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## DECARCERATION TO COMBAT PUBLIC EMERGENCIES: USING COVID-19 STRATEGIES IN ANTICIPATION OF CLIMATE CATASTROPHES

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### Abstract

*This Note examines decarceration strategies used during the COVID-19 crisis and proposes the application of these strategies in regions heavily affected by climate change. Detention centers do not have the resources to respond to public emergencies like climate change and the coronavirus. Extreme weather events such as extreme heat, wildfires, and flooding exacerbate inhumane conditions in detention centers. Recent cases on jail and prison conditions argue that these dangerous conditions violate the Eighth Amendment, but such claims are increasingly difficult to win. During the COVID-19 pandemic, courts, police departments, and other entities worked to decrease the number of people who were incarcerated through strategies like early release and alternatives to incarceration. These policies reduced the number of people in prisons by 16 percent, and so this Note explores the use of these policies in areas with high climate vulnerability. Proactive solutions aimed at reducing the incarcerated population would allow prison systems to better handle extreme weather events while reducing the number of people who are harmed during natural disasters.*

INTRODUCTION

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\* JD Candidate at the University of Arizona, James E. Rogers College of Law. I am grateful to Professor Herr-Cardillo for asking valuable questions that made this Note more compelling. I am especially thankful for the organizations and people who are working to reduce the harm that our incarceration system inflicts on communities.

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## INTRODUCTION

During the Dixie Fire in August 2021, electrical lines providing power to nearby prisons were destroyed.<sup>1</sup> The backup generator at the California Correctional Center's C-Yard had failed, and people serving their sentences in the facility no longer had stable access to basic necessities, including light, phone calls, and running toilets.<sup>2</sup> Although a California prison official claimed that the facility was operating at full power, the ventilation systems were only running sporadically.<sup>3</sup> Without fully functional ventilation, people in the facility were breathing smoke from the fire as nearby residents in the surrounding towns fled the area.<sup>4</sup> The prison officials never shared emergency evacuation procedures, and so the people in the prison did not know whether they would be consumed by the fire.<sup>5</sup>

Wildfires, flooding, and extreme heat endanger the lives of people serving their sentences in prisons across the United States.<sup>6</sup> In Texas, one of the hottest states in the country, only thirty federal prisons are fully air-conditioned.<sup>7</sup> This is not a rarity. Thirteen states, many of which have

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<sup>1</sup> Alleen Brown, *Dark, Smoky Cells: As Wildfires Threaten More Prisons, The Incarcerated Ask Who Will Save Their Lives*, THE INTERCEPT (Feb. 12, 2022), <https://theintercept.com/2022/02/12/wildfires-prisons-climate-california/> [https://perma.cc/T7LW-C8TQ].

<sup>2</sup> *Id.*

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

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

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

<sup>6</sup> SABIN CENTER FOR CLIMATE CHANGE LAW, *HEAT IN US PRISONS AND JAILS: CORRECTIONS AND THE CHALLENGE OF CLIMATE CHANGE* 90 (Aug. 2015), [https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1123&context=sabin\\_climate\\_change](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1123&context=sabin_climate_change) [https://perma.cc/VZG4-8M8V].

<sup>7</sup> Alan Kozeluh, *Most Texas Prisons Are Not Fully Air Conditioned. A House Bill Aims to Change That*, TEXAS NEWS KENS5 (May 10, 2021), <https://www.kens5.com/article/news/local/texas/most-texas-prisons-are-not-fully-air->

numerous extreme heat events each year, lack universal air conditioning in their prisons.<sup>8</sup> In other prisons, flooding and hurricanes create additional safety issues because subpar plumbing infrastructure causes sewage to seep into people's cells.<sup>9</sup> Without standard evacuation protocols in hurricane-prone areas, people wait for days in flooded prisons without water or electricity while animals are evacuated from local shelters before the hurricane even hits land.<sup>10</sup> During wildfire events, people in prisons breathe smoke for weeks, and many states know that climate change is increasing the risk of wildfires.<sup>11</sup> Overcrowding, a problem in the federal prison system and at least ten state prison systems, exacerbates all of the dangers of extreme weather events.<sup>12</sup>

People who have lived through these inhumane conditions sometimes choose to file Eighth Amendment claims, but winning these claims is a difficult hurdle for plaintiffs.<sup>13</sup> To avoid these legal battles and prevent the trauma that these events inflict on people, a more proactive and humane solution is to decrease the number of people in incarceration facilities, a concept known as decarceration. Legal officials used this solution during the COVID-19 pandemic, when a fast-spreading virus threatened the lives of people in overcrowded prisons and the surrounding communities.<sup>14</sup> The declaration of a public health crisis necessitated immediate decarceration strategies as people in prisons were more likely to be infected by COVID-19.<sup>15</sup> These strategies were especially vital because, as a result of structures of racism in the United States, both

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[<https://perma.cc/SVJ4-9EK3>].

<sup>8</sup> Alexi Jones, *Cruel and Unusual Punishment: When States Don't Provide Air Conditioning in Prison*, PRISON POL'Y INITIATIVE (June 18, 2019), <https://www.prisonpolicy.org/blog/2019/06/18/air-conditioning/> [<https://perma.cc/54K8-2GTV>].

<sup>9</sup> Alleen Brown, *Trapped in the floods: With floodwaters rising, prisoners wait for help in floating feces*, THE INTERCEPT (Feb. 12, 2022), <https://theintercept.com/2022/02/12/prison-climate-crisis-flood/> [<https://perma.cc/HS2N-58PR>] [hereinafter *Trapped*].

<sup>10</sup> Matthew Clarke, *In the Eye of the Storm: When Hurricanes Impact Prisons and Jails*, PRISON LEGAL NEWS (May 17, 2018), <https://www.prisonlegalnews.org/news/2018/may/17/eye-storm-when-hurricanes-impact-prisons-and-jails/> [<https://perma.cc/YD8C-B4BQ>].

<sup>11</sup> Brown, *supra* note 1.

<sup>12</sup> Aaron Nolan, *America's Prisons and Jails: Overcrowded and Understaffed*, NEWSNATION (Aug. 10, 2021), <https://www.newsnationnow.com/us-news/americas-prisons-and-jails-overcrowded-and-understaffed/> [<https://perma.cc/Z6T7-C88C>].

<sup>13</sup> Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 373, 378, 380 (1995).

<sup>14</sup> See Franco-Paredes et al., *Decarceration and community re-entry in the COVID-19 era*, 21 LANCET INFECT. DISEASES e11-e16 (2020).

<sup>15</sup> American Medical Association, Medical Student Section, Support Public Health Approaches for the Prevention and Management of Contagious Diseases in Correctional Facilities. Res. 415. Nov. 2020, <https://www.ama-assn.org/system/files/2020-11/nov20-415.pdf>.

incarceration and COVID-19 disproportionately endanger Black, Indigenous, and people of color (BIPOC).<sup>16</sup>

Climate change is viewed by many experts as a public health crisis with a similar, if not more dire, effect on human health as the COVID-19 pandemic.<sup>17</sup> This Note will look at the strategies used to decrease jail and prison populations during COVID-19 and explore the application of those strategies in regions that are heavily impacted by wildfires, extreme heat, and floods. The emergencies created by climate catastrophes differ from the COVID-19 crisis, which makes a direct analogy difficult. Therefore, this Note proposes the use of decarceration policies as a procedural model because these policies show that decarceration is possible in anticipation of or as a response to emergencies.

Part I will discuss the effects of climate change on correctional facilities and how those effects impact people in the facilities, especially those who are at higher risk due to age or chronic illness. Part II will describe current legal solutions for people who are incarcerated during extreme climate events. This part will include a brief history of Eighth Amendment challenges to prison conditions, along with recent cases that have argued cruel and unusual punishment during emergencies like heat waves or wildfires. Part III will describe the strategies used by governments, courts, and other officials to decrease the prison population during COVID-19. This part also examines the racial disparities in the application of those policies. Part IV will analyze the feasibility of using these strategies in regions with high climate risk and the current costs that governments are spending on addressing—or avoiding—the harms of climate change.

These strategies can provide a foundation for preserving the health and safety of people incarcerated in regions with higher susceptibility to climate risks. Therefore, it is vital that local, state, and federal entities consider expanding these policies to reduce climate susceptibility of a growing and vulnerable population.

## **PART I: CLIMATE CHANGE AND INCARCERATION**

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<sup>16</sup> See generally Katherine LeMasters et al., *Carceral epidemiology: mass incarceration and structural racism during the COVID-10 pandemic*, 7 LANCET PUB. HEALTH e287-e290 (2022) (declaring abolition as within the realm of public health research, evidenced by the ways that COVID-19 highlighted racial disparities in jails and prisons); Paddy Farr, *Toward a critical race analysis of the COVID-19 crisis in US carceral systems*, 42 CRITICAL SOC. POL'Y (2021) (finding that the increased rate of COVID-19 infection for the detained population is linked to the institutional racism in our criminal justice system); Lauren Jean Natoli et al., *Incarceration and COVID-19: Recommendations to curb COVID-19 disease transmission in prison facilities and surrounding communities*, 18 INT'L J. ENV'T RSCH. & PUB. HEALTH 9790 (2021) (stating that prison reform is necessary to equitably address COVID-19, especially because of the racial disparities in incarceration and early release rates).

<sup>17</sup> Press Release, American Medical Association, *AMA Adopts New Policy Declaring Climate Change a Public Health Crisis* (June 13, 2022), <https://policysearch.ama-assn.org/policyfinder/detail/climate%20change?uri=%2FAMADoc%2Fdirectives.xml-D-135.966.xml> [<https://perma.cc/9JZ7-YVAA>].

With the highest incarceration rate of any country in the world, the United States is responsible for almost two million people who are confined in its jails and prisons.<sup>18</sup> The prison population in the U.S. has quadrupled over the last four decades because of increasingly harsh criminal laws.<sup>19</sup> Over half of incarcerated people are in prison for nonviolent crimes, although this term is nuanced because the label “violent crime” does not automatically denote physical harm.<sup>20</sup> Currently, the federal prison system and at least ten state prison systems are operating at overcapacity.<sup>21</sup> This number is down from 2013, when at least 18 state systems exceeded capacity, but then court orders and consent decrees began requiring states to reduce overcrowding.<sup>22</sup> Overcrowding puts additional stress on already crumbling infrastructure in many prisons, but repairing this infrastructure takes money that most systems do not have.<sup>23</sup> In 2014, the Bureau of Prisons was estimated to have an accumulation of 185 anticipated projects—at a cost of \$370 million—to fix issues from overcrowding and aging infrastructure.<sup>24</sup>

People who live in these deteriorating conditions are typically older and/or suffer from chronic health problems.<sup>25</sup> The population of people in prison who are 55 and older increased by 282 percent from 1995 to 2010 due to policies like mandatory minimum sentences, three-strikes laws, and life without parole sentences.<sup>26</sup> People in local, state, and federal correctional facilities are also more likely to have chronic illnesses because of factors like age, race, and lack of access

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<sup>18</sup> Prison Pol’y Initiative, *United States Profile*, <https://www.prisonpolicy.org/profiles/US.html> [<https://perma.cc/NR4H-LC8F>] (last visited Sept. 23, 2022).

<sup>19</sup> Njideka C. Motanya & Pamela Valera, *Climate change and its impact on the incarcerated population: A descriptive review*, 31 *SOCIAL WORK IN PUBLIC HEALTH* 348, 349 (2016).

<sup>20</sup> Prison Pol’y Initiative, *Mass Incarceration: The Whole Pie 2023*, <https://www.prisonpolicy.org/reports/pie2024.html> [<https://perma.cc/93ZL-SVQB>] (last visited Apr. 24, 2024). “Violent” and “nonviolent” designations do not indicate whether a crime was a dangerous or serious act. Rather, these designations reflect biased, and sometimes racialized, language that is used to increase sentences and prevent effective reform. For instance, making methamphetamines and stealing drugs are considered violent crimes in some states, which will enhance a person’s sentence and give them a “violent” record.

<sup>21</sup> Nolan, *supra* note 12.

<sup>22</sup> SABIN CENTER FOR CLIMATE CHANGE LAW, *supra* note 6, at 12.

<sup>23</sup> See generally US DEP’T OF JUST., FY 2016 PERFORMANCE BUDGET (Feb. 2015), [https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/02/federal\\_bureau\\_of\\_prisons\\_bop\\_bf.pdf](https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/02/federal_bureau_of_prisons_bop_bf.pdf); CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL PRISON POPULATION BUILDUP: OPTIONS FOR CONGRESS (May 2016), <https://sgp.fas.org/crs/misc/R42937.pdf>.

<sup>24</sup> Motanya & Valera, *supra* note 19, at 350.

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

<sup>26</sup> *Id.* Younger prisoners may also have exacerbated health issues because they experience accelerated aging, with their biological age often showing as ten to fifteen years older than their chronological age. Susan J. Loeb & Azza Abudagga, *Health-related research on older inmates: an integrative review*, 29 *RSCH. IN NURSING & HEALTH* 556, 557 (2006).

to healthcare before incarceration.<sup>27</sup> Using data from 2011 to 2012, researchers found that people in these facilities are 31 percent more likely to have asthma than the general population and that 40 percent of people in these facilities have a chronic medical condition such as hypertension or hepatitis C.<sup>28</sup> Lastly, people in prison are 3.4 times more likely to have heart-related health problems and 1.5 times more likely to have diabetes.<sup>29</sup>

When people with chronic illnesses are sheltered in buildings with crumbling infrastructure, they have a higher risk of health or safety issues during extreme weather events.<sup>30</sup> Climate catastrophes such as wildfires, extreme heat, and flooding endanger communities across the globe.<sup>31</sup> Communities with higher incarceration rates and increased climate vulnerability typically overlap geographically, with four states—Texas, Florida, North Carolina, and California—containing almost a third of these highly vulnerable areas.<sup>32</sup> During natural disasters, emergency services in these communities are more strained as service providers balance the needs of the people who are not incarcerated with the needs of the people who are.<sup>33</sup>

Correctional facilities have legal duties to the people in their care, especially as these facilities strip people of their agency and autonomy.<sup>34</sup> However, facilities seldom honor this duty in the case of natural disasters. While facilities usually have emergency protocols for instances of inmate violence, they often do not have protocols for natural disasters.<sup>35</sup> In general, and especially in response to a natural disaster, corrections officers are advised not to trust incarcerated people in case they try to riot or cause damage.<sup>36</sup>

Correctional departments emphasize that evacuation of facilities is a difficult decision to make, dependent on factors like staff safety, safe evacuation routes, and adequate destination sites.<sup>37</sup> Once a facility makes the decision to evacuate, officials do not inform the people in their

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<sup>27</sup> See generally SABIN CENTER FOR CLIMATE CHANGE LAW, *supra* note 6; Prison Pol’y Initiative, *Chronic Punishment: The unmet health needs of people in state prisons*, <https://www.prisonpolicy.org/reports/chronicpunishment.html> [<https://perma.cc/3JPJ-T2Y8>] (last visited Feb. 10, 2024).

<sup>28</sup> US DEP’T OF JUST., MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES 2 (Oct. 2016), <https://bjs.ojp.gov/content/pub/pdf/mpsfpji1112.pdf>.

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

<sup>30</sup> Kristen N. Cowan et al., *Overlapping crises: Climate disaster susceptibility and incarceration*, 19 INT’L J. ENV’T RSCH. & PUB. HEALTH 7431, 7431.

<sup>31</sup> See generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2021 THE PHYSICAL SCIENCE BASICS (2021), [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_Full\\_Report.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf).

<sup>32</sup> Cowan et al., *supra* note 30, at 7434.

<sup>33</sup> *Id.* at 7434–35.

<sup>34</sup> See generally U.S. Const. amend. XIII; Ariz. Rev. Stat. § 31-121; Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997a.

<sup>35</sup> J. Carlee Purdam, *Hazardous or Vulnerable? Prisoners and Emergency Planning in the U.S.*, EMERGING VOICES IN NATURAL HAZARDS RESEARCH 179, 179 (Fernando I. Rivera ed., 2019).

<sup>36</sup> *Id.* at 180; Gary York, *Complacency Has No Place in Corrections*, CORRECTIONS 1 (July 13, 2021), <https://www.corrections1.com/officer-safety/articles/complacency-has-no-place-in-corrections-PO5j2zyJfb4c6NEF/> (advising corrections officers that “[t]rusting an inmate is letting your guard down.”).

<sup>37</sup> *Id.* at 186

care of the evacuation and shut off communication between those people and their loved ones outside of the facility.<sup>38</sup> When transporting incarcerated people during a natural disaster, more emphasis is placed on limiting people's mobility than ensuring humane treatment. For example, as zip-tied women from an Oregon prison sat in a bus for eight hours waiting to be transported, officials told them to urinate and defecate in their pants, with women eventually having no choice but to throw feces and tampons out of bus windows.<sup>39</sup> Additionally, because officials often transport people into another correctional facility, they face significant safety risks due to the mixing of genders, ages, and people with opposing gang affiliations.<sup>40</sup>

### *A. Facing extreme heat in an incarceration facility*

Over a third of U.S. detention facilities have historically had more than 50 days a year with a heat index above 90 degrees.<sup>41</sup> These temperatures are defined as "extreme heat," which is responsible for the most deaths globally among weather-related events.<sup>42</sup> Prison systems in thirteen states lack universal air conditioning in their facilities, with these states often located in the hottest regions of the country.<sup>43</sup> Without adequate ventilation and air conditioning,

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<sup>38</sup> *Id.* at 187.

<sup>39</sup> Conrad Wilson, *Oregon Prisoners Describe 'Insane' Fire Evacuation, Looming COVID-19 Threat*, OPB (Sept. 16, 2020), <https://www.opb.org/article/2020/09/16/oregon-wildfires-evacuation-prison-coronavirus/> [<https://perma.cc/H3JA-8RB3>]. During the Riverside and Beachie Creek fires in September 2020, officials were forced to evacuate the Coffee Creek Correctional Facility, Oregon's only state prison for women. Due to a lack of evacuation procedures, the transportation of the women was unorganized, unsanitary, and dangerous. Further, the prison that received the women was not prepared for additional prisoners, with many women being forced to rest on bare metal bed frames because they did not receive mattresses.

<sup>40</sup> Hilary Beaumont, *How Prisons in a US State Botched Wildfire Evacuations*, AL JAZEERA (Dec. 8, 2021), <https://www.aljazeera.com/news/2021/12/8/how-prisons-in-a-us-state-botched-wildfire-evacuations#> [<https://perma.cc/4QFN-A38Z>]. During wildfire evacuations, the Oregon State Penitentiary absorbed populations from three of the state's prisons, leading to 11 fights and assaults on 21 people.

<sup>41</sup> Brown, *supra* note 1.

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

<sup>43</sup> Alexi Ones, *Cruel and Unusual Punishment: When States Don't Provide Air Conditioning in Prison*, PRISON POL'Y INITIATIVE (June 18, 2019), <https://www.prisonpolicy.org/blog/2019/06/18/air-conditioning/> [<https://perma.cc/C949-M4Q5>]. Alabama, Arizona, Florida, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, South Carolina, Texas, and Virginia are the thirteen states that are known to not have universal air conditioning, though there are no national statistics tracking these metrics.

temperatures exceed 100 degrees,<sup>44</sup> especially if the facilities are overcrowded.<sup>45</sup> Both corrections officers and people incarcerated in these facilities have been hospitalized for heat-related illnesses.<sup>46</sup> However, unlike the officers, people who are incarcerated during extreme heat events lack available drinking water and safe places to sleep, as the metal bed frames become too hot to touch.<sup>47</sup>

Almost two-thirds of the state prisons in Texas, America's fourth hottest state, lack air conditioning, resulting in temperatures of almost 150 degrees inside facilities.<sup>48</sup> It is difficult to accurately count the number of deaths from heat-related illnesses because many people who are more susceptible to those illnesses have additional medical conditions.<sup>49</sup> When considering these variables, it is estimated that 13 percent of deaths in Texas's non-air conditioned prisons during the warm months of 2001–2019 are attributed to extreme heat days, compared to .35 percent of deaths for non-incarcerated individuals during that same time period.<sup>50</sup> Researchers looking at prison across the country found that a five percent increase in total mortality, a seven percent increase in heart-disease related mortality, and a nine percent increase in suicide were attributed to a ten degree increase in temperature.<sup>51</sup> These trends varied across regions: a two-day heatwave

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<sup>44</sup> Maurice Chammah & John Carlos Frey, "Cooking Them to Death:" *The Lethal Toll of Hot Prisons*, THE MARSHALL PROJECT (Oct. 11, 2017),

<https://www.themarshallproject.org/2017/10/11/cooking-them-to-death-the-lethal-toll-of-hot-prisons> [<https://perma.cc/UEN6-84FT>].

<sup>45</sup> Julianne Skarha et al., *Heat-related mortality in U.S. state and private prisons: A case-crossover analysis*, 18 PLOS ONE, e0281389, 2 (2023) [hereinafter Heat-Related Mortality].

<sup>46</sup> J. Carlee Purdum, *Conditions in Prisons During Heat Waves Pose Deadly Threats to Incarcerated People and Prison Staff*, THE CONVERSATION (Aug. 18, 2022), <https://theconversation.com/conditions-in-prisons-during-heat-waves-pose-deadly-threats-to-incarcerated-people-and-prison-staff-188272> [<https://perma.cc/54KK-L6HU>] [hereinafter Heat Waves].

<sup>47</sup> Hannah Grabenstein & Justin Stabley, 'I Thought I Was Going to Die There.' *What It's Like to Live With Rising Temperatures in Prisons*, PBS (Aug. 19, 2022),

<https://www.pbs.org/newshour/nation/i-thought-i-was-going-to-die-there-what-its-like-to-live-with-rising-temperatures-in-prison> [<https://perma.cc/UZ4E-4XC2>]. People recount frying eggs

on the concrete floor of their cells and flooding their toilets to soak their cell floors in search of a cooler place to sleep.

<sup>48</sup> Alleen Brown, *Study: Extreme Heat Responsible for Hundreds of Deaths in Texas Prisons*, GRIST (Nov. 10, 2022), <https://grist.org/equity/texas-prisons-heat-air-conditioning-study/>

[<https://perma.cc/Y75R-BUZU>] [hereinafter Hundreds of Deaths]; Nazish Dholakia, *Prison is Already Hell, and Climate Change is Making It Worse*, VERA INSTITUTE (Jul. 6, 2022),

<https://www.vera.org/news/prison-is-already-hell-and-climate-change-is-making-it-worse> [<https://perma.cc/W2C5-7LC7>].

<sup>49</sup> Grabenstein & Stabley, *supra* note 47; Heat Waves, *supra* note 46. At least twenty-three people who have been incarcerated in Texas jails or prisons have died of heat stroke since 1998.

<sup>50</sup> Julianne Skarha et al., *Provision of air conditioning and heat-related mortality in Texas prisons*, 5 JAMA NETWORK OPEN, e2239849, 5 (2022).

<sup>51</sup> Heat-Related Mortality, *supra* note 45, at 5.



increased mortality by 21 percent in the Northeast, 0.8 percent in the Midwest, 1.3 percent in the South, and 8.6 percent in the West.<sup>52</sup>

Aging populations and populations with chronic illnesses are more vulnerable to heat-related illnesses.<sup>53</sup> Generally, heat exposure is linked to an 8.2 percent increase in risk of mortality for adults over 75 years old,<sup>54</sup> a 14 percent increase in risk of diabetes-related death,<sup>55</sup> and an 8.8 percent increase in cardiovascular-related mortality.<sup>56</sup>

### ***B. Navigating floods and their effects on prisons***

Six hundred and twenty-one facilities in both coastal and land-locked states have major flood risks.<sup>57</sup> After a flood event, incarcerated people are forced to wait until prison officials initiate evacuation procedures, sometimes without electricity or adequate food.<sup>58</sup> People's cells may be flooded with feces from sewage overflows because of poorly maintained plumbing systems.<sup>59</sup> Few state prisons have emergency evacuation procedures for floods, even in coastal states that would have sufficient notice in the case of a hurricane.<sup>60</sup> Additionally, many prisons are at higher risk for flood and hurricane damage because they are built on toxic or environmentally degraded lands.<sup>61</sup>

Louisiana, a hurricane-ridden state with the highest death rate of incarcerated people in the United States, has no mandated systems for its prisons during flooding events.<sup>62</sup> After Hurricane Katrina, staff at Orleans Parish Prison locked people in their cells without food, water, or

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

<sup>53</sup> SABIN CENTER FOR CLIMATE CHANGE LAW, *supra* note 6, at 18.

<sup>54</sup> Brooke G. Anderson & Michelle L. Bell, *Weather-related mortality: How heat, cold, and heat waves affect mortality in the United States*, 20 EPIDEMIOLOGY 205, 210 (2009).

<sup>55</sup> Xuping Song, et al., *Impact of short-term exposure to extreme temperatures on diabetes mellitus morbidity and mortality? A systematic review and meta-analysis*, 28 ENV'T SCI. & POLLUTION RSCH. 58035, 58040 (2021).

<sup>56</sup> Anderson & Bell, *supra* note 54, at 210.

<sup>57</sup> Trapped, *supra* note 9.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Morgan Maner et al., *Where do you go when your prison cell floods? Inadequacy of current climate disaster plans of US Departments of Correction*, 112 AM. J. PUB. HEALTH 1382, 1383 (2022).

<sup>61</sup> Tamar Sarai, *Climate change puts the health and lives of incarcerated people at risk*, PRISM (Nov. 18, 2020), <https://prismreports.org/2020/11/18/climate-change-puts-the-health-and-lives-of-incarcerated-people-at-risk/> [<https://perma.cc/T5BX-8XE8>].

<sup>62</sup> Adam Mahoney, *Floods, power outages, no running water: Jails during Hurricane Ida*, GRIST (Sept. 21, 2021), <https://grist.org/equity/hurricane-ida-jails-prisons-emergency-response/> [<https://perma.cc/A9H3-QE52>]. Louisiana would have the highest incarceration rate in the world if it were its own country.

ventilation.<sup>63</sup> In the eventual evacuation days later, people said that they saw bodies floating in the facility, and, afterwards, 517 incarcerated people were listed as unaccounted for.<sup>64</sup> During flooding events, most deaths do not occur during the initial storm, but rather in the following days when people do not have access to food, drinking water, electricity, or medical services.<sup>65</sup>

### C. *Managing wildfires with overcrowded prison systems*

In the ten states that have the highest number of carceral facilities in areas with wildfire risk, there are a total of 266 facilities with extreme wildfire risk.<sup>66</sup> There are 54 carceral facilities that house more than 1,000 people and have extreme wildfire risk, and these high-capacity facilities will see the most people harmed by wildfires.<sup>67</sup> States have chosen not to evacuate people in prisons during wildfires, even as thousands of nearby residents are ordered to leave.<sup>68</sup> People in these prisons are left for weeks without electricity, working toilets, or functioning ventilation systems. Most officers only give people masks as an attempt to mitigate health risks from smoke inhalation.<sup>69</sup>

Two-thirds of California's prisons are near or inside fire zones, with the other one-third being at least ten miles from them.<sup>70</sup> Twenty-four of California's prisons responsible for over

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<sup>63</sup> Human Rights Watch, *New Orleans: Prisoners Abandoned to Floodwaters*, HUMAN RIGHTS WATCH (Sept. 21, 2005), <https://www.hrw.org/news/2005/09/21/new-orleans-prisoners-abandoned-floodwaters> [<https://perma.cc/Q4G6-A4NS>]. In all, 7,000 prisoners were stuck in cells filled chest-high with sewage water without electricity for days following Hurricane Katrina. Montse Reyes, *Many Incarcerated People in Louisiana Left Behind in the Wake of Hurricane Ida*, PRISM (Sept. 2, 2021), <https://prismreports.org/2021/09/02/many-incarcerated-people-in-louisiana-left-behind-in-the-wake-of-hurricane-ida/> [<https://perma.cc/R2H9-T3BT>].

<sup>64</sup> Human Rights Watch, *supra* note 63.

<sup>65</sup> See Mahoney, *supra* note 62; Deidre McDonald, *What Happened When a Hurricane Flooded My Prison*, The Marshall Project (Aug. 2, 2018), <https://www.themarshallproject.org/2018/08/02/what-happened-when-a-hurricane-flooded-my-prison> [<https://perma.cc/3VMA-SLBQ>]. Researchers found that 66 percent of people in state and federal prisons reported taking prescription medication, and so lack of access to medical services may have dire consequences. US DEP'T OF JUST., *MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES 2* (Oct. 2016), <https://bjs.ojp.gov/content/pub/pdf/mpsfpi1112.pdf>.

<sup>66</sup> Brown, *supra* note 1.

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

<sup>68</sup> See Jessica Yu, *Neglect, Wildfires and Poor Infrastructure Threaten California Inmates*, THE DAVIS VANGUARD (Mar. 14, 2022), <https://www.davisvanguard.org/2022/03/neglect-wildfires-and-poor-infrastructure-threaten-california-inmates/> [<https://perma.cc/2HYG-XPSR>]; Pendarvis Harshaw, *Let's Talk About Wildfires and Prisons*, KQED (Aug. 24, 2020), <https://www.kqed.org/arts/13885195/lets-talk-about-wildfires-and-prisons> [<https://perma.cc/FDR2-UNZY>]; Brown, *supra* note 1.

<sup>69</sup> Yu, *supra* note 68; Brown, *supra* note 1.

<sup>70</sup> Heather Harris et al., *What Can California Prisons Do When Wildfires Close In?*, PUB. POL'Y INST. OF CAL. (Nov. 13, 2020), <https://www.ppic.org/blog/what-can-california-prisons-do-when-wildfires-close-in/> [<https://perma.cc/49MS-C8B8>] (Nov. 13, 2020). The California Correctional

65,000 people are located within five miles of fire hazard zones.<sup>71</sup> In late 2020, almost 3,500 people being held at Solano State Prison were forced to stay in their cells, breathing in smoke from the fires.<sup>72</sup> While officials ordered 15,000 nearby residents to evacuate the area because of the fire, the California Department of Corrections and Rehabilitation removed the prison from the mandatory evacuation listing because the people in prisons “were not in immediate danger.”<sup>73</sup>

Smoke inhalation, particularly inhalation of the fine particles that penetrate deep into a person’s lungs, causes health problems ranging from burning eyes to aggravated chronic heart and lung diseases.<sup>74</sup> Experts emphasize that older adults, people with heart or lung diseases, and people with diabetes should avoid breathing in smoke from wildfires because of the long-term effects.<sup>75</sup> Officials at correctional facilities will sometimes decide to evacuate. Not because of proximity to fire, but because people under their care suffer from these chronic health conditions.<sup>76</sup>

#### *D. Working for prisons during natural disasters*

During natural disasters, facility officials may order or encourage incarcerated people to take actions that will protect the facilities. For example, prisoners of Lafourche Parish Jail in Louisiana were tasked with filling sandbags to protect property during Hurricane Ida.<sup>77</sup> Additionally, both California and Arizona have job programs for people in prisons to fight wildfires. While the professional firefighters in the Department of Forestry and Fire Management (DFFM) are typically paid \$22 an hour, prisoner-firefighters in Arizona earn \$1.50 per hour of actively fighting a fire and \$.50 per hour for other firefighting work.<sup>78</sup> Importantly, people in

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Center is in the 90th percentile for wildfire danger, with a fifth of state institutions falling above the 95th percentile. Brown, *supra* note 1.

<sup>71</sup> Harris et al., *supra* note 70.

<sup>72</sup> Harshaw, *supra* note 68.

<sup>73</sup> See generally *id.*; Yu, *supra* note 69; Sam Levin, ‘Severe Inhumanity’: California Prisons Overwhelmed by COVID Outbreaks and Approaching Fires, THE GUARDIAN (Aug. 21, 2020), [https://amp.theguardian.com/us-news/2020/aug/21/california-fires-prisons-covid-outbreaks?\\_\\_twitter\\_impression=true](https://amp.theguardian.com/us-news/2020/aug/21/california-fires-prisons-covid-outbreaks?__twitter_impression=true) [https://perma.cc/H3UD-ENRP].

<sup>74</sup> U.S. Env’tl. Prot. Agency, *Health effects attributed to wildfire smoke*, <https://www.epa.gov/wildfire-smoke-course/health-effects-attributed-wildfire-smoke> [https://perma.cc/MW3P-MSL4] (last visited Feb. 10, 2024).

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

<sup>76</sup> Chuck Hildebrand, *Continuity best practices from 2013 wildfire evacuation of the Colorado territorial correctional facility*, EMA CONTINUITY WEBINAR SERIES (June 3, 2015), <https://share.dhs.gov/p8rh8ywp992/?proto=true> [https://perma.cc/FU8A-Z6SP]; See also *infra* Part I.

<sup>77</sup> Mahoney, *supra* note 62.

<sup>78</sup> Dale Chappell, *Arizona Pays Prisoners Pennies on the Dollar to Fight Fires, All in the Name of Saving Money*, PRISON LEGAL NEWS (Feb. 1, 2021), <https://www.prisonlegalnews.org/news/2021/feb/1/arizona-pays-prisoners-pennies-dollar-fight->

prison are not allowed to unionize and are not covered by workers' compensation if they are injured or killed while working.<sup>79</sup>

Health and safety are significant concerns with fighting wildfires due to its inherently dangerous nature and the increased risk of respiratory disease and cancer.<sup>80</sup> At the same time, many of the participants appreciate the benefits of the firefighting program, even saying that fighting fires is safer than being in prison.<sup>81</sup> These programs are only noted here because people in prison provide a cheap labor force, which may influence a state's decision to release people in prisons. As California was struggling to comply with a prison population cap imposed by the U.S. Supreme Court,<sup>82</sup> a federal court ordered the state prison system to grant early release to minimum security prisoners.<sup>83</sup> Lawyers representing the state argued against early release because it would

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fires-all-name-saving-money/ [https://perma.cc/UF6Y-NAH7]. Because the Thirteenth Amendment bans slavery “except as a punishment for crime whereof the party shall have been duly convicted,” it is constitutional for inmate firefighters to be paid just 6 percent of what typical firefighters are paid.

<sup>79</sup> AM. CIV. LIBERTIES UNION, CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS 6 (June 2022), <https://www.aclu.org/publications/captive-labor-exploitation-incarcerated-workers>.

<sup>80</sup> In 2017, two inmate firefighters were killed fighting a fire in California. In 2006, an entire team of inmate firefighters died. Chuck McFadden, *Inmate Firefighters Risk Death at \$1 an Hour*, CAPITAL WEEKLY (Aug. 9, 2018), <https://capitolweekly.net/inmate-firefighters-risk-death-1-hour/> [https://perma.cc/Y6A8-B3A9]; Tom Story, *Remembering the Dude Fire*, AZ CENTRAL (June 26, 2015), <https://www.azcentral.com/story/behind-the-lens/2015/06/26/dude-fire/28981819/> [https://perma.cc/W5UJ-FR5F]. Typical DFFM wildland fighters will undergo 3,000 hours of apprenticeship training and two months in a firefighting academy, but inmate firefighters do not have those same requirements. United States Forest Serv., *Wildland Firefighter Apprenticeship Program*, <https://www.fs.usda.gov/working-with-us/jobs/fire-apprentice> [https://perma.cc/6H3W-ZYMH] (last visited Jan. 30, 2023).

<sup>81</sup> People in prison would often strive to be eligible to go to the fire camps because it granted more freedoms, such as increased visits from family and more relaxed boundaries. People who served in the program discuss the benefits of being in nature and the difference in camaraderie between the camps and prison, with less power dynamics, racial segregation, and violence. Further, the staff at the camps treat the people serving their time as humans, which differed greatly from their treatment in prisons. Eli Hager, *Prisoners Who Fight Wildfires in California: An Insider's Look*, THE MARSHALL PROJECT (Aug. 20, 2015), <https://www.themarshallproject.org/2015/08/19/prisoners-who-fight-wildfires-in-california-an-insider-s-look> [https://perma.cc/45GS-5PT5].

<sup>82</sup> See *Brown v. Plata*, 563 U.S. 493 (2011).

<sup>83</sup> *Coleman v. Brown*, No. 2:90-cv-0520 LKK DAD (PC), 2014 U.S. Dist. LEXIS 86855, 86869 (E.D. Cal. June 23, 2014).

“severely impact fire camp participation.”<sup>84</sup> Because over one-third of California’s fire workers come from its prison system, the lawyers said that this work force reduction is dangerous.<sup>85</sup>

## **PART II: CONSTITUTIONAL CHALLENGES TO DANGEROUS PRISON CONDITIONS**

Through damages and injunctive relief that may result from Eighth Amendment suits, people in prison can retroactively address the inhumane conditions of their confinement. However, Eighth Amendment claims are increasingly more difficult to win, fail to prevent the harm from happening, and involve an incredible amount of time and resources.

The Eighth Amendment prohibits cruel and unusual punishment so that the punishment does not offend societal standards.<sup>86</sup> The U.S. Supreme Court first found an Eighth Amendment violation in *Weems v. United States*<sup>87</sup> and eventually stated that the Eighth Amendment is to evolve with the progressing views of society and justice.<sup>88</sup> At the time, the public felt that harsh conditions were simply a part of a person’s punishment, but, in 1970, a federal court found that violations of the Eighth Amendment include appalling conditions of confinement.<sup>89</sup> For the next few decades, lower federal courts continued to hear cases regarding conditions of confinement and often ruled that such conditions violated the Eighth Amendment.<sup>90</sup> However, the U.S. Supreme Court narrowed these rulings as it started accepting prison condition cases, claiming that the Eighth Amendment does not mandate “comfortable prisons.”<sup>91</sup> The Court eventually held that people in prison must first show that the conditions are serious enough to violate their constitutional rights.

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<sup>84</sup> David Fathi, *Prisoners Are Getting Paid \$1.45 a Day to Fight the California Wildfires*, AM. CIV. LIBERTIES UNION (Nov. 15, 2018), <https://www.aclu.org/news/prisoners-rights/prisoners-are-getting-paid-145-day-fight-california-wildfires> [<https://perma.cc/VG6U-KR2K>]; Adam Serwer, *California AG “Shocked” To Learn Her Office Wanted to Keep Eligible Parolees in Jail to Work*, BUZZFEED NEWS (Nov. 18, 2014), <https://www.buzzfeednews.com/article/adamserwer/some-lawyers-just-want-to-see-the-world-burn> [<https://perma.cc/5V3U-5RDA>].

<sup>85</sup> Tony Dokoupil, *In California, a Clash of Ideals: Fighting Fires and Fixing The Prison System*, MSNBC (Sept. 15, 2015), <https://www.msnbc.com/msnbc/california-clash-ideals-fighting-fires-and-fixing-the-prison-system-msna682481> [<https://perma.cc/KZB7-G88W>].

<sup>86</sup> Gutterman, *supra* note 13, at 378, 380 (1995).

<sup>87</sup> *Weems v. United States*, 217 U.S. 349 (1910) (finding that 15 years in prison was disproportionate to the severity of the crime of falsifying documents).

<sup>88</sup> Gutterman, *supra* note 13, at 377.

<sup>89</sup> *Holt v. Sarver*, 300 F. Supp. 825, 826 (E.D. Ark. 1969) (ruling that the entire Arkansas prison system constituted cruel and unusual punishment).

<sup>90</sup> *See generally* *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676, 684 (D. Mass. 1973); *Pugh v. Lock* 406 F. Supp. 318, 323 (M.D. Ala. 1976); *Ramos v. Lamm*, 639 F.2d 559, 570 (10th Cir. 1980); *Gates v. Collier*, 489 F.2d 298 (5th Cir. 1973).

<sup>91</sup> *Rhodes v. Chapman*, 452 U.S. 337, 348–49 (1981) (ruling that conditions of confinement must be extreme to be unconstitutional).

Second, the claimants must show that the prison officials must intentionally act, with “deliberate indifference,” to continue these conditions.<sup>92</sup> These elements constitute the modern day test for Eighth Amendment violations and are referred to as the objective and subjective prongs.<sup>93</sup>

Even with the high standard for Eighth Amendment claims, people in prison and jails have won suits alleging unconstitutional conditions due to environmental events such as excessive heat. In 2004, inmates on Mississippi’s death row brought a successful class action suit for extreme temperatures, humidity, mosquito infestation, and other conditions.<sup>94</sup> Unfortunately, applications of these holdings are highly individualized, leading to limited opportunities for relief. For example, in *Graves v. Arpaio*, the Ninth Circuit found that the “dangerously high” temperatures in Maricopa County jails violated the Eighth Amendment.<sup>95</sup> However, one form of relief—providing housing with cooler temperatures—was limited to only pretrial detainees who require psychotropic medications.<sup>96</sup> Further, in *Ball v. LeBlanc*, plaintiffs on death row did not have air conditioning when temperatures exceeded 100° F.<sup>97</sup> The court held that the conditions violated their Eighth Amendment rights only because the plaintiffs all suffered from medical conditions that made them more vulnerable to heat-related injuries.<sup>98</sup>

People can only succeed on these claims if they have the resources to navigate a complex legal and administrative system. For example, a person with chronic breathing problems in a California jail sought a transfer to a facility with less exposure to wildfire smoke.<sup>99</sup> Although the court stated that the pro se plaintiff may have a valid Eighth Amendment claim, it denied the request for injunctive relief because the plaintiff did not identify appropriate defendants in his motion and did not pursue action through the administrative appeal process.<sup>100</sup>

Legal advocacy organizations, politicians, and people in prison are exploring other legal routes to address safety issues during natural disaster events, though with limited success. For example, the Prisoners Legal Advocacy Network has sent the Department of Justice testimony from people who were incarcerated during Hurricane Harvey.<sup>101</sup> These testimonies allege

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<sup>92</sup> *Wilson v. Seiter*, 501 U.S. 294, 298, 300 (1991) (reasoning that prison officials must have acted in a wanton manner after being notified of inhumane conditions).

<sup>93</sup> Brenna Helpple-Schmleder, *Toxic Confinement: Can the Eighth Amendment protect prisoners from human-made environmental health hazards*, 110 NW. U. L. REV. 647, 655 (2016).

<sup>94</sup> *Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004) (ruling that officials must maintain a comfortable temperature to meet minimal constitutional standards, as the heat index regularly exceeds 90 degrees, the facility is not air conditioned, and medications given to many inmates interfere with their ability to thermoregulate).

<sup>95</sup> 623 F.3d 1043, 1045, 1049 (9th Cir. 2010).

<sup>96</sup> *Id.* at 1045, 1048. The court reasoned that psychotropic medications increase a person’s risk of heat-related illnesses and only pretrial detainees were held in hotter cells. *Id.* at 1049.

<sup>97</sup> 792 F.3d 584, 590 (5th Cir. 2015).

<sup>98</sup> *Id.* at 596.

<sup>99</sup> *Burton v. McDonald*, No. 2:11-cv-2187 KJN P, 2012 U.S. Dist. LEXIS 98529 (E.D. Cal. July 13, 2012)

<sup>100</sup> *Id.* at \*32–34.

<sup>101</sup> Letter from Prisoners Legal Advoc. Network, Nat’l Laws. Guild to John Caraway, Reg’l Dir., South Central Reg’l Off. (Sept. 11, 2017) (on file with the Nat’l Laws. Guild) <https://www.nlg.org/wp-content/uploads/2017/10/09-11-2017-DE-NJ-NLG-PLAN-Notice-to-FBOP-re-Post-Harvey-Conditions-w.-Exhibits.pdf>.

constitutional violations because people were unable to access food, water, and medications and were met with retaliation from the guards when they complained.<sup>102</sup> State laws can provide other courses of action for people who are incarcerated. The Louisiana Center for Children’s Rights is exploring legal action after juvenile detainees were housed in facilities for incarcerated adults during Hurricane Ida.<sup>103</sup> Louisiana law prohibits minors from being held in facilities for adults,<sup>104</sup> but this law was also violated years earlier when children as young as ten were held in adult facilities during Hurricane Katrina.<sup>105</sup>

While those who have been harmed by the prison system’s inadequate handling of natural disasters deserve justice, proactive solutions would prevent the harm from happening in the first place. Because successful claims are usually limited in their application and provide relief long after the injury, decarceration strategies offer a more humane approach.

### **PART III: PRISON REDUCTION STRATEGIES DURING COVID-19**

Like the lack of emergency evacuation procedures in prisons and jails during major climate events, these facilities did not have adequate procedures to handle the COVID-19 crisis. Scientists and medical experts warned of the high risk of severe outbreaks in jails and prisons due to overcrowding, poor sanitation and ventilation systems, and lack of adequate medical services.<sup>106</sup> As a result of mounting pressure from advocates, scientists, and people in prison, entities passed decarceration policies that reduced populations in local jails, with prison populations not far behind.<sup>107</sup> These measures led to an 11 percent reduction in the population of people incarcerated

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<sup>102</sup> *Id.*

<sup>103</sup> Rachel Mipro, *New Orleans Planned for Years to Send Juvenile Detainees to an Adult Prison During Hurricanes*, WWNO NEW ORLEANS PUBLIC RADIO (Sept. 24, 2021), <https://www.wwno.org/news/2021-09-24/new-orleans-planned-for-years-to-send-juvenile-detainees-to-an-adult-prison-during-hurricanes> [https://perma.cc/SR4M-CMXW].

<sup>104</sup> LA. CHILDREN’S CODE ACTS 1991, No. 235, §8, Art. 822 (effective Jan. 1, 1992).

<sup>105</sup> Press Release, Am. Civ. Liberties Union, ACLU Report Details Horrors Suffered by New Orleans Parish Prisoners in Wake of Hurricane Katrina (Aug. 10, 2006) (on file with Am. Civ. Liberties Union), <https://www.aclu.org/press-releases/aclu-report-details-horrors-suffered-orleans-parish-prisoners-wake-hurricane-katrina> [https://perma.cc/TMY3-JEKZ].

<sup>106</sup> See NAT’L ACADS. OF SCIS., ENG’G, & MED., *DECARCERATING CORRECTIONAL FACILITIES DURING COVID-19: ADVANCING HEALTH, EQUITY, AND SAFETY* (Oct. 2020), <https://nap.nationalacademies.org/read/25945/chapter/1>.

<sup>107</sup> VERA INST. OF JUST., *PEOPLE IN JAIL AND PRISON IN 2020 2* (Jan. 2021), <https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-2020.pdf>. These measures were insufficient to properly protect the people who were incarcerated; almost 2,500 people in state and federal prisons died from the coronavirus in the first year of the pandemic. U.S. DEP’T OF JUST., *IMPACT OF COVID-19 ON STATE AND FED. PRISONS, MARCH 2020–FEBRUARY 2021 1* (Dec. 20, 2022), <https://bjs.ojp.gov/content/pub/pdf/icsfp2021.pdf>.

at jails, prisons, and immigration centers between April 2020 and September 2020.<sup>108</sup> Between February 2020 and February 2021, the number of people in state, federal, and private prisons decreased more than 16 percent.<sup>109</sup>

Jails and prisons implemented decarceration strategies at different times, though jails eventually increased their populations again with a ten percent increase from June 2020 to September 2020.<sup>110</sup> Yet, the overall number of people incarcerated in prisons and jails remained the same during this period because those increases in jail populations offset the prison reductions that happened during the beginning of the pandemic.<sup>111</sup>

### *A. Decarceration Strategies Used During COVID-19*

Decarceration can happen by diversion, which is understood as the practice of directing people away from custody if they otherwise would have been incarcerated, or by releasing people who are currently incarcerated.<sup>112</sup> Diversion of people from detention centers is more proactive, allowing a person to avoid the trauma and long-term effects of incarceration. Early release also addresses overcrowded conditions and is central to ensuring adequate resources in prisons and jails.

Diversion tactics vary. They range from community-based services, which can divert people away from police encounters entirely, to prosecutor-led interventions, occurring before a charge, to judge-led interventions when choosing an alternative punishment.<sup>113</sup> Diversion is an effective solution that reduces a person's chances of future contact with the criminal legal system.<sup>114</sup> At the local level, diversion policies can be created by police and sheriff's departments. For example, in Fort Worth, Texas, the police department stopped arresting people for Class C misdemeanors that could instead result in the issuing of a ticket.<sup>115</sup> If an officer wanted to make

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<sup>108</sup> Franco-Paredes et al., *supra* note 14, at e11.

<sup>109</sup> U.S. DEP'T OF JUST., *supra* note 107, at 1.

<sup>110</sup> VERA INST. OF JUST., *supra* note 107, at 3–4.

<sup>111</sup> Because of these variables and because climate catastrophes call for more immediate decarceration, this analysis will focus on decarceration during the first six months of the pandemic.

<sup>112</sup> NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 106, at 50.

<sup>113</sup> Leah Wang & Katie Rose Quandt, *Building Exits Off the Highway to Mass Incarceration: Diversion Programs Explained*, PRISON POL'Y INITIATIVE (July 20, 2021), <https://www.prisonpolicy.org/reports/diversion.html> [<https://perma.cc/Y22D-X7NQ>].

<sup>114</sup> Akhi Johnson et al., *Diversion Programs Are a Smart, Sustainable Investment in Public Safety*, VERA INSTITUTE (Apr. 28, 2022), <https://www.vera.org/news/diversion-programs-are-a-smart-sustainable-investment-in-public-safety> [<https://perma.cc/F5WN-NVKQ>]. In a Texas county, diversion programs decreased the chances of a person being convicted of a future crime by 48 percent after ten years of participation, and, nationally, youth diversion programs are ten percent more effective at reducing recidivism.

<sup>115</sup> Bob D'Angelo, *Coronavirus: Fort Worth Police Will Not Make Arrests for Low-Level Crimes*, KIRO7 (Mar. 17, 2020), <https://www.kiro7.com/news/trending/coronavirus-fort-worth-police-will-not-make-arrests-low-level-crimes/IEEWIXWF4NCJNJVGYYJQYSTMXSI/> [<https://perma.cc/B798-46C9>]. Class C misdemeanors include thefts of less than \$100 and vandalism.



such an arrest, they needed approval from a commander.<sup>116</sup> Further, in Racine County, Wisconsin, the sheriff suspended non-violent arrests and admission to the jail in the first month of the pandemic.<sup>117</sup> This type of policing still addresses the concern for public safety, but does not require placing someone in jail or prison.

State court systems and correctional departments also used diversion strategies, usually in a swift manner reflecting the need for immediate action. For example, in the first month of the pandemic, the Maine court system vacated all outstanding warrants for unpaid court costs and for failure to appear.<sup>118</sup> Additionally, in the first month of the pandemic, the Supreme Court of South Carolina directed courts to release any person charged with a non-capital crime, unless that person posed a danger to the community or was considered a flight risk.<sup>119</sup> The court also declared that bench warrants for failure to appear would not be issued.<sup>120</sup> Further, the Colorado Department of Corrections suspended arrests of parolees for low level parole violations, opting instead to refer people to treatment or to issue house arrest.<sup>121</sup> Lastly, California's Judicial Council set bail at \$0 for most people that were accused of misdemeanors and lower-level felonies.<sup>122</sup>

On the other hand, states fail to accomplish decarceration through diversion when state prison systems refuse to accept new people into prisons, a tactic that Wisconsin, Illinois,

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<sup>116</sup> *Id.*

<sup>117</sup> Alyssa Mauk, *Racine Sheriff Suspends Non-Violent Arrests Due to COVID-19*, THE JOURNAL TIMES (Mar. 14, 2020), [https://journaltimes.com/news/local/crime-and-courts/sheriff-suspends-non-violent-arrests-due-to-covid-19/article\\_141c020d-b911-5453-a04a-e67b8070d17c.html](https://journaltimes.com/news/local/crime-and-courts/sheriff-suspends-non-violent-arrests-due-to-covid-19/article_141c020d-b911-5453-a04a-e67b8070d17c.html) [<https://perma.cc/YG9V-2Z8D>].

<sup>118</sup> State of Maine Jud. Branch, *Pandemic Management Order from the Maine Trial Court Chiefs Consolidating, Ratifying, and Superseding Previous Orders* (rev. Feb. 17, 2021), <https://www.courts.maine.gov/covid19/pmo-tc-1.pdf>; Judy Harrison, *Maine Courts Vacate Warrants for Unpaid Fines and Fees*, BANGOR DAILY NEWS (Mar. 16, 2020), <https://www.bangordailynews.com/2020/03/16/news/maine-courts-vacate-warrants-for-unpaid-fines-and-fees/> [<https://perma.cc/5GTK-M965>].

<sup>119</sup> Memorandum from Chief Just. Beatty, Supreme Court of S.C., to Magistrates, Municipal Judges, and Summary Court Staff (Mar. 16, 2020) (on file with S.C. Jud. Branch) <https://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2461> [<https://perma.cc/YWJ5-ZGYX>].

<sup>120</sup> *Id.*

<sup>121</sup> Press Release, Colo. Dep't of Corrections, *Department of Corrections Provides Updates on COVID-19 Prevention Plan* (Mar. 23, 2020), <https://drive.google.com/file/d/1CRNKVcdx8xNBDD8wy-8Qgq6fPVc1Xb21/view>.

<sup>122</sup> Merrill Balassone, *California Counties Keeping COVID-19 Emergency Bail Schedules*, CAL. COURTS NEWSROOM (Jul. 10, 2020), <https://newsroom.courts.ca.gov/news/california-counties-keeping-covid-19-emergency-bail-schedules> [<https://perma.cc/3B8Y-TQ57>]. The set bail rate was only in effect from April to June 2020.

California, and Oklahoma employed at the onset of the pandemic.<sup>123</sup> The people that would have been sent to state prisons were then forced to sit in jails for longer periods, creating a buildup in jails. Admissions to prison decreased 67 percent during the first month of the pandemic, but this decrease was likely due to both diversion tactics and a refusal to accept new people in the prisons.<sup>124</sup> For this reason, diversion strategies must be executed at both the state and local level if the goal is to reduce the overall number of people in incarceration facilities.<sup>125</sup>

Experts advocated for state and federal officials to release people through methods like early release credits, compassionate release, and home monitoring.<sup>126</sup> Governors in California, Kentucky, Oklahoma, and at least fifteen other states used their power to commute sentences or order the early release of certain people being held in state prisons.<sup>127</sup> U.S. Attorney General William Barr directed officials within the federal Bureau of Prisons to use home confinement and release for certain individuals,<sup>128</sup> resulting in 30,000 people being transferred out of prisons.<sup>129</sup> State legislatures also used their authority to pass bills that granted early release. For example, New Jersey passed a bill that allowed the release of people with less than a year on their sentence

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<sup>123</sup> Emily Hamer, *Wisconsin Gov. Tony Evers Halting Prison Admissions to Prevent COVID-19 Spread*, WISCONSIN STATE JOURNAL (Mar 22, 2020), [https://madison.com/news/local/crime-and-courts/wisconsin-gov-tony-evers-halting-prison-admissions-to-prevent-covid-19-spread/article\\_032e01f1-931c-5347-9e96-b9dd2894248a.html](https://madison.com/news/local/crime-and-courts/wisconsin-gov-tony-evers-halting-prison-admissions-to-prevent-covid-19-spread/article_032e01f1-931c-5347-9e96-b9dd2894248a.html) [<https://perma.cc/53CZ-5H78>]; Taylor Walker, *Gov. Newsom Signs Executive Order Closing Prisons and Youth Lockups to New Prisoners*, WITNESS LA (Mar. 24, 2020), <https://witnessla.com/gov-newsom-signs-executive-order-closing-prisons-and-youth-lockups-to-new-prisoners/> [<https://perma.cc/NA2N-5VR9>]; Emmanuel Camarillo, *Illinois Prisons Halt Admissions From County Jails to Slow Spread of Coronavirus*, CHICAGO SUN TIMES (Mar. 26, 2020), <https://chicago.suntimes.com/2020/3/26/21196581/illinois-prisons-coronavirus-halt-admissions> [<https://perma.cc/AA67-ZQFD>].

<sup>124</sup> U.S. DEP'T OF JUST., *supra* note 107, at 5.

<sup>125</sup> NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 106, at 51.

<sup>126</sup> This analysis does not explore compassionate release because it had a miniscule impact on the reduction of people in prison. In the 13 months following March 2020, the Bureau of Prisons director approved only 36 requests for compassionate release, even as the number of requests for release reached 31,000. Keri Blakinger & Joseph Neff, *31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36*, THE MARSHALL PROJECT (June 11, 2021), <https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36> [<https://perma.cc/6H96-QRPV>].

<sup>127</sup> Prison Pol'y Initiative, *The most significant criminal justice policy changes from the COVID-19 pandemic*, <https://www.prisonpolicy.org/virus/virusresponse.html> [<https://perma.cc/C2EU-MWT2>] (last visited Feb. 10, 2024) [hereinafter Policy Changes].

<sup>128</sup> Memorandum from the Att'y Gen. to the Dir. of Bureau of Prisons (Apr. 3, 2020) (on file with Dep't of Just.) [https://www.bop.gov/coronavirus/docs/bop\\_memo\\_home\\_confinement.pdf](https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf).

<sup>129</sup> Bureau of Prisons, *Home confinement milestones*, [https://www.bop.gov/resources/news/20210823\\_home\\_confinement\\_milestone.jsp](https://www.bop.gov/resources/news/20210823_home_confinement_milestone.jsp) [<https://perma.cc/FE6W-2E77>] (last visited Feb. 10, 2024).

through “public health emergency credits.”<sup>130</sup> Those who are serving charges for murder or sexual assault do not qualify for emergency credits. A person will be given four months’ worth of early release credit for each month that they have served in prison during a public health emergency.<sup>131</sup> California expanded their use of “good time credits” during the pandemic.<sup>132</sup> With this expansion, 7,000 people in California prisons were released, though this was only a drop in the bucket due to California’s high imprisonment rate.<sup>133</sup>

Along with governors and legislatures, state parole boards and departments of corrections expedited the release of people in prison. Departments in Wisconsin, Iowa, Connecticut, and at least ten other states granted discretionary release to people, typically focusing on older people and people who were medically vulnerable.<sup>134</sup> However, the number of people in each state that benefited from these programs ranged from the thousands to less than fifty.<sup>135</sup>

Because of the diversion tactics used early in the pandemic, experts question whether release methods caused the significant decline in prison populations.<sup>136</sup> Therefore, to better provide for people serving their sentences while still diverting people from incarceration, it is more

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<sup>130</sup> N.J. REV. STAT. § 30:4-123.100 (2020). The bill also tried to reduce sentence lengths through “compliance credits,” which are similar to the “good time credits” that many states have and allow for early release of people who had not violated rules during their stay in prison. *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Cal. Dep’t of Corrections and Rehabilitation, *Actions to reduce population and maximize space*, <https://www.cdcr.ca.gov/covid19/frequently-asked-questions-expedited-releases/> [<https://perma.cc/8AP9-9SQ4>] (last visited Feb. 10, 2024).

<sup>133</sup> Emily Widra & Wanda Bertram, *More States Need to Use Their “Good Time” Systems to Get People Out of Prison During COVID-19*, PRISON POL’Y INITIATIVE (Jan. 12, 2021), <https://www.prisonpolicy.org/blog/2021/01/12/good-time/> [<https://perma.cc/9SQM-NAYG>].

<sup>134</sup> Policy Changes, *supra* note 127.

<sup>135</sup> *Id.* In a more egregious example, the Louisiana Department of Corrections created a panel to review 1,100 people for temporary medical release. Two months later, the panel was suspended after only reviewing 600 cases and releasing 63 people—a mere 0.2 percent of the total prison population in the state. Lea Skene, *Panel Meant to Reduce Louisiana Prison Population During Pandemic Has Negligible Impact—0.2%*, THE ADVOCATE (June 30, 2020), [https://www.theadvocate.com/baton\\_rouge/news/coronavirus/panel-meant-to-reduce-louisiana-prison-population-during-pandemic-has-negligible-impact-0-2/article\\_39acdb9a-ba3e-11ea-ac28-df318eb8fe9b.html](https://www.theadvocate.com/baton_rouge/news/coronavirus/panel-meant-to-reduce-louisiana-prison-population-during-pandemic-has-negligible-impact-0-2/article_39acdb9a-ba3e-11ea-ac28-df318eb8fe9b.html) [<https://perma.cc/YJ2Y-NW5A>].

<sup>136</sup> NAT’L ACADS. OF SCIS., ENG’G, & MED., *supra* note 106, at 56–57. Like the case in Louisiana, federal and state officials granted releases to a small amount of the total population who was imprisoned. *Id.* at 57. The Department of Justice estimates that only 6 percent of releases from January 2020 to February 2021 were classified as expedited releases, with 25 states and the Bureau of Prisons reporting no expedited releases. U.S. DEP’T OF JUST., *supra* note 107, at 7. Politics further obstruct already lengthy institutional processes for granting early release by politics, with officials focusing more on potential public backlash and perceptions of community safety. NAT’L ACADS. OF SCIS., ENG’G, & MED., *supra* note 106, at 57.

efficient to employ a mixture of both diversion and release tactics. For example, in East Baton Rouge, Louisiana, local law enforcement agencies focused their arrests on serious and violent charges instead of misdemeanors.<sup>137</sup> At the same time, local prosecutors and public defenders worked with judges to release inmates who *could not* afford bond.<sup>138</sup>

### ***B. Court Cases and Orders***

Prisoners and advocates in numerous states filed emergency legal actions out of fear for their safety and others in the prisons. Typically, petitioners sought relief in the form of release, diversion, or both. However, because the releases were on a case-by-case basis, these court ordered releases are an inefficient way to accomplish large-scale decarceration.

In April 2020, people incarcerated at an Ohio prison brought an emergency habeas action requesting release due to the rapid spread of COVID-19 within the prison.<sup>139</sup> The Court of Appeals vacated the initial injunction because the petitioners did not show a likelihood of success on their Eighth Amendment claim.<sup>140</sup> The court said that, while the objective prong of unsafe conditions was satisfied, the Bureau of Prisons' response to the pandemic did not constitute deliberate indifference and, therefore, the subjective prong was not satisfied.<sup>141</sup> In late March 2020, the ACLU Foundation of Massachusetts, Committee for Public Counsel Services, and Massachusetts Association of Criminal Defense Lawyers filed an emergency petition for both diversion and release of people in Massachusetts prisons.<sup>142</sup> The complaint cited a Massachusetts statute that grants the court such powers of diversion and release.<sup>143</sup> Reasoning that the governor had declared a state of emergency, the court ruled that pre-trial detainees not charged with specific violent offenses and those held on probation and parole violations are eligible for hearings to be

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<sup>137</sup> Lea Skene, *Baton Rouge Jail Population Hits 10-Year Low Amid Efforts to Combat Coronavirus Spread*, THE ADVOCATE (Mar. 23, 2020), [https://www.theadvocate.com/baton\\_rouge/news/coronavirus/baton-rouge-jail-population-hits-10-year-low-amid-efforts-to-combat-coronavirus-spread/article\\_7fb7e6f2-6d5e-11ea-b883-97717b9dfbce.html](https://www.theadvocate.com/baton_rouge/news/coronavirus/baton-rouge-jail-population-hits-10-year-low-amid-efforts-to-combat-coronavirus-spread/article_7fb7e6f2-6d5e-11ea-b883-97717b9dfbce.html) [https://perma.cc/3LLS-MQ9Q].

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

<sup>139</sup> *Wilson v. Williams*, 455 F. Supp. 3d 467, 470 (N.D. Ohio 2020) (granting a preliminary injunction that ordered prison officials to evaluate people's eligibility for transfer, prioritizing the most medically vulnerable). *Id.* at 480.

<sup>140</sup> *Wilson v. Williams*, 961 F.3d 829, 844 (6th Cir. 2020).

<sup>141</sup> *Id.* at 840. The court stated that prison officials acted reasonably in implementing a six-point plan, which included limiting inmates' movement, providing continuous access to soap and water, and providing masks and testing to inmates. *Id.* at 841. However, prison officials only tested 524 of 2,537 people serving their sentences, with 24 percent of those tests coming back positive. *Wilson v. Williams*, No. 4:20-cv-00794, 2020 U.S. Dist. LEXIS 87607, at \*3 (N.D. Ohio May 19, 2020).

<sup>142</sup> *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, 484 Mass. 431, 434 (2020).

<sup>143</sup> *Id.* at 444.

released.<sup>144</sup> However, the court stated that it did not have the power to grant such relief to sentenced inmates and instead suggested reviews by the parole board.<sup>145</sup>

Even so, other courts successfully ordered the release of people in prisons, especially those deemed most vulnerable. For example, the Maryland Chief Judge ordered the state's trial courts to release people who were at risk for COVID-19, an action that state public defenders and prosecutors had already been taking.<sup>146</sup> Additionally, the Hawaii Supreme Court appointed a special master to work with public defenders and prosecutors on releasing inmates.<sup>147</sup> The court took this action after the state's Office of the Public Defender filed two petitions requesting large-scale releases of inmates.<sup>148</sup>

### *C. Racial Disparities in Decarceration During COVID-19*

Due to the disproportionate incarceration rates of BIPOC, racial equity must be centered throughout the entire decarceration process. During the pandemic, many of the decarceration policies had unequal effects, resulting in a worsening of racial disparities in jail and prison populations.<sup>149</sup>

Data released by two states illustrate that release methods often benefited white people in prison more than Black people. In Illinois, white people make up only 32 percent of the state prison population, but account for almost half of the early releases during the beginning of the

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<sup>144</sup> *Id.* at 447.

<sup>145</sup> *Id.* at 452.

<sup>146</sup> Phillip Jackson & Tim Prudente, *Maryland Chief Judge Barbera Encourages Release of At-Risk Prisoners Amid Coronavirus Pandemic*, THE BALTIMORE SUN (Apr. 14, 2020), <https://www.baltimoresun.com/coronavirus/bs-md-maryland-prisoners-coronavirus-order-20200414-wl7otaoihnfdsdi7clh7dm7fcv4-story.html> [https://perma.cc/67BN-LJLX].

<sup>147</sup> Yoohyun Jung, *Special Master Appointed To Recommend on COVID-19 Jail Releases*, HONOLULU CIVIL BEAT (Apr. 2, 2020), <https://www.civilbeat.org/2020/04/special-master-appointed-to-decide-on-covid-19-jail-releases/> [https://perma.cc/X4FC-LP7B]. The court established criteria for releasing people in prison, but disagreements with prosecutors over who should be eligible stalled the release process. *Id.*

<sup>148</sup> *See* Office of the Pub. Def. v. Connors, Nos. SCPW-20-0000200, SCPW-20-0000213, 2020 Haw. LEXIS 84 (Apr. 15, 2020).

<sup>149</sup> THURGOOD MARSHALL INSTITUTE, LESSONS LEARNED FROM COVID-19 FOR RACIALLY EQUITABLE DECARCERATION 9 (Jan. 2023), <https://tminstituteldf.org/wp-content/uploads/2023/09/Lessons-learned-from-COVID-19-for-racially-equitable-decarceration.pdf>. In 2019, the jail incarceration rate of Black people was 3.26 times the jail incarceration rate of white people, and the Black prison incarceration rate was 5.08 times the white prison incarceration rate; in 2020, the numbers raised to 3.50 times and 5.13 times, respectively.

pandemic.<sup>150</sup> Almost twice as many white people were released early via sentencing credits compared to Black people.<sup>151</sup> Additionally, in Connecticut, white inmates made up 38 percent of those that were granted early release even though they make up less than 30 percent of the incarcerated population.<sup>152</sup>

Early release protocols that are dependent on good behavior are subject to racial bias, which influences who is disciplined and who is granted early release credits.<sup>153</sup> There is significant subjectivity in administrative disciplinary actions in prisons, with multiple opportunities for unconscious racism to influence the process.<sup>154</sup> The disciplinary codes range in types of offenses, from vague assertions of “disrespect” to more established violations such as contraband.<sup>155</sup> In 1977, researchers found that corrections staff are more likely to issue severe penalties and longer stays in solitary confinement to Black people than white people.<sup>156</sup> More recent state data show that such disparities have not improved.

In North Carolina state prisons, corrections staff were 10.3 percent more likely to issue a disciplinary write-up to a Black person than a white person, and 13 percent more likely to issue a write-up to a Native person than a white person.<sup>157</sup> In New York state prisons, a review of disciplinary actions from 2015–2020 found that officers were 22 percent more likely to issue a Misbehavior Report to a Black person than a white person, and 12 percent more likely to issue one to a Latinx person than a white person.<sup>158</sup> The study found that the 226 officers who issued more than 50 Misbehavior Reports only issued them to non-white people.<sup>159</sup>

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<sup>150</sup> Alissa Rivera, *Illinois Failing Key Pillar of COVID-19 Response*, RESTORE JUSTICE (June 15, 2020), <https://www.restorejustice.org/early-releases-exacerbate-racial-inequity/> [<https://perma.cc/78MW-U4GC>].

<sup>151</sup> Emily Hoerner & Carlos Ballesteros, *Illinois released white inmates at disproportionately high rates among pandemic, report shows*, INJUSTICE WATCH (June 17, 2020), <https://www.injusticewatch.org/news/2020/covid-release-disparity/> [<https://perma.cc/SPC4-NW74>].

<sup>152</sup> Kelan Lyons, *How COVID-19 is Shrinking Connecticut's Prison Population*, CT MIRROR (May 1, 2020), <https://ctmirror.org/2020/05/01/how-covid-19-is-shrinking-connecticuts-prison-population/> [<https://perma.cc/VKE7-QTAW>].

<sup>153</sup> Kelan Lyons, *Connecticut Prison Population Almost Halved Since 2008 Peak as Pandemic Continues*, CT MIRROR (June 25, 2020), <https://ctmirror.org/2020/06/25/connecticut-prison-population-almost-halved-since-2008-peak-as-pandemic-continues/> [<https://perma.cc/6XAA-ACP3>]; Hoerner & Ballesteros, *supra* note 151.

<sup>154</sup> Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 UC IRVINE L. REV. 759, 768 (2015).

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

<sup>156</sup> See J. DEBRO, INSTITUTIONAL RACISM WITHIN THE STRUCTURE OF AMERICAN PRISONS (FROM BLACK PERSPECTIVES ON CRIME AND THE CRIMINAL JUSTICE SYSTEM) (1977).

<sup>157</sup> Katie Michaela Becker, *Race and Prison Discipline: A Study of North Carolina State Prisons*, 43 NORTH CAROLINA CENTRAL L. REV. 175, 182 (2021).

<sup>158</sup> State of N.Y. Offices of the Inspector Gen., RACIAL DISPARITIES IN ADMINISTRATIVE DISCIPLINE IN NEW YORK STATE PRISONS 3 (Nov. 2022), <https://ig.ny.gov/system/files/documents/2022/12/oig-doccs-racial-disparities-report-12.1.22.pdf>.

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

Data on solitary confinement show that inmates of color are given more severe punishment. In a New York state prison, Black people were four times more likely than white people to be sent to solitary confinement.<sup>160</sup> In California, Latinx people constituted 86 percent of the people in solitary confinement when they only made up 42 percent of the general prison population.<sup>161</sup> When early release policies are contingent on “good behavior,” the unconscious racism of those who determine “good behavior” can have detrimental consequences.

Eligibility requirements may also influence the racial outcomes of release programs, as some early release policies require people to have stable housing.<sup>162</sup> Segregation, redlining, rental housing discrimination, and incarceration have caused disproportionate rates of homelessness. In Santa Clara County, California, Black people are seven times more likely to not have housing, while Native people are almost 15 times more likely to not have housing.<sup>163</sup> Nationwide, Black people make up 37 percent of the people experiencing homelessness even though they make up only 13 percent of the population.<sup>164</sup> The racial realities of the current housing crisis may have unintentional effects on release programs.

White people typically benefit more from diversion programs than BIPOC, especially as BIPOC communities are policed at a higher rate and therefore have less community-level diversion (occurring before and preventing police encounters).<sup>165</sup> For prosecutor-led diversion programs in California, Black men were twice as likely to receive a prison sentence instead of a diversion referral compared to white men, and Latinx men were 17 percent less likely to receive diversion than white men.<sup>166</sup> These disparities exist even after the passage of a policy designed to correct the inequalities.<sup>167</sup> Nationwide, the odds of Black and Latinx defendants with no prior convictions receiving pretrial detention are 34 and 39 percent lower, respectively, than the odds of similarly

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<sup>160</sup> Michael Schwirtz et al., *The Scourge of Racial Bias in New York State’s Prisons*, THE NEW YORK TIMES (Dec. 3, 2016), [https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html?\\_r=0](https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html?_r=0) [<https://perma.cc/5ECC-7EQY>].

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

<sup>162</sup> Hoerner & Ballesteros, *supra* note 151.

<sup>163</sup> DESTINATION: HOME & SUPPORTING PARTNERSHIPS FOR ANTI-RACIST COMTYS., RACE AND HOMELESSNESS IN SANTA CLARA COUNTY, CALIFORNIA 9 (Jan. 2020), [https://destinationhomesv.org/wp-content/uploads/2020/02/RacialEquityReport0131020.pdf?mc\\_cid=06a7865957&mc\\_eid=53a9a53ca3](https://destinationhomesv.org/wp-content/uploads/2020/02/RacialEquityReport0131020.pdf?mc_cid=06a7865957&mc_eid=53a9a53ca3).

<sup>164</sup> Nat’l Alliance to End Homelessness, *Homelessness and racial disparities*, <https://endhomelessness.org/homelessness-in-america/what-causes-homelessness/inequality/> [<https://perma.cc/D2AA-AMLJ>] (last visited Feb. 10, 2024).

<sup>165</sup> Daanika Gordon, *The Police as Place-Consolidators: The Organizational Amplification of Urban Inequality*, 45 L. & SOC. INQUIRY 1, 5–6 (2020).

<sup>166</sup> N. Nicosia, J.M. MacDonald, & J. Arkes, *Disparities in Criminal Court Referrals to Drug Treatment and Prison for Minority Men*, 103 AM. J. PUBLIC HEALTH e77, e79 (2013).

<sup>167</sup> *See id.*; CAL. PENAL CODE §§ 1210, 3063.1 (Deering 2000).

placed white defendants.<sup>168</sup> Drug defendants who are Black and have served time in prison are 55 percent less likely to receive pretrial diversion.<sup>169</sup> Program costs, eligibility requirements, and prosecutorial discretion work to create these gaps, among other causes.<sup>170</sup>

Governments and court systems must account for the factors that create discrepancies in releases and diversion. Although none of the decarceration policies had explicit racial overtones, the application of those policies intensified racial disparities in incarceration facilities that should be considered in the creation of future policies.

#### **PART IV: PRISON SAFETY DURING EXTREME WEATHER EVENTS**

State and federal governments should consider decarceration strategies to mitigate the harm caused to people in prisons; especially as extreme weather events are expected to continue increasing.<sup>171</sup> Evacuating prisoners in the midst of a natural disaster is a difficult and burdensome decision, and overcrowding in facilities aggravates many of the impacts from extreme weather events.<sup>172</sup> It is vital for state and federal prison systems to consider ways to proactively mitigate the effects from anticipated climate events, both for the safety of prisoners and the sanity of prison officials.

While climate regulations proposed by the legislative and executive branches would theoretically be effective in reducing climate vulnerability in prisons, politically motivated actions have yet to prove successful. Incarcerated populations are seldom included in climate risk and environmental justice frameworks. A renowned environmental justice mapping tool created by the federal government, which displays layers of pollutant data and data for vulnerable communities, does not include incarcerated populations as a vulnerable community.<sup>173</sup> Regulatory proposals reflect this lack of consideration.<sup>174</sup> The 2021 infrastructure bill provides funds for

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<sup>168</sup> Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts*, 3 RACE AND JUSTICE 210, 226 (2013).

<sup>169</sup> *Id.*

<sup>170</sup> Leah Wang, *Racial disparities in diversion: A research roundup*, PRISON POLICY INITIATIVE (March 7, 2023), [https://www.prisonpolicy.org/blog/2023/03/07/diversion\\_racial\\_disparities/](https://www.prisonpolicy.org/blog/2023/03/07/diversion_racial_disparities/) [<https://perma.cc/L25Q-QJH3>].

<sup>171</sup> Cowan, *supra* note 30, at 7434.

<sup>172</sup> Kristin Toussaint, *Extreme Heat is Turning Prisons Into Ovens*, FAST COMPANY (Aug. 17, 2021), <https://www.fastcompany.com/90664656/extreme-heat-is-turning-prisons-into-ovens> <https://perma.cc/RK4N-4AY2>.

<sup>173</sup> U.S. Env'tl. Prot. Agency, *EPA's environmental justice screening and mapping tool*, <https://ejscreen.epa.gov/mapper/> [<https://perma.cc/V7RZ-2AH9>] (last visited Feb. 10, 2024). EJSCREEN allows viewers to map pollutants as they relate to communities based on indicators like education level or income but does not provide the same opportunity for communities who are incarcerated.

<sup>174</sup> In 2009, President Barack Obama issued executive orders requiring federal agencies to make climate adaptation plans, but the Justice Department has only now issued a report saying that it will evaluate incarceration facilities for climate dangers. *See* Exec. Order No. 13,514 (2009); U.S. DEP'T OF JUST., CLIMATE ACTION PLAN (July 2021), <https://www.sustainability.gov/pdfs/doj-2021-cap.pdf>.



upgrading countless public entities like schools and roads, but does not mention jails or prisons and does not list incarcerated people as a vulnerable community.<sup>175</sup> Additionally, Senator Tammy Duckworth introduced a bill that would have required the Bureau of Prisons to encourage home confinement or early release to mitigate natural disasters, but that bill stalled in the Senate Judiciary Committee.<sup>176</sup>

Even state legislatures are unsuccessful at passing laws that protect people in prison in the face of climate change. For example, a prison advocacy organization in Texas worked with state legislators on a bill requiring climate control systems in state prisons, but the bill did not pass in the Senate.<sup>177</sup> Other organizations are pleading with state governments to create emergency plans for prisons during extreme weather events, like prison advocacy groups in Oregon after the Pacific Northwest experienced historic high temperatures in the summer of 2021.<sup>178</sup> However, as discussed above, many prison officials claim to have these plans even if they fail to share or implement them, and so state governments have yet to require such plans.

Public pressure is an effective tactic when expanding decarceration strategies. Throughout the pandemic, activist organizations advocated for local governments to enhance decarceration efforts. For example, in Maine, where courts vacated numerous warrants, the American Civil Liberties Union (ACLU) of Maine sent letters to officials requesting further decarceration through methods like issuing summons instead of arrests, only arresting violent offenders, eliminating bail, reducing pretrial detention, and dismissing cases for minor offenses.<sup>179</sup> Additionally, the Movement for Black Lives' *Free 'Em All* platform made requests at the federal, state, and local levels to pass policies aimed at both diversion and release.<sup>180</sup> These actions put pressure on public

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<sup>175</sup> Infrastructure Investment and Jobs Act, H.R. 3684, 117th Cong. (2021) (enacted).

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

<sup>177</sup> Toussaint, *supra* note 172.

<sup>178</sup> Tess Riski, *After Blistering Heat Wave, Prison Rights Group Calls on State to Create Emergency Plan for Future Extreme Weather Events*, WILLAMETTE WEEK (July 4, 2021), <https://www.wweek.com/news/courts/2021/07/04/after-blistering-heat-wave-prison-rights-group-calls-on-state-to-create-emergency-plan-for-future-extreme-weather-events/> [<https://perma.cc/6596-DU7Q>].

<sup>179</sup> Letter from Alison Beyea, Exec. Dir. of Am. Civ. Liberties Union, Maine to Maine Lawmakers (March 2020) (on file with Am. Civ. Liberties Union), [https://www.aclumaine.org/sites/default/files/aclu\\_coronavirus\\_criminal\\_justice\\_maine\\_letterhead\\_03182020.pdf](https://www.aclumaine.org/sites/default/files/aclu_coronavirus_criminal_justice_maine_letterhead_03182020.pdf). These requests were directed at all levels of the incarceration process: police, bail commissioners, prosecutors, judges, sheriffs, the governor, etc.

<sup>180</sup> Movement for Black Lives, *Free 'Em All*, <https://m4bl.org/policy-platforms/free-em-all/> [<https://perma.cc/GY92-VE7D>] (last visited Feb. 10, 2024). Federal requests included pardons and halting all new sentences, while state requests included commuting sentences for older people and those who have served at least half of their sentence. Local requests included releasing people with certain health conditions and using money bonds to halt admission of new people to jails.

officials to address the growing crisis, and it is likely that such pressure will be necessary to pass decarceration policies in areas with high climate vulnerability.

When supporting expanded decarceration policies, it is important for advocates to emphasize the costs of incarceration in the face of climate change. At the same time, creating flexibility within the policies is vital to properly provide public officials with immediate solutions before or during natural disasters.

### *A. The Costs of Climate Change in Prisons*

Legal fees, evacuation expenses, and needed improvements to deteriorating infrastructure are just some of the costs that state and federal prisons incur as they insist on maintaining a historically high prison population.

State and federal governments spend money on attorney's fees, settlement payments, and other costs incurred in legal battles over prison conditions during extreme weather events. For example, after heat-related deaths of three prisoners, the Texas state legislature approved spending \$1.8 million in settling wrongful death lawsuits.<sup>181</sup> Further, the state of Texas spent \$7 million defending a prison in a class action lawsuit regarding the installation of air conditioning in facilities that housed disabled, sick, and elderly people.<sup>182</sup> The state eventually settled the suit, but could have installed air-conditioning units for \$3 million less than what it spent on legal fees.<sup>183</sup> For this reason, some experts claim that prisons have the money for upgrades, but choose instead to spend it on other items.<sup>184</sup>

Many states refuse to update deteriorating infrastructure with the necessary safety measures due to the high costs. For example, a Texas bill proposing air conditioning in state prisons died in the state Senate because of the \$100 million price tag.<sup>185</sup> Additionally, voters in a Louisiana town only approved funding for a new jail after officials promised that the facility will not have air conditioning, which they considered a luxury item.<sup>186</sup> Generally, experts estimate that it would cost \$38,414 per inmate to upgrade the HVAC system of a prison.<sup>187</sup> For this reason, some jails

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<sup>181</sup> Toussaint, *supra* note 172.

<sup>182</sup> *Id.*; See also Cole v. Livingston, No. 4:14-CV-1698, 2016 U.S. Dist. 77435 (S.D. Tex. June 14, 2016). The prison in question implemented a policy that required people to have their temperature taken with a rectal thermometer in order to be approved to use air-conditioned respite rooms.

<sup>183</sup> Toussaint, *supra* note 172.

<sup>184</sup> Dholakia, *supra* note 48.

<sup>185</sup> *Id.*; See also Lauren McGaughy, *As Texas Enters Peak Summer Months, Bills to Cool State Prisons Fail Yet Again*, THE DALLAS MORNING NEWS (May 29, 2021), [https://www.dallasnews.com/news/politics/2021/05/29/as-texas-enters-peak-summer-months-bills-to-cool-state-prisons-fail-yet-again/?utm\\_source=pocket\\_mylist](https://www.dallasnews.com/news/politics/2021/05/29/as-texas-enters-peak-summer-months-bills-to-cool-state-prisons-fail-yet-again/?utm_source=pocket_mylist) [<https://perma.cc/6AC5-Y3FS>].

<sup>186</sup> Sarai, *supra* note 61.

<sup>187</sup> Laurie L. Levenson, *Climate Change and the Threat to U.S. Jails and Prisons*, 33 VILL. ENVTL. L.J. 143, 153 (2022).

and prisons across the country are choosing to close instead of making the facilities habitable, while other facilities are on the brink of closure.<sup>188</sup>

The expenses of evacuations and emergency response efforts are also costing prisons additional funds that the federal government is unwilling to cover. During severe storms, the Louisiana Department of Public Safety and Corrections applied for over \$125,000 of reimbursement funds to cover items such as a temporary facility for people who were incarcerated and hotel lodging for guards.<sup>189</sup> The Department of Homeland Security Federal Emergency Management Agency denied this request and the subsequent appeal, saying that operating expenses are not eligible for reimbursement.<sup>190</sup>

On the other hand, decarceration leads to cost savings. In 2020, the average cost of incarceration for a person in a federal facility was \$39,158,<sup>191</sup> while states spent an average of \$45,771 per person.<sup>192</sup> When states work to reduce the population of people in their prisons, there are long-term cost savings. Michigan reduced its prison population by 20 percent from 2000–2016 and saved \$392 million in operating costs, which do not include savings from cost avoidance.<sup>193</sup> South Carolina saved \$33 million after reducing by 14 percent from 2008–2016 and expects to

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<sup>188</sup> See Edward Lyon, Associated Press, *Arizona Closing Prison, Moving Prisoners to CoreCivic Lockup*, PRISON LEGAL NEWS (Sept. 1, 2022), <https://www.fox10phoenix.com/news/arizona-to-close-florence-prison-transferring-thousands-of-inmates-to-ely> [<https://perma.cc/R9PX-CHH7>] (quoting Arizona Gov. Ducey saying that it “just doesn’t make sense” to keep an aging prison open because of the cost of needed repairs); Sarah Sax & Christopher Blackwell, *The Climate Crisis is Pushing Washington’s Prisons to the Brink*, HIGH COUNTRY NEWS (Nov. 1, 2023), <https://www.hcn.org/issues/55-11/climate-change-the-climate-crisis-is-pushing-washingtons-prisons-to-the-brink/> [<https://perma.cc/S5H5-UBVR>] (describing how increased flooding from climate change will aggravate mold and fungal infections that plague people in Washington’s already-underfunded prisons); Daniel Trotta, *New York City Council Votes to Close Infamous Rikers Island Jails*, REUTERS (Oct. 17, 2019), <https://www.reuters.com/article/us-new-york-rikers-idUSKBN1WW2ZW/> [<https://perma.cc/7Z2F-CPVW>] (citing closure of jails that lacked heating in the winter and air conditioning in the summer).

<sup>189</sup> Federal Emergency Management Agency, *Increased Operating Expenses*, <https://www.fema.gov/appeal/increased-operating-expenses-3> [<https://perma.cc/TBJ9-S7HW>] (last visited Feb. 9, 2024).

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

<sup>191</sup> Annual Determination of Average Cost of Incarceration Fee, 86 Fed. Reg. 49,060 (Sept. 1, 2021).

<sup>192</sup> USA Facts, *How much do states spend on prisons?*, <https://usafacts.org/articles/how-much-do-states-spend-on-prisons/#footnote-1> [<https://perma.cc/78V2-Y299>] (last visited Feb. 10, 2024).

<sup>193</sup> THE SENTENCING PROJECT, *DECARCERATION STRATEGIES: HOW 5 STATES ACHIEVED SUBSTANTIAL PRISON POPULATION REDUCTIONS* 17 (Sept. 2018), <https://www.sentencingproject.org/app/uploads/2022/08/Decarceration-Strategies.pdf>.

avoid an additional \$458 million that the state would have spent on future prison costs.<sup>194</sup> Generally, if ten percent of people charged with drug-related crimes were sent to treatment programs, the criminal justice system would save \$4.8 billion; savings jump to \$12.9 billion if forty percent of people with drug charges were sent to treatment programs.<sup>195</sup>

### ***B. Decarceration Strategies for Extreme Weather Events***

Both diversion and early release strategies are appropriate measures to mitigate the effects of extreme weather events. To be most effective, these measures should be put into place before seasons of extreme weather events. However, as weather can be unpredictable, these policies should be flexible enough to be applied quickly and easily in a variety of circumstances. The policies can provide local and state governments with an ability to both anticipate and respond to a natural disaster.

Many of the early release policies passed during COVID-19 are applicable to extreme weather events and could be applied ahead of a natural disaster. For example, the public health emergency credits granted to people in New Jersey prisons would apply during extreme weather events and could even be applied retroactively for time served during hurricanes or other emergencies. Further, good time credits can also be used more effectively to grant early release.<sup>196</sup> Good time credits can be both granted and revoked. Therefore, one method of improving efficiency is to refrain from revoking credits in all but the most serious situations.<sup>197</sup> Additionally, states can remove the eligibility requirements of some credit programs that are typically based on a person's sentence length or offense.<sup>198</sup> Lastly, states can protect already-accumulated good time credits by making them vested and immune from forfeiture.<sup>199</sup>

However, implementing diversion strategies in the months leading up to periods of extreme weather is the most proactive way to minimize safety concerns for people in prison in areas with high climate vulnerability. By reducing the number of low-level arrests, vacating outstanding warrants, eliminating bail, and implementing other diversion strategies, state and local governments can reduce the number of people under their care during extreme weather events.

Though these policies should be passed in all regions with higher climate vulnerability, advocacy organizations can prioritize states with the most significant effects. For instance, the Northwest and West have higher mortality rates during extreme heat events than the Midwest and Southeast. Additionally, diversion strategies in hurricane-prone states like Florida and Louisiana would be effective at helping coastal counties manage disaster response. These actions will minimize strain on local courts, enforcement agencies, and importantly, emergency responders

## **CONCLUSIONS**

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<sup>194</sup> *Id.* at 41.

<sup>195</sup> Gary A. Zerkin et al., *Lifetime benefits and costs of diverting substance-abusing offenders from state prison*, 61 CRIME & DELINQUENCY 829, 842 (2012).

<sup>196</sup> Widra & Bertram, *supra* note 133.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

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

Extreme heat, wildfires, and flooding exacerbate already inhumane conditions in prisons. Inadequate infrastructure, like subpar plumbing systems or a lack of air conditioning, make for unsafe and unsanitary prison conditions during extreme weather events. Prison reduction strategies during the COVID-19 pandemic show that decarceration is possible in response to emergency circumstances with minimal safety risk to the public.<sup>200</sup> While many governments employed these methods in a piecemeal manner during the pandemic, combining both diversion and release strategies best accounts for the health and safety of people who are incarcerated.

A more proactive approach to decarceration at the onset of the pandemic would have better mitigated the effects of the virus on many people who were incarcerated. Although COVID-19 had been proliferating since January of 2020, many governments did not take action until the end of March or early April. Governments should have legislative frameworks that allow for more swift mitigation measures so that time is not wasted in the process of establishing those frameworks. Additionally, like the COVID-19 pandemic, climate change disproportionately affects BIPOC communities. To promote racial and climate justice, governments must learn from the racial inequities in decarceration during the pandemic and create policies that preemptively address the racial realities in rates of release and diversion.

Many experts view climate change as a public health crisis with a similar, if not more dire effect on human health as the COVID-19 pandemic. Therefore, governments need strategies that decrease prison populations before the harm hits.

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<sup>200</sup> Christy Visher & John Eason, *Changing Prisons to Help People Change* 28, 33, in A REPORT BY THE BROOKINGS-AEI WORKING GROUP ON CRIMINAL JUSTICE REFORM (Apr. 2021).