race and class, and the lack of help provided to these citizens.[37]

Generally, this Article argues that prison administrators have both a legal and a moral obligation to create plans to ensure prisoners' safety during emergency situations. This obligation includes planning for prisoners to receive basic sustenance and medical care, as well as ensuring that pre-trial detainees receive their trials as soon as the circumstances allow. Thus, this Article does not argue for a radical advancement of prisoners' rights, but rather for the enforcement of established, well-recognized constitutional rights. In planning for emergencies, we must heed the lessons of previous disasters and recognize that our plans for adequate relief must include prisoners' safety and well-being.

## I. PREPARING FOR HURRICANE KATRINA

### *A. "There Was No Plan for This Situation."*[38]

At a press conference on the morning of Sunday, August 28, 2005, New Orleans Mayor C. Ray Nagin declared the city's first ever mandatory evacuation.[39] Nearly every person who remained in the city was ordered to leave immediately.[40] Among those excluded from the evacuation were the "[e]ssential personnel of the Orleans Parish criminal sheriff's office and its inmates."[41] When a reporter asked Mayor Nagin about the decision not to evacuate the OPP prisoners, he deflected the question to Sheriff Marlin N. Gusman, who commented, "[W]e have backup generators to accommodate any power loss. . . . We're fully staffed. We're under our emergency operations plan. . . . [W]e've been working with the police department—so we're going to keep our prisoners where they belong."[42]

37. *See* BROKEN PROMISES, *supra* note 2, at 11–16 (arguing that "countless race-based attacks on . . . civil and human rights" have interfered with the recovery process from Hurricane Katrina in Louisiana, and that the process has demonstrated the continued existence of race and class divisions in the United States).

38. BALABAN & JAWETZ, *supra* note 2, at 25 (quoting Deputy Luis Reyes).

39. *Id.* at 19.

40. *See CNN Breaking News: New Orleans Mayor, Louisiana Governor Hold Press Conference* (CNN television broadcast Aug. 28, 2005), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0508/28/bn.04.html (quoting Mayor Nagin, who listed exceptions to the evacuation order).

41. *Id.*

42. *Id.*

As the above anecdotes indicate, however, the emergency operations plan about which Sheriff Gusman spoke was either nonexistent, grossly insufficient, or poorly executed.[43] Many OPP deputies abandoned thousands of inmates[44] during the hurricane.[45] Prisoners were left without food, water, or ventilation for days.[46] Trapped inside their locked cells,[47] many prisoners broke windows simply in order to breathe.[48] Some tried to escape by carving holes into the jail's granite walls.[49] Others made signs or set fire to bed sheets to get the attention of rescuers.[50] When they were finally evacuated to other state facilities, conditions deteriorated for some inmates.[51] Thousands of evacuees, for example, were subjected to rampant prisoner-on-prisoner violence at the Elayn Hunt Correctional Center.[52]

Approximately a month after Katrina, the American Civil Liberties Union of Louisiana (ACLU) filed a written request asking the sheriff for a copy of the emergency operations plan.[53] The sheriff failed to respond for nearly two months.[54] Human Rights Watch made similar requests,[55] also to no avail.[56] The ACLU eventually sued the sheriff pursuant to the Louisiana Public Records Act, which requires government officials to answer such requests within

43. BALABAN & JAWETZ, *supra* note 2, at 23.

44. At the time of the hurricane, there were more than 6,000 inmates at OPP. Richard A. Webster, *Caught Off Guard: OPP Deputies Blame Sheriff for Hurricane Crisis*, NEW ORLEANS CITYBUSINESS, Mar. 27, 2006, http://www.neworleanscitybusiness.com/viewStory.cfm?recID=15123 [hereinafter *Caught Off Guard*].

45. *See* BALABAN & JAWETZ, *supra* note 2, at 9. *But see* Richard A. Webster, *Jail Tales: Sheriff Gusman, Prisoners Differ on Storm Evacuation Success*, NEW ORLEANS CITYBUSINESS, Feb. 20, 2006, http://www.neworleanscitybusiness.com/viewStory.cfm?recID=14735 [hereinafter *Jail Tales*] (quoting Sheriff Gusman as saying, "[N]o one abandoned them. I know it may have seemed long inside but it wasn't three days because we weren't there for three days").

46. *See Jail Tales*, *supra* note 45 (quoting an inmate who said, "We had no water, nothing to eat and no oxygen either.... At night we had to burn paper for light and it smothered us"). *But see id.* (reporting that Sheriff Gusman said the prison had sufficient food in storage to feed the entire inmate population during the hurricane).

47. A number of malfunctioning cells had to be chained shut with handcuffs to prevent inmates from escaping. *Caught Off Guard*, *supra* note 44.

48. BALABAN & JAWETZ, *supra* note 2, at 9.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *See* Letters from Joe Cook, Executive Director, ACLU of Louisiana, to Various State and Local Officials, Requesting Documents Pursuant to Louisiana State Law (Sept. 22, 2005), *available at* http://www.aclu.org/FilesPDFs/state%20foia%20letters.pdf.

54. BALABAN & JAWETZ, *supra* note 2, at 25.

55. *See, e.g.*, Letter from Jamie Fellner, Director, U.S. Program, Human Rights Watch, to Sheriff Marlin N. Gusman (Oct. 8, 2005), *available at* http://hrw.org/english/docs/2005/10/08/usdom11907.htm.

56. BALABAN & JAWETZ, *supra* note 2, at 98 n.41.

three business days.[57] The sheriff's attorney, Allen Usry, wrote to the ACLU, "All documents re[garding] evacuation plans were underwater—can't find any now."[58]

Multiple deputies at the OPP, however, attest that there were no evacuation plans in place at the time of the hurricane.[59] Christina Foster, a deputy in the House of Detention for more than two-and-a-half years, said she knew of no evacuation plan other than the fire escape plan displayed on the walls of the jail.[60] She also stated that there was barely enough food and water for the guards, much less for the prisoners.[61] Another OPP deputy who joined the sheriff's office in 2002 echoed similar sentiments:

> [There was] no training for emergencies in the training back in 2002. . . . Initial training for deputies went on for like three months. We had a 90-hour course, and then we went to work and to academy class at the same time. We didn't even have fire drills. Only way we knew about fire exits is because they had posters on the wall, but no one ever told us.[62]

Deputy Luis Reyes, who spoke to a reporter shortly after the evacuation, said prisoners in the Community Correctional Center "had been escaping throughout the night because we were so shorthanded. . . . There was no plan for this situation."[63]

While claiming that all evacuation plans were destroyed by the water, the sheriff provided the ACLU with a document entitled, "The Orleans Parish Criminal Sheriff's Office Hurricane/Flood Contingency Plan."[64] Because the document is undated, the ACLU suspects that it was hastily prepared in the weeks following the public records request.[65] Nevertheless, even if the plan existed at the time of the hurricane, its shortcomings are so considerable that, according to the ACLU, "it would have been of little use even if it had been executed to perfection."[66]

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57. *Id.* at 25.

58. Orleans Parish Criminal Sheriff's Office, Hurricane/Flood Contingency Plan (undated) and Handwritten Notation by Orleans Parish Prison Attorney Allen Usry on Letter from Joe Cook, Executive Director, ACLU of Louisiana, to Sheriff Marlin N. Gusman (Sept. 21, 2005), *available at* http://www.aclu.org/images/asset_upload_file879_22359.pdf [hereinafter Usry Notation], *cited in* BALABAN & JAWETZ, *supra* note 2, at 25.

59. BALABAN & JAWETZ, *supra* note 2, at 25.

60. *Id.*

61. *Id.* at 33.

62. *Id.* at 25.

63. *Id.*

64. Usry Notation, *supra* note 58.

65. BALABAN & JAWETZ, *supra* note 2, at 25.

66. *Id.*

The deficiencies of the purported OPP emergency operations plan are symptomatic of a larger departmental failure.[67] The Louisiana Department of Public Safety and Corrections ("the Department") did not have a comprehensive emergency system.[68] Parts of the system were missing, while the parts that did exist often did not complement one another.[69] Consequently, during the hurricane, prison officials generally ignored the existing emergency plans and instead relied on their own experience and common sense to deal with the crisis.[70] The leadership and bravery of many prison officials should be commended, but there is no question that a more comprehensive system would have better prepared them for the emergency.[71]

One could argue that no emergency plan, no matter how extensive, could have anticipated the magnitude of an event like Hurricane Katrina.[72] Although there is some truth to this statement—as surely there were some things that occurred during the hurricane that no emergency plan would have foreseen[73]—in many ways this is always the case.[74] No two emergencies are exactly alike.[75] Emergency plans are not meant to account for every single contingency.[76] Rather, the purpose of an emergency plan is to provide an organizational foundation and structure for the prison's response, from which prison officials can extrapolate general principles and apply them to the specific situation at hand.[77]

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67. *See* SCHWARTZ & WEBB, *supra* note 32, at c (2006) (explaining that emergency readiness is insufficient at both the departmental and institutional levels).

68. *Id.* at 78.

69. *Id.*

70. *Id.* at 61.

71. *See id.* at 78 (arguing that the Department's "existing emergency plans could be substantially stronger and more useful").

72. *See id.* at 79.

73. For example, the Elayn Hunt Correctional Institute (EHCI) was asked at one point "to come up with a cemetery for emergency burials" within twenty-four hours. *Id.* at 25; *see also id.* at 81. The EHCI, however, did not have an emergency plan that included contingencies for establishing a cemetery. *Id.* The plans were therefore scrapped. *Id.* at 25.

74. JEFFREY A. SCHWARTZ & CYNTHIA BARRY, NATIONAL INSTITUTE OF CORRECTIONS, A GUIDE TO PREPARING FOR AND RESPONDING TO PRISON EMERGENCIES 272–74 (2005), *available at* http://www.nicic.org/pubs/2005/020293.pdf [hereinafter NIC GUIDE] (stating that a helicopter intrusion and escape from a prison in Colorado gave rise to unanticipated problems, such as using search vehicles to hunt down a helicopter).

75. *See* SCHWARTZ & WEBB, *supra* note 32, at 79; NIC GUIDE, *supra* note 74, at 204.

76. *See* SCHWARTZ & WEBB, *supra* note 32, at 79.

77. *See* NIC GUIDE, *supra* note 74, at 205 ("[T]he challenge is to find common elements that make it possible to generalize across crisis situations so that policy, procedure, equipment, and training can be developed and meaningfully applied."); *see also* SCHWARTZ & WEBB, *supra* note 32, at 79 (noting that plans were not used as a foundation during Hurricane Katrina).

One significant flaw in the Department's emergency system is that it uses an outmoded approach to emergency planning: different plans are created for different types of emergencies[78] and plans differ among institutions.[79] The Louisiana approach to emergency planning stands in contrast to the approach that most state Departments of Corrections (DOCs) now use. The standard approach is characterized by a single, generic emergency plan with "offshoots" for the various kinds of emergencies and different institutions.[80] The plan for one kind of emergency often is not practical for another kind of emergency.[81] Further, the plan for a particular emergency may be effective given one institution's capabilities, but substantially less realistic given another.[82] The "all risk" approach, however, standardizes the organization, format, and style of emergency plans to create consistency among plans and institutions, and ultimately engenders better preparation and efficiency.[83] For example, if, during an emergency, prison staff members from one institution are needed at another institution to help implement the plan, they will be able to do so with the least disruption.[84]

The Department, moreover, does not use any specific command structure for emergencies.[85] Instead, it relies on the same organizational structure that operates the prison on a day-to-day basis.[86] As a result, during an emergency, there is significant risk of confusion regarding who is in command.[87] During Hurricane Katrina, for example, while it was clear that Secretary Richard L. Stalder was the person in charge of the Department, with the Chief of Staff second in line, it was not clear who would exercise command if neither of these officials could be reached.[88] While this confusion did not cause a serious problem, the potential clearly existed.[89]

The Department's emergency plans are also overly "person-specific" and "position-specific."[90] Institutional plans will frequently specify that a particular assistant warden will fulfill one role in an

78. SCHWARTZ & WEBB, *supra* note 32, at 78.
79. *Id.*
80. *Id.* at 78–79.
81. *See id.* (asserting that there are many problems with having different plans for different kinds of emergencies).
82. *Id.* at 79.
83. *Id.*
84. SCHWARTZ & WEBB, *supra* note 32, at 83.
85. *Id.* at 79.
86. *Id.*
87. *See id.* at 79–80.
88. *Id.*
89. *Id.* at 80.
90. SCHWARTZ & WEBB, *supra* note 32, at 80.

emergency, while another key administrator will fill another role.[91] During an actual emergency, however, if several or all of the top administrators are unavailable, the plans do not specify who should fill their roles.[92] It is also unclear whether other individuals even have the competence to fill their roles, as those key administrators are often the only people who have been adequately trained for their positions.[93]

### *B. Point of Comparison: The Nebraska Emergency System*

The deficiencies of the Louisiana Department of Public Safety and Corrections (LDPS&C) Emergency System become especially evident when compared with emergency systems from around the country.[94] Consider the Nebraska Emergency System, one of the more sophisticated systems in the nation. Unlike the LDPS&C system, the Nebraska system employs a single, generic plan that can be used for any type of emergency.[95] Once the emergency is identified, the commander then uses a specific incident plan that supplements the general plan.[96] Specific incident plans consist of a series of checklists that are used before, during, and after an emergency to ensure that the most important steps are not forgotten during the crisis.[97]

If an institution chooses to evacuate, the Nebraska system has a comprehensive set of detailed policies in place for both the evacuating and receiving institutions.[98] For example, the policies include information on how many beds are available at each institution and what type of prisoners the respective facilities are capable of handling, such as whether an institution is capable of housing prisoners with special needs.[99] Nebraska's system also prepares all institutions to "defend in place" if they choose not to evacuate.[100]

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91. *Id.*

92. *Id.*

93. *Id.*

94. *See* BALABAN & JAWETZ, *supra* note 2, at 27 (asserting that "[t]he problems with the [OPP Emergency] Plan become even starker when the plan is compared with emergency preparedness systems from other state prison and jail systems").

95. E-mail from Brad Hansen, Emergency Management Supervisor, Nebraska Department of Correctional Services, to Eugene Ho, American University, Washington College of Law (Jan. 26, 2007, 05:00:00 EST) (on file with author).

96. *See* NIC GUIDE, *supra* note 74, at EP-1 to EP-72 (providing a sample emergency preparedness self-audit checklist).

97. E-mail from Brad Hansen, *supra* note 95.

98. BALABAN & JAWETZ, *supra* note 2, at 27.

99. *Id.*

100. *Id.*

Warehouses, for instance, are required to stock thirty days worth of essential provisions.[101]

The Nebraska Department of Correctional Services, unlike the LDPS&C, employs an Emergency Management Supervisor, whose principal duty is to ensure that all DOC facilities are prepared to respond to emergencies. More specifically, the Emergency Management Supervisor manages the development of emergency response and emergency incident plans, ensures that these plans are reviewed and revised annually, develops and conducts emergency drills and exercises to test staff response, makes certain that the Central Office Staff and Institutional Staff are adequately trained, and supervises the Department's emergency response teams, including the Special Operations Response Team (SORT), the Correctional Emergency Response Team (CERT), and the Crisis Negotiation Team (CNT).[102] Brad Hansen, Nebraska's current Emergency Management Supervisor, knows of only three other states—Kansas, New Mexico, and Washington—that have an Emergency Management Supervisor or similar position.[103]

It is important to note that the Nebraska DOC bases its emergency system on Law Enforcement Training and Research Associates, Inc.'s (LETRA)[104] *Emergency Preparedness for Correctional Institutions* program, also used in Arkansas, Idaho, Iowa, Kansas, Kentucky, Montana, New Hampshire, Oregon, Pennsylvania, South Carolina, Vermont, and Wyoming.[105] The program is a thirty-two hour, four-day, hands-on course specifically designed for prison and jail officials and administrators to plan for and cope with emergency situations.[106]

## II. EMERGENCY PREPARATION AND RESPONSE IN PRISONS GENERALLY

Emergency preparedness has come a long way in the last decade and a half.[107] Fifteen years ago, less than one-third of state departments of corrections had any kind of serious emergency

101. *Id.*

102. E-mail from Brad Hansen, *supra* note 95.

103. *Id.*

104. LETRA is a small non-profit organization in Campbell, California.

105. LETRA, INC., EMERGENCY PREPAREDNESS FOR CORRECTIONAL INSTITUTIONS: READING ASSIGNMENT: INTRODUCTION, PHILOSOPHY, GOALS, POLICY A1 (2004).

106. LETRA, INC., EMERGENCY PREPAREDNESS FOR CORRECTIONAL INSTITUTIONS: OVERVIEW 4 (1997). This training is discussed in more detail in the Recommendations section of this Article. *See infra* Part IV.

107. *See* NIC GUIDE, *supra* note 74, at 198–99.

preparation system.[108] By contrast, a recent survey conducted by the National Institute of Corrections (NIC) suggests that this figure is now between seventy percent and eighty-five percent.[109] Moreover, fifteen years ago, nearly every prison that had an emergency system used the then-conventional approach to emergency planning: separate plans were developed for different kinds of emergencies.[110] Now the general trend is toward using a single generic plan, which is then supplemented by appendices.[111] The advantages of using a single generic plan are vast.[112] It is easier, for example, to train prison staff for one plan, as opposed to six or eight.[113] A single generic plan is also less cumbersome and thus more "user friendly" than six or eight separate plans.[114]

Despite the clear improvements in prison emergency preparedness nationwide, serious problems remain.[115] Emergency training, both initial and refresher, remains an area of concern, particularly at the new recruit level.[116] In addition, evidence suggests that many state DOCs do not take emergency drills and exercises seriously enough.[117] Finally, most state DOC preparations for potential terrorist attacks have been largely inadequate.[118]

### *A. Emergency Training*

No matter how practical and well-thought-out an emergency plan may be, its chances of being executed effectively are slim if prison personnel, both at the new recruit level and at the middle and more senior levels, are not adequately trained in the details.[119] Prison staff members must have a clear understanding of the specific procedures required of them if an emergency plan is to

108. *Id.* at 198.

109. *Id.*

110. *Id.* at 199; *see supra* notes 79–80 and accompanying text.

111. NIC GUIDE, *supra* note 74, at 186.

112. *Id.*

113. *Id.*

114. LETRA, INC., *supra* note 106, at 2.

115. NIC GUIDE, *supra* note 74, at v (stating that, to this day, emergency preparedness is often not afforded the priority that it deserves).

116. *See id.* at 190 ("The findings on emergency preparedness training for new recruits are discouraging.").

117. *See id.* at 199.

118. *See id.* at 199–200 (stating that it is unclear whether most DOCs are just slow to respond in the wake of September 11th or simply do not think terrorism is "a prison issue").

119. *See, e.g., id.* at 268 (asserting that the quality of the emergency plans at the Southern Ohio Correctional Facility was irrelevant, as "staff had not been trained in them and did not know them").

succeed.[120] Moreover, training often serves the integral role of developing strong leadership skills, a necessity in situations in which decisions must be made quickly and authoritatively.[121] Unfortunately, the results of the NIC survey demonstrate that, while many departments are taking appropriate steps to train at the middle and upper management levels, there are still significant deficiencies in emergency preparedness training at the new recruit level.[122]

In the last three or four decades, the sophistication of recruit academy training has improved dramatically.[123] Twenty-five to thirty-five years ago, some departments provided new recruits with no pre-service training whatsoever.[124] Instead, learning occurred only on the job.[125] Now pre-service training is fairly extensive, including an average five-and-a-half-week recruit academy program.[126] Within these five-and-a-half weeks, however, typically less than three percent of the program (i.e., six hours) is devoted to emergency preparedness training.[127] It is hard to imagine a new recruit understanding, in just six hours, the level of detail essential to effectively implement the procedures that are required in all of the different kinds of emergency situations.[128]

New recruit in-service training is also lacking in many departments.[129] The results of the NIC survey reflect three different approaches to in-service training of general staff.[130] Some departments devote substantial time, from eight to sixteen hours, to an initial in-service emergency training program, which is supplemented with refresher training that ranges from four to eight

120. *See id.* ("Inevitably, staff found themselves trying to invent emergency response procedures and strategies in the midst of the crisis.").

121. *See, e.g.*, NIC GUIDE, *supra* note 74, at 286 (summarizing the lessons learned from the riot at the maximum-security compound of the Montana State Prison, and stating that "[s]trong leadership from the person in charge may be the most important need during a major prison emergency").

122. *See id.* at 190.

123. *See id.* (asserting that state corrections has become increasingly professional, as indicated by the development of "rigorous standards for personnel and training").

124. *Id.*

125. *See id.* (stating that older prison staff members remember receiving a set of keys on their first day of work and being told to "be careful while you're figuring it out") (internal quotation marks omitted).

126. *Id.*

127. *See* NIC GUIDE, *supra* note 74, at 190 (reporting that the average length of a recruit academy is 213 hours and the average time spent on general emergency preparedness is six hours).

128. *Id.*

129. *See id.* at 190–91 (explaining that many departments devote an hour or less each year to in-service emergency preparedness training).

130. *Id.*

hours annually.[131] A second approach devotes minimal time to an initial block of training but from two to four hours to annual in-service training.[132] Finally, some departments devote little to no time, one hour or less, to any kind of in-service training, initial or refresher.[133] Far too many departments fall into this last category.[134]

To the credit of most DOCs, emergency training at the middle and upper management levels is generally encouraging.[135] The majority of departments responding to the NIC survey provide additional refresher training to prison staff at these levels; this training is particularly important because these staff members often serve as shift commanders.[136] Shift commanders are in charge of the institution during nights and weekends; they often find themselves suddenly in command when an unexpected crisis occurs.[137] It makes sense, therefore, that these staff are provided with additional training (generally at least two hours annually).[138] Some departments not only provide this additional training, but also specifically tailor the training to reflect the increased responsibilities.[139]

### *B. Emergency Drills and Exercises*

Emergency drills and exercises are invaluable for emergency preparedness. Yet the NIC survey reveals that many departments fail to engage in a systematic program of drills and simulations.[140] One reason this may be the case is that institutions often believe there are more pressing day-to-day needs than emergency drills. This is a dangerous rationale, however, for several reasons. First, it assumes that prisons rarely implement their plans. Yet in the recent past, prisons have had to respond to prison escapes,[141] natural disasters,[142]

131. *Id.*

132. *Id.* at 191.

133. NIC GUIDE, *supra* note 74, at 191.

134. *See id.* (stating that of the thirty state DOCs responding to the survey, more than a quarter fell into this category).

135. *Id.*

136. *Id.*

137. *Id.*

138. NIC GUIDE, *supra* note 74, at 191.

139. *Id.*

140. *Id.* at 199.

141. *See, e.g., id.* at 271 (describing a 1989 incident at the Arkansas Valley Correctional Facility near Ordway, Colorado, where a helicopter landed on the ball field of the prison's main recreation yard and carried away two inmates, with little resistance from prison officials).

142. *See, e.g., id.* at 289 (discussing how floods in 1993 forced the Missouri DOC to evacuate inmates at the Renz Correctional Center, a process that took two days but was accomplished without violence, injuries, or escapes). At Dade Correctional Institution in

large-scale prison riots,[143] and hostage situations.[144] Second, this belief does not take into account the relative safety risk that being ill-prepared for an emergency will entail. Widespread inmate violence or a natural disaster can threaten the lives of thousands of institutional staff and inmates. Finally, this belief fails to consider how critical emergency drills are to emergency preparedness. Notwithstanding the comprehensiveness of an emergency plan, an institution can truly know whether all parts of the plan are practical only by testing the plan.[145] Moreover, emergency drills serve the critical role of helping prison staff members become comfortable with the procedures.[146]

All DOCs responding to the NIC survey stated that they conduct some sort of fire drills, either timed evacuations or staff walk-throughs.[147] Institutions generally carried out all fire drills as actual timed-evacuation drills, except in restricted or segregation housing units (i.e., high-security areas).[148] Presumably, safety is the reason for this procedural difference.[149] But staff walkthroughs are not as effective as actual evacuations. It is not until a real evacuation is conducted that prison administrators can discover problems with plans that otherwise exist only on paper.[150] While the safety risks are undoubtedly significant in high-security areas, these risks can be abated by using extra staff or engaging in additional planning.[151]

Moreover, when asked whether they conduct emergency exercises on each shift, more than half of the responding departments answered "no" or did not respond.[152] This suggests that prison

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Florida, approximately 1,000 inmates were successfully evacuated to other state institutions just hours before Hurricane Andrew hit. *Id.* at 319–20.

143. *See, e.g., id.* at 261 (detailing an eleven-day prison riot at the Southern Ohio Correctional Facility in Lucasville, Ohio that involved almost 2,000 law enforcement and National Guard troops). In 1991, a riot at the maximum security Montana State Prison resulted in five inmate deaths and several other serious injuries. *Id.* at 277.

144. *See, e.g.*, JEFFREY A. SCHWARTZ & DENNIS LUTHER, HOSTAGE INCIDENT AT THE DELAWARE CORRECTIONAL CENTER 1 (2005) (summarizing a situation in Smyrna, Delaware, where an inmate took a young female correctional counselor hostage and raped her before being shot to death by a DOC CERT team).

145. *See* NIC GUIDE, *supra* note 74, at 275 (noting that communications systems often are not adequately tested until "after a serious incident in which communications proved to be a major barrier").

146. *Id.* at 252.

147. *Id.* at 191–92.

148. *Id.*

149. *See id.* at 192.

150. NIC GUIDE, *supra* note 74, at 192.

151. *See id.* at 191–92 (reporting that some administrators feel strongly that there is no replacement for actual time evacuations, and thus they use these methods to conduct evacuation drills in high-profile areas).

152. *Id.* at 192.

administrators do not run drills during the night or weekend shifts.[153] Emergencies, however, can strike at any time, during any shift. In fact, the tendency is for these events to occur at night and on the weekends.[154]

### *C. Planning for Terrorism*

In the last decade or so, events such as the September 11 attacks on the World Trade Center and the Pentagon, the subsequent anthrax scares, the 2004 Madrid train bombings, and the 2005 London bombings have revealed challenges that American corrections never before had to consider.[155] While bomb threats and other similar types of crises have traditionally been within the purview of prison officials,[156] concerns over terrorism and its potentially substantial consequences have changed the way officials must think about exigencies.[157] In this new world, no emergency preparedness system is complete without comprehensive consideration of counterterrorism response.[158]

There are several reasons that prisons constitute a potential target for terrorist attack.[159] First, prisons are densely populated and the nature of confinement makes it extremely difficult for staff and prisoners to evacuate quickly.[160] Thus, an attack could kill and injure numerous victims.[161] Second, prisons are symbols of government authority.[162] Terrorists who are seeking to challenge such authority might target these facilities.[163] Third, a terrorist attack on a prison has the potential to cause widespread panic.[164]

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153. *See id.* at 192–93 ("Emergency drills and emergency plans tend to be written on the assumption that crises and disasters will strike on the day shift between Monday and Friday, and prison administrators often operate under the same assumptions.").

154. *Id.* at 193.

155. *See id.* at v (stating that terrorism presents new risks that cannot be ignored).

156. *See* NIC GUIDE, *supra* note 74, at v.

157. *See id.* at 12 (explaining that the risks associated with terrorism "are quite different in nature and scope from those posed by more traditional prison emergencies").

158. *See id.* at 13 (noting that there is an "urgent need for prisons to gain familiarity with [terrorism]").

159. *See id.* at 242. *But see* U.S. Department of State, Significant Terrorist Incidents, 1961–2003: A Brief Chronology, http://www.state.gov/r/pa/ho/pubs/fs/5902.htm (last visited Aug. 28, 2008) (listing significant terrorist attacks between 1961 and 2003). Out of nearly 250 incidents listed, only one occurred at a prison. *Id.*

160. NIC GUIDE, *supra* note 74, at 242.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

High-security prisoners, if released, would present a grave danger to the community at large.[165]

Most DOCs, however, have not explicitly addressed the potential danger.[166] Indeed, fewer than thirty percent of the departments in the NIC survey reported any specific policy designed to respond to terrorist threats.[167] This finding stands in stark contrast to the level of counterterrorism planning in fire and law enforcement departments.[168] It is unclear whether this lack of attention is because prisons are slow to react or because they do not believe they need to react at all.[169] The NIC survey did reveal, however, that most of the responding departments regularly participate in law enforcement-led task forces on terrorism.[170] Hopefully, their involvement in these task forces will lead to more focused preparation for dealing with terrorism.[171]

The importance of having specific emergency preparedness procedures for terrorist activities cannot be overemphasized. Absent proper planning and training, prison officials will almost certainly make poor decisions, no matter how obvious their mistakes may seem to be in hindsight, when under the emotional stress and time pressures of a terrorist threat.[172] Institution officials cannot expect (nor can they be expected) to figure out on the spot how to respond most effectively,[173] especially when their facility's general emergency preparedness plan will likely be insufficient. For example, the medical services plan of a prison's general emergency plan will probably not take into account a terrorist attack's potential for mass casualties.[174] Furthermore, the unique nature of an event such as a biological or chemical attack may require prison officials to implement special procedures not necessary in a conventional emergency.[175]

Although prison emergency planning presents grave challenges to prison officials, awareness of the issue is growing, and the

165. *Id.*
166. NIC GUIDE, *supra* note 74, at 199–200.
167. *Id.* at 198.
168. *Id.*
169. *Id.* at 199–200.
170. *Id.* at 200.
171. *See id.*
172. NIC GUIDE, *supra* note 74, at 248.
173. *Id.*
174. *Id.* at 250.
175. *See id.* ("If onduty staff at a prison found people sick or dying and suspected chemical or biological contaminants, would any of them know how to contact the nearest HAZMAT team?").

resources that are now available to administrators make overcoming these challenges more possible than ever before.

## III. LEGAL AND MORAL ISSUES IN PRISON EMERGENCY PREPAREDNESS

### *A. Emergency Preparedness and the Eighth Amendment*

This Part argues that, despite recent cases urging judicial restraint in prisoners' rights lawsuits, Eighth Amendment litigation is a potentially successful way to ensure that prison officials plan adequately for emergencies in their facilities.[176] The goal of this Part is to demonstrate how an inmate could present such a lawsuit successfully. The constitutional argument is framed within the story of the Orleans Parish Prison during Hurricane Katrina,[177] but the same basic line of reasoning would apply in other emergency planning situations as well.[178]

Courts interpret the Eighth Amendment "in a flexible and dynamic manner,"[179] meaning that, when faced with unique factual scenarios, courts may make varied applications of legal standards to determine whether a prisoner's rights have been violated.[180] The Eighth Amendment prohibition on "cruel and unusual punishments"[181] not only prevents "unnecessary and wanton infliction of pain,"[182] but also ensures that prisoners are not deprived of "the

176. *See* David J. Gottlieb, Wilson v. Seiter*: Less Than Meets the Eye, in* 1 PRISONERS AND THE LAW 2-33, 2-46 to 2-47 (Ira P. Robbins ed., 2008) (contending that the standard established for conditions-of-confinement challenges in *Wilson v. Seiter*, 501 U.S. 294 (1991), provides a viable way to contest the "failure to meet basic human needs" requirement using the Eighth Amendment, despite how some courts have interpreted *Wilson*'s holding).

177. It is important to note that, while at least forty prisoner suits relating to post-Katrina conditions at OPP have been dismissed, for a variety of reasons these results are not dispositive in showing that no constitutional violation occurred. *See infra* note 224.

178. Although Eighth Amendment cases are fact-sensitive, there are commonalities among many emergency planning situations or disasters that allow application of the lessons learned from Katrina. *See infra* Part III.A.1.

179. Gregg v. Georgia, 428 U.S. 153, 171 (1976) (deciding that Eighth Amendment claims are not limited to protection against "barbarous" methods, but can adapt as the idea of "humane justice" changes).

180. *See* Melissa Whish Coan, Comment, Whitley v. Albers*: The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155, 159–64 (1988) (explaining that, in *Whitley v. Albers*, 475 U.S. 312, 327 (1986), the Court applied a wide array of previously used Eighth Amendment law to develop the standards for an Eighth Amendment case relating to a prison riot). *See generally* Ira P. Robbins, *Legal Aspects of Prison Riots*, 16 HARV. C.R.-C.L. L. REV. 735 (1982).

181. U.S. CONST. amend. VIII.

182. *Gregg*, 428 U.S. at 173.

minimal civilized measure of life's necessities."[183] The inmates of the OPP suffered many such deprivations during and following Hurricane Katrina.

When Katrina hit the Gulf Coast, many OPP inmates were deprived of food and water.[184] Others were denied essential medication or medical attention.[185] Some inmates were violently attacked by other prisoners because the prison had too few guards to watch over the inmates.[186] Prisoners were trapped in their cells as floodwaters rose around them[187] and others had to endure abuse from prison guards who were not adequately trained to handle emergency situations.[188] These harms were as much a result of OPP's inadequate emergency planning and preparation as the result of the natural disaster itself.

Since courts have previously recognized that each of these harms and risks implicates the Eighth Amendment, inmates could bring a lawsuit against the prison administration for the constitutional violations suffered.[189] The dynamic nature of Eighth Amendment jurisprudence means that courts should recognize both the exceptional dangers created by prison emergencies and the constraints that such emergencies place on prison personnel.[190] Of course, prison officials cannot foresee the occurrence of some emergencies, nor can they necessarily account for every contingency that may occur during an emergency.[191] However, many emergencies, like the ones arising from Hurricane Katrina, are

183. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

184. BALABAN & JAWETZ, *supra* note 2, at 39.

185. *Id.* at 39–40 (relating that, following the storm, many prisoners were deprived of their daily HIV medications).

186. *See supra* note 14 and accompanying text.

187. *See supra* note 15 and accompanying text.

188. *See supra* note 16 and accompanying text.

189. *See* Farmer v. Brennan, 511 U.S. 825, 847 (1994) (acknowledging that the failure to protect against harm from other inmates implicates the Eighth Amendment); Whitley v. Albers, 475 U.S. 312, 327 (1986) (finding that use of excessive force by guards can violate prisoners' Eighth Amendment rights); Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding that "deliberate indifference to serious medical needs of prisoners" is an Eighth Amendment violation). Of course, just because the Eighth Amendment is implicated does not mean that the inmate will succeed in court. He or she still must prove that the defendant-official had a culpable state of mind. *See infra* Part III.A.1 (identifying the standard for the defendant-official's state of mind as deliberate indifference).

190. *See* Procunier v. Martinez, 416 U.S. 396, 404–05 (1974) (recognizing the "Herculean obstacles" faced by prison administrators, and approving of courts that show both deference to prison officials' decisions and a "healthy sense of realism" by acknowledging the resources and expertise required to operate a prison).

191. *See supra* notes 72–77 and accompanying text (noting that prison officials must be able to adapt both plans and training to circumstances).

fairly common, predictable, and *actually predicted.*[192] Further, the extensive literature available on emergency planning and the successes of various prison systems in preparing for emergencies shows that proper planning can significantly reduce the chance that prisoners' constitutional rights will be violated.[193] Where emergency planning is so inadequate that the basic needs of prisoners, such as food, water, and medical services, go unfulfilled, prisoners have a strong argument that prison administrators have violated the Eighth Amendment.[194]

### 1. The Components of an Eighth Amendment Claim

An inmate who believes that prison officials have violated his or her Eighth Amendment rights may bring a lawsuit for monetary damages and injunctive and declaratory relief, pursuant to 42 U.S.C. § 1983.[195] Prevailing on such an action rests on showing that prison officials exhibited deliberate indifference to the prisoner's rights.[196] Although the deliberate indifference standard originally applied only to cases involving prisoners' medical needs, the United States Supreme Court, in *Wilson v. Seiter*,[197] extended this standard to actions challenging conditions of confinement[198] and

192. *See* CENTER FOR PROGRESSIVE REFORM, AN UNNATURAL DISASTER: THE AFTERMATH OF HURRICANE KATRINA 23 (2005), *available at* http://www.progressivereform.org/Unnatural_Disaster_512.pdf ("Although the government will not typically receive prior notice before a terrorist attack, there is often at least some advance warning of natural disasters, and of hurricanes in particular."); *infra* notes 238–39 and accompanying text (noting that Hurricane Katrina was predicted by weather forecasters and two government agencies).

193. *See, e.g.*, SCHWARTZ & WEBB, *supra* note 32, at 78–81 (describing the situation in New Orleans prisons during and after Katrina, and finding a general consensus that emergency plans would have made the ad hoc process much more efficient and humane); *supra* Part I.B (highlighting the deficiencies of the Louisiana Department of Public Safety and Corrections Emergency System by comparing it to the Nebraska Emergency System).

194. *See infra* notes 199–207 and accompanying text (asserting that corrections officials have a duty under the Eighth Amendment to provide prisoners with humane conditions).

195. 42 U.S.C. § 1983 (2000) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .").

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

197. 501 U.S. 294 (1991).

198. *Id.* at 303 (quoting approvingly Justice Powell's conclusion that, "[w]hether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle*").

later to actions based on prison officials' failure to prevent harm to an inmate.[199]

The deliberate indifference standard has an objective and a subjective component.[200] The objective component requires that the constitutional deprivation suffered be "sufficiently serious."[201] Where a claim is "based on a failure to prevent harm," as in the context of an action challenging an insufficient prison emergency plan, "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm."[202] This standard was satisfied where prison officials failed to provide inmates with "prompt access" to mental health treatment.[203] But there was no Eighth Amendment violation where a prisoner's claim that double-celling had harmed inmates was unsubstantiated by any facts showing that the practice had caused "serious injury."[204]

Even in the face of sufficiently serious harm, courts have conditioned prison officials' liability for violating the Eighth Amendment on a showing of a culpable state of mind. Without such a showing, the harm suffered by the prisoner is not considered to be a punishment and, therefore, is outside the bounds of the Cruel and Unusual Punishments Clause.[205] Judicial interpretations of the state of mind component of the deliberate indifference standard have been far from uniform.[206] Some of the variations in applying the standard are determined by how the plaintiff or the court characterizes a specific challenge.[207] For example, if an inmate challenges the prison officials' decision to use force on an inmate population, then courts will allow great deference to the officials and impose liability only where they did not act in good faith or acted for the "purpose of causing harm."[208] In the context

199. Farmer v. Brennan, 511 U.S. 825, 834 (1994).

200. *Wilson*, 501 U.S. at 298 (characterizing the objective and subjective components of an Eighth Amendment claim, respectively, as whether the deficiency was "sufficiently serious" and whether the official's state of mind was "sufficiently culpable").

201. *E.g.*, *Farmer*, 511 U.S. at 834 (1994).

202. *Id.*

203. Coleman v. Wilson, No. CIV S-90-0520, 1994 U.S. Dist. LEXIS 20786, at *41 (E.D. Cal. June 6, 1994).

204. Rhodes v. Chapman, 452 U.S. 337, 368 (1981).

205. *See, e.g.*, *Wilson*, 501 U.S. at 300 ("If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.").

206. *See* Gottlieb, *supra* note 176, at 2–44 to 2–45 (evaluating applications of the deliberate indifference standard and approving those that do not wholly abandon objective standards for judging officials' awareness of a risk, while criticizing Seventh Circuit Judge Frank Easterbrook's transformation of the standard into "a purely subjective one").

207. *See id.* (explaining that cases involving persistent prison conditions satisfying the deliberate indifference test are easier to prove than cases involving isolated events).

208. Whitley v. Albers, 475 U.S. 312, 320–21 (1986).

of a claim challenging conditions of confinement,[209] however, courts have held that prison officials have a "sufficiently culpable state of mind"[210] when the plaintiff can demonstrate that the officials were aware of an "excessive risk to inmate health or safety" and failed to take reasonable measures to abate that risk.[211] Deliberate indifference to inmates' health needs can be shown not only where an individual inmate is denied access to medical attention, but also where the state has failed to provide inmates with care that is reasonably designed to meet their emergency medical needs.[212]

The Supreme Court has vaguely set the parameters for deliberate indifference by stating that it "entails something more than mere negligence," but "is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result."[213] More specifically, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[214] Thus, the Court has concluded that "subjective recklessness as used in . . . criminal law" is "the test for 'deliberate indifference' under the Eighth Amendment."[215] And, if an

> Eighth Amendment plaintiff presents evidence showing that a substantial risk . . . was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk."[216]

But it still "remains open to the [prison] officials to prove that they were unaware even of an obvious risk to inmate health or safety."[217] Prison officials can also defend against an Eighth Amendment

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209. The "very high state of mind prescribed by *Whitley* does not apply to prison conditions cases." *Wilson*, 501 U.S. at 302–03.

210. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 834 (1994) (defining the state of mind as "'deliberate indifference' to inmate health or safety"); *Wilson*, 501 U.S. at 302–03 (explaining that cases challenging prison conditions require assessment of prison official's state of mind and that the deliberate indifference standard must be met to establish culpability).

211. *Farmer*, 511 U.S. at 837.

212. Ramos v. Lamm, 639 F.2d 559, 574 (10th Cir. 1980).

213. *Farmer*, 511 U.S. at 835 (citing Estelle v. Gamble, 429 U.S. 97 (1976)).

214. *Id.* at 837.

215. *Id.* at 839–40.

216. *Id.* at 842–43 (quoting Brief for Respondents, at 22).

217. *Id.* at 844.

claim by showing that they responded reasonably to a risk despite actually failing to protect inmates from the harm.[218]

### 2. Applying the Deliberate Indifference Standard to the Orleans Parish Prison

Depending on the facts of a given Katrina-related Eighth Amendment lawsuit, claims could be characterized as challenging conditions that posed a serious risk of harm, officials' use of force, and/or officials' denial of medical treatment. Regardless of how the claim is categorized, the biggest hurdle for a prisoner-plaintiff will be overcoming the subjective requirements of the deliberate indifference standard.[219] The objective component, that serious harms were suffered by inmates, is relatively straightforward.[220]

In an Eighth Amendment claim challenging conditions of confinement, plaintiff-inmates must show that the condition itself presented the risk of harm.[221] In the case of OPP, therefore, a prisoner could characterize the lack of a sufficient emergency plan as a condition of confinement and draw the connection between that condition and the harms suffered.[222]

Characterizing the lack of an adequate emergency plan as a condition of confinement is a novel strategy. On the one hand, inadequate or nonexistent prison emergency plans present several serious risks to inmates' safety.[223] On the other hand, a court could

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218. *See id.* at 844–45 (indicating that prison officials' Eighth Amendment duties to ensure inmates' safety are judged by standards that account for the difficulty of providing humane conditions to an entire prison population). "[P]rison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Id.* at 845.

219. *See, e.g.*, Lloyd v. Gusman, No. 06-4288, 2007 WL 1850999, at *7 (E.D. La. June 26, 2007) (holding that plaintiff failed to show deliberate indifference on the part of Sheriff Gusman, although recognizing that conditions were difficult); Kennedy v. Gusman, No. 06-5274, 2007 U.S. Dist. LEXIS 17866, at *11 (E.D. La. Mar. 13, 2007) (dismissing claims against Sheriff Gusman for failing to show deliberate indifference, and characterizing the conditions as "simply the unfortunate result of an act of nature").

220. *See* BALABAN & JAWETZ, *supra* note 2, *passim.* For one example, the authors discuss the situation of Raphael Schwarz, an inmate at OPP, who was stuck in a cell with eight other inmates without food, water, or ventilation for four days and without any contact with deputies for two days. *See id.* at 31.

221. *See* Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (holding that courts should apply an Eighth Amendment analysis to conditions of confinement where "the conditions of confinement compose the punishment at issue").

222. *Cf.* Coleman v. Wilson, No. CIV S-90-0520, 1994 U.S. Dist. LEXIS 20786, at *22–23 (E.D. Cal. June 6, 1994) (holding that deficient mental health care within the California Department of Corrections was a constitutional violation because of the conditions to which prisoners were subjected).

223. *See, e.g.*, BALABAN & JAWETZ, *supra* note 2, at 26 (citing flaws in the OPP Contingency Plan and the negative impact caused by the inadequate emergency plan).

rule that it was the hurricane, and not the lack of an emergency plan, that created those risks.[224] And, unlike a claim challenging physical conditions, it might prove difficult for a plaintiff to identify specific risks associated with insufficient emergency planning until a physical risk to prisoners' safety, such as rising floodwaters, actually materializes. Yet once that condition appears, it would

224. *See* Allen v. Gusman, No. 06-4539, 2007 WL 2407305 (E.D. La. Aug. 20, 2007) (claims dismissed as frivolous); Bridges v. Gusman, No. 06-4444, 2007 WL 2362335 (E.D. La. Aug. 15, 2007) (same); Frye v. Orleans Parish Prison, No. 06-5964, 2007 WL 2362338 (E.D. La. Aug. 14, 2007) (same); Francis v. United States, No. 07-1991, 2007 WL 2332322 (E.D. La. Aug. 13, 2007) (same); Jones v. Gusman, No. 06-5275, 2007 WL 2264208 (E.D. La. Aug. 2, 2007) (same); Burbank v. Gusman, No. 06-4398, 2007 WL 2228593 (E.D. La. July 27, 2007) (same); Maturin v. Gusman, No. 07-1932, 2007 WL 2079709 (E.D. La. July 17, 2007) (same); Lloyd v. Gusman, No. 06-4288, 2007 U.S. Dist. LEXIS 46380, 2007 WL 1850999 (E.D. La. June 26, 2007) (same); Harris v. Gusman, No. 06-3939, 2007 U.S. Dist. LEXIS 44853, 2007 WL 1792512 (E.D. La. June 19, 2007) (same); Daggett v. Gusman, No. 06-5625, 2007 U.S. Dist. LEXIS 43751, 2007 WL 1746987 (E.D. La. June 14, 2007) (same); Anders v. Gusman, No. 06-2898, 2007 WL 1029417 (E.D. La. Mar. 29, 2007) (frivolous); Robinson v. Gusman, No. 06-3760, 2007 WL 1029425 (E.D. La. Mar. 29, 2007) (same); Fairley v. Louisiana, No. 06-3788, 2007 U.S. Dist. LEXIS 20825, 2007 WL 914024 (E.D. La. Mar. 23, 2007) (claims dismissed for failure to state claim), *reh'g denied*, No. 06-3788, 2007 WL 1991534 (E.D. La. July 3, 2007); Smith v. Gusman, No. 06-4095, 2007 U.S. Dist. LEXIS 20824, 2007 WL 914171 (E.D. La. Mar. 23, 2007) (same); Hines v. Cain, No. 06-3722, 2007 U.S. Dist. LEXIS 19962, 2007 WL 891875 (E.D. La. Mar. 20, 2007) (frivolous); Kennedy v. Gusman, No. 06-5274, 2007 U.S. Dist. LEXIS 17866, 2007 WL 782192 (E.D. La. Mar. 13, 2007) (failure to state claim); Bennet v. Gusman, No. 06-1754, 2007 WL 763207 (E.D. La. Mar. 9, 2007) (frivolous); Wright v. Gusman, No. 06-5768, 2007 U.S. Dist. LEXIS 10678, 2007 WL 519159 (E.D. La. Feb. 15, 2007) (failure to state claim); Deselles v. Gusman, No. 06-4163, 2007 U.S. Dist. LEXIS 2168, 2007 WL 121833 (E.D. La. Jan. 11, 2007) (frivolous); Hill v. Gusman, No. 06-527, 2006 U.S. Dist. LEXIS 91676, 2006 WL 3760454 (E.D. La. Dec. 18, 2006) (same); Bright v. Gusman, No. 06-2782, 2006 U.S. Dist. LEXIS 86887, 2006 WL 3469560 (E.D. La. Nov. 28, 2006) (same); Dean v. Gusman, No. 06-3243, 2006 U.S. Dist. LEXIS 86903, 2006 WL 3469558 (E.D. La. Nov. 28, 2006) (same); Holmes v. Gusman, No. 06-3245, 2006 U.S. Dist. LEXIS 86896, 2006 WL 3469555 (E.D. La. Nov. 28, 2006) (same); Lopez v. Gusman, No. 06-3048, 2006 U.S. Dist. LEXIS 86881, 2006 WL 3469559 (E.D. La. Nov. 28, 2006) (same); Henson v. Blanco, No. 06-0269, 2006 U.S. Dist. LEXIS 79539 (E.D. La. Oct. 26, 2006) (failure to state a claim); Tate v. Gusman, 459 F.Supp.2d 519 (E.D. La. 2006) (frivolous); Wade v. Gusman, No. 06-4541, 2006 WL 4017838 (E.D. La. Oct. 17, 2006) (same); Galo v. Blanco, No. 06-4290, 2006 U.S. Dist. LEXIS 72657, 2006 WL 2860851 (E.D. La. Oct. 4, 2006) (same); Charles v. Gusman, No. 06-53, 2006 U.S. Dist. LEXIS 67538, 2006 WL 2604613 (E.D. La. Sept. 6, 2006) (same); Hayes v. Gusman, No. 06-504, 2006 U.S. Dist. LEXIS 42590, 2006 WL 1985464 (E.D. La. June 22, 2006) (same); Gauff v. Gusman, No. 06-842, 2006 U.S. Dist. LEXIS 62690, 2006 WL 2460753 (E.D. La. June 12, 2006) (Roby, M.J.) (same), *adopted*, 2006 U.S. Dist. LEXIS 62690, 2006 WL 2468771 (E.D. La. Aug. 21, 2006) (Engelhardt, J.); *see also* Cobbins v. Gusman, No. 06-4397, 2007 WL 2228624 (E.D. La. July 31, 2007) (dismissed on procedural grounds); Pittman v. Gusman, No. 06-0120, 2007 WL 2228596 (E.D. La. July 31, 2007) (same); Booker v. Gusman, No. 06-4477, 2007 WL 1729248 (E.D. La. June 14, 2007) (same); Pederson v. Gusman, No. 06-5715, 2007 WL 1752631 (E.D. La. June 14, 2007) (same); Washington v. Gusman, No. 05-6048, 2007 WL 1728729 (E.D. La. June 14, 2007) (same); Conner v. Gusman, No. 06-1650, 2007 WL 1428749 (E.D. La. May 10, 2007) (same); Bickham v. Gusman, No. 06-3844, 2007 U.S. Dist. LEXIS 18415 (E.D. La. Jan 31, 2007) (same); Rudolph v. Gusman, No. 06-3514, 2006 WL 3422314 (E.D. La. Nov. 27, 2006) (same); Pollard v. Gusman, No. 06-3941, 2006 WL 3388491 (E.D. La. Nov. 21, 2006) (same).

seem more appropriate to characterize the physical occurrence, rather than the lack of a plan, as the condition being challenged. Further, the argument that the lack of an adequate emergency plan is a condition of confinement might make it difficult for an inmate to demonstrate officials' awareness of a particular risk. Because officials must be aware of the risks associated with not having a plan, their lack of a plan might be evidence that they were not cognizant of the risks.

Alternatively, a prisoner could challenge the abhorrent conditions of confinement *post*-Katrina, arguing that these conditions were the result of insufficient planning, and that the insufficient emergency planning itself demonstrated officials' deliberate indifference towards prisoners' health and safety needs.[225] Such connections are not difficult to draw. For example, by failing to designate a safe place to keep food, the officials disregarded the risk that inmates would be unfed in the event of a hurricane.[226] Likewise, by not ensuring that an adequate number of guards would be present during the hurricane, the officials did not address the probability that inmate-on-inmate or guard-on-inmate violence would increase in the midst of an emergency.[227] Moreover, by not planning an effective evacuation procedure, officials forced inmates to remain in unsanitary conditions and failed to address the likelihood that they

225. *See* Bob Williams, *Reflections on Katrina's First Year: The Story of Chaos and Continuing Abuse in One of America's Worst Justice Systems*, PRISON LEGAL NEWS, Apr. 2007, at 1, 6 (discussing the incompetence of Sheriff Gusman and the lack of a viable plan).

226. *See* BALABAN & JAWETZ, *supra* note 2, at 18 (discussing the lack of food and water at OPP). When notified of the shortage of food, water, batteries, and flashlights, Sheriff Gusman reportedly stated, "Those are incidentals, and we'll deal with them later." *Id.* at 23. More recently, Dr. Demaree Inglese, Medical Director of OPP when Katrina hit, confirmed that Sheriff Gusman refused to evacuate OPP before the storm despite the objections of his own disaster planning committee. BROKEN PROMISES, *supra* note 2, at 29.

227. *See* BALABAN & JAWETZ, *supra* note 2, at 45 (explaining that, as conditions at OPP worsened and guards left, tensions and violence rose among prisoners). Those prison officials who remained were unable to protect prisoners from each other. *Id.* at 17. One prisoner reported:

> There was a riot. They broke people out of their cells, they broke into the property room, they broke into the deputies' locker. Stabbing, fighting, kicking, jumping on and beating 'em half to a pulp. I mean, 8, 9 guys on one guy. I tell ya, there was about 250, 300 people. It was only about 8 of us that were white. And the whole time, they was . . . spittin' on us, sayin' "we're gonna kill the white guys," all that stuff, kickin' at us, all that stuff. You're sitting there and you don't know if someone's gonna walk up and kick you in the mouth, just 'cause you're sitting there and they feel like hitting somebody. It was chaos. I mean, we thought we were gonna die, 'cause no one was there to stop anything.

*This World: Prisoners of Katrina* (BBC television broadcast Aug. 13, 2006), *available at* http://tinyurl.com/2j2pcu.

might be left in the prison if an emergency necessitated the prison's evacuation.[228] Finally, by neglecting to place medical supplies in a safe and accessible location, officials acted indifferently toward the potential unavailability of medications and medical care to inmates during an emergency.[229] Based on the seriousness of the harms suffered, it appears that the objective portion of the deliberate indifference standard is satisfied in the case of the OPP.[230]

The question of whether the government officials violated the Eighth Amendment rights of prisoners at OPP will then turn on the application of the subjective component of the deliberate indifference standard. Once again, this standard requires that, where an inmate was seriously harmed, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[231] And, if the official claims ignorance of a risk, the plaintiff may prove the official's knowledge by providing evidence of the obviousness of the risk.[232]

### *a. Officials' Awareness of Serious Risks to Inmates*

When suing under Section 1983 for the conditions prisoners had to endure after Hurricane Katrina, two sets of facts are important in establishing officials' awareness of the risks posed to the prisoners. First, the officials would need to have been aware of both the likelihood of a hurricane in their region and the specific risks that a hurricane presented. If administrators did not know (1) that a hurricane was likely in their region, and (2) that Katrina would likely strike the OPP, then the officials would not have been aware of the risks that the hurricane presented. Second, an inmate would need to show officials' awareness of the need to plan for prison emergencies. If officials did not know that extensive planning and preparation were necessary to ensure adequate

228. *See* BALABAN & JAWETZ, *supra* note 2, at 17, 26 (stating that, because there were no procedures for evacuation, prisoners were forced to stay in "unsanitary and hazardous conditions," including standing in locked cells in chest-deep floodwaters for hours, and were evacuated only after floodwater continued to rise and chaos ensued).

229. *See id.* at 26 (noting that several medical staff abandoned patients in need of care and many supplies were destroyed by rising floodwaters). Iris Hardeman, arrested on minor charges, did not receive her blood pressure or heart medication during the storm and died less than a month after being evacuated to Angola Prison. *Id.* at 36.

230. *See supra* notes 43–52 and accompanying text (describing the range of harms at OPP that implicate the Eighth Amendment).

231. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

232. *Id.* at 842.

conditions for prisoners, then they were not aware that they were risking inmates' health and safety by failing to have a comprehensive emergency plan. Although direct evidence of OPP officials' knowledge of these sets of facts may be difficult to come by without explicit admissions, there is copious circumstantial evidence to show that the officials were aware of the risks presented by an inadequately planned-for hurricane.

The facts relating to the hurricane itself provide strong circumstantial evidence. Since Hurricane Camille in 1969 (if not earlier), Gulf Coast inhabitants have been aware that their geographic location and proximity to sea level make their region particularly vulnerable to hurricanes.[233] Hurricanes Elena (1983) and Andrew (1992) confirmed this reality.[234] Hurricane Katrina's ravaging of the Gulf Coast was predicted not only by weather forecasters,[235] but also by two government agencies.[236] Originally classified as a tropical storm, Katrina reached hurricane strength on August 24, 2005.[237] On August 28, the National Weather Service office closest to New Orleans released warnings cautioning that "[m]ost of the area will be uninhabitable for weeks . . . perhaps longer."[238] The warnings also foresaw the likelihood of "human suffering incredible by modern standards."[239] It is beyond dispute that OPP officials knew that Hurricane Katrina would likely strike their facility. The Louisiana Department of Corrections reports that it met on the morning of August 27 to discuss preparations for Katrina and, following the meeting, notified all divisions of the LDPS&C.[240] Max Mayfield of the National Hurricane Center, while reluctant to criticize the emergency response to Katrina, said "[t]he fact that we had a major hurricane forecast over or near New Orleans is reason for

233. In fact, more than seventy-five percent of New Orleans is below sea level. SCHWARTZ & WEBB, *supra* note 32, at 8. National Hurricane Center Director Max Mayfield explained, "The 33 years that I've been at the hurricane center we have always been saying—the directors before me and I have always said—that the greatest potential for the nightmare scenarios, in the Gulf of Mexico anyway, is that New Orleans and southeast Louisiana area." John Pain, *Dire Katrina Predictions Were on Track*, ASSOCIATED PRESS, Sept. 16, 2005, *available at* http://www.livescience.com/environment/ap_050916_hurricane_forecasting.html.

234. *See* Memorable Gulf Coast Hurricanes of the 20th Century, http://www.aoml.noaa.gov/general/lib/mgch.html (last visited Aug. 28, 2008) (noting a history of hurricanes in the Gulf Coast Region).

235. Pain, *supra* note 233 (observing AccuWeather, Inc.'s early prediction of the necessity for evacuating the regions struck by Katrina).

236. *Id.* (observing that both the National Weather Service and the National Hurricane Center had forecast Katrina's path and "potential for devastation with remarkable accuracy").

237. SCHWARTZ & WEBB, *supra* note 32, at 8.

238. Pain, *supra* note 233.

239. *Id.*

240. SCHWARTZ & WEBB, *supra* note 32, at 12.

great concern. The local and state emergency management knew that . . . ."[241]

While establishing OPP officials' knowledge of Katrina is simple, the officials must also have actually known of the ensuing risks to inmate health and safety for their actions to rise to the level of deliberate indifference.[242] Establishing officials' knowledge of the specific risks presented to inmates by a hurricane, particularly one that is not prepared for, is more difficult and will require circumstantial evidence. As mentioned above, when establishing awareness, the obviousness of the risk and the likelihood of the prison administration having been exposed to information concerning the risk are relevant factors for a court to consider.[243]

That a hurricane has the potential for serious harm to those in its path is common knowledge. Hurricanes produce a "storm surge"[244] that is likely to flood low-lying areas, placing residents in grave danger.[245] According to the National Hurricane Center, flooding was responsible for more than fifty percent of deaths resulting from tropical storms and hurricanes "[in] the 1970s, '80s, and '90s."[246] Further, the floodwaters that remain after the storm has passed can be "contaminated by oil, gasoline, or raw sewage."[247] These unsanitary floodwaters can then contaminate products, such as food or drugs, with which people come into contact. Floodwaters also might contaminate an area's supply of drinking water.[248]

These risks are painfully obvious, but prison officials might defend themselves by arguing either that none of these risks are particular to their prison or that they thought their prison was less vulnerable to these risks because of the degree of control they exercise over the environment.[249] In anticipation of, or in response to,

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241. Pain, *supra* note 233.

242. *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994) (rejecting "an objective test for deliberate indifference," the Court held that the official must know of the possible risk and draw the inference of serious harm).

243. *Id.* at 842.

244. FEMA, Hurricane Hazards: Storm Surge, http://www.fema.gov/hazard/hurricane/hu_surge.shtm (last visited Aug. 28, 2008).

245. In urging caution during floods, FEMA warns that an average-size person can be swept away by only six inches of floodwater. FEMA, Hurricane Hazards: Rainfall and Flooding, http://www.fema.gov/hazard/hurricane/hu_flood.shtm (last visited Aug. 28, 2008).

246. Inland Flooding, http://www.nhc.noaa.gov/HAW2/english/inland_flood.shtml (last visited Aug. 28, 2008).

247. FEMA, After a Flood, http://www.fema.gov/hazard/flood/fl_after.shtm (last visited Aug. 28, 2008).

248. *Id.*

249. *See, e.g.*, Kennedy v. Gusman, No. 06-5274, 2007 U.S. Dist. LEXIS 17866, at *11 (E.D. La. Mar. 13, 2007) (dismissing an OPP prisoner's claims about conditions of confinement as "simply the unfortunate result of an act of nature which wrought devastation throughout this region. During the time at issue, virtually all of this area's citizens, incarcer-

defenses in which officials plead ignorance of a risk, a plaintiff could provide evidence to establish that the prison officials knew not only of the general risks, but also of those specific to their institution. In the case of Hurricane Katrina, one such piece of evidence is the fact that the LDPS&C actually contacted OPP officials to discuss meeting about potential prison evacuation plans in the event of an emergency.[250] While that meeting never occurred, the idea to have it is an acknowledgement by officials that evacuation planning can be necessary to inmate safety.

The abundance of available emergency training materials also helps establish OPP officials' knowledge of the specific risks posed by various emergency scenarios.[251] For example, the NIC, an agency within the Federal Bureau of Prisons,[252] published the "Emergency Preparedness Self-Audit Checklist" in June 2005.[253] The seventy-three-page checklist provides hundreds of criteria designed to help prison officials determine whether their facility is prepared to handle diverse emergencies. There are criteria concerning emergencies in general and others specific to various types of emergencies, such as riots and hurricanes. The checklist asks prison administrators many questions that are designed to expose flaws in emergency preparedness.[254] If the administrators of OPP

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ated and free person alike, were forced to endure hardships and unpleasant conditions."). The reasoning in *Kennedy* fails to acknowledge that inmates cannot fairly be compared with the general population, because inmates are detained and are unable to protect themselves in emergency situations. *See* NIC GUIDE, *supra* note 74, at 3.

250. SCHWARTZ & WEBB, *supra* note 32, at 15.

251. *See, e.g.*, Neb. Dep't. of Corr. Services, Fire Safety and Emergency Evacuation Procedures, Admin. Reg. 111.04 (1982), http://www.corrections.state.ne.us/policies/files/111.04.pdf (outlining a plan for the evacuation of inmates in the event of a major emergency); NIC GUIDE, *supra* note 74, at EP-1 to EP-73 (emphasizing the importance of prison emergency preparedness and detailing self-audit criteria for prisons to assess their preparedness).

252. Central Office–National Institute of Corrections (NIC), http://www.bop.gov/about/co/nic.jsp (last visited Aug. 28, 2008). One of the NIC's primary missions is to provide "training, technical assistance, information services, and policy/program development assistance to Federal, state, and local corrections agencies." *Id.* The Federal Bureau of Prisons is itself a division of the Department of Justice. *See* A Brief History of the Bureau of Prisons, http://www.bop.gov/about/history.jsp (last visited Aug. 28, 2008).

253. NIC GUIDE, *supra* note 74, at EP-1 to EP-73.

254. The questions include, *inter alia*: "Does the institution have a single, comprehensive emergency plan (versus individual plans for various emergencies)?"; "Does the [emergency] plan include procedures for specific types of emergencies?"; "Does the institution's emergency plan require an annual risk assessment?"; "Does the risk assessment include identification of those emergencies judged most likely to occur at that institution?"; "Are all roofs painted with numbers or letters for helicopter identification?"; "Does the institution have a tactical team trained to respond to emergency situations?"; "Is there a medical person . . . attached to the disturbance control team?"; and "Does the institution have written agreements for assistance during an institutional emergency with . . . state police, nearby correctional institutions, local hospitals, and ambulance services?" *Id.* at EP-19 to EP-38. The

had read the NIC checklists or had been aware of the document but had not read it, then they would have been subjectively on notice of the risks facing their institution were a hurricane or other emergency to strike.[255] Even if OPP administrators did not receive or had not been aware of the NIC checklists, the body of other planning resources available to prison administrators, along with the obviousness of the risk, would render claims of ignorance of the risks highly suspect.[256]

Of course, prison officials who are sued pursuant to Section 1983 can concede their awareness that a condition presents an unreasonable risk to inmates' health and safety[257] and ask the court to

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checklists also address whether the institution stocks emergency equipment, such as emergency generators, bolt cutters, and a two-to-three-day supply of potable water. *Id.* at EP-40 to EP-47. Another set of criteria addresses both onsite and offsite evacuations, and asks whether the institution's offsite evacuation plan specifies evacuation routes, security precautions, and procedures for providing inmates with food and medical service. *Id.* at EP-56 to EP-63. Finally, there are criteria that address whether the prison has a plan for "extended emergencies," *id.* at EP-65, and whether there is a "comprehensive medical plan," *id.* at EP-72. Further, the *NIC Guide* includes case studies, some of which provided the basis for the various checklists. *Id.* at 255–323. Of particular relevance is the case study regarding how the Dade Correctional Institution responded to Hurricane Andrew. *Id.* at 319. That study recommended that institutions facing hurricanes take many specific steps to ensure inmate and staff safety, such as creating a tracking system for inmates during an evacuation and making arrangements to guarantee that inmates have food and potable water. *Id.* at 321–23.

255. Discovery—either through interrogatories, or if need be, a subpoena—should reveal whether OPP officials received these checklists.

256. For example, Oregon's DOC has a comprehensive emergency plan that many other state DOCs cite as an example of comprehensive and effective emergency planning. NIC GUIDE, *supra* note 74, at 185. The Oregon plan is itself based on LETRA's *Emergency Preparedness for Correctional Institutions*, which is a four-day course designed to prepare prisons and jails to plan for emergencies. *See* LETRA, INC., *supra* note 105, at A1 (listing state departments that use *Emergency Preparedness for Correctional Institutions*). Also, the NIC makes available a computer training program aimed at preparing prison administrators for emergencies. Leadership in Times of Critical Incidents, http://nicic.org/Library/020523 (last visited Aug. 28, 2008). And the American Correctional Association (ACA), a group that accredits penal institutions and trains their employees, distributes a video that discusses proper responses to prison emergencies. Videotape: Ready 2 Respond: Correctional Emergency Response Teams (ACA 2001) (available for purchase at ACA Bookstore, http://www.aca.org/store/bookstore/view.asp?Product_ID=304 (last visited Aug. 28, 2008)). In addition, the ACA publishes "Performance-Based Standards for Adult Local Detention Facilities," which includes requirements on emergency planning and standards requiring prisons to train their employees in the implementation of written emergency plans. AMERICAN CORRECTIONAL ASSOCIATION, STANDARDS FOR ADULT LOCAL DETENTION FACILITIES (3d ed. 1991); *see also* AMERICAN CORRECTIONAL ASSOCIATION, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (4th ed. 2003). The sheer volume of emergency planning materials available to prison administrators makes it highly unlikely that a prison official would be totally ignorant of the risks presented by inadequate emergency planning.

257. *See, e.g.*, Coleman v. Wilson, No. CIV S-90-0520, 1994 U.S. Dist. LEXIS 20786, at *23 (E.D. Cal. June 6, 1994) (stating that defendant acknowledged that mental health care in the California Department of Corrections was "grossly inadequate").

assist them in emergency planning.[258] For example, when accused of violating inmates' Eighth Amendment rights by not providing effective mental health care, the prison administrators in *Coleman v. Wilson*[259] acknowledged, *inter alia*, the deficiencies in the California Department of Corrections' recordkeeping, treatment, and screening procedures.[260] This admission provided the grounds for a settlement in which the court appointed a Special Master, who was responsible for overseeing the implementation of fourteen specific recommendations.[261] By admitting their awareness of the problem, prison administrators are able to focus their efforts on eliminating the constitutional deficiencies, rather than on defending against a lawsuit.

### *b. OPP Officials Were Deliberately Indifferent by Failing to Take Reasonable Steps to Abate the Risks to Prisoners*

The extent of emergency planning undertaken by prison officials at OPP is still unclear.[262] The only potentially relevant planning document that the ACLU's information request obtained is the aforementioned "Orleans Parish Criminal Sheriff's Office Hurricane/Flood Contingency Plan."[263] This two-page document outlines the steps for the sheriff to follow when expecting a hurricane.[264] Unfortunately, the document is so vague that it has extremely limited value for use as anything more than a list of goals. The document provides, for example, that twenty-four hours prior to the expected arrival of a hurricane, the sheriff will meet with building wardens to "discuss" seven "possibilities."[265] While the recognition of these occurrences is beneficial, simply requiring

258. The court can assist prison officials' emergency planning efforts in a variety of ways. *See infra* Part IV.A (arguing that a court can grant injunctive relief to remedy a constitutional violation).

259. 1994 U.S. Dist. LEXIS 20786.

260. *Id.* at *103–04.

261. *Id.* at *105–12. The recommendations for improving mental health care at California Department of Corrections facilities included the standardization of forms, adoption of protocol, and implementation of procedures necessary to remedy the constitutional violations. *Id.*

262. *See supra* notes 53–58 and accompanying text (discussing the ACLU's and Human Rights Watch's fruitless attempts to access OPP's emergency plans).

263. BALABAN & JAWETZ, *supra* note 2, at 125–26.

264. *Id.*

265. *Id.* at 126. The enumerated "possibilities" are power outages, loss of communications, vertical evacuation in case of flooding, provision of medical services to inmates, manipulations of manpower to meet changing requirements, possible provision of services to the outside community, and coordination with other city and state agencies. *Id.*

that the sheriff meet with wardens to discuss contingencies is inadequate.

For a contingency plan to be of any assistance to both prison officials and prisoners, it must delineate specific actions to be taken. To illustrate, another portion of the document states that the sheriff should ensure that each building has a ninety-six-hour supply of food and water.[266] Yet there is no discussion of where those supplies of water will come from and how they will be safeguarded from potentially contaminating floodwaters.

The issue then becomes whether these planning inadequacies and the subsequent problems in implementation were, in light of the circumstances, reasonable enough for OPP officials to avoid liability.[267] To date, the United States District Court for the Eastern District of Louisiana has decided more than forty claims filed by plaintiffs who had been OPP prisoners when Katrina struck;[268] the court dismissed all of the claims.[269] Two of the opinions specifically discuss, and dismiss without analyzing the case-specific facts, the argument that Sheriff Gusman was constitutionally required to "have taken more effective precautions to prepare for the hurricane and its aftermath."[270] Both courts stated:

> 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. Rather, at best, plaintiff could show only that Gusman was negligent in that regard. However, it is clear that "deliberate indifference cannot be inferred merely from *a negligent or even*

266. *Id.*

267. *See supra* notes 200-04 and accompanying text (outlining the relevant standard).

268. Many of these suits were brought against Sheriff Gusman and were dismissed because he "was not personally involved in the post-Katrina conditions, acts, or omissions." *See, e.g.*, Kennedy v. Gusman, No. 60-5274, 2007 U.S. Dist. LEXIS 17866, at *6–7 (E.D. La Mar. 13, 2007) (listing cases). Personal involvement is necessary to establish a civil rights violation. *Id.*

269. *See supra* note 224 (citing more than forty suits against prison officials that were dismissed on the merits, and noting that other cases were dismissed on other grounds). Many of the plaintiffs' claims were unsuccessful because they alleged only negligence on the part of Sheriff Gusman. A finding of negligence, or even gross negligence, does not provide the basis for an Eighth Amendment claim. *See, e.g.*, Hayes v. Gusman, No. 06-0504, 2006 U.S. Dist. LEXIS 42589, at *6–8 (E.D. La. Apr. 28, 2006). However, the fact that the pro se plaintiffs were not sufficiently skilled in drafting complaints alleging Eighth Amendment violations does not mean that constitutional violations did not occur.

270. *See Kennedy*, 2007 U.S. Dist. LEXIS 17866, at *11–12; Wright v. Gusman, No. 06-5768, 2007 U.S. Dist. LEXIS 10678, at *9–10 (E.D. La. Feb. 15, 2007). Both cases used the identical paragraph to dismiss this argument.

*a grossly negligent* response to a substantial risk of serious harm."[271]

The conclusion that the plaintiffs could not show Gusman's culpability lacks factual and legal analysis. The courts ignored the mens rea category of recklessness, which is a middle ground between intention and negligence. As applied to Eighth Amendment cases, recklessness requires careful analysis of the facts.[272] Without this analysis, prisoners are essentially stripped of their opportunity to prove an Eighth Amendment violation. Further, in dismissing OPP prisoners' claims, the U.S. District Court for the Eastern District of Louisiana also stated that, because so many of the area's free citizens suffered hardships similar to those of prisoners, the sheriff's actions did not meet the deliberate indifference standard.[273] This logic ignores the fact that the prisoners could not possibly care for themselves in this situation, whereas free citizens are responsible for their own safety. Indeed, prisoners' inability to care for themselves is the driving force behind the constitutional requirement to provide safe conditions.[274] There is simply no precedent for using similar harms endured by free citizens as a basis for refusing to find an Eighth Amendment violation of prisoners' rights, regardless of difficult circumstances.

In *Farmer v. Brennan*, the Supreme Court recognized that a plaintiff can present evidence sufficient for a trier of fact to find that the official had actual knowledge of a risk by showing that the risk was "longstanding, pervasive, well-documented, or *expressly noted by prison officials in the past*, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it."[275] The plaintiff in *Farmer*, a transsexual inmate who had been sexually assaulted, survived the prison officials' motion for judgment as a matter of law because she alleged the existence of documents that would show defendants' knowledge of previous sexual assaults in their correctional facility.[276] The Court remanded for consideration

271. *Kennedy*, 2007 U.S. Dist. LEXIS 17866, at *11–12 (quoting Thompson v. Upshur County, Texas, 245 F.3d 447, 459 (5th Cir. 2001)) (emphasis added); *Wright*, 2007 U.S. Dist. LEXIS 10678, at *9–10.

272. *See* Farmer v. Brennan, 511 U.S. 825, 843–44 (1994) (assessing a variety of factual scenarios, both inside and outside of prisons, that courts have considered before imposing liability on prison administrators for reckless acts).

273. *See Wright*, No. 06-5768, 2007 U.S. Dist. LEXIS 10678, at *8–9.

274. Estelle v. Gamble, 429 U.S. 97, 103–04 (1976).

275. *Farmer*, 511 U.S. at 842–43 (quoting Brief for Respondents, at 22) (emphasis added).

276. *Id.* at 849.

of whether additional discovery should be permitted, as such documents would presumably be necessary to establish the officials' awareness of the risk to Farmer.[277]

Current and former inmates of OPP have struggled to show officials' awareness of the risks to inmates (both by inadequate planning and by the storm itself),[278] but court-ordered discovery could reveal exactly what knowledge about the risk of harm to inmates the officials had. For example, discovery could reveal what emergency planning information the officials had received over time, as well as what warnings they received as Hurricane Katrina approached. A plaintiff could also gain access to communications between prison and state officials to elucidate precisely what steps were taken once the prison administrators recognized that the hurricane posed a risk to inmates' health and safety.

In *Helling v. McKinney*,[279] the Supreme Court held that an allegation that prison administrators had violated the Eighth Amendment by exposing inmates to second-hand smoke, which arguably presented an unreasonable risk to inmates' future health, was a valid constitutional claim.[280] The Court explained that, on remand, the subjective factor of deliberate indifference should "be determined in light of the prison officials' current attitudes and conduct," and that the plaintiff would have to "demonstrat[e] that prison authorities [were] ignoring the possible dangers [to inmates] posed by exposure to [second-hand smoke]."[281] The Court noted that the adoption of a smoking policy subsequent to the filing of plaintiff's suit would "bear heavily" on this decision and, depending on how the policy was effectuated, demonstrating officials' ignorance of the risk would be difficult.[282] The same point can be made about the planning document produced by OPP officials when asked to share their emergency planning procedures.[283] If the document was produced before Hurricane Katrina, then it manifests the officials' awareness of the risks to inmates. And the document's specific provisions, such as ones addressing the need for an evacuation plan and the ones requiring food and water to be

277. *Id.*

278. *See supra* note 224 (citing prisoner claims that have been dismissed).

279. 509 U.S. 25 (1993).

280. *Id.* at 35.

281. *Id.* at 36–37.

282. *Id.* at 36.

283. *See supra* notes 64–66 and accompanying text (noting that officials presented "The Orleans Parish Criminal Sheriff's Office Hurricane/Flood Contingency Plan," an inadequate plan that was undated and is suspected to have been produced following a public records request).

stored safely, demonstrate officials' awareness of the need to take certain steps, many of which they did not take.

Even after establishing OPP officials' awareness of the risks to inmate safety, officials would likely raise the affirmative defense that, although they did not avert much harm to inmates, they "responded reasonably to the risk."[284] Sheriff Gusman and other officials, the argument might go, cannot be blamed for many of the constraints that hampered OPP's emergency response.[285] In light of precedent, however, the OPP's meager emergency preparation and training were unreasonable considering officials' knowledge of the risks that a storm could present to prisoners.[286]

Many courts have addressed emergency planning in the context of prison fires, and held that inadequate fire safety plans can form the basis for finding violations of inmates' Eighth Amendment rights.[287] In *Tillery v. Owens*,[288] for example, the federal district court for the Virgin Islands found that, because prison administrators did not adequately prepare their facility for a fire, the Commonwealth "failed to provide a reasonably safe place of confinement [for inmates housed in a certain part of the facility], and consequently, is violating the eighth amendment rights of those prisoners."[289] The court specified that the lack of alarms, sprinklers, and adequate ventilation systems were conditions that "present[ed] an unnecessary risk of tragedy."[290] The lack of preparations for a hurricane (or other emergency) should be held unconstitutional for the same reason.[291] This is especially true where the harm is not

284. Farmer v. Brennan, 511 U.S. 825, 844 (1994).

285. *See* SCHWARTZ & WEBB, *supra* note 32, at 59, 61–62 (noting the "confluence of events" that made the disaster more severe and the unanticipated failures of the backup satellite phone communication system).

286. *See id.* at 1, 78–83 (citing the gross inadequacies in the DOC's emergency plans and emergency preparedness training).

287. *See, e.g.*, Hadix v. Johnson, 367 F.3d 513, 529 (6th Cir. 2004) (paying "deference to the district court's decision to issue an injunction to remedy the constitutional violations," and remanding for "a more detailed analysis of how the current conditions in the *Hadix* facilities continue to be deprivations denying the minimal civilized measure of life's necessities"); Tillery v. Owens, 907 F.2d 418 (3d Cir. 1990); Santana v. Collazo, 714 F.2d 1172, 1182–83 (1st Cir. 1983) (affirming that "fire safety is a legitimate concern under the Eighth Amendment," and remanding for a determination of whether the lack of charged fire extinguishers and evacuation plans rose to the level of constitutional violations); Carty v. Farrelly, 957 F. Supp. 727, 737 (D.V.I. 1997) (holding, *inter alia*, that the "[f]ailure to provide functional fire safety systems subjects prisoners to life-threatening conditions," thus violating Eighth Amendment principles).

288. 719 F. Supp. 1256 (E.D. Pa. 1989), *aff'd*, 907 F.2d 418 (3d Cir. 1990).

289. *Id.* at 1279–80.

290. *Id.* at 1279.

291. *See* NIC GUIDE, *supra* note 74, at 321–23 (detailing the lessons learned from Hurricane Andrew, including essential elements of an emergency plan, in a report published prior to Hurricane Katrina).

only speculative (as in *Tillery*), but actually realized (as with Hurricane Katrina). The Third Circuit Court of Appeals affirmed the district court, underscoring the lower court's "moral and legal obligation to relieve the inhumane and unconstitutional conditions."[292] If prison administrators have a constitutional duty to provide adequate fire safety, then clearly a similar duty exists to protect against the risks presented by other foreseeable harms.[293]

Finally, many cases challenging inmates' conditions of confinement have established prison administrators' duty to guard against deprivation of the "minimal civilized measure of life's necessities."[294] When administrators fail at this task while possessing a culpable state of mind (i.e., deliberate indifference), they violate prisoners' Eighth Amendment rights and should be held accountable.[295] In the case of OPP, the lack of emergency planning was a failure to prevent harm[296] that resulted in substandard conditions of confinement, as well as in the deprivation of nourishment and medical care after the hurricane hit.[297]

Although courts have been hesitant to rule that the harms suffered at OPP were constitutional violations, there is sufficient legal authority for them to do so. Recognition of a constitutional violation will both vindicate prisoners' rights and open the door for meaningful reform in the area of prison emergency planning.[298]

### 3. The Defense of Qualified Immunity

The litigation approach described above could be invaluable to enable courts to order that institutions undertake specific emergency preparations and thereby decrease the likelihood of serious harm to prisoners and staff in the event of an emergency.[299] In such

292. *Tillery*, 907 F.2d at 431.

293. For example, because prisons should not place their inmates unnecessarily at risk, courts have found valid constitutional claims where an inmate complained of potential health problems from secondhand smoke. *See* Helling v. McKinney, 509 U.S. 25, 35 (1993). *See generally* Scott C. Wilcox, Note, *Secondhand Smoke Signals from Prison*, 105 MICH. L. REV. 2081 (2007).

294. *E.g.*, Rhodes v. Chapman, 452 U.S. 337, 347 (1981); Hutto v. Finney, 437 U.S. 678, 685 (1978).

295. Wilson v. Seiter, 501 U.S. 294, 303 (1991).

296. *See supra* note 222 and accompanying text (arguing that the lack of an emergency plan may be characterized as an unsafe condition of confinement).

297. *See supra* notes 12–16 and accompanying text (recounting the harms suffered by OPP inmates).

298. *See infra* Part IV (discussing possible ways for prisoners, lawyers, and legislators to improve prison emergency planning).

299. *See infra* Part IV.A (evaluating the effectiveness of litigation as a means to address the lack of emergency preparedness in correctional facilities).

a suit, qualified immunity poses no threat to a court's ability to reform prison emergency planning, because officials cannot assert that defense where the prisoner-plaintiff seeks injunctive relief.[300]

If the plaintiff seeks monetary damages,[301] however, prison officials might have a valid defense of qualified immunity.[302] To overcome a qualified immunity defense, a plaintiff must first make a threshold showing that the facts alleged, if true, establish a constitutional violation.[303] Even when the complainant satisfies this threshold showing, government officials may still be protected from liability if their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[304] However, "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[305] In such novel situations, the court must inquire whether "the state of the law [at the time of the incident which forms the basis of the claim] gave [the officials] fair warning" that their conduct was unconstitutional.[306]

To determine whether an official had sufficient warning, many courts will consider whether general principles of law apply with obviousness to the facts of the current case, so as to put the official on notice.[307] How tightly the general principles of law must fit the facts of the instant case varies among the circuits.[308] Since the facts of each emergency differ, officials might present a valid defense of

300. *See, e.g.*, William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1157 (1996) (citing injunctions as a way for a plaintiff to validate his or her rights without having to face an immunity defense).

301. *See, e.g.*, Wright v. Gusman, No. 06-5768, 2007 U.S. Dist. LEXIS 10678, at *2–3 (E.D. La. Feb. 15, 2007) (denying prisoner's request for damages for being left without food or water for three days during the evacuation of OPP); Charles v. Gusman, No. 06-0053, 2006 U.S. Dist. LEXIS 67037, at *5, *20 (E.D. La. Apr. 25, 2006) (dismissing a lawsuit in which the prisoner sought to recover damages for personal property lost during the evacuation of OPP), *adopted by* 2006 U.S. Dist. LEXIS 67538 (E.D. La. Sept. 6, 2006).

302. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

303. Hope v. Pelzer, 536 U.S. 730, 736 (2002).

304. *Harlow*, 457 U.S. at 818.

305. *Hope*, 536 U.S. at 741 (citing Unites States v. Lanier, 520 U.S. 259 (1997)).

306. *Id.*

307. *See Harlow*, 457 U.S. at 818–19.

308. *See* Leah Chavis, *Qualified Immunity After* Hope v. Pelzer*: Is "Clearly Established" Any More Clear?*, 26 U. ARK. LITTLE ROCK L. REV. 599, 606 (2004) (lamenting that "[n]either the Supreme Court nor any other federal court has provided bright-line rules that may be used to determine whether a specific federal right has been clearly established," and observing federal courts' frustration with the vague standards for determining when an official has notice of a legal right).

qualified immunity in failing to plan for some less common emergencies, but not have that defense if they fail to plan for more obvious risks. Also, some courts take the view that, if the cause of action involves a culpable state of mind and the plaintiff establishes that state of mind, then the government official may not use the defense of qualified immunity.[309] The deliberate indifference standard in an Eighth Amendment lawsuit is such a state-of-mind requirement.[310]

With the complexities of Eighth Amendment jurisprudence and the inconsistencies in how courts apply the qualified immunity defense, it is impossible to say with certainty whether qualified immunity will shield prison officials from liability for harms resulting from deficient emergency planning. Plaintiffs bringing such a lawsuit must remain cognizant of the hurdle that qualified immunity may present. It is especially important, therefore, for potential plaintiffs to remember that qualified immunity will not be a barrier to injunctive relief.[311]

### *B. Emergency Preparedness and the Sixth Amendment*

Prison emergency planning also implicates Sixth Amendment rights to a speedy trial and to the assistance of counsel. Pre-trial detainees face the same threat of physical harm that convicted prisoners do, but their right to a fair and speedy trial is additionally jeopardized. If emergencies are insufficiently planned for, courts can be out of operation for months, evidence and records can be destroyed, and detainees can be "lost" in the court system. In addition, public defenders may not be available. Moreover, if detainees must be released because they cannot receive a trial within a

309. *See, e.g.*, Walker v. Benjamin, 293 F.3d 1030, 1037 (7th Cir. 2002). The court in *Walker* stated:

> [A] plaintiff claiming an Eighth Amendment violation must show the defendant's actual knowledge of the threat to the plaintiff's health or safety, the defendant's failure to take reasonable measures, and the defendant's subjective intent to harm or deliberate indifference. . . . If there are genuine issues of fact concerning those elements, a defendant may not avoid trial on the grounds of qualified immunity.

*Id.* (citations omitted).

310. *See* McKee v. Turner, No. 96-3446, 1997 WL 525680, at *4 (6th Cir. Aug. 25, 1997) (concluding that "*Farmer*'s deliberate indifference analysis precludes the application of qualified immunity to this case").

311. *See supra* note 300 and accompanying text (noting that officials cannot use qualified immunity as a defense to injunctive relief).

constitutionally acceptable time frame, the reintroduction into society of certain accused criminals presents a public safety hazard.

This subpart of the Article begins by discussing federal[312] and Louisiana[313] law on speedy trial and the right to counsel. It then considers the experiences of Hurricanes Katrina and Rita for examples of the problems that can result from inadequate planning. Finally, this section discusses what could have been done differently following these two hurricanes. Recommendations on proactive measures for avoiding violation of the rights to a speedy trial and how to ensure continued operation of the criminal justice system following an emergency are discussed later in the Article.[314]

### 1. The Rights to Speedy Trial and Counsel: Legal Background

The right to a speedy trial arises under the Sixth Amendment to the U.S. Constitution.[315] The purpose of this right is not only to protect the interests of an individual defendant, but also to serve the public's interest.[316] Although the Sixth Amendment guarantee of a speedy trial applies to the states through the Fourteenth Amendment,[317] states are not subject to the Speedy Trial Act or the Judicial Emergency Act. Each state must establish its own methods for assuring speedy trials, subject to constitutional review. Louisiana has a constitutionally protected right to a speedy trial in the parish in which the alleged acts took place[318] and has applied the Supreme Court's *Barker* standard on delay.[319] Since the Louisiana

312. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defense.").

313. *See, e.g.*, LA. CONST. art. I, § 16 ("Every person charged with a crime is . . . entitled to a speedy, public, and impartial trial in the parish where the offense or an element of the offense occurred . . . .").

314. *See infra* Part IV.D (arguing that states must take preventative measures to protect and facilitate the justice system during times of emergency).

315. *See supra* note 312 (quoting Sixth Amendment). The Sixth Amendment applies directly to the federal government, and applies to the states via the Due Process Clause of the Fourteenth Amendment. Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) (stating that speedy trial is a fundamental right and must be honored by the states).

316. *See* Barker v. Wingo, 407 U.S. 514, 519–20, 522, 529, 531 (1972) (including as rationales for the right to a speedy trial the public interest in the prompt disposition of cases, the right to public justice, keeping possibly dangerous criminal violators off the streets, and decreasing the degree of recidivism).

317. *Klopfer*, 386 U.S. at 223.

318. LA. CONST. art. I, § 16.

319. *See, e.g.*, State v. Richardson, 649 So. 2d 472, 473–74 (La. Ct. App. 1994) (applying the *Barker* four-part balancing test, the court held the defendant was denied the constitutional right to speedy trial); *see Barker*, 407 U.S. at 530.

Constitution also guarantees a speedy trial and the Louisiana courts use the same standard as the federal courts, the issue will be the same in both federal and state prosecutions.[320]

Determining whether a defendant's speedy trial right has been violated depends on the totality of circumstances of the particular case.[321] If a defendant's trial is delayed, that delay must not be "purposeful or oppressive."[322] It is not only the speed at which the proceedings move that is determinative, but rather whether there is an "orderly expedition" toward trial.[323] In *Barker v. Wingo*, the Supreme Court announced a balancing test to determine whether a defendant has been deprived of his or her right to a speedy trial.[324] Taking into consideration all of the facts and proceedings of the case, including weighing the actions of the prosecution and the defense,[325] *Barker* recognizes that sometimes the rights of the defendant may be adverse to the interests of society.[326] The test consists of four factors: (1) the reasons for the delay; (2) whether the delay caused prejudice to the accused; (3) the length of the delay; and (4) what actions the defendant took to assert his or her speedy trial right.[327]

Congress passed the Speedy Trial Act of 1974[328] ("the Act") in an attempt to create timelines for trying federal criminal cases.[329] The Act sets out specific time limits within which federal criminal trials must begin. The Act also creates certain exceptions to those limits. Generally, criminal trials must begin within seventy days from the time of a defendant's indictment or from his or her initial appear-

320. *Barker*, 407 U.S. 514; *see also Richardson*, 649 So. 2d at 473 (affirming defendant's motion to quash an information based on both *Barker v. Wingo* and the speedy trial right granted by the Louisiana Constitution).

321. *See* United States v. Ewell, 383 U.S. 116, 120 (1966) ("The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.") (quoting Beavers v. Haubert, 198 U.S. 77, 87 (1905)).

322. *Id.* at 120 (citing Pollard v. United States, 352 U.S. 354, 361 (1957)).

323. *Id.* (citing Smith v. United States, 360 U.S. 1, 10 (1959)).

324. *Barker*, 407 U.S. at 530.

325. *Id.* (requiring a balancing of the accused's right to decent and fair procedures with the public's interest in timely resolution of proceedings).

326. *See id.* at 522 (noting, for example, that the only possible remedy for a violation of the right to a speedy trial is dismissal of the indictment, possibly allowing a guilty defendant to go free).

327. *See* United States v. Graham, 128 F.3d 372, 374 (6th Cir. 1997) (citing *Barker*, 407 U.S. at 530).

328. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174 (2000).

329. Prior to passage of the Speedy Trial Act, the Supreme Court rejected both a fixed time period in which a criminal defendant must be brought to trial and the "demand-waiver rule," pursuant to which a defendant who fails to object to the delay is deemed to have forever waived the right to a speedy trial. *Barker*, 407 U.S. at 529–30.

ance before the court.[330] The Act requires strict compliance, and any failure to observe the deadlines, unless excused, leads to dismissal of the criminal charges.[331]

Recognizing that varying circumstances and valid reasons for delay beyond the normal time limits will occur, the Act explicitly indicates reasons for delay and lists periods of delay that are either to be included or excluded when calculating time.[332] In addition to enumerating specific reasons for delay, most related to procedural issues,[333] Congress also created a catchall excuse for delaying trials: a court may grant a continuance or extension, either by written motion or on the record, in a situation in which "the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial."[334]

In the aftermath of Hurricanes Katrina and Rita, it has become apparent that the Speedy Trial Act does not account for the impact of natural and man-made disasters on the federal judicial system. While the ends-of-justice exception has taken on added significance in the case of such disasters, it is not a panacea. Hurricane Katrina has brought into sharp focus the issue of the Speedy Trial Act and the difficulties in conducting speedy trials after disasters occur.[335]

In August 2005, as a direct result of the tumultuous aftermath of Hurricanes Katrina and Rita, Congress enacted the Federal Judiciary Emergency Special Sessions Act of 2005 ("Judiciary Emergency

330. 18 U.S.C. § 3161(c)(1) (2000).

331. *See generally Graham*, 128 F.3d at 376 (asserting that it is the court's duty to "zealously defend" the right to a speedy trial because of the Sixth Amendment's fundamental importance to the judicial system).

332. *See* 18 U.S.C. § 3161(h) (2000) (listing the permissible reasons for exclusion).

333. *Id.* (allowing exclusion resulting from, *inter alia*: any proceeding to determine the defendant's mental competence, trial with respect to other charges against the defendant, interlocutory appeal, any pre-trial motion, transfer of the case, transportation of the defendant in certain circumstances, and court consideration of a proposed plea agreement).

334. Zedner v. United States, 547 U.S. 489, 498–99 (2006) (describing the purposes of 18 U.S.C. § 3161(h)(8)).

335. Hurricanes Katrina and Rita have had a similar or greater impact on civil cases in Louisiana. Like the Federal Rules of Civil Procedure, the Local Rules of Civil Procedure for U.S. District Courts in Louisiana provide that the court may dismiss pending civil cases if the plaintiff fails to prosecute the case. *See* FED. R. CIV. P. 41; D.C. LA. R. 41.3M (2005). The Local Rule provides that the court has discretion to dismiss a civil action for lack of prosecution in three situations: "[w]here no service of process has been made within 120 days after filing of the complaint; . . . [w]here no responsive pleadings have been filed or no default has been entered within 60 days after service of process . . . ; or . . . [w]here a cause has been pending six months without proceedings being taken within such period." D.C. LA. R. 41.3M.A-C (2005). Prior to issuance of a dismissal, the court is required to afford the plaintiff ten days "to file evidence of good cause for plaintiff's failure to act." D.C. LA. R. 41.3M (2005). Each of these provisions is relevant in the post-Katrina environment in New Orleans.

Act").[336] The Act grants federal courts the flexibility to move proceedings temporarily when emergency conditions create situations in which courthouses in the court's normal jurisdiction are unusable and there is no reasonable alternative within that jurisdiction.[337] Prior to the Judiciary Emergency Act, there was no explicit authority granting federal courts the ability to transfer proceedings outside the district or to perform their functions outside the jurisdiction.[338] This was a particular problem in the aftermath of Katrina, where courthouses in the Eastern District of Louisiana closed and judges had moved or dispersed throughout the region.

Unfortunately, the Judiciary Emergency Act is of limited benefit, since removing a trial to another jurisdiction requires the consent of the defendant and raises several other problems as well.[339] For example, as some commentators have noted, the Judiciary Emergency Act gives the defendant the choice of a jury pool that may be drawn from either the jurisdiction where he or she committed the alleged crime or the jurisdiction of the relocated trial.[340] This choice can lead to the anomalous result in which the defendant consents to relocation of the trial, but insists on a jury pool from the original venue—a logistical nightmare both in terms of physical arrangements and expense.[341] The Judiciary Emergency Act also creates the possibility that courts will seek to delay trials for their own convenience.[342]

The Sixth Amendment to the U.S. Constitution also guarantees the criminally accused the right to counsel.[343] Criminal defendants

336. Federal Judiciary Emergency Special Sessions Act of 2005, Pub. L. No. 109-63, 119 Stat. 1993 (2005) (codified as amended at 28 U.S.C. §§ 48, 141, 152(c), 636).

337. *See* Karen L. Helgeson, Note, *The Federal Judiciary Emergency Special Sessions Act of 2005: Allowing Ongoing Criminal Prosecutions During Crisis or Hindering Compliance with the Speedy Trial Act?*, 92 IOWA L. REV. 245, 248–49 (2006) (stating that the Act was specifically intended to prevent delay in criminal proceedings).

338. *Id.* at 252.

339. *See id.* at 258–59 (discussing various concerns, such as the Act's failure to address time requirements and court deadlines that may be affected by a change in jurisdiction, precisely what events may trigger applicability of the statute, issues about jury pools, and economic costs).

340. *Id.* at 260.

341. Civil courts in Orleans Parish have not been able to overcome this problem. In response, the civil district court for Orleans Parish moved to a city approximately sixty miles away and suspended jury trials indefinitely. Walt Pierce, a spokesperson for the court, wrote in a press release that the suspension of jury trials occurred because "[m]assive evacuation has crippled the ability to confect an appropriate jury." Press Release, Civil District Court for the Parish of Orleans (Sept. 27, 2005), *available at* http://www.lasc.org/katrina_orders/CDC%20Post%20Katrina%20Press%20Release%20-%209-27-05.pdf.

342. *See* Helgeson, *supra* note 337, at 264.

343. U.S. CONST. amend. VI.

in Louisiana have a commensurate right to the assistance of counsel under the state constitution.[344]

### 2. Hurricane Katrina, the Rights to Speedy Trial and Counsel, and Emergency Planning

Despite the guarantees of the U.S. and Louisiana Constitutions, many circumstances in the wake of natural and man-made disasters present obstacles to their effective implementation. The aftermath of Hurricane Katrina in New Orleans provides a case study in the facts and circumstances that can lead to delay in trials and the lack of adequate representation. This subpart explores the impact of Hurricanes Katrina and Rita on defendants' rights to a speedy trial and to the assistance of counsel. It also highlights the difficulties of applying the existing tests to disaster situations.

#### *a. The Right to Speedy Trial*

Under *Barker v. Wingo*, determining whether a defendant was deprived of his or her right to a speedy trial requires a court to consider the totality of circumstances, including the application of a four-pronged balancing test.[345] In some cases, the prejudice to the defendant may be easy to determine; extraordinary delay by the prosecution may tip the balance toward dismissal.[346] In other cases, where it is clear that the defendant either has sought or otherwise acted to delay the trial, the contrary result may be warranted.[347] Due largely to the scope of the disaster, the number of cases involved, and the types of issues presented, the outcome of the *Barker* balancing test in disaster situations such as Hurricane Katrina is less clear.

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344. LA. CONST. art. I, § 13.

345. 407 U.S. 514 (1972). *See supra* notes 324–27 and accompanying text (detailing the four factors of the *Barker* test).

346. *See* United States v. Cardona, 302 F.3d 494, 497–99 (5th Cir. 2002) (dismissing a prosecution after finding that the government's five-year delay in serving an arrest warrant was negligent where there was no evidence that the government had made diligent efforts to locate the defendant and the defendant was prejudiced by the delay).

347. *See* Guice v. State, 952 So. 2d 129, 142 (Miss. 2007) (determining that the defendant's actions (e.g., firing his counsel) indicated that he wanted a dismissal of the charges rather than a speedy trial, and thus did not violate his speedy trial rights under either the Sixth Amendment or the Mississippi Constitution).

Regarding the first *Barker* factor, the length of the delays that occurred after Katrina varied greatly, but was often substantial.[348] Some inmates were relatively lucky. Ashley McDonald, an Australian tourist arrested just before Katrina on a charge of public intoxication, was released after two weeks in OPP and the Elayn Hunt Correctional Center, but only after his situation garnered significant media attention.[349] Others were not so fortunate. Pearl Cornelia Bland, held in OPP prior to Katrina because she owed $398 in fines from a previous conviction, remained incarcerated without a court appearance until a Tulane Law Clinic professor appeared before a judge on her behalf on June 28, 2006, ten months after Hurricane Katrina had struck New Orleans.[350]

Regarding the second *Barker* factor, the reason for the delay is obvious: in the case of New Orleans and many other areas devastated by Hurricane Katrina, the entire justice system simply ceased to function. Compounding this breakdown, many facilities regularly used for criminal proceedings were no longer operable.[351] Those judicial proceedings that were held often took place in makeshift facilities.[352]

Disasters and emergency situations often result in the disappearance or unavailability of police officers, attorneys, judges, and court personnel, as well as witnesses, evidence, and records. In the aftermath of Katrina, many of the area's judges, court personnel, and lawyers were unavailable, and those who were available were overwhelmed by the volume of judicial business.[353] Witnesses were displaced or simply disappeared.[354] Evidence and records were ei-

348. *See* Pamela R. Metzger, *Doing Katrina Time*, 81 TUL. L. REV. 1175, 1183 (2007) (reporting that Gregory Davis was "detained, evacuated, and imprisoned" for almost six months because "[h]e failed to appear to pay $448 in fines and fees because he was in jail on a charge that would eventually be dismissed").

349. *See* Mark Coultan, *In Bars, Then Behind Bars, But Quite Alive*, SYDNEY MORNING HERALD (Australia), Sept. 10, 2005, at 17.

350. BALABAN & JAWETZ, *supra* note 2, at 46.

351. *See Newshour, New Orleans Struggles to Rebuild Justice System After Hurricane Katrina* (PBS television broadcast May 25, 2006), *available at* http://www.pbs.org/newshour/bb/law/jan-june06/neworleans_05-25.html (reporting that Magistrate's court was held in the visitor's lounge of the county jail and that the district attorney's office worked out of an old nightclub).

352. *See* Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 DUKE L.J. 127, 135–38 (2006) (describing the evacuation of approximately 8,000 prisoners from OPP after Hurricane Katrina, and reporting that prisoners had to be processed at the football field of a correctional facility in St. Gabriel, Louisiana).

353. *Id.* at 138.

354. *Cf.* Newshour, *supra* note 351 (reporting on New Orleans Civil Court Chief Judge Ethel Simms Julien's concerns about missing clients and doctors).

ther lost or damaged in flooding, sometimes resulting in a total loss of evidence in a case.[355]

In addition, many defendants who were in custody were dispersed throughout the State of Louisiana and often unaccounted for.[356] In some cases, arrestees were lost in the state criminal justice system for as long as seven months without ever being arraigned or appearing before a judge; charges were dropped in many of these cases.[357] During a disaster, defendants who are free pending trial may disappear or be lost from tracking systems. This dispersal exacerbates the defendants' inability to reach their counsel.[358]

The third *Barker* factor is whether the defendant took any action to assert his or her right to a speedy trial. The Supreme Court in *Barker* indicated that "[t]he more serious the deprivation, the more likely a defendant is to complain," and emphasized that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."[359] However, the situation in New Orleans and at OPP after Hurricane Katrina effectively renders application or analysis of this factor meaningless, as it was difficult, if not outright impossible, for defendants to assert their speedy trial rights. With a completely non-functioning judicial system, there was no venue in which defendants could assert their rights. Further, when some defendants did seek to assert their rights through the only available means, the prison guards, those efforts were met with scorn and abuse.[360]

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355. *See* Helgeson, *supra* note 337, at 247 (citing local newspaper articles); Laura Parker, *City's Public Defender System Troubled before Katrina*, USA TODAY, May 23, 2006, at 4A (describing the conditions of some evidence vaults as "a moldy mess"). The problem is not limited to criminal cases. The closing of courts, depletion of jury pools, destruction of evidence, loss of witnesses, and disruption of attorneys' practices also affected and still affect state and federal civil cases.

356. *See* Williams, *supra* note 225, at 6 (reporting that prisoners were dispersed to thirty-eight prisons and jails throughout Louisiana); Newshour, *supra* note 351 (interviewing Marlin Gusman, Sheriff of New Orleans, who admitted that his department had not been able to track all of the prisoners being held in confinement at the time Katrina hit).

357. Williams, *supra* note 225, at 6 (interviewing Gregory Davis, who spent seven-and-a-half months in jail after being arrested on a charge of burglary). At the time of Hurricane Katrina, the New Orleans Public Defender's Office did not assist defendants until the time at which formal charges were filed. *See* Metzger, *supra* note 348, at 1195. This policy was changed in 2006, so that criminal defendants received assistance from that office from the time of arrest. *See* BROKEN PROMISES, *supra* note 2, at 30.

358. *See* Newshour, *supra* note 351 (quoting New Orleans Civil Court Chief Judge Ethel Simms Julien as saying, "You have many lawyers who've lost their files, who can't find clients, who their doctors [sic] are missing or gone to other places, have lost their records.").

359. Barker v. Wingo, 407 U.S. 514, 531–32 (1972).

360. *See* BALABAN & JAWETZ, *supra* note 2, at 79 (reporting that Ivy R. Gisclair—an OPP inmate whose release date had passed shortly after he was transferred from OPP to Bossier Maximum Security Jail—was pepper-sprayed and later tasered and beaten when he informed the guards at Bossier that his release date had passed).

Finally, regarding the fourth *Barker* factor, defendants suffered significant prejudice from the delays after Hurricane Katrina. The Supreme Court in *Barker* stated that any analysis of prejudice to the defendant should consider three interests that are protected by the right to a speedy trial: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."[361] These interests were palpably implicated in the aftermath of Katrina. Defendants faced long pre-trial incarceration,[362] the conditions of which were such that anxiety was inevitable.[363] Further, the aftermath of Katrina clearly impaired the defenses of many of those who faced trial in New Orleans in the months following the hurricane.[364]

Natural and man-made disasters give rise to substantial additional claims of prejudice by defendants,[365] beyond the typical types of prejudice envisioned by *Barker*. For instance, defense counsel's records can be lost or damaged. Chain of custody issues may arise for physical evidence. Also, the Judiciary Emergency Act requires a defendant's consent to relocate a trial,[366] but if a defendant does not consent, it is unclear how long a delay will constitute prejudice. If a defendant does consent, the court must evaluate whether the venire for the jury in the new trial venue is proper. This takes time. In addition, if a trial is relocated, only the wealthiest criminal defendants can bear the extra costs of housing counsel and transporting records to a remote location. Further, relocating a federal criminal trial to another jurisdiction does not solve many of the problems seen after Hurricane Katrina. While a judge and court personnel may be available for the defendant's trial, defense

361. *Barker*, 407 U.S. at 532.

362. *See supra* notes 348–50 and accompanying text.

363. *See supra* notes 12–16 and accompanying text (noting that many prisoners were trapped in cells with rising water, faced escalating violence, and suffered from a lack of food and medical attention).

364. *See infra* notes 371–76 and accompanying text (describing how the limited resources of Louisiana's state court system, the loss of crucial evidence and records, the dispersal of witnesses, and a reduction in the number of public defenders in New Orleans, impaired the defenses of many individuals who awaited trial in New Orleans courts following Hurricane Katrina).

365. Terrorism is an example of a man-made disaster that can prejudice the defendant. In one case that had been scheduled for trial on September 11, 2001, the court delayed the trial for eight days for the defendant who was "a foreign national alleged to have perpetrated a fraud against, among other individuals and entities, the World Trade Center." United States v. Adedoyin, 369 F.3d 337, 340 (3d Cir. 2004). But the judge denied a motion for continuance for an additional ninety days. *See id.* at 341–42. The defendant's conviction was upheld. *See id.* at 345.

366. Federal Judiciary Emergency Special Sessions Act of 2005 § 2(b)(3) (codified at 28 U.S.C. § 141(b)(2)–(3)).

counsel either may be unavailable or not have had an adequate opportunity to prepare the defense. And relocating the trial does not solve the problems of damaged or lost evidence. Nor does relocation solve, and it may even exacerbate, the potential problem of witnesses' unavailability.

The situation in Louisiana state courts is more acute than the situation in the federal courts.[367] State resources to respond to disasters are far more limited than those of the federal government.[368] Yet even where the federal government does furnish aid, that aid is slow to arrive;[369] as demonstrated by Katrina, it is also highly unlikely to meet the needs of a judicial system that is funded largely by means of revenue from traffic tickets.[370] Further, the disaster itself undoubtedly leads to an enlarged workload for the state and federal courts in the area.[371] Following Katrina and Rita, the vast amount of litigation against insurers substantially increased the burdens on already strained judicial systems.[372]

The state's inability to transfer cases outside their jurisdiction, as federal courts can do under the Judicial Emergency Act, is an additional burden on the local courts.[373] Even if a disaster's impact is

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367. Nine months elapsed between Katrina and the reopening of the Orleans Parish Criminal District Court. When the court reopened, it had a backlog of approximately 5,000 cases, but only the ability to handle twelve cases per day. *See New Orleans Criminal Court Reopens Nine Months After Katrina*, JURIST LEGAL NEWS & RES., June 1, 2006, http://jurist.law.pitt.edu/paperchase/2006/06/new-orleans-criminal-court-reopens.php; Patrick Ellard, Note, *Learning from Katrina: Emphasizing the Right to a Speedy Trial to Protect Constitutional Guarantees in Disasters*, 44 AM. CRIM. L. REV. 1207, 1232 (2007) (noting that the federal district court in New Orleans reopened within two months of Katrina).

368. *Cf.* Budget Summary, Louisiana Division of Administration (Sept. 28, 2006), http://www.doa.louisiana.gov/OPB/pub/FY07/State_Budget_Document_FY07_Budget_Highlights.PDF (reporting that, out of the approximately $7.8 billion allocated to hurricane relief in Louisiana during the financial year 2006–2007, the federal government provided approximately $7.3 billion).

369. *Cf.* Press Release, Louisiana Office of Homeland Security and Emergency Preparedness, Orleans Parish Prison Restoration Gets FEMA's Financial Backing (May 23, 2007), http://www.fema.gov/news/newsrelease.fema?id=36512 (noting that, in May 2007, one-and-a-half years after Hurricane Katrina struck New Orleans, FEMA agreed to help fund the restoration of the Orleans Parish Prison).

370. *See* Parker, *supra* note 355.

371. *See* Metzger, *supra* note 348, at 1195 (arguing that Katrina magnified the circumstances in Louisiana, and that "Katrina was the straw that broke the camel's back of the precarious public defense system").

372. Louisiana courts were forced to adopt special measures to deal with these cases. *See* LOCAL RULE FOR ORLEANS CIV. DIST. COURT, R. # (Hurricane Katrina and Rita Cases), *available at* http://www.orleanscdc.com/forms/hurricanelitigationrulerevisedcdc.pdf (last visited Aug. 28, 2008) (mandating a timeline for parties involved in insurance claims for property damage relating to Hurricane Katrina or Rita, so that these cases are resolved promptly).

373. *See* Federal Judiciary Emergency Special Sessions Act of 2005, Pub. L. No. 109-63, 119 Stat. 1993 (2005) (codified as amended at 28 U.S.C. §§ 48, 141, 152(c), 636).

felt in only one part of a state, the resources of the rest of the state may be inadequate to compensate. If a state has other high-crime areas, those jurisdictions may already be operating at capacity without the additional burden; conversely, low-crime jurisdictions may not be equipped to accommodate an enormous influx of criminal cases. All of these practical considerations may tip the ends-of-justice balance toward the outcome of dismissing many state criminal cases. Further, unless a defendant waives his or her right (which, with effective assistance of counsel, would be unlikely), the defendant has a state constitutional right to have his or her trial in the parish in which the alleged crime took place.[374]

Finally, delays caused by disasters also have implications for potential criminal (and civil) cases that have yet to be filed. Most federal and state criminal matters are subject to a statute of limitations. Unless charges are brought within a specified time period after the alleged crime, a defendant cannot be prosecuted. With Speedy Trial Act deadlines limiting federal prosecutors' ability to bring pending cases to trial,[375] and prosecutors' offices understaffed and operating under other handicaps, the resources available to bring new cases are severely depleted.

### *b. The Right to Counsel*

The inability to provide counsel caused even more problems in the courts. Following the hurricanes, thirty-one of New Orleans' thirty-nine public defenders were laid off.[376] As a result, in May 2006 an estimated 2,100 people were awaiting trial in jail without effective legal representation.[377] The situation after Katrina was so severe that a local judge ordered the release of four inmates who were charged with misdemeanor drug charges and a minor felony because he found that they were being held in violation of their right to effective assistance of counsel.[378] Some reports estimated

374. LA. CONST. art. I, § 16.

375. *See* Helgeson, *supra* note 337, at 261 (noting the Speedy Trial Act's hundred-day calendar for criminal prosecutions).

376. Laura Parker, *New Orleans Plans First Criminal Trials Since Katrina*, USA TODAY, May 23, 2006, at 1A, *available at* http://www.usatoday.com/news/nation/2006-05-22-new-orleans-criminal_x.htm (reporting a huge deficiency in funding for the New Orleans' public defender's office). There are varying reports regarding the number of public defenders laid off after Hurricane Katrina. *See, e.g.*, Ellard, *supra* note 367, at 1224 (reporting that only six employees remained in the public defender service).

377. *See* Parker, *supra* note 376.

378. Leslie Schulman, *New Orleans Judge Releases Four Inmates Stuck in Katrina Trial Backlog*, JURIST LEGAL NEWS & RES., Oct. 7, 2006, http://jurist.law.pitt.edu/paperchase/

that as many as 4,000 defendants who had gone without access to counsel for more than six months would have to be released.[379]

### 3. What Could Have Been Done Differently?

The aftermath of Hurricanes Katrina and Rita presents a challenging situation for those determining how to respond to disasters while preserving a defendant's speedy trial rights. The length of delays has been substantial. With the damage to and disappearance of evidence, diminished jury pools,[380] and the unavailability of witnesses, many defendants are certain to be prejudiced. In many cases, the loss of evidence and witnesses also prejudices the prosecution. A well-considered emergency plan would have lessened the disruption to the justice system, and such a plan should be prepared.[381] In light of the magnitude of the damage, however, it is impossible to say that any disaster plan would have avoided all of the problems that New Orleans and OPP experienced.[382]

In the wake of Hurricane Katrina, two things clearly should have occurred. First, prosecutors should have evaluated all minor charges and, as a matter of judicial and prosecutorial economy, dropped those cases that did not truly merit prosecution.[383] Since prosecutors generally have limited resources, and those resources

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2006/10/new-orleans-judge-releases-four.php. The judge had originally threatened to begin releasing prisoners in July 2006, but delayed the releases until October 2006. *Id.*

379. *See* James M. Yoch, Jr., *Louisiana AG to Investigate Indigent Defense System After Katrina*, JURIST LEGAL NEWS & RES., Oct. 7, 2006, http://jurist.law.pitt.edu/paperchase/2006/02/louisiana-ag-to-investigate-indigent.php.

380. The population of New Orleans has not yet returned to anywhere near the level before Katrina. Thus, the available jury pool for criminal trials has been substantially reduced, although it is impossible to specify the precise demographic impact or how this may affect defendants' rights with respect to jury selection.

381. *See infra* Part IV.D (recommending measures that will help protect against the breakdown of the criminal justice system during an emergency).

382. The Sixth Amendment recommendations are necessarily different from the Eighth Amendment's, because, after the disaster, there was a great deal that could have been done without an emergency evacuation plan in place to reduce Sixth Amendment violations. However, once Sheriff Gusman chose not to evacuate OPP prisoners, the storm had taken its toll and the damage had been done; it was too late to avoid many of the further Eighth Amendment violations without having previously had an emergency plan in place.

383. *See* Ellard, *supra* note 367, at 1230 (noting that society has a greater interest in prosecuting individuals accused of violent crimes); Bob Williams, *Doing "Katrina Time"*, PRISON LEGAL NEWS, May 2007, at 18 (reporting that Criminal Court Judge Calvin Johnson, frustrated with the number of individuals detained on minor charges, released 100 prisoners in November 2005; the district attorney appealed the decision, however, and the Louisiana Supreme Court stayed the release order). The Municipal Court and Traffic Court of New Orleans heeded this advice and issued orders requiring the sheriff to release "certain municipal and traffic offenders in the event of a declared emergency, and to refuse to take in additional individuals." *See* BROKEN PROMISES, *supra* note 2, at 29.

were further stretched during the hurricane, eliminating de minimis cases would have permitted the government to concentrate the available resources on the most serious offenses, including those that may have arisen as a result of the disaster.[384]

Second, once the prosecution determined that particular cases should proceed, the courts should have promptly held "ends-of-justice" hearings on all pending criminal cases to assess the speedy trial issues and the likelihood of each case ever being prosecuted.[385] These hearings would have required far fewer judicial resources than full-scale trials in all pending cases. With greater foresight and efficiency, the result of these hearings would not necessarily have been that all or even most of the criminal trials would have been delayed significantly.

Ends-of-justice hearings could also provide judicial triage of the criminal docket. If the court determined at the hearing that evidence had been lost or compromised or that witnesses could not be located, or found other reasons indicating that the prosecution's case would fail, then the inevitable dismissal could be accelerated. In these situations, the prosecution's case would not be prejudiced and the public's interest would not be harmed, since the result would have been preordained.

### *C. Emergency Preparedness and Human Rights Concerns*

Beyond constitutional issues, inadequate emergency planning in prisons implicates several moral and human rights concerns. Although most of the international standards discussed in this subpart are not binding law in the United States, they still reflect widely held standards of moral propriety and have relevance in

384. *See* VERA INSTITUTE OF JUSTICE, PROPOSALS FOR NEW ORLEANS' CRIMINAL JUSTICE SYSTEM: BEST PRACTICES TO ADVANCE PUBLIC SAFETY AND JUSTICE 47 (2007), *available at* http://www.vera.org/publication_pdf/399_770.pdf (reporting that up to forty-one percent of inmates entering OPP could have been released on their own recognizance if OPP had used practices accepted elsewhere). The Vera Institute proposes a jail facility approximately half the size of OPP by adopting basic practices in use elsewhere in the country, including "[e]arly triage of cases and routine communication between police and prosecutors, [a] wider range of pretrial release options, [c]ommunity-service sentencing and greater use of alternatives to prison, and [m]ore appropriate and cost-effective sanctions for municipal offenses." *Id.* at i. In general, the report finds that New Orleans has engaged in overincarceration, without enhancing public safety. *Id. Compare* FEMA, JUSTICE FACILITIES MASTER PLAN 122, 135 (Sept. 15, 2007) (calling for the sheriff's office to get back to its pre-Katrina size of more than 6,000 beds by 2015; one part of the plan envisions as many as 8,300 beds).

385. *See* Helgeson, *supra* note 337, at 261–62 (noting that case law prevents federal courts from issuing ends-of-justice continuances unless the delay is necessary and "adherence to the statutory timeline would be logically impossible or unjust").

U.S. courts.[386] As such, they provide a viable starting point for analyzing the issues of prison emergency planning from a broader moral and legal perspective.[387] Where the previous subparts of the Article discussed the constitutional standards that prisons are compelled to meet, this Part of the Article examines persuasive international authority on prison emergency planning and argues that these sources provide reasons to reform such planning regardless of how one interprets the Constitution.

International human rights law shares aspirations with the U.S. Constitution and the Bill of Rights in that both bodies of law generally seek to uphold individuals' rights to justice and dignity.[388] The commonalities between domestic and international approaches to prisoners' rights are further highlighted by the fact that some states have adopted international standards in their own rules regarding the treatment of prisoners. For example, the Utah Supreme Court, in *Bott v. DeLand*,[389] recognized that Article 1, Section 13 of the Oregon Constitution (prohibiting the treatment of prisoners with "unnecessary rigor") was based on "internationally accepted standards of humane treatment."[390] Connecticut has

386. *See* Alvin J. Bronstein & Jenni Gainsborough, *Using International Human Rights Laws and Standards for U.S. Prison Reform*, 24 PACE L. REV. 811, 814–16 (2004). The authors note that Supreme Court Justices at that time had referenced international legal standards in at least three recent cases. *Id.* at 815–16. The Justices had cited such sources of law as the Convention on the Elimination of All Forms of Racial Discrimination and decisions of the European Court of Human Rights. *Id.* Even state courts have looked to international standards for guidance, including the Missouri Supreme Court's consideration of the United Nations Convention on the Rights of the Child to support its decision against applying the death penalty to juveniles. *Id.* at 816. *See generally* A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication with U.S. Supreme Court Justices Antonin Scalia & Stephen Breyer (American University, Washington College of Law, Jan. 13, 2005), *available at* http://www.wcl.american.edu/secle/founders/2005/050113.cfm (containing link to podcast and transcript).

387. *See* Bronstein & Gainsborough, *supra* note 386, at 822.

> The language of human rights is important precisely because it speaks of universal rights—rights that belong to everyone based on their humanity without regard to conduct or status. Indeed all the major human rights documents make specific reference to the rights of detained people. The Universal Declaration of Human Rights states in Article 5 that, "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."

*Id.* (internal citation omitted).

388. *See id.* at 823–34 (arguing that, because international human rights law "was built on the same language and values as our own Constitution," it might be possible in the not-too-distant future to ask courts to use international law as a basis for enforcing U.S. prisoners' rights).

389. 922 P.2d 732 (Utah 1996).

390. *Id.* at 740 (noting that the drafters of the Amendment looked to the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, and the Standard Minimum Rules for the Treatment of Prisoners in drafting the Bill of Rights).

administratively adopted the U.N.'s Standard Minimum Rules for the Treatment of Prisoners (SMRs).[391] A federal court, while realizing that it was not bound by the SMRs, equated these standards with due process in finding that a prison's conditions violated inmates' rights.[392] In other words, international law articulates standards of human dignity with which American courts often agree. Because inadequate prison emergency planning impedes the ability of prison administrators to uphold these standards, international law is both a relevant and an instructive body of knowledge to draw upon when discussing reform of prison emergency planning.

There are several international standards pertaining to the issue of prison emergency planning. The U.N.'s SMRs for the Treatment of Prisoners is perhaps the most ubiquitous and most useful.[393] The U.N. adopted these standards out of respect for the rights of prisoners and in general agreement regarding proper practices in prisons.[394] The U.N.'s lead is constructive; while in the United States political factors typically affect legislators' treatment of correctional issues, the SMRs provide a transcendent reminder that there should be clearly established minimum standards to strive for in order to preserve prisoners' human dignity.[395]

Article 20 of the SMRs requires that "[e]very prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome

391. *See* Lareau v. Manson, 507 F. Supp. 1177, 1193 (D. Conn. 1980) (noting that, in 1974, the SMRs were adopted as the "preamble to the Administrative Directives of the Connecticut Department of Correction" and, at a minimum, the SMRs serve as "guidelines" for the department).

392. *Id.* at 1192–93.

> The adoption of the Standard Minimum Rules by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders and its subsequent approval by the Economic and Social Council does not necessarily render them applicable here. However, these actions constitute an authoritative international statement of basic norms of human dignity and of certain practices which are repugnant to the conscience of mankind. The standards embodied in this statement are relevant to the "canons of decency and fairness which express the notions of justice" embodied in the Due Process Clause.

*Id.* at 1188 n.9.

393. SMRs, *supra* note 25.

394. *See id.* art. II (declaring that the SMRs should "serve to stimulate a constant endeavour to overcome practical difficulties in the way of [the SMRs'] application, in the knowledge that [the SMRs] represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations").

395. *See id.* art. 60(1) ("The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.").

quality and well prepared and served."[396] Article 20 further declares that "[d]rinking water shall be available to every prisoner whenever he needs it."[397] Articles 22 to 26 go on to delineate minimum standards for medical services to be provided for prisoners.[398] The SMRs thus impose requirements that are similar to those imposed by federal courts in prisoners' Eighth Amendment claims.[399] When prison emergency planning is inadequate, the food and medical care provisions are often violated, much in the same way that officials' insufficient planning can demonstrate deliberate indifference in violation of the Eighth Amendment.[400] It is therefore critical for prison officials to take reasonable precautions, including adequate emergency planning, to guard against the possibility of hunger, dehydration, and insufficient medical care.

Another relevant provision of the SMRs is Article 55:

> There shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be in particular to ensure that these institutions are administered in accordance with existing laws and regulations and with a view to bringing about the objectives of penal and correctional services.[401]

If an inspector is required to ensure that these standards are being met, he or she should also assess the institution's emergency plans so that, if a predictable emergency arises, the prison will be adequately prepared. This provision should remind courts of their power to appoint Special Masters and Prison Monitors to oversee the remediation of constitutionally deficient prisons.[402]

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396. *Id.* art. 20(1).

397. *Id.* art. 20(2).

398. *Id.* arts. 22–26.

399. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (declaring that the Eighth Amendment ensures prisoners' right to receive "the minimal civilized measure of life's necessities"); Estelle v. Gamble, 429 U.S. 97, 103 (1976) (affirming that prisoners have an Eighth Amendment right to adequate health care). *See generally* Ira P. Robbins & Michael B. Buser, *Punitive Conditions of Prison Confinement: An Analysis of* Pugh v. Locke *and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893, 909–20 (1977) (discussing the foci of federal court scrutiny to determine the existence of an Eighth Amendment violation based on improper prison conditions, as well as the range of options available to remedy the violation).

400. *See supra* Part III.A (explaining that insufficient emergency planning violates the deliberate indifference standard when prison officials are aware of a serious risk to inmate health and safety and fail to take reasonable precautions to avoid that risk).

401. SMRs, *supra* note 25, art. 55.

402. *See supra* notes 259–61 and accompanying text (reviewing a case from the Eastern District of California, in which a Special Master was appointed to oversee the court's

Another source that underscores the propriety of accounting for international standards is *A Human Rights Approach to Prison Management: A Handbook for Prison Staff*.[403] This book, published by the International Centre for Prison Studies, is a manual for prison employees that bases its guidance on the standards promulgated by international human rights law.[404] Written by a former prison administrator, the Handbook recognizes the need to consider both the often abstract ideals set forth in human rights instruments and the practical constraints that officials face in operating a prison.[405] This dual focus on prisoners' rights and practical realities is useful for American prison administrators who must protect prisoners' Eighth Amendment rights in the face of less than ideal circumstances.[406]

The Handbook's section on staff training is particularly relevant to the matter of emergency planning, because it asserts that prison staff must be made aware of their duty to provide prisoners with basic levels of protection.[407] The section also recommends extensive and ongoing training, with specific programs tailored to staff with varied levels of experience and responsibility.[408] Initial training must provide a new prison employee with both the technical know-how and an understanding of his or her duties to prisoners and the prison system.[409] In addition, there should be training on both the provision of a safe prison environment and the proper use of force, guided by relevant U.S. constitutional and international standards.[410]

All of these provisions have clear relevance to emergency preparedness. If a prison employee is not trained properly, he or she

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recommendations to rectify inadequate mental health care that violated the prisoner's Eighth Amendment rights).

403. ANDREW COYLE, A HUMAN RIGHTS APPROACH TO PRISON MANAGEMENT: HANDBOOK FOR PRISON STAFF (2002), *available at* http://www.fco.gov.uk/resources/en/pdf/pdf2/fco_pdf_prisonreformhandbook.

404. *See id.* at 155–56 (listing as "relevant human rights instruments" upon which the Handbook's recommendations are based, the Universal Declaration of Human Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Standard Minimum Rules for the Treatment of Prisoners; and the International Covenant on Civil and Political Rights).

405. *See id.* at 10 ("[I]t is not sufficient for those responsible for prisons to be aware of and to refer to these international standards. If they are to implement the standards in their daily work, they must be able to interpret them and to apply them in real working situations. This is what the handbook sets out to do.").

406. *See supra* Part III.A.

407. COYLE, *supra* note 403, at 22.

408. *Id.*

409. *Id.* at 26 (citing Ghana's three-month-long academy for prison personnel as an example of a comprehensive training program).

410. *See id.* at 60–63.

cannot be expected to implement the prison's emergency plan in an appropriate manner. Similarly, a prison's emergency plan is integral to a prison employee's duty to provide a safe environment for prisoners. This is not meant to suggest that the Handbook is a cure-all for inadequate emergency planning. Rather, the Handbook illustrates that, in order to effectively protect prisoners' rights, however they are defined, those rights must be kept in mind when creating prison policies.

Nor is international human rights law, by itself, a panacea for the problem of inadequate prison emergency planning. However, because international law devises principles of basic human dignity to which many nations subscribe, it is a source that should motivate courts, legislatures, and citizens to take an active role in reforming prison emergency planning.[411]

## IV. RECOMMENDATIONS

As emergency planning receives increased attention, both locally and nationally, government officials must remain cognizant of their duty to help those who have been assigned to their care.[412] As demonstrated, inadequate prison emergency planning can lead to serious consequences, including inmate suffering, great physical harm, and even death.[413] These consequences often amount to constitutional violations.[414] But even where insufficient emergency

411. This statement holds true regardless of whether one believes that these international human rights standards create binding legal obligations in the United States.

> People who are detained or imprisoned do not cease to be human beings, no matter how serious the crime of which they have been accused or convicted. The court of law or other judicial agency that dealt with their case decreed that they should be deprived of their liberty, not that they should forfeit their humanity.

*Id.* at 31. The U.N.'s Human Rights Committee noted the "Katrina-related violations of human rights" in reviewing the United States' compliance with the International Covenant on Civil and Political Rights. *See* BROKEN PROMISES, *supra* note 2, at 35.

412. *See* FEMA, Government, http://www.fema.gov/government/index.shtm (last visited Aug. 28, 2008) (providing documents for federal, state, and local governments to use to assist communities before, during, and after disasters).

413. *See* BROKEN PROMISES, *supra* note 2, at 38–39 (recommending that the NIC focus its attention more closely on OPP and investigate not only OPP's emergency plan, but also its medical and mental health care; also recommending that the Civil Rights Division of the U.S. Department of Justice "should investigate serious civil rights violations at the jail, including the dangerous and unsanitary conditions in the jail's buildings and the unacceptable levels of violence caused, in part, by inadequate staffing and a culture of abuse"); *supra* Introduction.

414. *See supra* Part III.A-B (arguing that, during Hurricane Katrina, OPP prisoners suffered Sixth and Eighth Amendment constitutional violations).

planning does not result in constitutional violations, it can create dangers to the public,[415] impede the judicial system, and overburden public resources.[416]

This Part of the Article explores the possible methods of ensuring that prisons have, at a minimum, constitutionally sufficient emergency plans.[417] The Part describes how prison emergency planning can be improved both through litigation and through legislation and regulation; it then evaluates the benefits and drawbacks of each approach.[418]

### *A. Reform Through Prisoners' Rights Litigation*

Although 42 U.S.C. § 1983 authorizes suits for both injunctive relief and monetary damages, this Article focuses on injunctive relief because monetary awards for prisoners will likely be ineffective in bringing about broad-scale emergency planning.[419] Despite often hostile judicial attitudes toward prisoner lawsuits seeking injunctive relief from constitutionally deficient conditions,[420] prisoners do not have to wait until a risk materializes into a harm in order to obtain such relief.[421] Therefore, a suit for injunctive relief provides one

415. *See supra* Part III.B (noting briefly the dangers to the public's safety caused by the reintroduction of accused criminals).

416. *Cf. supra* note 383 and accompanying text.

417. *See* BROKEN PROMISES, *supra* note 2, at 19–20 (stating that several problems that existed in the OPP system before Katrina have been exacerbated and continue to be a problem, including chronic overcrowding, unclean facilities, environmental hazards, and inadequate medical care).

418. The goal of this Article is to shed light on the issue of prison emergency planning and, therefore, to motivate scholars, judges, and legislators to take action on the matter. Because many factors complicate litigation and legislation regarding prison emergency planning, the recommendations in this Part are necessarily of a general nature. For example, the restrictions of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered titles and sections of the U.S.C.) (PLRA) and the doctrine of qualified immunity, as well as political pressures, all must be addressed in depth as prison emergency planning reform is pursued. *See generally* William C. Collins, *Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 PACE L. REV. 651, 653 (2004) (explaining that, because of the PLRA, "[t]he legal bar has been set much higher on many issues" in prisoners' rights litigation). I sincerely hope that other commentators will consider these issues in future scholarly endeavors.

419. *See supra* note 195 (quoting § 1983).

420. *See* David J. Gottlieb, *The Legacy of* Wolfish *and* Chapman*: Some Thoughts About "Big Prison Case" Litigation in the 1980s*, *in* 1 PRISONERS AND THE LAW 2-3, 2-4 (Ira P. Robbins ed., 2008) (lamenting that the Court's decisions in *Bell v. Wolfish* and *Rhodes v. Chapman* "have been successful as expressions of an attitude of judicial restraint").

421. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 845 (1994) (citing Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923) and Helling v. McKinney, 509 U.S. 25, 33–34 (1993)). The Court in *Helling* stated:

means to ensure that deficient emergency planning will not lead to a violation of prisoners' constitutional rights.

Courts have broad equitable discretion in a Section 1983 suit, but they are instructed to limit their intrusion into prison administrators' difficult jobs by allowing the latter initially to fashion their own plans for remedying unconstitutional conditions.[422] Moreover, courts admittedly do not have expertise in matters of prison planning.[423] However, these two facts do not mean that courts cannot play a vital role in reforming prison emergency planning. "While . . . judicial restraint is often appropriate in prisoners' rights cases, [the Supreme Court has] also repeatedly held that this policy 'cannot encompass any failure to take cognizance of valid constitutional claims,'"[424]

Therefore, if a plaintiff can successfully prove a violation of Eighth Amendment rights by using the arguments described earlier in this Article, a court must remedy the constitutional deficiency.[425] This remedy could be in the form of an order for the DOC or the prison officials to adopt a specific type of emergency plan, to keep certain essential supplies on hand, and to train

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> We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery. Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.

509 U.S. at 33.

422. *See* Lewis v. Casey, 518 U.S. 343, 362 (1996) (quoting Preiser v. Rodriguez, 411 U.S. 475, 492 (1973)) ("[T]he strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors . . . also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons.").

423. *See* Procunier v. Martinez, 416 U.S. 396, 404–05 (1974):

> Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.

*Id.*

424. Bounds v. Smith, 430 U.S. 817, 832 (1977) (quoting *Procunier*, 416 U.S. at 405).

425. *See* Toussaint v. McCarthy, 801 F.2d 1080, 1087 (9th Cir. 1986) ("In fashioning a remedy for constitutional violations, a federal court must order effective relief. Therefore, a federal court may order relief that the Constitution would not of its own force initially require if such relief is necessary to remedy a constitutional violation.") (internal citation omitted).

employees in emergency procedures.[426] Courts even have the power to require prison administrators to consult with experts in a given field, such as fire prevention, when developing a plan to remedy a constitutional violation.[427]

While prison administrators should retain some flexibility in implementing these orders, a court has the discretion to appoint a Prison Monitor to oversee a prison's compliance with the order.[428] Courts can appoint a Special Master who has expertise in prison administration and/or emergency preparedness[429] to oversee all reforms that are constitutionally required, as well as any other changes to which prison administrators consent.

### *B. Reform Through Legislation*

Federal legislation is another way to ensure that state DOCs adequately prepare their facilities for emergency situations. Congress could enact laws to require that all state departments meet a certain level of emergency preparedness.[430] Legislation may in fact be the preferred course of action, since, unlike a court, Congress is permitted to prescribe laws that go well beyond the requirements of the Constitution. In other words, the Constitution merely acts as

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426. *See, e.g.*, Tillery v. Owens, 719 F. Supp. 1256, 1310 (W.D. Pa. 1989) (ordering a prison official to create plans for the reduction of fire hazards, monitoring of recreational areas, and medical care of mentally ill inmates), *aff'd*, 907 F.2d 418 (3d Cir. 1990).

427. *See* Tillery v. Owens, 1989 U.S. Dist. LEXIS 9986, at *173 (W.D. Pa. Aug. 15, 1989) (requiring that the court-ordered fire prevention plan be made in consultation with fire prevention experts).

428. *See Tillery*, 719 F. Supp. at 1309.

429. *See* FED. R. CIV. P. 53(a)(1) ("[A] court may appoint a master . . . to[] perform duties consented to by the parties; . . . [or to] address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district."); *see also* Coleman v. Wilson, No. CIV S-90-0520, 1994 U.S. Dist. LEXIS 20786, at *105 (E.D. Cal. June 6, 1994) (ordering the appointment of a Special Master to "[m]onitor compliance with court-ordered injunctive relief").

430. At one level, to require state DOCs to adopt a federal emergency preparedness program could potentially create Tenth Amendment anti-commandeering issues. *See* Prince v. United States, 521 U.S. 898, 925 (1997) ("[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."). To avoid these issues, Congress, as it often does, merely needs to condition the receipt of federal funding on a state's agreement to adopt the federal program. *Cf.* South Dakota v. Dole, 483 U.S. 203, 211–12 (1987) (holding that, while Congress may not be able to impose a national minimum drinking age directly, it can do so indirectly by threatening to withhold a percentage of federal highway funds from states that do not agree to raise their drinking age to twenty-one). The penalty for noncompliance, however, must be only the loss of funds that are related to the program. *See id.* (explaining that case law suggests that conditions on federal grants might be deemed illegitimate if the grants are not at least somewhat related to the federal program). Here, Congress could condition the receipt of criminal justice funding on the adoption of national emergency preparedness standards.

a floor, not a ceiling, when Congress considers appropriate legislation.[431]

Convincing Congress to take action may not be an easy task, however, given that formulating and implementing an adequate plan for emergency preparedness will be expensive.[432] But the Constitution does not cease to exist simply because of the lack of resources.[433] The onset and aftermath of Hurricane Katrina underscore how inadequate emergency preparedness can lead to a deprivation of prisoners' Eighth Amendment right to be free from cruel and unusual punishments.[434] Prison officials are entrusted with the unique task of protecting the health and safety of a large number of individuals who have been stripped of their ability to care for themselves.[435] Failure to give them a well-conceived,

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431. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) (articulating what later became known as the ratchet theory, according to which Congress may expand rights beyond what the Supreme Court has deemed constitutional, but it may not ratchet down judicially recognized rights).

432. *See* JEFFREY A. SCHWARTZ & CYNTHIA BARRY, CRITICAL ANALYSIS OF EMERGENCY PREPAREDNESS: SELF-AUDIT MATERIALS vi (1996), *available at* http://www.nicic.org/pubs/1996/013223.pdf ("Good emergency preparedness is not cheap or easy to attain, and once developed it must be maintained or it will quickly deteriorate.").

433. Courts have routinely held that inadequate funding is not a legitimate defense to constitutional violations. *See, e.g.*, Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 336–37 (3d Cir. 1987); Ramos v. Lamm, 639 F.2d 559, 573 n.19 (10th Cir. 1980); Smith v. Sullivan, 611 F.2d 1039, 1043–44 (5th Cir. 1980). However, by introducing the deliberate indifference subjective component, the Supreme Court intimated in *Wilson v. Seiter*, 501 U.S. 294 (1991), that funding limitations may indeed be a valid defense. *See* Russell W. Gray, Note, Wilson v. Seiter*: Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U. L. REV. 1339, 1380–81 (1992). Nevertheless, courts generally have been unwilling to accept inadequate funding defenses. *See* MICHAEL B. MUSHLIN, 1 RIGHTS OF PRISONERS § 2:15, at 342–43 (3d ed. 2002) (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) and Alberti v. Sheriff of Harris County, Tex., 978 F.2d 893 (5th Cir. 1992)).

434. *See supra* Part III.A (describing the horrors that prisoners faced during and in the aftermath of Hurricane Katrina, partially due to OPP's failure to have an adequate emergency plan).

435. NIC GUIDE, *supra* note 74, at 3. Compare the situation at U.S. colleges and universities in the aftermath of the tragedy at Virginia Tech University, on April 16, 2007, leaving thirty-three people dead and many others wounded—the deadliest shooting in American history. *See* Christine Hauser & Anahad O'Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES, Apr. 16, 2007, *available at* http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html; Ian Shapira & Tom Jackman, *Gunman Kills 32 at Virginia Tech In Deadliest Shooting in U.S. History*, WASH. POST, Apr. 17, 2007, at A1. While students are in a better position than prisoners to care for themselves, colleges and universities still stand *in loco parentis*, and therefore have ongoing obligations to care for the safety and well-being of their charges.

When the will is there, results soon follow. Many institutions reacted quickly to consider their own situations. *See, e.g.*, *Va. Tech Shooting Leaves Md. Colleges Reevaluating Security Measures*, S. MD. ONLINE, Apr. 17, 2007, *available at* http://somd.com/news/headlines/2007/5764.shtml ("Maryland's higher education institutions are waiting for more details about the Virginia Tech shooting that left 33 dead Monday before reviewing their security

detailed emergency plan to implement during the course of an emergency may make this task exceedingly difficult.

Congressionally required emergency planning may in fact save the government money in the long run. Effective planning can result in emergencies going less badly than necessary.[436] It can also result in early intervention, so that smaller emergencies do not escalate into larger ones.[437] Naturally, larger emergencies will require more state resources than smaller ones.[438] Of course, having an emergency plan will not guarantee that prison officials will be prepared for every single contingency.[439] Nor will having an emergency plan guarantee that prison officials will actually implement the plan or execute it well.[440] Nevertheless, a comprehensive emergency plan and a well-trained staff to carry it out will significantly decrease the risk that prisoners will be subjected to unnecessary pain and suffering, which in turn will decrease the need for additional medical and other expenditures. Moreover, anticipating the physical damage that could result from an emergency may mitigate the damage that actually does result.

The level of preparedness that can be achieved through legislation will depend on the extent to which Congress wishes to safeguard against possible harms to inmates. As explained above, when emergency preparedness is so inadequate that prisoners' basic needs, such as food, water, and medication, go unfulfilled,

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measures, but vowed changes if needed."). *See generally* STEVE CHARVAT, COLLEGE AND UNIVERSITY DISASTER PLANNING: NEW GUIDELINES BASED ON COMMON INDUSTRY PRINCIPLES AND PRACTICE 2 (2008), *available at* http://www.edc.higheredcenter.org/violence/college-disaster-planning.pdf ("9/11, Katrina, Northridge, and most recently Virginia Tech.... These four incidents immediately bring to mind scenes of despair, death, destruction and terrible human loss. They also represent ongoing wake up calls to members of the higher education community for the need to develop and implement strong emergency and crisis/disaster plans for our respective institutions."). On March 7, 2008, Virginia Governor Tim Kaine signed into law a bill requiring the board of visitors or other governing body of each Virginia public institution of higher education to develop, adopt, and keep current a written crisis and emergency management plan and first warning and emergency notification system. *See* H.B. 1449 (Va. 2008) (introduced Jan. 15, 2008).

436. *See* NIC GUIDE, *supra* note 74, at 4.

437. *Id.*

438. *See* Christopher Barton & Stuart Nishenko, Marine and Coastal Geology Program, Natural Disasters: Forecasting Economic and Life Losses, http://marine.usgs.gov/fact-sheets/nat_disasters (last visited Aug. 28, 2008) (explaining the correlation between the predicted frequency and magnitude of natural disasters and the predicted economic and human costs).

439. *See* NIC GUIDE, *supra* note 74, at 274 (noting that, even with detailed planning, every institution will have to deal with unanticipated problems in any major emergency), 287 ("Unanticipated problems are the rule, not the exception.").

440. *See, e.g., id.* at 274 ("Most of the problems encountered had to do with failures to follow the prison's established plans, policies, and procedures for escapes, rather than with inadequacies in the procedures themselves.").

prisoners have a strong argument that prison administrators have violated their Eighth Amendment rights.[441] Any congressionally required emergency plan, therefore, must at least ensure that these needs are met. It will be difficult, however, to pinpoint the precise level of preparedness at which the risk of harm to prisoners will be so significant that the deliberate indifference standard of the Eighth Amendment will be satisfied[442]—should Congress want to key its legislative response to a constitutional requirement.

What is clear, however, is that the failure to have any emergency preparedness plan at all qualifies as deliberate indifference. One might assume that all prisons now have at least some sort of emergency preparedness plan, but this simply is not true.[443] Even if emergency planning has come a long way in the last decade or two, it would be a falsity to think that one hundred percent of prisons can point to a specific, even if minimal, written policy that deals with emergencies.

Congress should appoint a clearinghouse, such as the NIC or perhaps the Federal Emergency Management Agency (FEMA), to gather information and design a detailed, well-tested emergency preparedness system and require that all state DOCs adopt it. Although this process will take some time (something prisons can ill-afford to lose when it comes to emergency planning), the designated clearinghouse would not be starting from scratch. Detailed, tested emergency plans already exist in many states. Approximately one-third of state DOCs,[444] and a number of county jail systems, use LETRA, Inc.'s *Emergency Preparedness for Correctional Institutions.*[445] This system has been adapted to meet local needs and conditions in each of these states.[446]

*Emergency Preparedness for Correctional Institutions* has been used by institutions for more than twenty-five years.[447] It is a detailed course designed specifically for prisons and jails.[448] It is not merely a training course, however.[449] It is a fully developed system of emergency

441. *See supra* Part III.A (arguing that prisoners can prevail on an Eighth Amendment claim by showing that prison officials acted deliberately indifferent, both by allowing the conditions of confinement to deteriorate and by failing to prevent harm).

442. In order for a constitutional violation to occur, not only do prison officials have to exhibit deliberate indifference, but also harm must result from the indifference.

443. NIC GUIDE, *supra* note 74, at 186.

444. Many states use this system at all of their institutions statewide. *See supra* note 105 and accompanying text (listing twelve states).

445. LETRA, INC., *supra* note 106, at 4.

446. LETRA, INC., *supra* note 105, at A1.

447. *Id.*

448. LETRA, INC., *supra* note 106, at 1.

449. *Id.* at 2.

preparation and response, with training as just one component.[450] Other components include plans, staffing, equipment, checklists, outside agency agreements, and emergency post orders.[451] Because *Emergency Preparedness for Correctional Institutions* has been field-tested and revised many times, each of these components is integrated with the others.[452]

The delegated clearinghouse would also have other non-prison-specific emergency systems to reference. For example, the Incident Command System (ICS) is a management system developed by fire departments in the 1970s in response to a series of catastrophic fires in California.[453] The main purpose of developing the ICS was to remove many of the traditional barriers associated with multi-agency responses, such as incompatible communication problems and ambiguous chains of command.[454] The National Incident Management System (NIMS), another national emergency system, was developed after the September 11 attacks and is largely just an offshoot of the ICS.[455] Nevertheless, NIMS represents the first time the nation has developed a unified system for coordinating an emergency response.[456] NIC or FEMA could draw upon this system.

### *C. Comparing Litigation with Legislation*

While litigation and legislation are both viable options to ensure that prisons are sufficiently prepared to deal with emergencies, each method has advantages and disadvantages. This subpart of the Article compares and contrasts these avenues for reform. Because each method has distinct advantages, a combination of litigation and legislation is likely to yield the best results.

#### 1. Advantages of Litigation

Perhaps the greatest advantage to using prisoners' rights lawsuits pursuant to Section 1983 is that these suits give prisoners the

450. *Id.*

451. *Id.*

452. *Id.*

453. *See* FEMA, INCIDENT COMMAND SYSTEM: REVIEW MATERIALS 1 (2005), *available at* www.training.fema.gov/EMIWeb/IS/ICSResource/assets/reviewMaterials.pdf (noting that millions of dollars in property damage and numerous causalities could be attributed to inadequate management after the fires).

454. NIC GUIDE, *supra* note 74, at 6.

455. *Id.*

456. *Id.*

chance to establish clearly that certain harms resulting from inadequate emergency plans constitute Eighth Amendment violations. If such cases reach federal appellate courts or the Supreme Court, powerful precedents can be set to remind prison administrators of their constitutional emergency planning duties. Judicial recognition of prisoners' constitutional rights in this context could also serve as an impetus for state DOCs and individual facilities to improve their own emergency preparedness. Further, Congress and state legislatures might similarly be encouraged to remedy the identified constitutional violations.

Another benefit of seeking reform through litigation is that courts can create facility-specific injunctive orders. In contrast, legislation could only provide more general standards that might not be as effective in remedying deficient emergency plans.[457] Enforcement via litigation might also be less bureaucratic, because courts have the ability to appoint a single Special Master who can oversee compliance with court orders.[458]

### 2. Advantages of Legislation

The greatest advantage of using legislation to reform prison emergency planning is that Congress has capabilities that prisoners do not. Prisoners, for example, do not have the resources to research emergency planning, nor can they examine their facility's emergency plans. Further, the sophisticated pleading needed to demonstrate an Eighth Amendment violation can thwart a pro se prisoner's lawsuit that is based on an otherwise valid claim.[459] Similarly, Congress faces none of the legal hurdles, such as Prisoner Litigation Reform Act[460] restrictions and qualified immunity, that a prisoner-plaintiff does.

Another advantage to legislation is that Congress can be more proactive than a court. While a court's powers are limited to remedying constitutional violations, Congress can require prisons to meet standards higher than those that the Eighth Amendment

457. *Cf. supra* notes 78–82 and accompanying text (discussing how a non-traditional approach to emergency planning requires accounting for different types of emergencies within the facilities and different plans for different institutions).

458. *See supra* notes 428–29 and accompanying text.

459. *See* Collins, *supra* note 418, at 658–59 (explaining that prisoners must demonstrate that the official had a state of mind of deliberate indifference to establish an Eighth Amendment violation, and that this test, in turn, creates the possibility of a "pure of heart" defense).

460. *See supra* note 418.

imposes. Congress can also provide funding to state DOCs and prisons to help accomplish its prescribed standards.

### *D. Speedy Trial Recommendations*

Hurricane Katrina also provides an illustration of how lack of preparation for an emergency can lead to Sixth Amendment speedy trial violations.[461] Of the 8,000 inmates who were transferred from New Orleans throughout the State of Louisiana, thousands served much longer sentences than they should have.[462] Of course, some of the events that transpired during and after Hurricane Katrina could not have been prevented.[463] For example, even the most detailed emergency plan could not have physically kept open the court buildings that were located in New Orleans, many of which became flooded and inaccessible after the storm.[464] Nevertheless, it is clear that the Louisiana criminal justice system could have been better prepared to handle an emergency situation.[465] Fortunately, the Katrina experience provides lessons so that future crises do not similarly result in the suspension of fundamental rights, like the right to a speedy trial.[466]

As Professors Brandon Garrett and Tania Tetlow recommend, states should create an institution (an "emergency court") designed to plan and prepare for the administration of justice during times of emergency.[467] This court could be responsible for holding

461. *See supra* Part III.B.2 (noting that the complete failure of the criminal justice systems—including the loss of prisoners in the system, the destruction of courthouse buildings, and the disappearance of police officers, attorneys, judges, court personnel, witnesses, evidence, and records—caused substantial time delays for many prisoners between incarceration and trial).

462. Garrett & Tetlow, *supra* note 352, at 128.

463. *See* NAT'L ASS'N FOR COURT MANAGEMENT, DISASTER RECOVERY PLANNING FOR COURTS: A GUIDE TO BUSINESS CONTINUITY PLANNING 2 (2000), *available at* http://www.abanet.org/crimjust/calendar/disaster_nacm.pdf (asserting that, while not even the best emergency plan can prevent a disaster, "courts with a plan in place are more apt to continue to serve the community through crisis than are courts caught unprepared").

464. *See* George B. Huff Jr., *Planning for Disasters: Emergency Preparedness, Continuity Planning, and the Federal Judiciary*, JUDGES' J., Winter 2006, at 7 (explaining that Hurricanes Katrina and Rita forced the closing and relocation of the Fifth Circuit Court of Appeals, the district courts for the Eastern District of Louisiana, and many local trial courts).

465. *See* Jack Pool, *Planning for the Inevitable*, A.B.A. CRIM. JUST. SEC. NEWSL., Winter 2007, at 5 ("With adequate preparedness, an event may be a problem rather than a disaster.").

466. *See id.* ("In the span of time between September 11, 2001 and the Katrina Hurricane in 2005, all public institutions have gained a new awareness of the impact of natural and manmade emergencies on the necessary governmental functions, including the judicial and criminal justice systems.").

467. Garrett & Tetlow, *supra* note 352, at 174.

sessions in areas that are not affected by the crisis, as well as for administering some of the coordination issues that were not performed after Katrina.[468] For instance, an emergency court could be charged with:

> planning for transfer of prisoners; tracking and making public updated contact information for defense attorneys and prosecutors; making public lists of prisoners and where they are located; monitoring hearings; ensuring adequate indigent defense; ensuring court deadlines are complied with; safeguarding records and evidence; and supervising efforts to locate witnesses and evidence.[469]

In addition to creating emergency courts, states should take preventative steps to ensure that important court documents, and perhaps more importantly the information contained in the documents, are protected and preserved.[470] One way to do this would be to store all information electronically and to make sure that the data recorded is securely duplicated.[471] Electronic records should be stored in an area outside of the respective court's jurisdiction.[472] That way, a disaster that destroys the courthouse does not at the same time destroy the back-up database.[473]

States should also maintain a list of in-state and out-of-state public defenders, pro bono lawyers, and law school clinics to be called upon in the aftermath of an emergency to assist indigent detainees in their pre-trial and trial proceedings. Like the right to a speedy trial, criminal defendants also have a Sixth Amendment right to counsel.[474] Therefore, even if a court is ready to hear a case, a detainee's trial could still be delayed if he or she does not have representation. Only six public defenders remained in New Orleans after the storm.[475] So few defenders cannot keep up with the arraignments in new cases, let alone the arraignments and

468. *Id.*

469. *Id.*

470. *See* Joe Whitley, *A Few Thoughts on the ABA Conference on Disaster Preparedness and the Criminal Justice System*, A.B.A. CRIM. JUST. SEC. NEWSL., Winter 2007, at 4 (explaining that disaster planning in any criminal justice system "should address basic data protection and redundancy of critical documents and information").

471. Pool, *supra* note 465, at 6.

472. *Id.*

473. *Id.*

474. *See supra* notes 315–16, 380–83 and accompanying text (discussing the right to counsel).

475. Garrett & Tetlow, *supra* note 352, at 128.

trials of the thousands of backlogged cases.[476] A pre-established list that is kept updated on a regular basis would make obtaining outside help significantly easier.

The importance of ensuring that states take preventative steps so that courts can continue to administer justice during times of emergency cannot be overemphasized. The Constitution guarantees individuals certain fundamental rights. Courts have an obligation to protect those rights to the best of their ability. The judicial system serves an important symbolic role in our constitutional democracy.[477] In the midst of chaos and confusion, it is vital that individuals have the ability to look to the justice system for a sense of stability, predictability, and fairness.[478] The right to prompt legal hearings is guaranteed by the Sixth Amendment to the U.S. Constitution.[479] If preparatory measures, such as those described above, can be taken to ensure the fair administration of justice, then the judiciary has a constitutional obligation to take those measures.

## CONCLUSION

When Hurricane Katrina devastated the Gulf Coast in August 2005, the American public learned of both the awesome power of Mother Nature[480] and the serious consequences of being unprepared for an emergency.[481] One of the most important lessons to glean from the Katrina experience is that the government can ill-afford to be unprepared or under-prepared to protect the most vulnerable members of society.[482] The very nature of correctional institutions makes it such that the state has deprived prisoners of their ability to care for themselves. The Supreme Court has repeat-

476. *See id.* at 158. As a direct result of not having enough public defenders, a judge in New Orleans recently released forty-two inmates who were suspected of drug crimes. Laura Sullivan, *New Orleans Runs Short on Public Defenders*, Morning Edition (National Public Radio broadcast Apr. 19, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=9678502.

477. *See* Thomas A. Birkland & Carrie A. Schneider, *Emergency Management in the Courts: Trends After September 11 and Hurricane Katrina*, 28 JUST. SYS. J. 20, 20 (2007).

478. *See id.* (acknowledging that, under the rule of law, individuals look to the judicial system for protection of their legal rights).

479. *See supra* note 315 and accompanying text.

480. *See* CENTER FOR PROGRESSIVE REFORM, *supra* note 192, at 1 ("The extent of the human tragedy produced by Hurricane Katrina has nearly overwhelmed our ability to comprehend it.").

481. *See id.* (asserting that the tragedy of Hurricane Katrina was made worse by the failure of the government to anticipate and prepare for the storm).

482. *See id.* (arguing that society needs to protect its most vulnerable citizens from the forces of nature and a winner-take-all economic system).

edly recognized this unique relationship[483] and has read the Eighth Amendment to require prison officials to take affirmative steps to abate serious risks to the health and safety of prisoners in many different contexts.[484] This Article argues that the failure to have an adequate emergency preparedness plan can lead to serious harms that will violate a prisoner's right to be free from cruel and unusual punishments.[485] Further, inadequate planning can lead to violations of citizens' right to a speedy trial, as well as to public safety problems.[486]

Legal arguments aside, this Article illuminates an issue on which perhaps everyone can agree: the need to prevent unnecessary suffering. Many of the harms that result from emergencies are entirely preventable, and recently the government has begun to focus more on emergency preparedness.[487] As emergency preparedness becomes a regular function of government, we must not forget prisoners; they are dependent on others for their health and safety and consequently may suffer unnecessary tragedy as the result of others' inadequate emergency planning.

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483. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 103 (1976) (explaining that the government has an obligation to provide medical care to prisoners, because, if the government fails to do it, those needs will not be met).

484. *See, e.g.*, Farmer v. Brennan, 516 U.S. 825, 832 (1994) (citing Hudson v. Palmer, 468 U.S. 517, 526–27 (1984)) (discussing the duty of prison officials not only to guard against cruel and unusual punishments, but also to provide inmates with food, clothing, shelter, medical care, and reasonable safety).

485. *See supra* Part III.A (arguing that Eighth Amendment adjudication is a potentially successful avenue for ensuring that prison administrators plan adequately for emergencies in their facilities).

486. *See supra* Part III.B (asserting that Hurricane Katrina serves as a valuable case study in the facts and circumstances that can lead to trial delays).

487. *See supra* note 1 and accompanying text.