Toward Liberation: Reclaiming the Eighth Amendment's Promise in the Era of Climate Change

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Abstract

As climate disasters become increasingly common, causing unprecedented death and destruction, the Eighth Amendment's promise against cruel and unusual punishment offers little relief to incarcerated people. In 2005, Hurricane Katrina caused historic devastation on the Gulf Coast, and more than 8,000 people detained in state-run prisons and jails in the Orleans Parish Prison ("OPP") were left to die. OPP took four days to evacuate survivors.[1] *Despite this tragedy, the law has not required the carceral system to meet the growing threat of climate disasters in the years since. And while climate change is devastating many communities, the plight of incarcerated people is unique: the state has total control over whether they can leave an overheated location or escape a hurricane.*

This Article analyzes federal courts' jurisprudence developed in response to incarcerated peoples' claims that extreme climate conditions in prisons and jails betray their Eighth Amendment right. Building on that case law, it advances a climate-informed approach to the Eighth Amendment. This Article does not seek to reform *prisons to better equip them for the Anthropocene—or, as some suggest, to "green" prisons by making them environmentally friendly.*[2] *Such efforts historically have only further entrenched carceral violence by providing a veneer of acceptability. Instead, this Article recommends non-reformist reforms (actions that shrink "the state's capacity for violence") in the face of climate change.*[3]

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[1] C. D. Sinigalliano, M. L. Gidley, T. Shibata & H. M. Solo-Gabriele, *Impacts of Hurricane Katrina and Rita on the Microbial Landscape of the New Orleans Area*, 104 Proc. Nat'l Acad. Scis. U.S. 9029, 9029 (2007).

[2] *See, e.g.*, Laurie L. Levenson, *Climate Change and the Criminal Justice System*, 51 Env't L. 333, 333-34 (2021) (proposing ways for "law enforcement, prisons, prosecutorial and defense agencies, government offices, and communities" to meet the "new challenges" that climate change creates); Ryan M. Moser, *How Prisons and Jails Can Go Green*, Prison Journalism Project (Feb. 20, 2023), https://prisonjournalismproject.org/2023/02/20/how-prisons-and-jails-can-go-green/ [https://perma.cc/U3C7-MKM3]; Robert Pistone, *Violations of the Eighth Amendment: How Climate Change Is Creating Cruel and Unusual Punishment*, 28 Hastings Env't L.J. 213, 213 (2022) (proposing "changes [that] should be made to prison infrastructure to solve the issue" of climate change in prisons).

[3] Dorothy Roberts, *Abolition Constitutionalism*, 133 Harv. L. Rev. 1, 114 (2019) (citing Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, Jacobin (Aug. 24, 2017), https://www.jacobinmag.com/21 7/o8/prisonabolition-reform-mass-incarceration [https://perma.cc/235V-6YEG]).

Part I of this Article explains how climate change exacerbates the already inhumane conditions of incarceration. Part II outlines the current confines of the law. Part III advances a climate-informed approach to the Eighth Amendment. Part IV argues that if the state continues to trap people during natural disasters, the proper remedy for such cruel and unusual conditions is release. In sum, Parts I-IV show that current Eighth Amendment jurisprudence effectively legalizes *cruel and unusual punishment and that the state cannot constitutionally confine people in such conditions.*

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Introduction

In 2005, Hurricane Katrina caused unprecedented devastation in the United States Gulf Coast, resulting in more than 1,800 deaths and catastrophic flooding.[4] While the mayor of New Orleans issued a mandatory evacuation for approximately 1.5 million people,[5] the State of Louisiana abandoned those within the evacuation zone trapped in the state-run Orleans Parish Prison ("OPP").[6] Earrand Kelly was one of those people. He explained, "[t]he water started rising, it was getting to here," pointing at his neck.[7] Kelly continued: "We was calling down to the guys in the cells under us, talking to them every couple of minutes. They were crying, they were scared. [One of them said] . . . 'I feel like I'm about to drown.'"[8] The people imprisoned in OPP were left alone without food or water for multiple days and forced to live in contaminated conditions. One person explained it was so hot that "breathing was unbearable," and they had to "fan [themselves] to keep from passing out."[9] Some people set blankets and shirts on fire to signal to people outside the prison that they were alive but stuck inside.[10] Signs hanging outside prison windows read "Help Us" and "One Man Down."[11] More than twelve people jumped out of windows to try to save their lives.[12]

Although OPP had evacuated their prisons and jails in the 1990s due to intense flooding,[13] they failed to create evacuation plans for future flooding.[14] OPP officials waited four days to evacuate people after Hurricane Katrina hit, at which point the toxic floodwaters contained "high levels of

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[4] Sarah Pruitt, *Hurricane Katrina: 10 Facts About the Deadly Storm and Its Legacy*, History (Aug. 27, 2024), https://www.history.com/news/hurricane-katrina-facts-legacy [perma.cc/427M-HHTN].

[5] Lynn Goldman & Christine Coussens, Environmental Public Health Impacts of Disasters: Hurricane Katrina: Workshop Summary 16 (2007).

[6] This Article does not seek to ignore the reality that many non-incarcerated New Orleans residents lacked the means or capacity to evacuate. It also does not assert that the evacuation order to non-incarcerated people was done well. This Article merely seeks to demonstrate that the City of New Orleans knew Hurricane Katrina could be deadly for people who chose to or were forced to stay in the City and did nothing to evacuate the incarcerated people who were under its full control, without choice or freedom to evacuate themselves.

[7] *New Orleans: Prisoners Abandoned to Floodwaters*, Hum. Rts. Watch (Sept. 21, 2005, 8:00 A.M.), https://www.hrw.org/news/2005/09/21/new-orleans-prisoners-abandoned-floodwaters [https://perma.cc/TE9F-ENNK].

[8] *Id.*

[9] *Testimonials from Inmates Incarcerated at Orleans Parish Prison During Hurricane Katrina*, Am. C.L. Union 1, 3, 31 (Jan. 11, 2006), https://www.aclu.org/sites/default/files/images/asset_upload_file182_23418.pdf [https://perma.cc/5J5Z-FZD9].

[10] *New Orleans: Prisoners Abandoned*, *supra* note 7.

[11] *Id.*

[12] *Id.*

[13] Jamie Feller, *What Was the Evacuation Plan for Orleans Parish Prison?: Letter to New Orleans Sheriff Marlin N. Gusman*, Hum. Rts. Watch (Oct. 7, 2005, 8:00 AM), https://www.hrw.org/news/2005/10/07/what-was-evacuation-plan-orleans-parish-prison [perma.cc/XVX6-4RJ9].

[14] *New Orleans: Prisoners Abandoned*, *supra* note 7.

fecal indicator bacteria and microbial pathogens."[15] Some testified that bodies were floating in the water.[16] Others said that OPP officials did not evacuate everyone, and people were left trapped in their cells to die.[17]

OPP never released an official death count for the people it abandoned. However, Human Rights Watch ("HRW") compared the official list of people held at OPP immediately before Hurricane Katrina with a list of those who were evacuated. Five hundred and seventeen people remain unaccounted for to this day.[18] HRW called on the Department of Justice to investigate what happened to the hundreds of people OPP did not evacuate, but there is no indication that an investigation ever occurred.[19] Without an investigation, it is impossible to know whether those people died, escaped, or were not properly accounted for afterward. If all those unaccounted for perished, that would mean more than 6% of OPP's incarcerated population died trapped inside OPP. And if only half of the people unaccounted for perished, the incarcerated death rate would still be three times greater than the death rate for New Orleans' non-incarcerated residents.[20]

When OPP leadership finally evacuated the prison, it did so without a plan. People were forced to wade through waste-filled water until they reached the Broad Street Overpass on Interstate 10 (*see* Figure 1).

FIGURE 1. People kettled by armed guards on the sunken Interstate[21]

[15] Sinigalliano et al., *supra* note 1, at 9029.

[16] *New Orleans: Prisoners Abandoned*, *supra* note 7.

[17] *Id.*

[18] *Id.*

[19] *After the Hurricane: Where Have All the Prisoners Gone? More Than 500 From New Orleans Jail Still Unaccounted For*, DEMOCRACY NOW! (Sept. 27, 2005), https://www.democracynow.org/2005/9/27/after_the_hurricane_where_have_all [https://perma.cc/HPN8-X3FB].

[20] 1,390 Louisiana non-incarcerated residents died as a result of Hurricane Katrina, which is approximately 0.29% of New Orleans' non-incarcerated population. If all 500 people unaccounted for died, that would have been more than 6% of OPP's population. If only 250 people perished, that would still be over 3% of OPP's population. *See Hurricane Katrina: Facts, FAQs, and How to Help*, WORLD VISION (Nov. 20, 2023), https://www.worldvision.org/disaster-relief-news-stories/2005-hurricane-katrina-facts [https://perma.cc/MFX3-TVMU].

[21] *Testimonials*, *supra* note 9.

One person explained,

> The water was nasty, all black an[d] dirty with all types of debris, even human waste. There was no way that I could have stop[ped] the force of that water entering my mouth. I swallow[ed] some of it. I even vomit[ed], an[d] I felt bad for hours . . . , like I was going to die.[22]

While prison officials attempted to locate other prisons or jails in which to confine people, OPP kettled[23] people in blistering heat on the sunken highway, guarded by armed OPP staff.[24] Once "rescued," the people who had just suffered four days of rising floodwaters were then maced and beaten by armed guards with K-9 dogs.[25] Women faced degrading and sexually offensive comments from law enforcement personnel while exposed on the bridge.[26]

Hurricane Katrina exacerbated the already brutal experience of incarceration.[27] Despite the heightened risk of climate disasters in the twenty-first century, the law has consistently failed to protect people like Mr. Kelly in the twenty years since. For example, in 2024, Hurricane Helene became the deadliest inland hurricane on record when its storm surge, winds, and rainfall devastated six southern U.S. states.[28] In what seems like disheartening déjà vu, the leadership of multiple carceral facilities located in areas with mandatory evacuation orders refused to evacuate the people incarcerated under their control.[29] In North Carolina—the state that suffered the worst of Helene's impact—people imprisoned at Mountain View Correctional Institution "were forced to stay as their cells flooded" and "remained without lights, running water, or functional toilets for almost a week."[30]

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[22] *Id.* at 3 (alterations omitted).

[23] Kettling is a police "crowd control" tactic in which law enforcement personnel aim to "confine a crowd to a specific space" such as a "city block or a bridge" and "block[] the means of escape." Jen Kirby, *The "Kettling" of Protesters, Explained*, Vox (June 6, 2020), https://www.vox.com/2020/6/6/21282509/george-floyd-protests-kettling-new-york-nypd [https://perma.cc/9FJ2-9C9C].

[24] *Testimonials*, *supra* note 9, at 1.

[25] *Id.* at 18.

[26] *Prison Conditions and Prisoner Abuse After Katrina*, Am. C.L. Union (Dec. 14, 2005), https://www.aclu.org/documents/prison-conditions-and-prisoner-abuse-after-katrina [https://perma.cc/4YKR-XH94].

[27] *See generally* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271 (2004) (describing the enormous harm of mass incarceration).

[28] Cary Mock, *How Hurricane Helene Became a Deadly Disaster Across 6 States*, Univ. S.C. (Oct. 7, 2024), https://sc.edu/uofsc/posts/2024/10/conversation-hurricane-helene-deadly-disaster-six-states.php [https://perma.cc/W2WV-TTYB].

[29] *See* Isabelle Taft, *Some Florida Inmates Were Not Evacuated, Officials Said*, N.Y. Times (Oct. 9, 2024), https://www.nytimes.com/2024/10/09/weather/florida-milton-evacuations-jail.html.

[30] Nazish Dholakia, *When Disasters Strike, Incarcerated People Are Often Left Behind—Then Tasked with Dangerous Cleanup*, Vera Inst. Just. (Oct. 18, 2024), https://www.vera.org/news/when-disasters-strike-incarcerated-people-are-often-left-behind-then-tasked-with-dangerous-cleanup [https://perma.cc/7LBE-P2Q7].

Neither Mr. Kelly, the people incarcerated during Hurricane Helene, nor anyone else who is incarcerated was sentenced to torture or risk of death by hurricane. These examples highlight the reality that, while climate change is devastating many communities, the plight faced by incarcerated people[31] is unique: the state has full control over their ability to escape a climate disaster.

A. Eighth Amendment Doctrine Effectively Legalizes the Cruel and Unusual Punishment it Purports to Prohibit

Seeking justice after Hurricane Katrina, dozens of incarcerated people represented themselves in claims against OPP, arguing that the conditions during the storm violated their Eighth Amendment rights.[32] The Eighth

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[31] A note on language: This Article uses the terms "incarcerated person" and "imprisoned person" to describe someone whose will is restrained by the power of the state and who is held in a prison or a jail. These terms are used throughout this Article interchangeably. This language is intentional as, throughout history, dehumanizing language such as "convict," "inmate," "felon," and "prisoner," has been used to facilitate the systemic, inhumane treatment of too many people. To subvert these tendencies, this Article uses language that centers a person's humanity first, such as "person in jail" or "incarcerated person." To read more about the importance of person-first language, see Akiba Solomon, *What Words We Use – and Avoid – When Covering People and Incarceration*, MARSHALL PROJECT (Apr. 12, 2021), https://www.themarshallproject.org/2021/04/12/what-words-we-use-and-avoid-when-covering-people-and-incarceration [https://perma.cc/7H83-MWVB]. This Article only uses non-person-first language in direct quotes.

[32] *See* August v. Gusman, Civil Action No. 06-3962, 2008 WL 466202, at *1-2 (E.D. La. Feb. 13, 2008) (The plaintiff was housed in a "medical unit located on the first floor" due to a recent "knee surgery." He "was abandoned for three days . . . [without] food, water, or electricity . . . [while the] water rose to waist high level."); Smith v. Gusman, Civil Action No. 06-4121, 2007 WL 2407304, at *2 (E.D. La. Aug. 20, 2007) (The plaintiff "was abandoned and left to fend for himself in the locked jail with contaminated water rising up to six feet. He . . . called to the deputies but no one came to help" and he was left without "food or water."); Bridges v. Gusman, Civil Action No. 06-4444, 2007 WL 2362335, at *1-3 (E.D. La. Aug. 15, 2007) (The plaintiff was "'herded' out of the unit into deep water" and then "left in a field to spend the night" with "only a blanket . . . in the cold and rain with mosquitos biting him."); Allen v. Gusman, Civil Action No. 06-4539, 2007 WL 2407305, at *2 (E.D. La. Aug. 20, 2007) (The plaintiff was stuck "in his cell for three days."); Lloyd v. Gusman, Civil Action No. 06-4288, 2007 WL 1850999, at *2 (E.D. La. June 26, 2007) (The plaintiff was "abandoned and left to fend for himself in the locked jail with water rising up to three to six feet" without "food or water."); Deselles v. Gusman, No. CIV A 06-4163, 2007 WL 121833, at *4 (E.D. La. Jan. 11, 2007) (The plaintiff sought relief for an "evacuation process" that was "not timely and was negligently performed causing him to sustain a skin ailment."); Burbank v. Gusman, Civil Action No. 06-4398, 2007 WL 2228593, at *1 (E.D. La. July 27, 2007) (The plaintiff "was forced to remain" in prison where he "had no food, drinking water, or electrical power" and "no access to medication for high blood pressure, Hepatitis C, or depression," while "the sewer water backed-up into the dormitory leaving him in a foul smelling area."); Nguyen v. Gusman, Civil Action No. 06-3046, 2008 WL 1903166, at *1-2 (E.D. La. Apr. 28, 2008) (The plaintiff was housed on the fifth floor when "water began to rise from the toilets and flood drains" and his "calls for help and requests to be moved were ignored by the tier deputies." He "did not believe that he would get out of the jail alive" as it was "extremely hot, with no ventilation, such that breathing became very difficult."); Conner v. Gusman, Civil Action No. 06-1650, 2007 WL 1428749, at *1 (E.D. La. May 10, 2007) (The plaintiff was left with "no food, no security, no medical attention, no drinking water, and no clean clothes."); Wright v. Gusman, Civil Action No. 06-5768, 2007 WL 519159,

at *1 (E.D. La. Feb. 15, 2007) (The plaintiff was "left imprisoned in a hot, flooded cell."); Jones v. Gusman, Civil Action No. 06-5275, 2007 WL 2264208, at *5 (E.D. La. Aug. 2, 2007) (The plaintiff "suffer[ed] fear and anxiety."); Collins v. Gusman, Civil Action No. 07-0211, 2008 WL 466464, at *2 (E.D. La. Feb. 13, 2008) (The plaintiff "was abandoned in the jail for three days without food, water, functioning toilets, and no air circulation."); Waganfeald v. Gusman, 674 F.3d 475, 486 (5th Cir. 2012) (The court acknowledged that "[a]ppellees suffered terribly while held in custody after Hurricane Katrina struck New Orleans."); Brooks v. Gusman, Civil Action No. 06-5752, 2009 WL 511997, at *2 (E.D. La. Mar. 2, 2009) (The plaintiff "suffered fear and anxiety."); Smith v. Gusman, Civil Action No. 06-4095, 2007 WL 914171, at *4 (E.D. La. Mar. 23, 2007) (The plaintiff "was left without access to medical care, lights, telephone, drinking water, or food" and "suffered nerve damage as a result of the contaminated flood waters."); Kennedy v. Gusman, Civil Action No. 06-5274, 2007 WL 782192, at *1 (E.D. La. Mar. 13, 2007) (The plaintiff "was left in his cell in unsanitary conditions without lights, food, or water" and, "[d]uring the subsequent evacuation . . . he was in over four feet of water for approximately five hours waiting for transportation, and he was sprayed with Mace and beaten by an unnamed deputy."); Hayes v. Gusman, Civil Action No. 06-0504, 2006 WL 1985464, at *2 (E.D. La. June 22, 2006) (The plaintiff "suffer[ed] without food or water for two days."); Gauff v. Gusman, Civil Action No. 06-0842, 2006 WL 2460753, at *2 (E.D. La. June 12, 2006), *report and recommendation adopted*, No. CIVA 06-0842, 2006 WL 2468771 (E.D. La. Aug. 21, 2006) (The plaintiff "suffer[ed] without food and water for days."); Kearns v. Gusman, Civil Action No. 06-2896, 2008 WL 2038938, at *2 (E.D. La. May 12, 2008) (The plaintiff was abandoned without "electricity, food, water, or ventilation" and "was without medication for his diabetes for three days, which caused him to fear for his life."); Harris v. Gusman, Civil Action No. 06-3939, 2007 WL 1792512, at *5 (E.D. La. June 19, 2007) (The plaintiff "as a result of the rising water, . . . nearly drowned, exposed his new amputation site with contaminated water, which may have caused an infection, and went without medication and food for several days."); Frye v. Orleans Par. Prison, Civil Action No. 06-5964, 2007 WL 2362338, at *6 (E.D. La. Aug. 14, 2007) (The plaintiff was forced to "live in unacceptable conditions and endure the untimely and negligently performed evacuation."); Holmes v. Gusman, No. Civ.A.06 3245, 2006 WL 3469555, at *2 (E.D. La. Nov. 28, 2006) (The plaintiff had "to go without food and water."); August v. Gusman, Civil Action No. 06-3962, 2009 WL 1212401, at *4 (E.D. La. Apr. 30, 2009) (The plaintiff "did not receive proper medical treatment during the storm and upon being evacuated" for his "post-surgical knee."); Lopez v. Gusman, No. Civ.A.06 3048, 2006 WL 3469559, at *2 (E.D. La. Nov. 28, 2006) (The plaintiff "suffered physical injury as a result of the conditions of the jail which consisted of nausea and vomiting caused by the awful smell and taste of raw sewerage and water that covered the prison facility." He also "was denied food, and made to sit in the heat."); Charles v. Sheriff Orleans Par., No. Civ.A.06-0053, 2006 WL 2604613, at *4 (E.D. La. Sept. 6, 2006) (The plaintiff "was not fed for three days," which the court called an "unfortunate condition[]" and "temporar[y]."); Hill v. Gusman, No. CIVA 06-0527, 2006 WL 3760454, at *2 (E.D. La. Dec. 18, 2006) (The plaintiff "suffer[ed] without food, medical attention, and water for a couple of days" and was "forced to live in a contaminated area with sewerage water."); Carroll v. Gusman, Civil Action No. 06-9031, 2009 WL 2949997, at *1 (E.D. La. Sept. 10, 2009) (The plaintiff described "deprivation of food, water, bathroom facilities, and proper clothing."); Dean v. Gusman, No. Civ.A.06 3243, 2006 WL 3469558, at *2 (E.D. La. Nov. 28, 2006) (The plaintiff "was denied food[] and was made to sit in the heat" without regard for his medical needs.); Bright v. Gusman, No. Civ.A.06 2782, 2006 WL 3469560, at *1 (E.D. La. Nov. 28, 2006) (The plaintiff describes water that "began to rise out of the toilets and drains" and he "remained with sewerage water" for multiple days.); August v. Gusman, Civil Action No. 06-3962, 2009 WL 166653, at *4 (E.D. La. Jan. 22, 2009) (The plaintiff "did not receive proper medical treatment during and after the storm."); Russ v. Gusman, Civil Action No. 06-5821, 2009 WL 507046, at *1 (E.D. La. Feb. 27, 2009) (The plaintiff was "left in the prison following the storm without food or any assistance from prison officials" and with "conditions of his cell [that] were deplorable . . . with rising flood waters, sewage problems, no electricity, and no ventilation."); Tate v. Gusman, 459 F. Supp. 2d 519, 521 (E.D. La. 2006) (The plaintiff explained that the "deputies . . . panicked and left the inmates stranded without supervision[,] . . . medication, food or drinking water." The "water rose to waist" height and "was high enough to cover the lower bed on bunk beds in the unit."); Duhaney v. Gusman, Civil Action No. 06-3518, 2009 WL 302162, at *1 (E.D. La. Feb. 2, 2009) (The court dismissed the claim with prejudice as "frivolous"

Amendment of the U.S. Constitution reads, in its entirety: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*."[33] Cruel is defined as inflicting "pain or suffering."[34] Unusual is defined as something that is "uncommon" or "rare."[35] On its face, forcibly confining people without means of escape to endure "pain" and "suffering" in a circumstance that is "uncommon" is unconstitutional. The constitutional mandate is clear: OPP's subjugation of its incarcerated population to confinement during a deadly hurricane violated their Eighth Amendment right.

In practice, OPP officials defended their actions by arguing the hurricane was "unprecedented and unanticipated."[36] Therefore, they posited, they had no constitutional duty to protect incarcerated people from the conditions they endured. This argument successfully defeated every claim, highlighting the gap between legal doctrine and lived reality. The Court has repeatedly stated that the Eighth Amendment "acquire[s] meaning as public opinion becomes enlightened by humane justice"[37] and reflects "evolving standards of decency that mark the progress of a maturing society."[38] However, the values articulated in Eighth Amendment cases do not align with the reality of many court decisions. Dorothy Roberts notes that Supreme Court "Justices sometimes refuse to find that specific carceral practices are unconstitutional because they fear such a ruling would require 'too much justice.'"[39] Despite

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without discussion.); Foster v. Louisiana *ex rel.* Dep't of Corr., Civil Action No. 06-9876, 2008 WL 3477016, at *2 (E.D. La. Aug. 11, 2008) (The plaintiff "was injured when he fell from a bunk" and, while he "requested medical care . . . [he] did not receive it."); Anders v. Gusman, Civil Action No. 06-2898, 2007 WL 1029417, at *2 (E.D. La. Mar. 29, 2007) (The plaintiff "was forced to go without food and clean water for four days because no one came to assist him." He was "forced to live in an unsanitary, messy environment that was hazardous to his health."); Morgan v. Gusman, Civil Action No. 06-5700, 2008 WL 3851576, at *1 (E.D. La. Aug. 12, 2008) (The plaintiff "was left without food, water, or medical care" and "the toilets backed up with human waste." When he was evacuated, "he was ordered at gunpoint to leave his personal belongings, including his legal paperwork."); Bolden v. Orleans Par. Jail, Civil Action No. 08-0728, 2009 WL 507045, at *1 (E.D. La. Feb. 26, 2009) (The plaintiff explained that "the Orleans Parish Prison officials left him to die." Further, "he contracted a staph infection and Hepatitis C as a result of his contact with the contaminated flood waters" and "as a result of not having medications during that period, he suffered a stroke," which "permanently affected his ability to walk." He also "suffers from post-traumatic stress syndrome and nightmares due to the inhumane conditions."); Robinson v. Gusman, Civil Action No. 06-3760, 2007 WL 1029425, at *1 (E.D. La. Mar. 29, 2007) (The plaintiff explained that the "water began to rise from the toilets and flood drains" and "his calls for help were ignored although he was told that someone was coming to get him.").

[33] U.S. Const. amend. VIII (emphasis added).

[34] *Cruel*, Merriam-Webster, https://www.merriam-webster.com/dictionary/cruel [https://perma.cc/Z5G2-QDNB] (last visited Feb. 24, 2025).

[35] *Unusual*, Merriam-Webster, https://www.merriam-webster.com/dictionary/unusual [https://perma.cc/9QHQ-FHY6] (last visited Feb. 24, 2025).

[36] *Harris*, 2007 WL 1792512, at *6.

[37] Weems v. United States, 217 U.S. 349, 378 (1910).

[38] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[39] Roberts, *supra* note 3, at 91.

the Court's promises of *protection* against cruel and unusual punishment, Eighth Amendment law is—in actuality—ground zero for *constraints* on incarcerated people's ability to realize that protection.

One critical constraint in Eighth Amendment jurisprudence is the judicially created "deliberate indifference" standard. Between the 1970s and 1990s, the Supreme Court decided multiple cases that focused on the extent to which incarcerated people must prove defendants' *intent* or *awareness* of the harm they face to succeed with their Eighth Amendment claims.[40] In *Estelle v. Gamble* (1976), the Court recognized that incarcerated people have a right to medical care, but emphasized that only "deliberate indifference to serious medical needs of prisoners," rather than accidents or negligence can form the basis of an Eighth Amendment claim.[41] Fifteen years later, in *Wilson v. Seiter*, the Court expanded the deliberate indifference standard to apply broadly to cases involving prison conditions, beyond the medical care cases discussed in *Estelle*.[42] In 1994, the Court further clarified that "deliberate indifference" is subjective, which means that defendants can be liable for cruel and unusual punishment if they ignore risks of harm, but not if they should have been aware of risks but were not.[43]

To win an Eighth Amendment claim, incarcerated people must prove that their conditions were not only cruel and unusual but also the result of more than accident or neglect.[44] Courts analyze deliberate indifference claims with a two part test, determining whether the harm suffered was "sufficiently serious,"[45] and whether officials were aware of and ignored "an excessive risk to inmate health or safety."[46] If plaintiffs cannot meet this standard, courts will not offer relief. As a result, incarcerated people face an uphill battle to realize the protections promised by the Eighth Amendment, even if the presence of patently cruel and unusual conditions.

How can such facile dismissals of blatantly cruel and unusual conditions withstand constitutional scrutiny?

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[40] Estelle v. Gamble, 429 U.S. 97, 104 (1976); Whitley v. Albers, 475 U.S. 312, 319 (1986); Farmer v. Brennan, 511 U.S. 825, 826, 841 (1994); *Eighth Amendment Prison Litigation*, Fed. Jud. Ctr., https://www.fjc.gov/history/spotlight-judicial-history/eighth-amendment-prison-litigation [https://perma.cc/V7AT-98WD] (last visited Feb. 24, 2025).

[41] 429 U.S. at 104-05 ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.").

[42] Wilson v. Seiter, 501 U.S. 294, 303 (1991).

[43] *Farmer*, 511 U.S. at 831-32.

[44] *Estelle*, 429 U.S. at 106.

[45] *Wilson*, 501 U.S. at 298, 303-04 (holding that an imprisoned person can bring an Eighth Amendment claim by applying the deliberate indifference standard to a condition of confinement that denies them an obvious human need such as "food, warmth or exercise" and establishing that a prison official was deliberately indifferent to that "identifiable human need").

[46] *Farmer*, 511 U.S. at 837 (holding that a prison official must: 1) know that a substantial risk of serious harm to an imprisoned person exists, and 2) ignore that risk).

B. From Cruelty to Compassion: The Ethos of the Eighth Amendment Is Rooted in Humane Treatment

> [T]he one thing that I . . . never do when contemplating the future is give up hope. In fact, the very act of trying to look ahead to discern possibilities and offer warnings is in itself an act of hope.
>
> — Octavia E. Butler[47]

Understanding the constitutional context of Eighth Amendment jurisprudence, especially given its apparent divergence from the values it purports to espouse, necessitates a recognition of the historical roots of "cruel and unusual punishment" within the U.S. carceral system—roots that trace directly back to the institution of slavery.[48] As myriad scholars have pointed out, criminal punishment in the U.S. "function[s] to maintain forms of racial subordination that originated in the institution of slavery—despite the dominant constitutional narrative that those forms of subordination were abolished."[49] In fact, after the abolition of chattel slavery,[50] criminal punishment has been "instrumental in reinstating the subjugated status of black people and preserving a racial" power structure.[51]

Many scholars have written about the fallacy of humane prisons.[52] Professor Herman Schwartz describes prisons as "a garbage can of law."[53] In many ways, the very purpose of incarceration is the infliction of cruelty, serving as a modern extension of the historical practice of enslavement.[54] This Article does not seek to recreate arguments aptly made elsewhere that incarceration is per se cruel and unusual.[55] Instead, it builds upon these

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[47] Octavia E. Butler, *A Few Rules for Predicting the Future*, Essence, May 2000, at 165.

[48] Roberts, *supra* note 3, at 7.

[49] *Id.* at 4.

[50] While chattel slavery was abolished, the Constitution's slavery exception permits forced labor as a punishment for a crime. *Id.* at 107. Scholars Earl Smith and Angela J. Hattery describe incarceration "[a]s a tool of segregation, incarceration not only removes African Americans as competition in a tight labor market, but takes those who were formerly 'unexploitable' and transforms the[m] into labor that can be exploited for profit through their work in prison industries." Earl Smith & Angela J. Hattery, *Incarceration: A Tool for Racial Segregation and Labor Exploitation*, 15 Race Gender & Class 79, 79 (2008). This exploitation is particularly evident in the use of incarcerated labor to fight increasingly dangerous wildfires.

[51] Roberts, *supra* note 3, at 4.

[52] *See, e.g.*, Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 Harv. L. Rev. F. 253, 266 (2025) ("In a society that requires prisoners to be treated humanely, American jails and prisons are cesspools of disease and trauma."). *See generally* Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 Yale L.J.F. 848 (2019).

[53] *The Nation: Prisons: The Way to Reform*, Time (Sept. 27, 1971), https://time.com/archive/6843884/the-nation-prisons-the-way-to-reform/ [https://perma.cc/J58Z-VEBN].

[54] Roberts, *supra* note 3, at 19 ("[T]he extreme cruelty and degradation that characterize today's penitentiaries, police forces, and executions [are] the inevitable result of a racially subordinating system.")

[55] *See* Jonathan Simon, Mass Incarceration on Trial 3 (2014); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Forward, in Developments in the Law – Prison Abolition*,

analyses by focusing on a pressing and compounding crisis that further exacerbates the inhumane reality of prison: climate change. In doing so, it highlights how the worsening climate crisis exposes the structural cruelty inherent in imprisonment and reinforces why the notion of a "humane" prison is a contradiction.

Despite the escalating threats posed by climate change to the level of cruelty experienced in prisons and jails, the constitutional framework governing the Eighth Amendment remains resistant to realizing the Amendment's promise against cruel and unusual punishment. In fact, Eighth Amendment jurisprudence is contracting rather than expanding rights.[56] In recent years, courts have increasingly adopted a more restrictive approach, limiting the scope of what constitutes "cruel and unusual punishment." For instance, the Supreme Court's decision in *Baze v. Rees* introduced a standard that makes it more challenging for incarcerated people to contest methods of execution, holding that Kentucky's lethal injection protocol did not violate the Eighth Amendment and establishing a new "objectively intolerable" standard of harm.[57]

This judicial trend reflects broader ideological shifts in constitutional interpretation, with courts prioritizing deference to state-level legislative and executive authority. Such deference can undermine the judiciary's role in safeguarding individual rights against potential overreach by other branches of government. Crucially, such deference to legislative bodies in matters affecting fundamental rights is not constitutionally mandated nor jurisprudentially sound, as it leads to the erosion of core protections.[58] Given this trajectory, a different interpretive approach is necessary—one that is not confined by the current political landscape of the United States but instead seeks to ground constitutional interpretation in bedrock principles of the Amendment itself.

Thus, this Article does not assert that the arguments discussed herein are presently politically feasible. Instead, it adopts an "ethical" modality of interpretation, which Professor Philip Bobbitt describes as one that focuses

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132 HARV. L. REV. 1575, 1578 (2019); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1207 (2015) ("[A] critical abolitionist ethic centers on how caging or confining human beings in a hierarchically structured, depersonalizing environment developed through historical practices of overt racial subordination tends inherently toward violence and degradation."); Kim Gilmore, *Slavery and Prison – Understanding the Connections*, 27 SOC. JUST. 195, 196 (2000) (discussing how the prison industrial complex and its foundation is "related to," albeit distinct from histories of chattel slavery); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 284-86 (2007).

[56] Johnson v. Prentice, 144 S. Ct. 11, 12 (2023) (denying petition for writ of certiorari).

[57] Baze v. Rees, 553 U.S. 35, 61-63 (2008); *see also* Blake Allen, *Changing Against the Times: Against an Originalist Cruel and Unusual Jurisprudence*, 18 GEO. J.L. & PUB. POL'Y 583, 587 (2020).

[58] *See* Preetesh Kapur, *Judicial Deference in the Face of Human Rights Violations: A Constitutional Anathema*, BAR & BENCH (Aug. 5, 2020), https://www.barandbench.com/columns/judicial-deference-in-the-face-of-human-rights-violations-a-constitutional-anathema [https://perma.cc/WK4H-4LUA].

on the underlying "ethos of the law" and "fill[s] in gaps in the text to address situations unforeseen at the time of the Founding."[59] This approach has historic roots. The nineteenth-century abolitionist Lysander Spooner asserted that the Constitution was an antislavery document and "distinguished between the democratic principles stated in [the Constitution's] text that repudiated slavery and the proslavery intent of its framers and proslavery interpretations of slaveholders and judges."[60] Constitutional scholar Randy Barnett argues that "the Constitution's inclusive language" should be construed "as it *reads*, and not as the slaveholders pretend that it *means*."[61]

What democratic principles do plaintiffs seek to have validated, and how do courts articulate them when interpreting the Eighth Amendment? The cases reviewed below reveal recurring themes of bodily autonomy, humane treatment, and human dignity as central to both plaintiff and judicial understandings of the Eighth Amendment.

This Article proceeds in four parts: Part I describes how climate change exacerbates the already inhumane conditions of incarceration. Part II outlines the current confines of federal case law. Part III advances a climate-informed approach to the Eighth Amendment. First, it describes how contemporary Eighth Amendment jurisprudence effectively *legalizes* cruel and unusual punishment by placing the burden on incarcerated people to prove that the harm they experienced resulted from prison and jail officials' "deliberate indifference" to obtain relief. Second, it argues that because prisons and jails have complete control over incarcerated people's safety during natural disasters, they cannot forcibly expose them to danger by keeping them confined during an emergency. Third, it argues that legal analysis must evolve as science evolves. Numerous studies confirm that natural disasters *will* occur with increasing frequency and intensity,[62] meaning that prison officials cannot claim—as they did after Hurricane Katrina—that they have no "burden to protect [incarcerated people] from the unknown and unexpected" during climate emergencies.[63] Fourth, it provides concrete

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[59] Brandon J. Murrill, Cong. Rsch. Serv., R45129, Modes of Constitutional Interpretation, 15-16 (2018).

[60] Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. Legal Analysis 165, 201-03 (2011) (explaining abolitionist Lysander Spooner's argument that the intent of the founders should not be used to imbue protections for slavery into the Constitution where they do not exist).

[61] *Id.* at 243 (explaining that the 1855 convention on "Radical Political Abolitionists" deemed it "right and proper to construe the Constitution as it *reads*, and not as the slaveholders pretend that it *means*"); *see also* Roberts, *supra* note 3, at 50 n.285, 55 (quoting Barnett and his work "discussing how legal historians 'long obscured' the abolitionist constitutional roots of Section 1 of the Fourteenth Amendment").

[62] Daniel Vernick, *Is Climate Change Increasing the Risk of Disasters? Facts About Floods, Fires, Hurricanes, and Tornadoes*, World Wildlife Fund (Jan. 14, 2025), https://www.worldwildlife.org/stories/is-climate-change-increasing-the-risk-of-disasters [https://perma.cc/JF24-5TUN].

[63] Harris v. Gusman, Civil Action No. 06-3939, 2007 WL 1792512, at *6 (E.D. La. June 19, 2007) ("[T]he flooding as a result of the levee breaches after Hurricane Katrina passed through

suggestions to incarcerated people and advocates working within the current Eighth Amendment framework. Part IV argues that, if the state continues to maintain its right to hold people in cages during natural disasters, the proper remedy for such cruel and inhumane treatment is release.

This Article contributes to current scholarship in three critical ways: (1) It provides the most comprehensive survey to date of the body of cases in which incarcerated people have challenged the cruelty of their confinement due to natural disaster conditions. (2) It focuses on the relief sought by petitioners and the underlying values espoused by the court's holdings. And (3) in responding to the relief sought by petitioners, it advances arguments for non-reformist reforms,[64] which abolitionists describe as actions that shrink "the state's capacity for violence"[65] and increase the possibility of freedom.[66]

Together, Parts I through IV bring into sharp relief a rule-of-law problem: Eighth Amendment doctrine not only fails to prevent but expressly authorizes the very reality it promises to prevent. The federal courts' current jurisprudence on extreme heat and natural disasters in prisons is unconstitutional. Denying incarcerated people humane climate conditions violates the Eighth Amendment. The only way to fully recognize and remedy this harm is to let people out.

I. Climate Change Exacerbates Excruciating Prison Conditions

Contrary to popularized expressions claiming that "[c]limate change puts us all in the same boat,"[67] the exact opposite is true. Climate change exacerbates systemic inequity and further divides the world's haves and have-nots. As climate activist Greta Thunberg says, "We're all in the same storm. But we're not all in the same boat."[68] The United Nations calls this reality "climate apartheid," a system in which "the wealthy pay to escape

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the metropolitan area was unprecedented and unanticipated. [Sheriff] Gusman was under no constitutional burden to protect [incarcerated people in New Orleans] from the unknown and unexpected.").

[64] While the literature has highlighted the ways in which climate change makes prison conditions harsher, it has largely responded to that reality by proposing reforms that further entrench the prison industrial complex. *See, e.g.*, sources cited *supra* note 2.

[65] Berger et al., *supra* note 3; *see also* Mariame Kaba, *Police "Reforms" You Should Always Oppose*, TRUTHOUT (Dec. 7, 2014), https://truthout.org/articles/police-reforms-you-should-always-oppose [https://perma.cc/3DCS-8SNW]; Roberts, *supra* note 3, at 114 ("To be abolitionist, reforms must shrink rather than strengthen 'the state's capacity for violence.'") (citation omitted).

[66] *Dismantle and Transform: On Abolition, Decolonization, and Insurgent Politics, A Conversation Between Harsha Walia and Andrew Dilts*, 1 ABOLITION 12, 14-15 (2016).

[67] Kofi Annan, *Climate Change Puts Us All in the Same Boat. One Hole Will Sink Us All*, GUARDIAN (Dec. 10, 2009), https://www.theguardian.com/environment/cif-green/2009/dec/10/kofi-annan-climate-change [https://perma.cc/D7X3-Y8SU].

[68] @gretathunberg, TWITTER (Sept. 20, 2020, 11:03 AM), https://twitter.com/GretaThunberg/status/1305160244729913351 [https://perma.cc/P826-6BL4].

overheating, hunger, and conflict while the rest of the world is left to suffer."[69] And just as climate change disproportionately impacts women,[70] Indigenous people,[71] Black people,[72] poor people,[73] rural communities,[74] disabled people,[75] and LGBTQ people,[76] it also intensifies the systemic harm incarcerated people already face.[77]

This harm takes many forms. The first, and most litigated, is extreme heat exposure, which has become more frequent and intense due to climate change. Incarcerated people are frequently subjected to inhumane heat conditions due to prisons' aging infrastructure and lack of air conditioning. For example, in the summer of 2023, at least forty-one people "died of either heat-related or unknown causes in Texas prisons, many of them in their 20s and 30s," more than four times the number of heat-stroke-related deaths in the state in 2011.[78] Despite a Texas statute requiring jails to maintain interior

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[69] *World Faces 'Climate Apartheid' Risk, 120 More Million in Poverty: UN Expert*, U.N. NEWS (June 25, 2019), https://news.un.org/en/story/2019/06/1041261[https://perma.cc/AVV4-KUGP].

[70] Taylor Caton, *Climate Change Disproportionately Affects Women*, DREXEL UNIV. COLL. MED. WOMEN'S HEALTH EDUC. PROGRAM BLOG (Dec. 6, 2023), https://drexel.edu/medicine/academics/womens-health-and-leadership/womens-health-education-program/whep-blog/climate-change-disproportionately-affects-women/ [https://perma.cc/D386-BRF2].

[71] *Climate Change and the Health of Indigenous Populations*, U.S. EPA, https://www.epa.gov/climateimpacts/climate-change-and-health-indigenous-populations [https://perma.cc/MU4A-DQXW] (last visited Feb. 26, 2024).

[72] AFRICAN AMERICAN COMMUNITIES AND CLIMATE CHANGE, ENV'T DEF. FUND 1, https://www.edf.org/sites/default/files/documents/African%20American%20Communities%20and%20Climate%20Change.pdf [https://perma.cc/A974-YN46] (last visited Feb. 26, 2024).

[73] ABEYGUNAWARDENA ET AL., POVERTY AND CLIMATE CHANGE: REDUCING THE VULNERABILITY OF THE POOR THROUGH ADAPTATION, WORLD BANK , http://documents1.worldbank.org/curated/en/534871468155709473/pdf/521760WP0pover1e0Box35554B01PUBLIC1.pdf [https://perma.cc/PFX3-5TBP] (last visited Feb. 26, 2024).

[74] *Rural Communities*, U.S. GLOB. CHANGE RSCH. PROGRAM, https://nca2014.globalchange.gov/highlights/regions/rural-communities [https://perma.cc/4UQE-H249] (last visited Feb. 26, 2024).

[75] *Disability, Displacement and Climate Change*, U.N. HIGH COMM'R FOR REFUGEES (2021), https://www.unhcr.org/us/media/disability-displacement-and-climate-change [https://perma.cc/AW8K-HZLR].

[76] *See* Mikyla Reta, *How Environmental and Climate Injustice Affects the LGBTQI+ Community*, CTR. FOR AM. PROGRESS (June 16, 2022), https://www.americanprogress.org/article/how-environmental-and-climate-injustice-affects-the-lgbtqi-community/ [http://perma.cc/E78Z-K92Y].

[77] For a comprehensive survey of the ways in which climate change is exacerbating already harsh prison and jail conditions, see Emily C. Gribble & David N. Pellow, *Climate Change and Incarcerated Populations: Confronting Environmental and Climate Injustices Behind Bars*, 49 FORDHAM URB. L.J. 341, 353 (2022).

[78] *See* Samantha Harrington, *Extreme Heat Can Be a Death Sentence in Texas Prisons: Advocates Are Calling for Solutions, Such as More Air Conditioning, Worker Protections, and Prison Abolition*, YALE CLIMATE CONNECTIONS (Sept. 29, 2023), https://yaleclimateconnections.org/2023/09/extreme-heat-can-be-a-death-sentence-in-texas-prisons/ [http://perma.cc/L2AC-PNSA]; Candace Bernd, Zoe Loftus-Farren & Maureen Nandini Mitra, *America's Toxic Prisons*, EARTH ISLAND J., https://earthisland.org/journal/americas-toxic-prisons/ [perma.cc/ZJH2-JPCB] (last visited Apr. 19, 2025).

temperatures between sixty-five and eighty-five degrees,[79] as of 2018, over 70% of the 141,000 incarcerated people in Texas facilities lack air conditioning. These facilities routinely reach temperatures above 110 degrees in the summer.[80] Recent studies confirm that Texans need air conditioning to survive the heat.[81] However, only about 30% of prison housing in Texas is fully air-conditioned,[82] in contrast with the more than 98% of Texas homes that have air conditioning.[83] For example, Eugene Blackmon, who was particularly susceptible to heat due to his medication, age, and high blood pressure, was forced to live in a cell in Beeville, Texas, where the temperature was "in the extreme danger range [and] the risk of heat stroke was imminent."[84]

Despite this, the Texas Department of Criminal Justice ("TDCJ") dismissed the idea of adding air conditioning to its buildings due to "extreme[] expens[e]."[85] The Director of the American Civil Liberties Union's ("ACLU") National Prison Project, David Fathi, explained that carceral officials often view air conditioning as a "luxury" that undermines the image of their facilities as harsh places.[86] Such dismissive attitudes toward life-saving cooling measures has had lethal impacts: A recent study by researchers at Harvard University, Boston University, and Brown University showed that a two-day heat wave in the Northeast was correlated with a 21% mortality increase for imprisoned people.[87] As Fathi explained "The absence of air conditioning in prisons and jails . . . is an issue of life and death . . . a decision to let people

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[79] Tex. Admin. Code § 260.154 (1994). Experts caution that temperatures above eighty-two degrees require "extreme caution" and "heat-related illness is possible with long exposure." Elizabeth Pratt, *These Are the Symptoms of Heat Stroke That You Should Never Ignore*, HealthLine (July 3, 2019), https://www.healthline.com/health-news/what-you-should-do-if-you-exercise-work-in-the-heat [https://perma.cc/A35X-6UNB].

[80] Harrington, *supra* note 7878; *see also* Christopher Zoukis, *Litigation Heats Up Over Extreme Temperatures in Prisons, Jails*, Prison Legal News (June 29, 2018), https://www.prisonlegalnews.org/news/2018/jun/29/litigation-heats-over-extreme-temperatures-prisons-jails/ [http://perma.cc/Q38A-UDZW].

[81] *See* Julianne Skarha, Amite Dominick, Keith Spangler, David Dosa, Josiah D. Rich, David A. Savitz & Antonella Zanobetti, *Provision of Air Conditioning and Heat-Related Mortality in Texas Prisons*, 5(11) JAMA Network (Nov. 2, 2022) (finding that a one-degree increase above eighty-five degrees Fahrenheit "was associated with a 0.7% increase in the risk of daily mortality").

[82] *See* Juan A. Lozano, *Texas Heat Wave Has Inmates' Families Worried About Lack of Air Conditioning in State's Prisons*, Associated Press (July 18, 2023), https://apnews.com/article/texas-prison-air-conditioning-families-rally-bdd5f3d46462d804cc1d8c7116af5d1d [http://perma.cc/8LRF-9735].

[83] *See* Molly Hennessy-Fiske, *Texas Heat Wave Means Life Revolves Around Air Conditioning*, Wash. Post (July 14, 2023), https://www.washingtonpost.com/nation/2023/07/14/air-conditioning-extreme-heat-wave-climate-change/.

[84] Blackmon v. Garza, 484 F. App'x 866, 867, 871, 872 (5th Cir. 2012).

[85] Zoukis, *supra* note 80.

[86] *Id.*

[87] *See* Amanda Hernández, *Stifling Prison Heat Used to be Just a Southern Problem. Not Anymore.*, N.H. Bull. (Aug. 15, 2023), https://newhampshirebulletin.com/2023/08/15/stifling-prison-heat-used-to-be-just-a-southern-problem-not-anymore [http://perma.cc/JHS2-95D4]. The study did not specify how many actual deaths the increase equated to.

die."[88] And climate change will only make this worse, making heatwaves longer, more extreme, and more frequent.[89]

The impact of extreme heat on incarcerated people is no longer limited to the southern (hottest) states. Dangerous levels of excessive heat are a common experience amongst incarcerated people across the country. Ellis Walker, incarcerated in Illinois, described being "confined in a cell with five other men, with inadequate space and ventilation, [and] stifling heat in the summer and freezing cold in the winter."[90] Luis Vasquez, imprisoned in Wisconsin, described temperatures that were "too hot in the summer" and shared how he "coughed up blood and experienced nose bleeds, heat exhaustion, dizziness, and insomnia."[91]

Aging and disabled people incarcerated across the country are particularly vulnerable to extreme heat. Approximately 40% of people incarcerated in federal prisons and 33% of people incarcerated in state prisons "reported having a chronic [medical] condition,[92] making them especially susceptible to heat stroke and other heat-related health issues.[93] Even basic measures to reduce heat exposure—like handheld fans, which can cost about twenty dollars—are often prohibitively expensive for incarcerated people who typically earn between $0.14 to $1.41 per hour.[94] Even if they can afford them, the only fans available to incarcerated people are small, poorly made, and largely ineffective.[95]

Further, in the face of extreme heat conditions, incarcerated people report limited access to water and ice, restrictions on showers, and fans set up to cool guards rather than prison living areas.[96] For example, at the Wallace Pack Unit in Texas in 2017, eighty-four incarcerated people were forced to share a single ten-gallon water cooler locked in a common area. Each person received a maximum of one eight-ounce cup of water every four hours, half of the amount recommended by the National Academy of

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[88] *Id.*

[89] *See* Climate Change 2023: Synthesis Report, Intergovernmental Panel on Climate Change 13 (2023); *Climate Change Indicators: Heat Waves*, EPA, https://www.epa.gov/climate-indicators/climate-change-indicators-heat-waves [https://perma.cc/UQP2-W9SJ] (last visited Apr. 12, 2025).

[90] Walker v. Schult, 717 F.3d 119, 126 (2d Cir. 2013).

[91] Vasquez v. Frank, 209 F. App'x 538, 540 (7th Cir. 2006).

[92] *See* Laura M. Maruschak, Jennifer Bronson & Mariel Alper, Medical Problems Reported by Prisoners: Survey of Prison Inmates, 2016, at 10, Bureau Just. Stat., NCJ 252644 (2021), https://bjs.ojp.gov/library/publications/medical-problems-reported-prisoners-survey-prison-inmates-2016 [http://perma.cc/Z64P-ZLHJ].

[93] *Heat and Chronic Conditions*, U.S. Ctr. for Disease Control, https://www.cdc.gov/heat-health/risk-factors/heat-and-chronic-conditions.html [https://perma.cc/9T62-CASQ] (last visited Apr. 12, 2025).

[94] *See* Hernández, *supra* note 87.

[95] *See id.*

[96] *See* Zoukis, *supra* note 80.

Medicine for adults under *normal* temperature conditions.[97] It bears emphasizing that prison housing under the responsibility of the TDCJ has reached 140 degrees during the summer months.[98] In 2016, Benny Hernandez, held at the Price Daniel Unit west of Dallas, explained that "[i]t routinely feels as if one's sitting in a convection oven being slowly cooked alive."[99] Individuals held in confinement cannot simply leave the overheated location and seek refuge somewhere else.

Heatwaves are just one of the climate-related impacts that incarcerated people are forced to endure. Another prominent climate reality impacting incarcerated people is increasing natural disasters. As exemplified by the case of Hurricane Katrina, prison officials have repeatedly failed to evacuate incarcerated people in the face of hurricanes. And people have faced unprecedented dangers when abandoned. In addition to the hurricanes mentioned above, incarcerated people were abandoned during Hurricane Irene in 2011,[100] Hurricane Harvey in 2017,[101] and Hurricane Florence in 2018,[102] among others. Carceral institutions have refused to evacuate people facing other types of natural disasters as well, such as tornadoes and wildfires. The recent wildfires in Los Angeles are a recent example of incarcerated people being abandoned despite living within a mandatory evacuation zone.[103] The danger of wildfires to incarcerated people will only increase as climate change intensifies, making wildfire season longer, more extreme, and more treacherous.[104]

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[97] *See id.*

[98] *See id.*

[99] *Id.*

[100] *See* James Ridgeway & Jean Casella, *Rikers Island Prisoners Left Behind to Face Irene*, Mother Jones (Aug. 27, 2011), https://www.motherjones.com/criminal-justice/2011/08/rikers-island-prisoners-irene/ [https://perma.cc/FA9W-N42G].

[101] *See* Nathalie Baptiste, *"We Didn't Have to Suffer Like That": Inside a Texas Prison During Hurricane Harvey*, Mother Jones (Nov. 9, 2017), https://www.motherjones.com/criminal-justice/2017/11/we-didnt-have-to-suffer-like-that-inside-a-texas-prison-during-hurricane-harvey/ [https://perma.cc/3RSD-TGYL].

[102] Madison Pauly, *Thousands of Prisoners Are Being Forced to Stay During Hurricane Florence: Some States Have Not Learned the Dangerous Lessons of Hurricane Harvey*, Mother Jones (Sept. 11, 2018), https://www.motherjones.com/criminal-justice/2018/09/thousands-of-prisoners-are-being-forced-to-stay-during-hurricane-florence/ [https://perma.cc/9QMY-VSN7].

[103] Alleen Brown, *Dark, Smoky Cells: As Wildfires Threaten More Prisons, the Incarcerated Ask Who Will Save Their Lives*, Intercept (Feb. 12, 2025), https://theintercept.com/2022/02/12/wildfires-prisons-climate-california/ [https://perma.cc/DU5N-4SRM]; Sam Levin, *'Severe Inhumanity': California Prisons Overwhelmed by Covid Outbreaks and Approaching Fires: Families of Prisoners Declare Public Health and Human Rights Catastrophes as Officials Resist Calls to Evacuate as Virus Spreads*, Guardian (Aug. 21, 2025), https://www.theguardian.com/us-news/2020/aug/21/california-fires-prisons-covid-outbreaks [https://perma.cc/L6LM-43N6].

[104] Additionally, incarcerated people are often forced to fight increasingly dangerous wildfires, earning less than six dollars per day—a stark reminder that their safety is disregarded during natural disasters, even as they are tasked with protecting the safety of non-incarcerated people. Note, *Climate Carceralism: The Future of Climate-Linked Prison Labor*, 137 Harv. L. Rev. 706, 711-12 (2023); Sam McCann, *From Fighting Wildfires to Digging Graves, Incarcerated Workers Face Danger on the Job*, Vera Inst. Just. (July 26, 2023), https://www.vera.org/

The harm of climate change extends beyond extreme weather events. Its impact on prison and jail buildings themselves puts incarcerated people at risk. Many prisons are built on the "cheapest, easiest to obtain sites: toxic waste sites and environmentally compromised locations around the country."[105] Approximately one in three state or federal prisons are located within three miles of a Superfund site,[106] contaminated with abandoned hazardous waste. Extensive research reveals that living, working, or even going near Superfund waste sites[107] is linked to serious illness and lower life expectancy.[108]

Climate change also destabilizes the physical foundations of prisons and jails.[109] The warming climate includes more "heat and . . . moisture in the air, [which] cause[s] structures to deteriorate more quickly."[110] In 2021, a twelve-story condominium complex with over 100 units collapsed in Surfside, Miami, killing ninety-eight people.[111] This serves as a stark warning of what could happen to the many jails and prisons built in similar circumstances.[112] The complex, like many carceral structures, was a large cement building that was poorly maintained. It is suspected that the building's deterioration, which led to the collapse, was accelerated by climate change.[113]

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news/from-fighting-wildfires-to-digging-graves-incarcerated-workers-face-danger-on-the-job [https://perma.cc/XKN9-MGWK]. Scholar Maya Habash highlights the "unfair dichotomy" between how the Thirteenth Amendment enables the "mass utilization of prison labor during an emergency" while "disregarding [incarcerated people's] safety needs" during hurricanes. Maya Habash, *Locked Up in the Eye of the Storm: A Case for Heightened Legal Protections for Incarcerated People During Hurricanes*, 21 U. Md. L.J. Race, Religion, Gender & Class 137, 137-38 (2021) (arguing that the Thirteenth Amendment is the "basis for the mass utilization of prison labor during an emergency, and how the experiences of incarcerated people during hurricanes highlight an unfair dichotomy between viewing them as a necessary labor force while simultaneously disregarding their safety needs").

[105] Melissa Mitchell (Zeid), *Cruel, Unusual, and Toxic: The Environmental Implications of Mass Incarceration in the United States*, 11 Ariz. J. Env't L. & Pol'y 267, 267 (2021).

[106] Abby Outterson, *Polluted Prisons*, Pub. Health Post (Nov. 23, 2022), https://www.publichealthpost.org/research/polluted-prisons [perma.cc/6XZ3-FC8X].

[107] *See generally* Amin Kiaghadi, Hanadi S. Rifai & Clint N. Dawson, *The Presence of Superfund Sites as a Determinant of Life Expectancy in the United States*, 12 Nature Commc'ns 1 (2021) (highlighting the dangers of spending time in or near superfund sites, including effects to life expectancy).

[108] Leah Wang, *Prisons Are a Daily Environmental Injustice*, Prison Pol'y Initiative (Apr. 20, 2022), https://www.prisonpolicy.org/blog/2022/04/20/environmental_injustice/ [https://perma.cc/YD2B-H4RF].

[109] Laurie L. Levenson, *Climate Change and the Threat to U.S. Jails and Prisons*, 33 Vill. Env't L.J. 143, 144-45 (2022).

[110] *Id.* at 148.

[111] *Id.* at 143; *How the Surfside Condo Collapse Has Reshaped South Florida, 3 Years Later*, CBS News (June 24, 2024), https://www.cbsnews.com/miami/news/surfside-florida-condo-collapse-champlain-towers-south-3-years-later/ [https://perma.cc/8R2J-CNBA].

[112] Levenson, *supra* note 109, at 143.

[113] *Id.* at 147.

The construction of new federal prisons and jails requires an Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA") whenever a proposed project could significantly impact the environment, public health, or human safety.[114] However, despite the longstanding practice of building carceral facilities in hazardous locations with unstable foundations, the EIS process does not require the government to consider the health of incarcerated residents. Instead, the EIS focuses on the environmental impacts on nearby non-incarcerated residents.[115] Incarcerated people "have never been considered in any new prison construction EISs" and the Bureau of Prisons ("BoP") has historically "*never* taken [the] prisoner population into consideration" under its EIS environmental justice analysis.[116] For example, one BoP EIS asserted that "the only [environmental justice] impact to the local community . . . w[ould] be the positive economic benefits associated with the prison." State-run prisons and jails are typically not subject to NEPA unless they are federally funded or require a federal permit. As a result, while the EIS process is designed to protect surrounding communities, it fails to address the environmental risks to the health and safety of the people living *within* a proposed jail or prison.[117]

As demonstrated throughout this Part, climate change amplifies and aggravates the already inhumane environments of prisons and jails. In light of these grim realities, many incarcerated people turn to the courts seeking reprieve. The following Part explores how courts have responded to those pleas.

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[114] *National Environmental Policy Act Review Process*, EPA, https://www.epa.gov/nepa/national-environmental-policy-act-review-process [perma.cc/VCV3-Y6MP] (last visited Feb. 24, 2025).

[115] *See* 42 U.S.C. § 4321 et seq. (1969); 40 C.F.R. Parts 1500-1508; *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, Exec. Order No. 12,898, 59 Fed. Reg. 32 (Feb. 16, 1994) (rescinded on Jan. 21, 2024); Nathalie Prescott, *Prisoner (In)Consideration in Environmental Justice Analyses*, Geo. Env't L. Rev. Online (May 31, 2016); Human Rights Defense Center, Comment on the Inclusion of Prisoner Populations in EPA's Draft Framework for EJ 2020 Action Agenda, 3 (July 14, 2015), https://www.humanrightsdefensecenter.org/media/publications/EJ%202020%20HRDC%20Prison%20Ecology%20comment%20to%20EPA%20with%2091%20sign%20ons%20FINAL.pdf [https://perma.cc/N2VK-9AG9].

[116] Prescott, *supra* note 115.

[117] While an EIS is generally not required for state prisons unless they receive federal funding (which is rare), some states have a state-level NEPA equivalent, such as the California Environmental Quality Act. *States and Local Jurisdictions with NEPA-like Environmental Planning Requirements*, Council on Env't Quality, https://ceq.doe.gov/laws-regulations/states.html [https://perma.cc/UCE2-KFND] (last visited Apr. 12, 2025). Texas (the state discussed most extensively in this Article), however, does not have a comprehensive state-level EIS requirement. *Id.* It does have an environmental review process but that is generally less extensive than a full EIS. *See* 31 Tex. Admin. Code § 371.41.

II. Incarcerated People's Eighth Amendment Rights are Betrayed Amid Extreme Climate Conditions

Prisons do not disappear problems, they disappear human beings.

— Angela Davis[118]

As climate change intensifies harsh conditions in prisons and jails, imprisoned people have turned to courts for remedies. This Part of the Article examines the two predominant circumstances where incarcerated people have sought relief from the courts under the Eight Amendment's prohibition of cruel and unusual punishment: (1) after heat waves and (2) after natural disasters. Courts have responded differently to the two types of claims. Courts *have* recognized a limited Eighth Amendment right to some cooling in heat cases. This is particularly true when incarcerated people have health conditions that make them vulnerable to extreme heat.

Courts have largely dismissed incarcerated people's Eighth Amendment claims that they have a right to be free of cruel and unusual punishment during natural disasters. The prevailing logic for rejecting these claims has been that—because natural disasters are "unpredictable," and prison and jail officials cannot foresee them—courts could not find that officials acted with "deliberate indifference" when they abandoned the people under their control in a storm. This jurisprudence effectively condones torturous conditions in the event of extreme weather events—such as hurricanes, wildfires, and tornados.

A. Extreme Heat: A Deadly Crisis in U.S. Prisons

The Supreme Court has held that incarcerated people are entitled to the "minimal civilized measure of life's necessities," including adequate shelter.[119] Within the scope of adequate shelter, courts have recognized that people who are imprisoned may have a constitutional right to a livable temperature—or, at minimum, to some cooling or heating. The extent of this right, however, is unclear. In 1991, the Supreme Court considered a case brought by Pearly L. Wilson, incarcerated in Ohio, who alleged multiple conditions in his facility—including "inadequate heating and cooling"—constituted cruel and unusual punishment.[120] The Court held that cell temperature is a condition of confinement.[121] It then recognized that warmth is an essential human need and explained that "a low cell temperature at

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[118] Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, History is a Weapon, http://www.historyisaweapon.com/defcon1/davisprison.html [https://perma.cc/NW78-8JW6] (last visited Feb. 24, 2025).

[119] Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

[120] Wilson v. Seiter, 501 U.S. 294, 296 (1991).

[121] *Id.* at 302-03

night combined with a failure to issue blankets" could violate the Eighth Amendment.[122]

Other federal courts have more explicitly stated that incarcerated people have a right to be "protected from extreme heat."[123] To determine what is "extreme," courts look to many factors, including "the severity [of the temperature] . . . ; its duration; whether the prisoner has alternative means to protect himself [from the temperature]; the adequacy of such alternatives; as well as whether [the prisoner] must endure other uncomfortable conditions."[124] However, courts consistently underscore that "[p]rison conditions may be harsh and uncomfortable without violating the Eighth Amendment's prohibition against cruel and unusual punishment."[125]

The survey of claims related to extreme heat in prisons over the past four decades conducted for this Article demonstrates that incarcerated people must clear a *very high bar* to receive redress for extreme heat in prisons, which will only worsen with climate change. The survey reveals two key themes. First, courts more frequently rule in favor of prison officials who claim they have responded appropriately to the health and safety of the incarcerated people in their control. More specifically, while the standards vary slightly by circuit (*see* Appendix Table 1), in general, courts seem to grant relief only in situations where incarcerated people can prove that: (1) temperatures exceeded 100 degrees, (2) for a sustained period (longer than one day), (3) prison officials were subjectively aware of the danger presented by the high temperature, and (4) prison officials did nothing (beyond placing a single fan) to ameliorate the conditions. Courts seem reluctant to hold officials responsible where it is either ambiguous whether officials knew of the danger or there is evidence that they made anything above a bare minimum effort to mitigate the circumstances.

Second, incarcerated plaintiffs are more likely to overcome prison officials' defenses and succeed in their claims for relief when they have heat-sensitive health conditions. To prevail, an incarcerated person experiencing extreme heat usually must: (1) document their health condition(s), (2) file a formal complaint through the grievance process, and (3) have a physical injury due to their sensitivity to the heat.

This section analyzes select cases that exemplify the two themes outlined above.

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[122] *Id.* at 304.

[123] Moore v. Monahan, No. 06 C 6088, 2009 WL 310963, at *6 (N.D. Ill. Feb. 9, 2009), *aff'd in part*, 428 F. App'x 626 (7th Cir. 2011); *see also* Jones-El v. Berge, 374 F.3d 541, 543 (7th Cir. 2004).

[124] Dixon v. Godinez, 114 F.3d 640, 644 (7th Cir. 1997).

[125] *Id.* at 642.

1. Incarcerated People's Claims Fail When Courts Defer to Prison Officials' "Reasonable" Responses

In cases where plaintiffs challenged extreme heat conditions, courts were most likely to find in favor of defendants—regardless of plaintiffs' health status—under the deliberate indifference standard if the court determined that (1) carceral officials responded "reasonably" to incarcerated people's heat exposure *or* the court concluded that (2) officials did not know enough to respond "reasonably" to the conditions.[126]

In a seminal 1994 Supreme Court case, *Farmer v. Brennan*, the Court expanded the deliberate indifference standard announced in *Estelle* to hold that prison and jail officials may be held liable for Eighth Amendment violations "*only* if [they] know that inmates face a substantial risk of serious harm" and "disregard[] that risk by failing to take reasonable measures to abate it."[127] After *Farmer*, a prison official cannot be found deliberately indifferent if they "respond[] reasonably" to risks to health or safety "even if the harm ultimately was not averted."[128]

Under the *Farmer* standard, in 2010, the Seventh Circuit heard *Green v. Walker*.[129] Donald L. Green asserted that prison officials retaliated against him for filing grievances about prison conditions and acted with deliberate indifference to excessive heat and insufficient ventilation.[130] The court rejected Green's claims, reasoning that "Green has not pointed to any evidence reflecting that the heat carried on at extreme levels for an extended duration of time or that he suffered any harm. . . . Moreover, . . . officials placed a fan in the hallway to help keep the air moving," which the court found "belie[d] the suggestion that they were deliberately indifferent to the effects of the heat."[131] The court emphasized the Eighth Amendment's promise of the "minimal civilized measure of life's necessities," while determining there was no deliberate indifference because the conditions Green experienced were not "serious enough" to deny those necessities.[132]

The District Court for the Northern District of Illinois ruled similarly in a heat-related case the following year.[133] Allen L. Moore alleged that the facility where he was held had "excessive heat in the summer and excessive cold in the winter."[134] The court disagreed. While it affirmed that

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[126] This section describes appellate courts' reasoning in exemplary cases from the Fifth and Seventh Circuits.

[127] 511 U.S. 825, 825 (1994) (emphasis added).

[128] *Id.* at 826, 844.

[129] 398 F. App'x 166 (7th Cir. 2010).

[130] *Id.* at 167.

[131] *Id.* at 169.

[132] *Id.*

[133] Moore v. Monahan, No. 06 C 6088, 2009 WL 310963, at *6-7 (N.D. Ill. Feb. 9, 2009), *aff'd in part*, 428 F. App'x 626 (7th Cir. 2011).

[134] *Id.* at *6.

"prisoners have a right to protection from extreme cold . . . [and] extreme heat,"[135] it explained that "a member of the maintenance staff who took daily temperature recordings did not recall the temperature being below 60 degrees. . . . [And] each resident's room . . . had a radiator to provide radiant heat and although . . . Moore [was only issued] one blanket, he had his own extra blankets, a coat, a jacket, winter gloves, slippers, a cap, and a fan in his room."[136] They determined that there was "only one day where the heat was extreme."[137] And, according to their precedent in *Perez v. Sullivan*,[138] "isolated incident[s] fail[] to demonstrate that defendants disregarded risk to prisoner's health."[139] This exemplifies how courts downplay the seriousness of heat conditions in prison, even where there is clear evidence of discomfort or harm. Extreme heat is the deadliest killer of all climate conditions,[140] and heat stroke can kill within a matter of hours, even if incarcerated individuals are young and healthy.[141]

In 2016, clarifying an earlier decision, the Western District of Louisiana, affirmed by the Fifth Circuit, held that a *de minimis* injury (an injury too small to be grounds for a legal claim, such as a small scratch) alone is not sufficient to prevail on an Eighth Amendment excessive heat challenge without evidence that officials knew about the conditions and were deliberately indifferent. In *Kimball v. Benjamin*, a man named Henry Kimball suffered from burns after being attacked and scalded with "hot coffee and magic shave."[142] Mr. Kimball was not given adequate medical treatment for his burns and was, instead, placed in a "segregation unit" where temperatures rose above one hundred degrees.[143] The extreme temperature in the "segregation unit" aggravated the pain he was already experiencing from his burns.[144] Mr. Kimball brought a claim that his prison doctor, Dr. Cleveland, acted with deliberate indifference by depriving him of "the 'minimal civilized measures of life's necessities' when he ordered nurses to place him in the non-air-conditioned segregation unit after his return from the hospital."[145]

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[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] 100 F. App'x 564, 567 (7th Cir. 2004).

[139] *Moore*, 2009 WL 310963, at *6.

[140] Jen Christensen, *How Extreme Heat Can Kill and How You Can Stay Safe*, CNN (June 22, 2023), https://www.cnn.com/2022/09/06/health/heat-waves-stay-safe/index.html [https://perma.cc/2S9M-X3F7].

[141] Maria Godoy, *How Heat Kills: What Happens to the Body in Extreme Temperatures*, NAT'L PUB. RADIO (July 23, 2023), https://www.npr.org/sections/health-shots/2023/07/23/1189506023/heres-what-happens-to-the-body-in-extreme-temperatures-and-how-heat-becomes-dead [https://perma.cc/5ZX3-LJ7K].

[142] 632 F. App'x 231, 232 (5th Cir. 2016).

[143] *Id.*

[144] *Id.*

[145] *Id.*

The court did not find this persuasive. While it acknowledged that Mr. Kimball was "housed in a unit with temperature extremes" and the "temperatures [] caus[ed] his burns to be more painful," it held that Mr. Kimball had no claim because he did not show that "Dr. Cleveland knew about the uncomfortable temperatures and failed to take action."[146] The court found Dr. Cleveland's actions adequate and characterized them as "attentive to Kimball's safety and needs[] by placing Kimball in medical isolation."[147] They also noted that "[e]ven if Kimball could show that Dr. Cleveland violated the Eighth Amendment by ordering Kimball to be housed in a unit with temperature extremes, Kimball does not allege that he informed officials that the temperatures were causing his burns to be more painful."[148] This further exemplifies the pattern of acknowledging the Eighth Amendment's protections in dicta without holding prison officials accountable for their (in) action. Even when officials' actions worsen the situation, as they did for Mr. Kimball, courts seldom find them in violation of the Eighth Amendment.

As these cases highlight, courts tend to acknowledge the Eighth Amendment's promise against extreme cold and extreme heat but then adopt a tepid approach when it comes to establishing safeguards for incarcerated people's safety from such conditions. Additionally, the relief courts have granted is very limited compared to the relief sought by plaintiffs. While the results have varied slightly by case (*see* Appendix Table 2), courts tend only to grant the minimum amount of relief they believe necessary to avoid concrete medical injury. Remedies sanctioned by appellate courts include: (1) fans, (2) ice water, (3) showers, (4) an ability to leave one's room during certain hours, (5) sporadic access to air conditioners in shared spaces, and (6) access to medical intervention if one succumbs to extreme heat-related medical conditions. Courts have proven unlikely—or unwilling—to order a remedy of transfer, maximum heat index,[149] or continual access to air conditioning, particularly in living quarters.[150]

An Eighth Amendment standard that relies on formal reporting and enables a period of "acceptable" suffering overlooks both (1) the constitutional reality that the Eighth Amendment bans cruel and unusual punishment without exception for "acceptable" suffering periods and (2) the practical reality that heat can kill in minutes.[151] This flawed jurisprudence

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[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] A heat index, "also known as the apparent temperature, is what the temperature feels like to the human body when relative humidity is combined with air temperature. This has important considerations for the human body's comfort." *What is the Heat Index?* Nat'l Weather Serv., https://www.weather.gov/ama/heatindex [https://perma.cc/DZR3-TFMV] (last visited Feb. 24, 2025).

[150] The Ninth Circuit is the only circuit to establish a right to a maximum temperature threshold. *See* Table 2.

[151] Prolonged or repeated exposure to extreme temperatures can negatively impact the health of otherwise healthy people, leading to long-term health impacts such as increased risk

not only fails to protect incarcerated people but also, in effect, *legalizes* cruel and unusual punishment, contradicting the Eighth Amendment's text and bedrock principle against it.

2. *Incarcerated People with Heat-Sensitive Health Conditions Are More Likely to Succeed in Eighth Amendment Claims*

This section reviews four exemplary excessive heat Eighth Amendment cases in which incarcerated plaintiffs prevailed in the Fifth Circuit—the circuit that has adjudicated the highest number of such cases, likely due to its hot climate and high number of incarcerated people within its bounds.[152] An analysis of these cases reveals a key theme: plaintiffs' successful claims often emphasize underlying health conditions that made them particularly susceptible to heat exposure. Plaintiffs with heat-sensitive conditions achieved similar success in other circuits, including three notable cases in the Seventh Circuit, one in the Ninth Circuit, and one in the Eleventh Circuit. These five cases are briefly summarized at the end of this section.

The survey of cases where plaintiffs prevailed to some degree highlights a significant stumbling block to plaintiffs receiving complete relief: the Prison Litigation Reform Act ("PLRA").[153] The PLRA is designed to reduce the volume of lawsuits filed by incarcerated people and limit the scope of remedies that courts can grant if they succeed. It creates four major obstacles:

(1) **The Exhaustion Requirement:** The PLRA's exhaustion requirement makes lawsuits non-starters if plaintiffs have not "exhausted" all of their prison or jail's administrative processes for filing a grievance.[154]
(2) **The Three-Strikes-Rule:** This rule states that after filing three claims that a judge decides are frivolous, malicious, or do not state a proper claim, incarcerated people have to pay fees upfront.[155]

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of cardiovascular disease, respiratory problems, and kidney damage. *See, e.g.*, *Heat and Health*, World Health Org. (May 28, 2024), https://www.who.int/news-room/fact-sheets/detail/climate-change-heat-and-health [https://perma.cc/UE9Y-MVH7].

[152] The Fifth Circuit hears cases that originate in Louisiana, Mississippi, and Texas. Mississippi has the highest incarceration rate of any state in the country, and Louisiana and Texas rank second and sixth nationally, respectively, for highest rates of incarceration. Steven Ross Johnson, *10 States With the Highest Incarceration Rates*, U.S. News & World Rep. (June 10, 2024), https://www.usnews.com/news/best-states/slideshows/10-states-with-the-highest-incarceration-rates?onepage [https://perma.cc/3DHV-2HKX].

[153] 42 U.S.C.§ 1997e.

[154] Colum. Hum. Rts. L. Rev., *The Prison Litigation Reform Act*, *in* A Jailhouse Lawyer's Manual 378, 405-06 (13th ed. 2024).

[155] *Id.* at 387. For example, Mr. Kimball's lawsuit against Dr. Cooper due to extreme heat "count[ed] as a strike" under the PLRA. Kimball v. Benjamin, 632 F. App'x 231, 232 (5th Cir. 2016).

(3) **The Physical Injury Requirement:** This restricts the remedies available when people cannot show a serious physical injury.[156]
(4) **Settlement Limitations:** The PLRA undermines settlements because court enforcement of settlements cannot include "prospective relief" unless the court specifically finds prospective changes are required to cure a violation of a federal right.[157]

When the PLRA passed, multiple courts held that the PLRA violated the Constitution's foundational tenet of the separation of powers.[158] Scholars argued that "the language in the statute seemingly mandates lower courts to determine the outcome of a case by a factual finding not related to the underlying constitutional violation."[159] Appellate courts ultimately overruled those early court decisions, and the PLRA remains in effect.[160] In the cases discussed below, the PLRA did not bar relief outright. However, its restrictions make certain types of relief difficult to obtain, such as prospective relief (i.e., ensuring humane conditions into the future) and injunctive relief that is deemed unnecessary to correct constitutional violations.

One of the earliest heat-related cases in Texas was *Blackmon v. Garza*, which the Fifth Circuit decided in 2012.[161] In that case, Eugene Blackmon, incarcerated in Texas, alleged violations of his Eighth Amendment rights, explaining that "the wardens did not take constitutionally adequate measures to address the extremely high temperatures in his dormitory during the summer of 2008, exposing him to substantial health risks. . . [exacerbated by the side effects of] his medication for . . . high blood pressure."[162] Because he was forced to live in extremely hot, confined conditions without adequate ventilation, water, fans, or showers,[163] he suffered injuries such as blurred and dimmed vision, headaches, nausea, and shortness of breath.[164]

The Fifth Circuit explained that, under the Eighth Amendment, "prison officials 'must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and

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[156] A Jailhouse Lawyer's Manual, *supra* note 154, at 445-46.

[157] *Id.* at 475.

[158] *See* Hadix v. Johnson, 947 F. Supp. 1100, 1113 (E.D. Mich. 1996), *rev'd*, 133 F.3d 940 (6th Cir. 1998); Gavin v. Ray, No. 4-78-CV-70062, 1996 WL 622556, at *4 (S.D. Iowa Sept. 18, 1996), *rev'd sub nom.* Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997); Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997) (reversing and remanding a decision by the Middle District of Alabama that the PLRA "violate[d] the separation-of-powers doctrine"); Taylor v. Arizona, 972 F. Supp. 1239, 1239 (D. Ariz. 1997), *aff'd sub nom.* Taylor v. United States, 143 F.3d 1178 (9th Cir. 1998), *reh'g granted, opinion withdrawn*, 158 F.3d 1059 (9th Cir. 1998), and *on reh'g*, 181 F.3d 1017 (9th Cir. 1999); Thomas Julian Butler, *The Prison Litigation Reform Act: A Separation of Powers Dilemma*, 50 Ala. L. Rev. 585, 588 (1999).

[159] Butler, *supra* note 158, at 600.

[160] *Hadix*, 133 F.3d at 943; *Gavin*, 122 F.3d at 1081; *Dougan*, 129 F.3d at 1427.

[161] 484 F. App'x. 866 (5th Cir. 2012).

[162] *Id.* at 867.

[163] *Id.* at 868.

[164] *Id.* at 872.

medical care, and must 'take reasonable measures to guarantee the safety of inmates.'"[165] The District Court for the Southern District of Texas granted judgment for Mr. Blackmon as a matter of law, and the Fifth Circuit affirmed, holding that: (1) Mr. Blackmon showed sufficient evidence that a jury could reasonably find that his conditions of confinement were objectively serious, (2) the evidence was sufficient such that a jury could conclude that prison wardens knew of the risks to Mr. Blackmon from extreme heat, and (3) Mr. Blackmon established more than *de minimis* physical injury.[166]

To establish the first prong, the district court analyzed historical data on temperature and heat indices in Beeville, Texas, where Mr. Blackmon lived. The court noted that Mr. Blackmon's cell had an air handler which, according to expert testimony, "did nothing to modify the humidity or temperature inside the dorm and simply functioned to move air in and out of the unit."[167] The expert testified that the "temperature and humidity were the same both inside Blackmon's dorm and outdoors."[168] They further explained that on "a substantial number of days . . . [the] heat index . . . presented a danger to [incarcerated people's] health."[169] At the time, the temperature was 103 degrees or higher. In such conditions, "heat exhaustion was possible" or "probable."[170]

The court held that this evidence was sufficient to conclude that "[d]efendants were deliberately indifferent to significant risks to Blackmon's health."[171] Before filing his lawsuit, Mr. Blackmon filed multiple grievances to the prison about the heat and its effect on his health, as well as the lack of response from prison officials to his concerns.[172] Following one of those grievances, a maintenance worker and Assistant Warden Garza measured the temperature in Mr. Blackmon's cell. The temperature was 108 degrees, and "the heat index was 115 degrees."[173] The court found this "suggest[ed] that, at a minimum, Garza was aware of the high temperatures in [Mr. Blackmon's] dorm."[174] It also explained that, regardless of whether prison officials were aware of the specific temperature in Mr. Blackmon's cell, the jury could "reasonably conclude that the heat-related risks to Blackmon were obvious."[175] Therefore, the court underscored that at the very least, *specific*

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[165] *Id.* at 869 (citations omitted).

[166] *Id.* at 870, 873-74. The *de minimis* injury standard requires plaintiffs to have been harmed by officials' deliberately indifferent action and that harm must not be so minor that it can merely be disregarded.

[167] *Id.* at 870.

[168] *Id.*

[169] *Id.*

[170] *Id.* at 871.

[171] *Id.* at 872.

[172] *Id.* at 873.

[173] *Id.*

[174] *Id.*

[175] *Id.* (citing Farmer v. Brennan, 511 U.S. 825, 842 (1994) ("(stating that the fact that a risk is obvious supports the conclusion that a prison official was aware of the risk)")).

knowledge of dangerous conditions is not required if such conditions are blatant. Finally, the court found that Mr. Blackmon's physical symptoms, including "headaches, nausea, shortness of breath, and blurred and dimmed vision," constituted "more than a *de minimis* physical injury."[176]

In sum, the Fifth Circuit held that a plaintiff can establish that extreme heat conditions violate the Eighth Amendment if (1) the plaintiff reports the extreme temperature, (2) the heat index surpasses 115 degrees, and (3) the plaintiff suffers from such heat. This is a very high bar. As described below, it excludes many scenarios in which incarcerated people face both cruel and unusual and lethal consequences before they can successfully petition the court for relief. It, in essence, sanctions a required period of cruel and unusual punishment that gambles with people's lives before people can seek reprieve.

In 2015, five men—Rodney Adams, Douglas Hudson, Kenneth Wayne James, Alexander Togonidze, and Robert Allen Webb—died from extreme heat confined in prisons operated by the TDCJ. In *Webb v. Livingston*, family members of the deceased sued prison officials under § 1983,[177] arguing that prison executives acted with deliberate indifference to the health and safety of the incarcerated population, violating the Eighth and Fourteenth Amendments.[178] The plaintiffs sought compensatory, nominal, presumed, and punitive damages.[179] They claimed the deceased were subjected to dangerously high temperatures that created "an objective and substantial risk of serious harm."[180] The plaintiffs further explained:

> [T]he prison locations where the decedents were housed were experiencing a severe heatwave with temperatures in the hundreds; the prisons' indoor temperatures routinely exceeded 100 degrees; the inmate living areas were not air conditioned or otherwise cooled to bring down these extreme temperatures; and such extreme temperatures made heatstroke imminent, especially for those with heat-related vulnerabilities like the decedents.[181]

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[176] *Id.* at 874. Mr. Blackmon contended that, under *Wilkins v. Gaddy*—holding that when officials use excessive force, "contemporary standards of decency" can be violated "whether or not significant injury is evident," Wilkins v. Gaddy, 559 U.S. 34, 37 (2010)—he did not have to show "even a *de minimis* physical injury." *Blackmon*, 484 F. App'x. at 874. However, given that Mr. Blackmon clearly suffered injury, the court declined to determine whether more than a showing of *de minimis* injury was required. *Id.*

[177] Section 1983 of Title 42 of the United States Code "provides an individual the right to sue *state* government employees and others acting 'under color of state law' for civil rights violations." *Civil Rights in the United States*, Univ. Minn. L. Sch., https://libguides.law.umn.edu/c.php?g=125765&p=2893387 [https://perma.cc/9L9K-FH62] (last visited Apr. 12, 2025).

[178] 618 F. App'x 201, 204 (5th Cir. 2015).

[179] Complaint at 24, Webb v. Livingston, No. 4:14-CV-3302, 2017 WL 2118969 (S.D. Tex. May 16, 2017).

[180] *Webb*, 618 F. App'x at 207.

[181] *Id.* at 208.

Plaintiffs alleged that prison officials had actively "discussed the risk posed by inmate exposure to extreme heat, routinely reviewed documents reporting heat-related injuries . . . sent out an informal email warning of the risk, and provided (inadequate) training . . . highlighting the warning signs of heat-related illness."[182] In effect, they had extensive knowledge about heat and its consequences. Despite this, officials "took no action to protect heat-sensitive inmates."[183] The court found that officials' conduct constituted deliberate indifference and indicated that officials "violated the decedents' clearly established Eighth Amendment right to be free from extreme heat."[184] It furthered that heat-sensitive incarcerated people are entitled to protective measures,[185] and the Eighth Amendment encompasses a "right to be housed in humane conditions" and free of "objective and substantial risk[s] of serious harm."[186]

Two years later, incarcerated people at the Wallace Pack Unit in an unincorporated location in Grimes County, Texas, filed a federal class action suit alleging prison officials violated their rights under the Eighth Amendment, the Americans with Disabilities Act, and the Rehabilitation Act due to the ongoing high temperature people were forced to endure in prison housing.[187] While portions of the "unit" of the prison in question were air-conditioned, "inmate housing areas [were] not. During summer months, indoor temperatures . . . [could] reach 100 degrees."[188] Plaintiffs sought a permanent injunction requiring defendants to "maintain a safe indoor [air] apparent temperature . . . (88 degrees or lower) inside each . . . housing area[] . . . [or] other injunctive relief sufficient to protect the health and safety of prisoners," and attorney's fees.[189]

In *Yates v. Collier*, the Fifth Circuit affirmed the district court's finding that TDCJ's heat mitigation measures did not reduce the heat-related risk of serious harm below the constitutional baseline.[190] The court explained that it is "well-established in our circuit that the Eighth Amendment guarantees

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[182] *Id.*

[183] *Id.*

[184] *Id*. at 209. The Fifth Circuit affirmed that, if the plaintiffs' asserted facts were true, they would overcome officials' qualified immunity defense. *Id.*

[185] In this case, the decedents were able to overcome a motion to dismiss and were entitled to discovery because multiple internal prison documents showed that prison executives knew of heat-related injuries that imprisoned people endured. *Id.* at 208-09.

[186] *Id.* at 207.

[187] Yates v. Collier, 868 F.3d 354, 358 (5th Cir. 2017).

[188] *Id*. Plaintiffs asserted that TDCJ did not "provide reasonable accommodations for inmates with heat-sensitive disabilities . . . [or] maintain a safe indoor [air] apparent temperature . . . inside each of the . . . housing areas." *Id.* at 358-59. They sought to certify a specific subclass of people with disabilities who are particularly heat susceptible. *Id.*

[189] *Id.* at 359. The district court certified a general class and two subclasses, concluding that plaintiffs demonstrated a question of law or fact common to the class, a requisite determination before certifying a class for a class action lawsuit. *Id.*

[190] *Id.* at 366.

inmates a right to be free from exposure to extremely dangerous temperatures without adequate remedial measures."[191] Defendants attempted to argue that, since the PLRA prohibits "prospective relief in any civil action with respect to prison conditions," the Fifth Circuit should dismiss the case.[192] The Fifth Circuit disagreed. It upheld the district court's finding that the "PLRA 'does not prohibit[] class-wide relief in this case' because it only 'prohibits relief that is unnecessary to correct the alleged Eighth Amendment violation.'"[193] The court further explained that its previous decision in *Williams v. Edwards*[194] held the "PLRA is not implicated . . . until the district court actually sets its hand to fashioning injunctive relief."[195] It refuted defendants' claims that its precedents "prohibit[ed] an injunction requiring . . . air condition[ing]."[196] While the court did not order an injunction requiring air conditioning, in 2018, the parties "entered into a Court-approved settlement agreement providing for the installation of permanent air conditioning."[197] This was one of the only cases surveyed where plaintiffs succeeded, but the court's analysis did not focus heavily on heat-related vulnerability of plaintiffs, likely, in part, because it was a class action. Judge Keith Ellison explained that,

> [a]ll inmates, regardless of age or health, are subject to the *same* policy on climate control . . . , all have the *same* heat-mitigation measures available to them . . . , and all are (allegedly) harmed in essentially the *same* way—*i.e.*, by exposure to a substantial risk of serious harm because of exposure to excessive heat.[198]

Therefore, he concluded, "the same action/inaction by Defendants is the source of any injury for the entire" class of plaintiffs.[199]

In *Ball v. LeBlanc*, plaintiffs successfully sought injunctive relief for extreme heat.[200] The district court held that to be uphold its constitutional mandate to protect incarcerated people from extreme heat, the prison must provide plaintiffs with air conditioning. It found that the "*only* means to reduce the substantial risk of harm to the Plaintiffs, and thereby the Eighth Amendment violation, is to lower the temperatures and heat indices to which Plaintiffs are exposed."[201] On appeal, this holding was overturned.

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[191] *Id.* at 360.
[192] *Id.* at 368.
[193] *Id.* at 369.
[194] 87 F.3d 126 (5th Cir. 1996).
[195] *Yates*, 868 F.3d at 370.
[196] *Id.*
[197] Cole v. Collier, No. 4:14-CV-01698, 2023 WL 1967951, at *1 (S.D. Tex. Feb. 10, 2023).
[198] *Yates*, 868 F.3d at 368.
[199] *Id.*
[200] Ball v. LeBlanc, 881 F.3d 346, 348 (5th Cir. 2018).
[201] *Id.* at 350 (citation omitted).

While the Fifth Circuit agreed that plaintiffs' constitutional rights were violated—explaining that "housing these prisoners in very hot cells without sufficient access to heat-related measures, while knowing that each suffers from conditions that render him extremely vulnerable to serious heat-related injury, violates the Eighth Amendment"[202]—it rejected the remedy of air conditioning.

The court concluded that only the most basic remedies were required to mitigate the harm from excessive heat, rejecting measures that went beyond that minimum, such as air conditioning. Under the PLRA, "[c]ourts may order only relief that extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation.'"[203] The court held that the interventions that would satisfy the PLRA include:

> (1) diverting 'cool air from the guards' pod into the tiers,' (2) allowing access to air conditioned areas during tier time, (3) allowing 'access to cool showers at least once a day,' (4) giving 'ample' cold drinking water and ice 'at all times,' (5) providing 'personal ice containers and individual fans,' and (6) installing 'additional ice machines.'[204]

The court remanded the case to the district court to review a revised state plan in light of its holding. The state submitted a new plan that "provided that plaintiffs would have cold water for their daily, fifteen-minute showers; . . . ice containers that would be regularly replenished from newly purchased ice machines; . . . [and a] personal fan."[205] The state did not provide for any air conditioning or powered temperature control beyond the most basic remedies stated above.

Plaintiffs, dissatisfied, returned to the court for relief. The district court again found the state's plan "inadequate because it exposed plaintiffs to heat indices above" eighty-eight degrees.[206] The relief was short-lived. The Fifth Circuit overturned the district court's holding, explaining it could not create a "maximum heat index"[207] and that constitutional protection only prohibited "'housing . . . prisoners in very hot cells without sufficient access to heat-relief measures.'"[208] But "the court cannot decree whether any given plan is necessary to lower the heat index to below a maximum, nor can it require [a facility] to . . . [take] other measures to keep the heat index below

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[202] *Id.* at 348 (citation omitted).

[203] *Id.* (citation omitted).

[204] *Id.* at 349.

[205] *Id.*

[206] *Id.* at 352. The State's rejected plan provided that "plaintiffs would have cold water for their daily, fifteen minute showers[,]" mandated that each plaintiff received an "ice container[] that would be regularly replenished from newly purchased ice machines[,] and "each plan [received] a personal fan." *Id.* at 349.

[207] *Id.* at 352.

[208] *Id.*

a certain point."[209] The court remanded the case to the district court to fashion a more limited remedy.

One year later, in *Meeks v. Davis*, the Fifth Circuit once again addressed the question of extreme heat.[210] It heard a case brought by James A. Meeks, who was confined in a cell where temperatures frequently exceeded even outdoor temperatures (which ranged from 104 to 110 degrees).[211] Mr. Meeks suffered from health conditions exacerbated by heat and lived in a facility that provided no heat mitigation.[212] Mr. Meeks alleged that prison officials did not implement sufficient measures to alleviate heat exposure despite being aware of his health conditions.[213] He challenged these conditions as excessive and sought damages and injunctive relief.[214] The Fifth Circuit agreed with Mr. Meeks. It held that, based on its precedent established in *Gates v. Cook* (affirming an injunction that required a prison in Mississippi to provide "fans, ice water, and daily showers" when the "heat index reache[d] 90 degrees or above"),[215] *Ball v. LeBlanc* (affirming an injunction that required heat reduction measures at a death-row facility),[216] and *Hinojosa v. Livingston* (holding that exposing an incarcerated person to extreme temperatures can constitute cruel and unusual punishment),[217] Mr. Meeks had sufficiently alleged harm.[218]

In sum, the Fifth Circuit has affirmed that "exposing" incarcerated people to "extreme cell temperatures" can violate the Eighth Amendment.[219] Yet, it has rejected court-mandated maximum temperature indices and facility-wide air conditioning.[220] To achieve even partial success in an Eighth Amendment heat case, a plaintiff must typically demonstrate: (1) that they have a health condition making them particularly vulnerable to heat

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[209] *Id.* at 352. Further, it built out its understanding of its own precedent in *Gates*, stating that *Gates* "did not mandate a maximum heat index . . . It required particular heat measures, including fans, ice water, ice, and showers, 'if the heat index reaches 90 degrees or above.' The injunction here requires relief that is far more extensive, applies even during months when there is no heat risk to the Plaintiffs, covers the entire facility, and of course is expensive. Since *Gates* upheld an injunction providing narrower relief, and there is no showing that the Constitution mandated more relief for these prisoners for the same prison condition in this case . . . ." Ball v. LeBlanc, 792 F.3d 584, 600 (5th Cir. 2015).

[210] Meeks v. Davis, 786 F. App'x 16 (5th Cir. 2019).

[211] *Id.* at 16-17.

[212] *Id.* at 17.

[213] *Id.*

[214] Meeks v. Davis, No. CV H-18-3431, 2019 WL 1200617, at *2 (S.D. Tex. Mar. 14, 2019), *vacated and remanded*, 786 F. App'x 16 (5th Cir. 2019).

[215] 376 F.3d 323, 339 (5th Cir. 2004).

[216] 792 F.3d 584, 596 (5th Cir. 2015).

[217] 807 F.3d 657, 665-68 (5th Cir. 2015).

[218] *Meeks*, 786 F. App'x at 17.

[219] *Hinojosa*, 807 F.3d at 665.

[220] *See* Ball v. LeBlanc, 881 F.3d 346, 348 (5th Cir. 2018).

exposure, and/or (2) clear evidence that prison officials were aware of the severity of the temperature but failed to redress it.[221]

The Ninth and Eleventh circuits have heard similar cases. In 2010, the Ninth Circuit heard *Graves v. Arpaio*. Fred Graves and others brought suit due to harsh conditions of confinement, including "dangerously high temperatures."[222] The court found that "air temperatures above 85 degrees greatly increase the risk of heat-related illnesses for individuals who take psychotropic medications."[223] It noted that "many seriously mentally ill detainees [were placed] in segregation cells where temperatures are known to exceed 85°F."[224] It dismissed arguments that "permitting . . . detainees to exercise outdoors without drinking water when the outside temperature exceeds 85 [degrees]" satisfied prison officials' constitutional responsibility.[225] The court prescribed a maximum temperature of eighty-five degrees for housing pretrial detainees who take psychotropic medications, as required by the Eighth Amendment.[226] It affirmed that the Eighth Amendment prohibits "temperatures that pose a significant risk to detainee health."[227]

Four years prior, in 2006, Stephen S. Green represented himself in a case against the Glades Correctional Institute ("GCI"), arguing that the very hot summer temperatures in Florida where he was held caused "extreme harm" to him and other incarcerated people, in violation of their Eighth Amendment rights.[228] Mr. Green explained that GCI "did not have air conditioning or adequate ventilation."[229] Temperatures in Moore Haven, Florida, where he lived, reached ninety-eight degrees in 2005,[230] the summer before he filed suit, a temperature that can cause heatstroke in mere minutes.[231]

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[221] *See, e.g.*, Meeks v. Davis, No. CV H-18-3431, 2019 WL 1200617, at *2 (S.D. Tex. Mar. 14, 2019), *vacated and remanded*, 786 F. App'x 16 (5th Cir. 2019).

[222] Graves v. Arpaio, 623 F.3d 1043, 1046 (9th Cir. 2010).

[223] *Id.* at 1048.

[224] *Id.* at 1049.

[225] Graves v. Arpaio, 633 F. Supp. 2d 834, 848 (D. Ariz. 2009), *aff'd*, 623 F.3d 1043 (9th Cir. 2010).

[226] *Graves*, 623 F.3d at 1049 (While this case involved pre-trial detainees, its analysis was conducted under *Farmer*, which is the standard used to evaluate whether incarcerated people are subjected to cruel and unusual punishment, and it does not appear that the court made its decision based on the status of plaintiffs as pre-trial detainees).

[227] *Id.*

[228] Green v. Sec'y for Dep't of Corr., 212 F. App'x 869, 870 (11th Cir. 2006).

[229] *Id.* at 870.

[230] *Moore Haven Weather in 2005*, Extreme Weather Watch, https://www.extremeweatherwatch.com/cities/moore-haven/year-2005#august [https://perma.cc/EKL4-8VSX] (last visited Apr. 12, 2025).

[231] *How to Recognize Symptoms of Heat Exhaustion and Heat Stroke*, HealthPartners, https://www.healthpartners.com/blog/how-fast-can-heatstroke-come-on/ [https://perma.cc/X5RM-HDCK] ("Heat stroke can set in quickly over the course of 10-15 minutes.") (last visited Apr. 29, 2025).

He sought damages and injunctive and declaratory relief.[232] The court found that Mr. Green had made the conditions known to prison officials.[233]

The court acknowledged that the Eighth Amendment ensures "humane conditions," including "adequate clothing, shelter, and medical care."[234] Despite this, the court did not agree that the prison violated Mr. Green's rights.[235] It emphasized that the prison had provided "ventilation and air circulation, . . . extra fans . . . during the hottest parts of the summer," and "access to water and other forms of relief, including medical intervention."[236] The court held that Mr. Green had not shown a "sufficiently severe condition," beyond "discomfort," which, in and of itself, "does not amount to an Eighth Amendment violation."[237] Thus, the *Green* court considered medical relief *after* injury constitutionally sufficient. This case illustrates how courts often pay lip service to the Eighth Amendment while ultimately dismissing claims if prison officials take even minimal action to address extreme heat, even when that action fail to rectify dangerously high temperatures.

The cases presented here constitute a representative sample of how appellate courts currently approach excessive heat litigation. Key takeaways are as follows: First, current jurisprudence acknowledges that extreme heat conditions *can* constitute cruel and unusual punishment under the Eighth Amendment. Second, federal appellate courts are more convinced that such conditions violate the Eighth Amendment when the plaintiff has a health condition that worsens with extreme heat. Third, courts are more likely to be persuaded to provide relief when carceral officials have been officially notified of temperatures. Finally, remedies to constitutional violations related to extreme heat are narrow and typically comprised of cold showers, ice, water, sporadic access to air conditioning, and medical intervention after the onset of heat-related symptoms. The case law underscores that under current federal statutory law and jurisprudence, a claim for cruel and unusual punishment must be substantiated by significant injury or even death before it is actionable in federal court. This requirement stands in direct contradiction to the Eighth Amendment's prohibition on inhumane treatment and the protective principles that judges consistently affirm in their rulings yet routinely fail to enforce.

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[232] Brief of Appellee, Green v. Sec'y for Dep't of Corr., 212 F. App'x 869 (11th Cir. 2006) (No. 05-16807-B), 2006 WL 4392142.

[233] *Green*, 212 F. App'x at 871.

[234] *Id.* at 872.

[235] *Id.*

[236] *Id.*

[237] *Id.*

B. Prisons and Jails Abandon Incarcerated People During Natural Disasters—Without Consequence

While appellate courts have acknowledged that incarcerated people have *some* rights to be free of excessive heat conditions, incarcerated people seeking to assert their rights in the face of other types of extreme weather conditions exacerbated by climate change, such as hurricanes and tornadoes, have not been vindicated. This section focuses on a series of cases that developed in the Fifth Circuit in the aftermath of Hurricanes Katrina (2005), Rita (2005), Ike (2008), and Irene (2011).

As noted in the Introduction, incarcerated people faced life-threatening risks when Hurricane Katrina struck New Orleans in 2005. Eight thousand people were incarcerated in Orleans Parish Prison ("OPP"), and while the City of New Orleans was ordered to evacuate twenty hours before the hurricane made landfall, the people in jail and prison within the evacuation zone—some held on charges as innocuous as public intoxication—were not evacuated.[238]

In the aftermath of Hurricane Katrina, dozens of people sued OPP's Sheriff Gusman for wanton neglect and failure to evacuate them in a timely manner, in violation of the Eighth Amendment. In large part, plaintiffs filed their cases pro se,[239] seeking compensatory, punitive, and nominal damages; declaratory relief; and injunctive relief for transfers to a different facility.[240] They alleged they were left to suffer without water and food for multiple days.[241] And the evacuation—once it did happen—was done without regard to their medical conditions or needs.[242] One by one, the cases were dismissed as frivolous for failure to state a claim for which relief could be granted.[243] Across the board, judges in the Eastern District of Louisiana

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[238] *Testimonials*, *supra* note 9, at 1.

[239] Pro se is Latin for "in one's own behalf." Plaintiffs "representing themselves in court without the assistance of an attorney are known as pro *se* litigants." *What Does It Mean to Appear Pro Se?*, U.S. Dist. Ct. for E.D.N.Y., https://www.nyed.uscourts.gov/content/what-does-it-mean-appear-pro-se [https://perma.cc/RL2N-BK9R] (last visited Feb. 24, 2025).

[240] Terry v. City of New Orleans, Civil Action No. 07-469, 2009 WL 211754, at *1 (E.D. La. Jan. 23, 2009).

[241] *See, e.g.*, Francis v. United States, Civil Action No. 07-1991, 2007 WL 2332322, at *1 (E.D. La. Aug. 13, 2007).

[242] *See, e.g.*, Hernandez v. Cnty. of Monterey, 305 F.R.D. 132, 141 (N.D. Cal. 2015).

[243] *See, e.g.*, Hayes v. Gusman, Civil Action No. 06-0504, 2006 WL 1985464 (E.D. La. June 22, 2006), Gauff v. Gusman, Civil Action No. 06-0842, 2006 WL 2460753 (E.D. La. June 12, 2006), *report and recommendation adopted*, No. CIVA 06-0842, 2006 WL 2468771 (E.D. La. Aug. 21, 2006); Harris v. Gusman, Civil Action No. 06-3939, 2007 WL 1792512 (E.D. La. June 19, 2007); Hill v. Gusman, No. CIVA 06-0527, 2006 WL 3760454 (E.D. La. Dec. 18, 2006); Tate v. Gusman, 459 F. Supp. 2d 519, 522-23 (E.D. La. 2006); August v. Gusman, Civil Action No. 06-3962, 2009 WL 166653 (E.D. La. Jan. 22, 2009); Conner v. Gusman, Civil Action No. 06-1650, 2007 WL 1428749 (E.D. La. May 10, 2007).

found that Sherriff Gusman's and other officials' actions did not amount to deliberate indifference, and therefore, a claim could not be sustained.[244]

The judges of the court persistently explained that, under the deliberate indifference standard, an incarcerated person must demonstrate that prison officials knew that they "face[d] a substantial risk of serious harm and disregard[ed] that risk by failing to take reasonable measures to abate it."[245] While they acknowledged that incarcerated people "experienced insufferable conditions as the water rose in their cells[;] . . . there was no air circulation; the toilets did not flush;" and "[t]he temperature was very high,"[246] they determined that Hurricane Katrina was "unprecedented and unanticipated" and, thus, Sheriff Gusman "was under no constitutional burden to protect [plaintiffs] from the unknown and unexpected."[247] Despite the fact that Eighth Amendment jurisprudence clearly establishes a right to "basic human needs and sanitation,"[248] the court called the conditions in which OPP abandoned people "a short term sanitation problem" that, although "admittedly unpleasant," did not "amount to a constitutional violation."[249] By characterizing life-threatening abandonment for days as merely an unpleasant yet permissible condition, the courts effectively signaled that the Eighth Amendment allows the objectively horrific conditions that it facially prohibits.

In *Spotts v. United States*, the Fifth Circuit heard a similar case about the South Central Region of the Federal Bureau of Prisons' ("BoP") decision not to evacuate incarcerated people before or after Hurricane Rita, which made landfall twenty-six days after Hurricane Katrina.[250] Plaintiffs claimed that the director of the BoP, in failing to evacuate high-security incarcerated people from prison "when damage caused by the hurricane deprived the facility of electricity and water for an extended period of time," violated their rights under the Eighth Amendment, the Federal Tort Claims Act ("FTCA"), and the Safe Drinking Water Act ("SDWA").[251] As they

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[244] Dozens of other plaintiffs sued OPP pro se for abandoning them during the hurricane. For example, Dorian Francis alleged that his Eighth Amendment right to be free from cruel and unusual punishment was violated because he was not evacuated from the OPP before Hurricane Katrina made landfall which resulted in "horrific conditions during the hurricane's aftermath." *Francis*, 2007 WL 2332322, at *1. He alleged that he was subjected to "no food or water" for multiple days, "[e]xposure to waist high water" for multiple days, and "[u]nsupervised interaction with state prisoners and prisoners with life sentences." *Id.* This case was dismissed as frivolous because "[s]uits against the United States [and its agencies] . . . are barred by sovereign immunity." *Id.* at *3.

[245] *Harris*, 2007 WL 1792512, at *6.

[246] Waganfeald v. Gusman, 674 F.3d 475, 479 (5th Cir. 2012).

[247] *Id.*

[248] Alvarez v. Reg'l Dir., No. 2:21-CV-00222, 2022 WL 19001853, at *4 (S.D. Tex. Oct. 26, 2022), *report and recommendation adopted*, No. 2:21-CV-00222, 2023 WL 1861278 (S.D. Tex. Feb. 8, 2023).

[249] *Id.*

[250] 613 F.3d 559, 563 (5th Cir. 2010).

[251] *Id.* at 565.

explain, the penitentiary in question, the Federal Correctional Complex in Beaumont, Texas, was:

> without electrical power for 36 days . . . [and t]he significant discomfort caused by the lack of electricity was aggravated by a heat wave that swept the region in the days after the storm. The temperature exceeded 100 degrees . . . . Inside the Penitentiary, the temperature was sometimes much higher. Floor wax melted; the cement and brick walls sweated; within a few days after the storm, the moisture developed into a slimy black mold. . . . The inmates spent their nights in pitch black darkness, without the ability to access electric emergency alarms.

For the first three days after the storm, incarcerated people remained "locked in their cells."[252] Those with chronic health issues did not have access to medical care, including "asthmatics [who] could not access inhaler refills [and] diabetics [who] could not get their insulin."[253] They did not receive any food, and while guards distributed some water, "it was 'colored brown with some type of material flowing in it,' and smelled foul."[254] Despite how unappealing the water was, they drank it because they were severely dehydrated. Two days later, they received written notice that the water they drank "had been declared non-potable and 'should not be ingested under any circumstance.'"[255]

Four days after the storm, they received their first meal. They ate "sandwiches made with moldy bread and spoiled meat."[256] They only received two sandwiches a day until power was restored.[257] At the same time that they started receiving food, they began receiving "one liter of sanitary water per day," which was insufficient to replenish "fluids lost from the heat."[258] After fourteen days, they had their first opportunity to shower.[259] The "shower water had a brownish color and offensive smell" and "immediately caused skin problems, such as open wound sores; peeling skin with pus; itching, burning rashes; and boils."[260] No medical care was provided for these injuries, nor clean clothes to change into.[261] It took thirty-six days before they could flush the toilets. By that point, "the odor of urine and feces in their

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[252] *Id.* at 564.
[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *Id.*

cells was overpowering."[262] There was "little toilet paper and no way to wash their hands." When the toilets were full to the brim, "the guards passed out plastic bags" for people to "relieve themselves."[263]

Plaintiffs detailed suffering multiple injuries during this time, including

> episodes of high stress; high blood pressure and heart disease; respiratory and lung disorders (from alleged exposure to ammonia from urine and feces and to mold); heat exhaustion and heat stroke; dehydration and malnutrition; Heliobactor Pylori (H.Pylori) infection (due to alleged exposure to human waste); diarrhea (due to alleged e-coli and salmonella exposure); blood stream infections; sleep deprivation; muscle atrophy (due to inactivity during lockdown); worsening of existing medical conditions; constipation; and pain from hunger.[264]

In addition to physical injuries, plaintiffs experienced mental health challenges, such as "post-traumatic stress disorder, suicidal tendencies, depression, insomnia, and delusions.[265] Two people died.[266]

The Fifth Circuit determined that, under the FTCA and the SDWA, the BoP's decision not to evacuate people was the type of policy decision protected by the FTCA's discretionary function exception.[267] The discretionary function exception to the FTCA is a provision that prevents the U.S. government from being held liable for actions taken by government employees if those actions involve the exercise of discretion or judgment, particularly with regard to decisions that involve balancing social, economic, or political factors.[268] In other words, some decisions should not be second-guessed by courts.

On appeal, plaintiffs argued that the Eighth Amendment precludes the application of the discretionary function exception under the FTCA.[269] They contended that prison officials' cannot rely on the FCTA to neglect their duty to provide basic living standards for incarcerated people, regardless of whether a statute, regulation or policy explicitly mandates evacuation during a hurricane.[270] The court agreed with plaintiffs "that to constrain [prison officials'] discretion . . . , the statute, regulation, or policy at issue need not specifically require evacuation, but instead might simply impose

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[262] *Id.*

[263] *Id.*

[264] *Id.* at 565.

[265] *Id.* at 563-65.

[266] *Id.* at 565.

[267] *Id.* at 572. The discretionary function exception of the FTCA is intended to prevent judicial second-guessing of administrative decisions well-grounded in policy. *Id.* at 568.

[268] Andreas Kuersten, Cong. Rsch. Serv., LSB11241, North Dakota v. United States: Litigating the FTCA's Discretionary Function Exception 2 (2024).

[269] *Spotts*, 613 F.3d at 569.

[270] *Id.*

other nondiscretionary duties—such as duties to provide certain living standards to inmates—that [prison officials could] . . . violate[] in deciding not to evacuate."[271] However, in contrast with the post-Katrina cases, however, the Fifth Circuit did not reach the Eighth Amendment question because plaintiffs failed to raise Eighth Amendment claims at the district court. The appellate court thus held that plaintiffs waived that argument.[272] As a result, the court "has not yet determined whether a constitutional violation, as opposed to a statutory, regulatory, or policy violation, precludes the application of the discretionary function exception."[273]

When Hurricane Ike barreled towards Galveston, Texas, in 2008—the largest storm to hit the city since 1900—Tholonaus D. Pomier, who was detained in jail awaiting trial, brought a case against Sheriff Leonard for failing to evacuate him.[274] Mr. Pomier attested that he suffered psychological damage from weathering the hurricane behind bars due to the "effects of a major hurricane and defendants' decision not to evacuate the jail."[275] Mr. Pomier described that "[he had] no power at the jail for five days, . . . he could not use a toilet to defecate for three days, . . . he could not shower for seven days, . . . toilets were filled with urine and feces for thirteen days, and . . . there was no clean water available for three days.[276] The court held that Mr. Pomier had "not alleged pervasive or extended misconduct in the face of this natural disaster, nor ha[d] he shown any actionable injuries from the resulting alleged conditions."[277]

In contrast with the other cases discussed herein, Mr. Pomier asserted that his claim, as a pretrial detainee, should be analyzed under *Bell v. Wolfish*[278] rather than the standard set out in *Farmer v. Brennan* because "[u]nder . . . the Fourteenth Amendment, states cannot punish pretrial detainees."[279] The court disagreed with Mr. Pomier's conclusion. The court agreed that, under *Bell*, "[p]retrial detainees and convicted prisoners . . . look to different constitutional provisions for their respective rights to basic needs such as medical care and safety."[280] It acknowledged that "[c]onvicted prisoners are protected by the Eighth Amendment's prohibition on cruel and unusual punishment [while] [u]nder the due process guarantees . . . , [the]

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[271] *Id.*

[272] More than 400 plaintiffs filed this lawsuit through counsel and not pro se. Spotts v. United States, Civil Action No. 1:08cv376, 2009 WL 3150872, at *1 (E.D. Tex. Sept. 26, 2009), *aff'd*, 613 F.3d 559 (5th Cir. 2010).

[273] *Id.*

[274] Pomier v. Leonard, 532 F. App'x 553, 553 (5th Cir. 2013).

[275] *Id.* at 554.

[276] *Id.*

[277] *Id.*

[278] 441 U.S. 520, 520 (1979).

[279] *Pomier*, 532 F. App'x at 554.

[280] *Id.* at 553-54 (citing Hare v. Corinth, 74 F.3d 633, 639 (5th Cir. 1996)).

[S]tates cannot punish pretrial detainees."[281] Despite this, the court analyzed Mr. Pomier's claim under the *Farmer* standard.[282]

It held that it could not find that the jail acted with deliberate indifference because officials' decisions amounted, at most, to negligence.[283] It determined that Mr. Pomier, despite not being convicted of a crime, *could* be punished by the state if the punishment was an isolated incident or due to an "omission" caused by negligence. The court furthered that Mr. Pomier could not "show that the sheriff knew that he faced a substantial risk of serious harm . . . [or] that the sheriff disregarded that risk by deciding unreasonably not to evacuate the jail."[284] The court also noted that Mr. Pomier had "not alleged pervasive or extended misconduct in the face of this natural disaster, nor ha[d] he shown any actionable injuries from the resulting alleged conditions."[285] Again, the court considered multiple days without clean water and exposure to unsanitary conditions merely "episodic" rather than an actionable violation.

To summarize, when incarcerated people bring cases alleging carceral officials violated their Eighth Amendment rights by failing to evacuate them during natural disasters, courts tend to dismiss these claims on the grounds that: (1) They are frivolous. (2) The harm is minimal due to the temporary nature of the crisis. And (3) the unpredictability of natural disasters makes deliberate indifference nearly impossible to prove (*see* Appendix Table 3). Under current case law in the Fifth Circuit, for an incarcerated person to successfully assert an Eighth Amendment claim against a prison or jail official for failure to evacuate during a natural disaster, they would likely need to demonstrate that: (1) They faced objectively serious harm (and overcome defenses related to the temporariness of the crisis). (2) Prison officials were aware of the impending harm. And (3) officials failed to take reasonable actions to ameliorate that harm. While the Fifth Circuit's decision in *Spotts* suggests that failure to evacuate could potentially constitute an Eighth Amendment violation, no plaintiff has yet prevailed on this type of claim in the Fifth Circuit or elsewhere (*see* Appendix Table 3). Similar to extreme heat cases, courts in natural disaster cases appear to view a period of cruel and unusual suffering as inevitable (and thus not grounds for relief).

III. A Climate-Informed Approach for Eighth Amendment Jurisprudence

Climate disasters have become a death sentence for incarcerated people. Few would argue that being abandoned in rising floodwaters or being

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[281] *Id.* at 554 (citing *Bell*, 441 U.S. at 538).

[282] *Id.* at 554.

[283] *Id.*

[284] *Id.*

[285] *Id.*

denied water and air conditioning during a lethal heat wave can be considered humane. Yet, courts have leaned on the *uncertainty* or *unpredictability* of climate disasters to find that carceral staff are not liable for the cruel and unusual conditions faced by incarcerated people during climate emergencies. This Part rejects that interpretation of the Eighth Amendment. Instead, this Article argues that current Eighth Amendment jurisprudence is increasingly outdated in an era of intensifying natural disasters. Taking the Eighth Amendment's text "as it *reads*" and not as this Court "pretend[s] that it *means*[,]"[286] climate change—and how it brings into stark relief the cruelty enacted by prisons and jails—presents an opportunity to reinvigorate a commitment to the constitutional prohibition on cruel and unusual punishment.

Unfortunately, the U.S. Supreme Court and other federal courts seem to be trending in the opposite direction. For example, in November 2023, the Court denied certiorari in *Johnson v. Prentice*,[287] an appeal challenging a district court's decision to absolve the Illinois Department of Corrections of accountability for their abhorrent treatment of Michael Johnson, who "was held in solitary confinement" and, for years, "spent nearly every hour of his existence in a windowless, perpetually lit cell about the size of a parking space."[288] The dissenting justices noted that Mr. Johnson's cell "was poorly ventilated, resulting in unbearable heat and noxious odors" and it was "unsanitary, often caked with human waste."[289] The Illinois Department of Corrections justified their treatment of Mr. Johnson because, they said, he continually disobeyed prison rules, but Mr. Johnson and his legal team emphasized that none of his infractions related to out-of-cell time, which he was "denied virtually all [of] for nearly three years."[290] In denying certiorari to hear the case, the Supreme Court signaled a reluctance to expand—and a desire to contract—Eighth Amendment jurisprudence.

This reluctance to expand Eighth Amendment protections comes at a time when climate change is presenting new, severe challenges to people trapped under carceral punishment systems. Courts seem intent on narrowing the scope of constitutional protections, even in cases in which the extreme conditions are caused completely by factors *within* the prison walls—such as in *Prentice*. This makes it even less likely that courts will expand protections for cases—like those involving climate-related events—where the harm is caused, in part, by disasters *outside* prison walls and *outside* of prison officials' control. However, the evolving reality of climate change should prompt a rethinking of what constitutes cruel and unusual punishment. The promise of Eighth Amendment law, as described above,

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[286] Barnett, *supra* note 60, at 227.

[287] 29 F.4th 895, 899 (7th Cir. 2022), *cert. denied*, 144 S. Ct. 11 (2023).

[288] *Johnson*, 144 S. Ct. at 12 (Jackson, J., dissenting).

[289] *Id.*

[290] *Johnson v. Prentice*, MacArthur Just. Ctr., https://www.macarthurjustice.org/case/johnson-v-prentice/ [perma.cc/8S7F-8NVH] (last visited Apr. 19, 2025).

allows for changes in interpretation, particularly as society advances its understanding of justice and climate science. These are precisely the type of "evolving standards of decency" that courts should consider in light of the new escalating climate devastation facing incarcerated people.[291] This Article does not seek to replicate well-established critiques of incarceration's inherent inhumanity. Rather, it highlights how climate change serves as a stark and urgent illustration of those claims. By exacerbating already deplorable conditions, the climate crisis further reveals the impossibility of a "humane" prison.

In attempting to craft remedies to the untenable realities described above, this Article acknowledges that attempts to make the criminal punishment system fairer can often be "inadequate or even harmful because the system's repressive outcomes don't result from any systemic malfunction. . . . [R]eforms that correct problems perceived as aberrational flaws in the system only help to legitimize and strengthen its operation."[292] For example, Alec Karakatsanis details how "the police bureaucracy" used the body camera movement "as the perfect alibi to get well-meaning people who lacked sufficient information to support greater police procurement budgets, more advanced and efficient technologies of control and incarceration, . . . and an expansion of the capacity of the government to surveil us."[293] In a similar vein, other scholars assert that "constitutional change within formal legal processes occurs only to maintain the look of legitimacy."[294] Such reforms can "result[] in more prisons," rather than fewer.[295] This underscores the inherent tension in considering the Constitution as an instrument for liberation. Meanwhile, the current issue is imminent: people in prisons and jails are losing their lives to climate conditions outside of their control.

As Dorothy Roberts puts it, "On the one hand, there is good reason to renounce the Constitution because constitutional law has been critical to upholding the interests of the racial capitalist regime while advancing legal theories that justify its inhumanity."[296] On the other hand, while "court decisions alone" are not enough, they can "weaken many of the practices . . . that help reinforce and expand" the prison industrial complex. Moreover, Roberts argues that a critical rethinking of constitutional meaning "can further the struggle to create a more humane, free, and democratic world."[297] With this as a guiding principle, the law can and should be used to push back against the scope and devastation of the mass-carceral system. The critical differ-

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[291] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[292] Roberts, *supra* note 3, at 42-43.

[293] Alec Karakatsanis, *The Body Camera: The Language of Our Dreams*, 4 YALE J.L. & LIBERATION 11, 12 (2024).

[294] Roberts, *supra* note 3, at 106 (referencing Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 476-79 (2018)).

[295] *Id.* at 43 (emphasis removed).

[296] *Id.* at 122.

[297] *Id.*

ence between reformist and non-reformist reforms is that reformist reforms entrench the prison industrial complex, whereas non-reformist reforms create greater possibilities of freedom. This Article takes the latter tack.

This Part advances the following four arguments and recommendations for a climate-informed approach to Eighth Amendment jurisprudence. First, it argues that the Court should abandon the deliberate indifference standard as it betrays bedrock principles of the Eighth Amendment and inherently *legalizes* the very cruel and unusual punishment the Amendment prohibits—an increasingly dangerous stance in the era of climate change. Second, it argues that because prisons and jails exercise total authority over incarcerated people's well-being during natural disasters, they have a responsibility to prevent, rather than impose, life-threatening conditions by keeping people confined in an emergency. Third, it argues that, regardless of whether courts adopt the aforementioned standard, climate science demands an evolving legal analysis of Eighth Amendment claims. Fourth, it outlines concrete steps incarcerated people and advocates can take while working within the current limitations of Eighth Amendment jurisprudence.

A. The Court Must Abandon the Deliberate Indifference Standard, which Enables Cruelty in the Era of Climate Change

The deliberate indifference standard, as established in *Estelle*, is a legal test to determine whether prison officials have violated the Eighth Amendment. Under this standard, prison staff are only responsible for the experience of cruel and unusual punishment if they: (1) knew that a person faced a substantial risk of serious harm, and (2) disregarded that risk by failing to take reasonable steps to address it. Scholars have called this standard "next to impossible."[298] Even federal courts have conceded that "[d]eliberate indifference is an extremely high standard to meet."[299] In practice, it is Eighth Amendment doctrine rather than the Constitution that determines when incarcerated people receive relief for cruel and unusual conditions. When—despite harsh circumstances—official behavior is not deemed "deliberate indifference" in the eyes of the courts, incarcerated people are

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[298] *See, e.g.*, Lori A. Marschke, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, 39 VAL. U. L. REV. 487 (2004) (noting the near impossibility of the deliberate indifference standard); Carson Thorton González, *A Deliberate Difference?: The Rights of Incarcerated Individuals Under the New Mexico State Constitution*, 52 N.M. L. REV. 548, 550 n.14 (characterizing the deliberate indifference standard as "an extremely difficult hurdle for plaintiffs who are incarcerated"); Gavin Justiss, *Deliberate Indifference Under § 1983: Do the Courts Really Care?*, 28 REV. LITIG. 953, 963 (2009) (calling the deliberate indifference standard "impossibly high"); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 882 (2009); Michael Cameron Friedman, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921, 937 (1992).

[299] Brewster v. Dretke, 587 F.3d 764, 770 (5th Cir. 2009) (internal quotation marks and citation omitted).

denied relief or redress, no matter how torturous their conditions. As such, the deliberate indifference standard is a blockade to relief from the cruel and unusual punishment.

While this Article focuses on climate change cases, there are myriad circumstances in which courts rely on the deliberate indifference standard and the fear of "too much justice" to stymie incarcerated people's claims for protection. Some examples include cases where an incarcerated person is assaulted but the prison staff did not have prior knowledge of potential violence,[300] an incarcerated person is subjected to extreme solitary confinement without sunlight or human contact for years,[301] or someone is denied more than two-and-a-half hours of continuous sleep per day.[302] In all of these cases, courts found that the prison and jail officials in charge of their conditions were not deliberately indifferent and thus plaintiffs received no relief for any Constitutional violations.

But the deliberate indifference standard is judge-created and not enshrined by the Constitution. Given this, scholars emphasize that future Eighth Amendment jurisprudence *could* protect against cruel and unusual punishment regardless of whether carceral officials intended, foresaw, or enabled it.[303] This Court's continued affirmation of the deliberate indifference standard in the era of climate change is increasingly dire when natural disasters, heat waves, cold streaks, and other climate conditions will only become more frequent. The Court must abolish the deliberate indifference standard and acknowledge the broad prohibition present in the constitutional text *as it reads*.

B. Prisons and Jails Have a Monopoly over Incarcerated People's Climate Conditions and Cannot Constitutionally Manufacture Climate Danger

The state exercises total control over incarcerated people's climate conditions, leaving them dependent on prison and jail officials for their safety and survival. This monopoly over people's ability to escape life-threatening conditions imposes a constitutional duty on the state to protect incarcerated people from extreme heat, flooding, and other climate-related dangers. By failing to provide temperature control, adequate ventilation, or evacuation plans during climate emergencies, prisons and jails effectively manufacture and maintain cruel and unusual conditions that incarcerated people have no power to avoid. This constitutes an affirmative act of cruelty rather than mere negligence, amounting to an unconstitutional practice that subjects incarcerated people to inhumane and preventable suffering, or cruel and unusual punishment.

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[300] Farmer v. Brennan, 511 U.S. 825, 847 n.9 (1994).

[301] Johnson v. Prentice, 29 F.4th 895, 906-07 (7th Cir. 2022).

[302] Garrett v. Lumpkin, 96 F.4th 896, 898 (5th Cir. 2024).

[303] *Id.*

In recognizing this, courts must fundamentally reconsider their remedy analysis, which has largely proceeded in a fragmented, case-by-case manner. While the Fifth, Seventh, Ninth, and Eleventh Circuits acknowledge that incarcerated people have *some* rights to a livable temperature, their recognition has been narrow and inconsistently applied. The unprecedented rise in global temperatures demands not just acknowledgement, but an expanded, enforceable duty for carceral officials to protect against extreme climate conditions. Courts' current piecemeal approach—approving fans, blankets, ice, and showers as needed—is inadequate. Perhaps most alarmingly, some courts have approved medical intervention in the case of heat exhaustion or malady as an acceptable retroactive remedy to extreme heat conditions without requiring preventative relief.

Eighth Amendment remedy analysis must incorporate concrete guardrails to ensure that incarcerated people are not subjected to life-threatening climate conditions without escape. This Article proposes the following two remedies, both of which have already been considered by at least one federal court:

- **Maximum Temperature:** Courts should adopt clear maximum and minimum temperature requirements based on the best scientific consensus of safe temperature ranges. If certain populations require more stringent temperature protections, courts should mandate accommodations for them. This is not unprecedented. The Ninth Circuit established a maximum temperature of eighty-five degrees for the housing of "pretrial detainees taking prescribed psychotropic medications" in *Graves v. Arpaio*.[304] Similarly, in *Yates v. Collier*, the district court held "air-conditioning" was a remedy that would meet the plaintiffs requested relief of "maintaining a heat index of 88 degrees or lower."[305] While *Yates* was overturned by the appellate court, the decision provides an example of a federal court adopting a maximum temperature as a right protected by the Eighth Amendment. Courts should follow the lead of the Ninth Circuit in *Graves* and prohibit extreme heat conditions that "greatly increase the risk of heat-related illnesses,"[306] but expand its scope to encompass a safe temperature for all incarcerated people. Additionally, courts should condemn any notion of an "acceptable" period of suffering as it betrays both scientific consensus that symptoms of heat stroke can occur within ten minutes[307] and the Eighth Amendment's patent ban on cruel and unusual punishment.

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[304] 633 F. Supp. 2d 834, 848 (D. Ariz. 2009), *aff'd*, 623 F.3d 1043 (9th Cir. 2010).

[305] 868 F.3d 354, 368 (5th Cir. 2017).

[306] *Graves*, 623 F.3d at 1048.

[307] *Heat Related Illness*, Ctr. for Disease Control, https://www.cdc.gov/niosh/heat-stress/about/illnesses.html [https://perma.cc/FBB3-FYMZ] (last visited May 17, 2024).

As *Graves* recognized, some populations—such as elderly people and those with disabilities—face heightened risks in extreme heat and require cooler conditions to "limit greatly increas[ing] the risk of heat-related illnesses." Carceral facilities can respond to this in two ways: (1) by maintaining temperatures at a level that protects the most vulnerable resident *or* (2) by setting a general baseline temperature with separate accommodations for those more susceptible to heat-related harm. As in *Graves*, courts should rely on the best available scientific evidence to determine what constitutes a safe temperature range. A judicially enforced maximum temperature would (1) eliminate the ability of prison officials to claim ignorance of extreme heat risks while also (2) establishing a legally enforceable minimum standard of safety from heat.

- **Eighth Amendment Right to Evacuation:** Courts should enforce the state's duty to safely evacuate every person in a mandatory evacuation zone. Despite constitutional guarantees, courts have yet to develop a climate-informed approach to Eighth Amendment protections during natural disasters. Instead, they have largely ignored the increasing frequency and severity of climate-related catastrophes. One court dismissed such abandonment during a natural disaster as an "isolated incident,"[308] while another termed these failures "episodic actions and omissions" that were not prohibited.[309] The pattern of considering climate conditions "episodic" and "unpredictable" is untenable given the growing scientific evidence showing their increasing frequency and especially in light of the extreme suffering detailed above.

Incarcerated people were not sentenced to death by hurricane, wildfire, flood, or heatwave. Courts must uphold the Constitution in the face of deadly natural disasters, ensuring that incarcerated people are not forced to suffer preventable harm. It is illogical to say in one breath that conditions are so dangerous that the non-incarcerated population *must* evacuate while in the other deciding that the incarcerated population living in the same place *could not* evacuate. As recognized in *Spotts v. United States*,[310] abandonment during a natural disaster can violate Eighth Amendment protections.[311] Eighth Amendment jurisprudence that rubber-stamps cruel and unusual suffering does not meet constitutional muster.[312]

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[308] Moore v. Monahan, No. 06 C 6088, 2009 WL 310963 (N.D. Ill. Feb. 9, 2009), *aff'd in part*, 428 F. App'x 626 (7th Cir. 2011) (citing Perez v. Sullivan, 100 F. App'x 564, 567 (7th Cir. 2004)).

[309] Pomier v. Leonard, 532 F. App'x 553, 554 (5th Cir. 2013).

[310] 613 F.3d 559, 563 (5th Cir. 2010).

[311] *Id.* at 575.

[312] While outside the scope of this paper, it is important to note that merely evacuating people is insufficient if the evacuation is not conducted safely. In multiple instances, natural disaster evacuations of prisons and jails were carried out haphazardly, resulting in unsafe and

When incarcerated people are confined in extreme heat under state-imposed control, the state must provide adequate cooling measures to protect their health. If a city, county, or state orders an evacuation, incarcerated people must be included in that evacuation. In sum, prison and jail officials should not have the power to *manufacture* climate-related danger by closing the door and throwing away the key.

Creating such a duty is not entirely novel. While there are many reasons to critique *Estelle v. Gamble*, as discussed above, in addition to announcing the deliberate indifference standard, the Court also recognized incarcerated people's right to health care under the Eighth Amendment. The Court acknowledged that, because an incarcerated person "must rely on prison authorities to treat his medical needs," failing to provide such care means those needs will go unmet.[313] And "[i]n the worst cases, such a failure may actually produce physical 'torture or a lingering death.'"[314]

Likewise, in cases of extreme environmental conditions, incarcerated people "must rely on prison authorities" to protect them from danger.[315] If authorities fail to do so, "such a failure may produce physical 'torture or a lingering death.'"[316] Given this forced dependence—closely paralleling the reliance of incarcerated people on prison officials for medical care—the State has a corresponding duty under the Eighth Amendment to ensure safe climate conditions.

C. Evolving Science Demands an Evolving Legal Framework

Even if the Court continues to apply the deliberate indifference standard rather than eliminating it, climate change necessitates an evolving legal analysis. The state's total control over incarcerated people's climate conditions makes it impossible to justify treating extreme weather events as "episodic" or "unexpected." Scientists have known since the 1960s that human activity increases heat-trapping greenhouse gases in our atmosphere,[317] and

dangerous conditions. For example, in *Hernandez v. County of Monterey*, a person incarcerated in a California state prison brought a § 1983 action against prison and jail officials for violating their Eighth Amendment rights during an evacuation due to Hurricane Ike. 305 F.R.D. 132, 141 (N.D. Cal. 2015). The plaintiff explained that the officials "completely lack[ed] policies and practices for evacuating and communicating with [incarcerated people] with disabilities in cases of emergencies, including natural disasters and security incidents, [and incarcerated people] with disabilities are at increased risk of injury in such circumstances." *Id.* In another instance, an incarcerated plaintiff described a negligent evacuation during Hurricane Katrina, "which caused him to suffer without food, medical attention, and water." Tate v. Gusman, 459 F. Supp. 2d 519, 522 (E.D. La. 2006).

[313] Estelle v. Gamble, 429 U.S. 97, 103 (1976).

[314] *Id.*

[315] *Id.*

[316] *Id.*

[317] *Taking a Global Perspective on Earth's Climate*, Nat'l Aeronautics & Space Admin., https://climate.nasa.gov/nasa_science/history/ [https://perma.cc/72BF-YETD] (last visited Jan. 25, 2024).

in 2023, the U.S.'s International Panel on Climate Change ("IPCC") warned that the world is likely to pass a dangerous temperature threshold within the next decade.[318] Similarly, the 2023 Lancet Countdown Report revealed that 2023 "saw the highest global temperatures in over 100,000 years," with record-breaking heat on every continent. The IPCC projected a 370% increase in heat-related deaths by mid-century as long as "no substantial progress on adaptation" was made.[319]

Other climate-related disasters, such as hurricanes, are also growing in frequency and severity. In the U.S., the most damaging hurricanes are now "three times more frequent than 100 years ago," and the proportion of major hurricanes[320] in the Atlantic "has doubled since 1980."[321] The science is overwhelmingly clear: we should anticipate a future with intensifying extreme heat and natural disasters. While some may argue that natural disasters are inherently unpredictable,[322] that does not change the fact that (1) it is now well-established that climate disasters are occurring with greater frequency and intensity, and (2) unpredictability does not preclude expectation. For example, hurricanes and wildfires may vary in their precise impact, but their occurrence is an inevitability. Moreover, media coverage of climate change has surged by 90% between 2015 and 2021, underscoring that those who oversee prisons cannot plausibly claim ignorance of these trends.[323]

Within the constraints of the deliberate indifference framework, courts must at a minimum recognize that extreme heat, extreme cold, and natural disasters are foreseeable, placing carceral officials on notice of their duty to prepare for and respond to these dangers. A legal standard that allows prison officials to ignore this reality effectively sanctions cruelty. If incarcerated people and advocates must work within the deliberate indifference standard, it should reflect the irrefutable science of climate change, making clear that failing to plan for and mitigate extreme climate conditions—such

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[318] Climate Change 2023: Synthesis Report, *supra* note 89, at 16.

[319] Marina Romanello et al., The 2023 Report of the Lancet Countdown on Health and Climate Change: The Imperative for a Health-centred Response in a World Facing Irreversible Harms 2346, https://pmc.ncbi.nlm.nih.gov/articles/PMC7616810/ [https://perma.cc/X2WE-AAZ4] (last visited Jan. 25, 2023).

[320] Defined as Category 3 or above.

[321] *How Climate Change Makes Hurricanes More Destructive*, Env't Def. Fund, https://www.edf.org/climate/how-climate-change-makes-hurricanes-more-destructive [https://perma.cc/P2WT-STH2] (last visited Apr. 20, 2025).

[322] *See, e.g.*, *Climate of Chaos: Stanford Researchers Show Why Heat May Make Weather Less Predictable*, Stanford Rep. (Dec. 14, 2021), https://news.stanford.edu/stories/2021/12/warming-makes-weather-less-predictable [https://perma.cc/9FQJ-AXCK] ("[N]ew results strongly indicate a shorter time horizon for reliable weather predictions in places that warm beyond their historical norms.").

[323] *A Review of Media Coverage of Climate Change and Global Warming in 2021*, Media & Climate Change Observatory (2021), https://mecco.colorado.edu/summaries/special_issue_2021.html [https://perma.cc/P58T-WTUC]. There is also a climate change denial movement that is attempting to challenge the scientific consensus. *See* Jeremiah Bohr, *The Structure and Culture of Climate Change Denial*, Am. Socio. Ass'n, https://www.asanet.org/footnotes-article/structure-and-culture-climate-change-denial/ [https://perma.cc/V6RB-UZT7] (last visited Feb. 25, 2025).

as by refusing to implement evacuation plans or provide cooling measures—constitutes deliberate indifference.

D. Practical Strategies for Incarcerated People and Their Advocates Within the Current Eighth Amendment Framework

Given the jurisprudence explored above and the Supreme Court's reluctance to expand Eighth Amendment protections, this section considers potential pathways for more immediate relief for incarcerated people facing extreme heat and weather conditions *now*.

- **Robust Medical Documentation:** Courts have demonstrated a greater likelihood of enforcing incarcerated people's Eighth Amendment rights in climate-related cases when plaintiffs have documented medical conditions that exacerbate their vulnerability to extreme temperatures. Medical providers should ensure that medical records explicitly highlight how extreme heat, lack of clean drinking water, or other foreseeable climate-related conditions worsen their health risks. Incarcerated people and their advocates could also ask medical providers to explicitly document any conditions that are vulnerable to climate disasters and their associated symptoms.
- **Climate Documentation:** Many heat-related cases have hinged on whether an incarcerated person formally documented their environmental conditions. Incarcerated people and their attorneys could consider submitting formal complaints detailing their exposure to extreme heat, unsafe drinking water, or other climate-related risks. Under the PLRA, incarcerated people have to file a grievance with the prison before they can seek relief from the courts. The grievance process is complicated and varies state by state. As an example, in Georgia, once a grievance is filed, a supervisor will have an opportunity to resolve it and, if the incarcerated person does not think the resolution was sufficient, a hearing is scheduled with the warden.[324] After that, it can be appealed to the corrections commissioner.[325] A claim can only be brought to the courts after these preliminary steps are complete. Since many incarcerated people lack legal representation (and the court does not appoint counsel for civil cases, such as those detailed in this paper), advocates could play a crucial role in disseminating information about how to file such documentation.[326]

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[324] THE JAILHOUSE LAWYER'S HANDBOOK 135 (Ctr. for Const. Rts. & Nat'l Laws. Guild, eds., 6th ed. 2021).

[325] *Id.*

[326] For example, the National Lawyers Guild and the Center for Constitutional Rights publish the *Jailhouse Lawyer's Handbook* and could consider expanding their information about extreme temperature. *See id.* at 38 ("While you are not entitled to a specific air temperature,

Because extreme events like life-threatening heatwaves, hurricanes, and tornadoes pose an immediate danger, they do not fit neatly into the belabored grievance process. While untested, incarcerated people or their attorneys could preemptively file formal notices before heatwave, hurricane, wildfire, or tornado seasons, alerting prison and jail officials to the potential dangers of foreseeable extreme weather events.

- **Evacuation Plan Development:** Incarcerated people and their attorneys can formally request that prison and jail officials develop and disclose evacuation plans for facilities located in hurricane, tornado, or wildfire-prone areas through the grievance process.

Courts have been more willing to grant relief in cases where there is clear evidence that prison officials were aware of hazardous conditions and failed to act. These three recommendations aim to preemptively establish documentation, making it harder for carceral officials to claim ignorance and easier for courts to recognize and remedy climate-related harm faced by incarcerated people. However, it is crucial to acknowledge that filing a grievance immediately exposes an incarcerated person to retaliation, which can have consequences such as transfer to "[a] facility where living conditions are worse."[327] The decision to file a grievance is a personal one, and each individual must weigh the potential risks and benefits based on their circumstances.

IV. With an Eye Toward Abolition: A Right to Release

In lieu of entrenching the prison through reformist reforms that further entrench the carceral punishment system, abolitionist scholars advocate for "non-reformist abolitionist reforms" that "use the Constitution to make persuasive arguments for change" that "would eradicate or shrink discrete components of the carceral punishment system [and] mitigate the suffering caused by carceral conditions."[328] The plaintiffs discussed in this Article, who sought legal redress for extreme climate conditions, base their claims on fundamental values of bodily integrity and the right to a livable—not merely survivable—climate. The conditions described above—e.g., lethal heat exposure and threat of death by rising floodwaters—are incompatible with constitutional protections. To uphold the Eighth Amendment's promise, when incarcerated people's constitutional rights are violated to this

you should not be subjected to extreme heat or cold, and should be given bedding and clothing appropriate for the temperature."). They could also consider including information specific to natural disasters, such as hurricanes, tornadoes, and wildfires.

[327] Tony Vick, *When the Prison Grievance Process Is Worth the Risk*, Filter Mag. (Aug. 5, 2024), https://filtermag.org/self-advocating-prison-grievance/ [https://perma.cc/U5KB-NBG9].

[328] Roberts, *supra* note 3, at 110, 114.

degree, carceral facilities must remedy these cruel and unusual conditions with release.

Courts have often refused to grant release as a remedy for Eighth Amendment violations,[329] arguing that conditions can be corrected without freeing people. They justify this refusal by asserting that incarcerated people are entitled to a "judicially mandated change in conditions and/or an award of damages."[330] Without addressing the legitimacy of this reasoning in other contexts,[331] this logic collapses in the face of climate disasters. In emergencies, there is no time to "correct[] . . . any condition causing cruel and unusual punishment."[332] Climate disasters present immediate, life-threatening dangers that cannot be mitigated retroactively. A person is either left in the path of a storm or they are not; they are either trapped in deadly heat or removed from it. If a facility cannot guarantee that people will not face cruel and unusual punishment, the Eighth Amendment mandates their release.[333]

Though courts have been reluctant to recognize release as an appropriate Eighth Amendment remedy, precedent exists. Some judges, though in the minority, acknowledge that Eighth Amendment violations can warrant release. For example, the District Court for the Middle District of Florida clearly stated that "circumstances justifying release" exist.[334] However, it noted that such circumstances should be "extraordinary" or "exceptional."[335] One need not stretch the imagination to understand that being abandoned without means of escape during a hurricane or trapped in "unbearable" heat conditions are "extraordinary"—defined as "going beyond what is usual, regular, or customary"—and "exceptional"—defined as "deviating from the

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[329] *See, e.g.*, Reaves v. United States, No. 1:14-CR-00082, 2020 WL 7233614, at *3 (N.D. Ala. Nov. 4, 2020) (noting "[t]he remedy for an Eighth Amendment violation is not release from prison"); Reaves v. Dep't of Corr., 404 F. Supp. 3d 520, 523 (D. Mass. 2019); Townsel v. Holbrook, No. C16-5305, 2016 WL 5110205, at *2 (W.D. Wash. Aug. 17, 2016), *report and recommendation adopted*, No. C16-5305, 2016 WL 4992682 (W.D. Wash. Sept. 19, 2016); Taylor v. Roal, No. 10-CV-3588, 2010 WL 4628634, at *4 (D. Minn. Nov. 5, 2010).

[330] Burnett v. Faecher, No. 08-27-45, 2009 WL 2007118, at *6 (C.D. Cal. July 6, 2009) (citing Crawford v. Bell, 599 F.2d 890, 891-92 (9th Cir. 1979)).

[331] *See, e.g.*, Prozer v. United States, No. 8:11-CR-202-T-33, 2016 WL 11650585, at *2 (M.D. Fla. Apr. 26, 2016) (involving a plaintiff who sought release to "make[] discovery of information . . . to support [their] claims."); Root v. Pallito, No. 1:12-CV-70, 2012 WL 5392091, at *6 (D. Vt. Oct. 2, 2012) (involving a plaintiff who sought release after experiencing "verbal harassment" and having someone slam their fist into the plaintiff's chest.), *report and recommendation adopted*, No. 1:12-CV-70, 2012 WL 5390502 (D. Vt. Nov. 5, 2012).

[332] *Prozer*, 2016 WL 11650585, at *2.

[333] While outside the scope of this Article, this argument likely extends to other types of cruel and unusual punishment enacted by the state, particularly those that are not easily or swiftly remedied.

[334] *Prozer*, 2016 WL 11650585, at *2.

[335] *Id.*

norm."[336] There is nothing "usual, regular, . . . customary,"[337] or "norm[al]"[338] about the conditions described herein.

The Supreme Court has agreed that release can be an appropriate Eighth Amendment remedy. In *Brown v. Plata*, the Court held that release was justified under the PLRA when the primary cause of an Eighth Amendment violation—overcrowding—could not be resolved while keeping people confined.[339] Climate disasters present an even clearer case: when an impending storm or extreme heat event makes continued confinement inhumane, the conditions cannot be resolved while keeping people confined and the appropriate remedy is evacuation or release. If the government mandates an evacuation for non-incarcerated residents, it must do so for incarcerated residents who have no ability to leave on their own. If the government declares a heat emergency and operates shelters with twenty-four-hour air conditioning,[340] it must provide the same for incarcerated residents, who cannot seek cooler conditions independently. While public and policy concerns about the safety risk posed by the release of incarcerated people will inevitably arise, in addition to the spate of scholarship on how prisons and jails do not keep people safe,[341] public safety concerns do not dismantle the central argument presented here, which is that those in prison cannot constitutionally be left to die or suffer when their non-incarcerated neighbors are ordered to evacuate.

Courts have previously considered time-sensitive release during emergencies. During the COVID-19 pandemic, courts were divided on whether the release of incarcerated people was required under the Eighth Amendment's mandate to provide "humane conditions of confinement," given how rapidly COVID-19 spread through carceral facilities.[342] Some courts found that humane release was not required.[343] However, others con-

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[336] *Extraordinary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/extraordinary [https://perma.cc/LT3H-G42H] (last visited Apr. 20, 2025); *Exceptional*, Merriam-Webster, https://www.merriam-webster.com/dictionary/exceptional [https://perma.cc/3PCK-LZNS] (last visited Apr. 20, 2025).

[337] *Extraordinary*, *supra* note 336.

[338] *Exceptional*, *supra* note 336.

[339] 563 U.S. 493 (2011).

[340] *Mayor Wu Declares Heat Emergency June 18 – 20, Opens BCYF Cooling Centers to All Residents*, City Boston https://www.boston.gov/news/mayor-wu-declares-heat-emergency-june-18-20-opens-bcyf-cooling-centers-all-residents [https://perma.cc/8N6G-LNHU] (last updated June 17, 2024).

[341] *See* Ashlei Anderson, *Prison Abolition is Needed Now: Prisons and Jails Do Not Keep Anyone Safe*, Geo. J.L. & Mod. Critical Race Persps. Blog (Jan. 23, 2023), https://www.law.georgetown.edu/mcrp-journal/blog/prison-abolition-is-needed-now-prisons-and-jails-do-not-keep-anyone-safe/ [https://perma.cc/LQ3M-ULD2].

[342] Farmer v. Brennan, 511 U.S. 825, 832 (1994).

[343] *See, e.g.*, Jones v. Whitmer, No. 22-11516, 2022 WL 3335796, at *3 (E.D. Mich. Aug. 12, 2022); Robertson v. Hazlewood, 628 F. Supp. 3d 381, 384 (D.N.H. 2022); Acha v. Wolf, No. CV 20-1696, 2021 WL 537101, at *8 (W.D. La. Jan. 28, 2021), *report and recommendation adopted*, No. CV 20-1696, 2021 WL 536243 (W.D. La. Feb. 12, 2021).

sidered "compassionate release or transfer to home confinement" necessary to protect incarcerated people's health and safety.[344] During this period, the Brennan Center reported that more than 100,000 people were "released from state and federal prisons . . . constitut[ing] an 8% decrease in the national prison population."[345] The conditions that prompted the COVID-era releases are strikingly similar to the conditions faced by incarcerated people during extreme weather events: they are trapped in unsafe environments with no ability to remove themselves from danger.

Scholars Paloma Wu and Korbin Felder analyzed how federal courts responded to COVID-19 in prisons to "provide insights into how federal courts may analyze future climate-related prison and jail litigation."[346] They argue that "prison and jail residents in most parts of the country will have difficulty using the courts to obtain preliminary relief to prevent climate-related injuries and harms."[347] Their work underscores the pressing need to develop climate-informed approaches to Eighth Amendment jurisprudence that align with "evolving standards of justice" as extreme weather events become more frequent.

An ethical approach to such disasters could mirror the Ninth Circuit's ruling in *Graves*, which held that temperatures that "greatly increase the risk of heat-related illnesses" violate the Eighth Amendment and must be remedied.[348] Applying this logic to extreme weather events could require release whenever failing to evacuate people would "greatly increase the risk" of harm.[349] Given the irregular and episodic nature of natural disasters, their capacity for devastation, and the reality that prison officials cannot evacuate people retroactively, this standard would necessitate release with frequency as we approach the Anthropocene. This approach may go against the grain of how the current Supreme Court has *construed* the Eighth Amendment. However, the *text* of the Amendment *as it reads* clearly establishes that if a carceral facility cannot meet the high constitutional standard of humane treatment, then it cannot lawfully confine people.

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[344] Dinkins v. United States, No. 2:21-cv-08942, 2022 WL 17253905, at *1 (C.D. Cal. Mar. 28, 2022).

[345] *Reducing Jail and Prison Populations During the Covid-19 Pandemic*, Brennan Ctr. for Just., https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic [https://perma.cc/UW44-HZ9P] (last updated Jan. 7, 2022).

[346] Paloma Wu & D. Korbin Felder, *Hell and High Water: How Climate Change Can Harm Prison Residents and Jail Residents, and Why COVID-19 Conditions Litigation Suggests Most Federal Courts Will Wait-and-See When Asked to Intervene*, 49 Fordham Urb. L.J. 259, 261 (2022).

[347] *Id.*

[348] Graves v. Arpaio, 623 F.3d 1043, 1046 (9th Cir. 2010).

[349] *Id.*

Conclusion

This Article seeks to move us toward liberation. The state wields immense power and control over incarcerated people, inflicting profound suffering. Climate change and its escalating disasters only intensify this harm. Amidst this, the Constitution's bedrock principle against cruel and unusual punishment is violated day in and day out. Eighth Amendment jurisprudence has effectively legalized cruel and unusual punishment, particularly through the deliberate indifference standard. In the spirit of nineteenth-century abolitionists, this Article reclaims the Eighth Amendment's promise *as it reads*: Prisons and jails cannot subject people to harmful—and even life-threatening—climate conditions while maintaining constitutional legitimacy. The Eighth Amendment—as it is written and as its foundational values of humane treatment demand—prohibits cruel and unusual punishment. If the state cannot honor that bedrock right, incarcerated people must be entitled to release, to be free of unconstitutional punishment, and closer to freedom.

APPENDIX

This Appendix provides the tables referenced in the Article. The tables list the relevant Court of Appeals' decisions evaluating plaintiffs' Eighth Amendment claims, as identified by the author.

TABLE 1: A Sample of Appellate Court Interpretations of the Eighth Amendment in Extreme Heat Cases

APPELLATE COURT	**1st PRONG: "OBJECTIVE SERIOUSNESS"**	**2nd PRONG: PRISON STAFF AWARENESS**	**3rd PRONG: FAILURE TO AMELIORATE CONDITIONS**
Fifth Circuit	The court is undecided as to whether *de minimis* injury is required (*Blackmon*),[350] but the court found objective seriousness in *Livingston* when conditions exceeded 100 degrees,[351] living areas were not cooled to bring down temperatures, and the temperatures made heatstroke imminent.	The court determined that *specific* knowledge of dangerous conditions is not required if the dangerous conditions are obvious (*Blackmon*).[352] However, in *Kimball* it did not consider conditions obvious when officials placed a man with severe burns in a solitary unit with temperatures above 100 degrees.[353]	In *Kimball*, the court explained that Mr. Kimball's access to medical attention to treat his wounds and antibiotics was sufficient "attentiveness" by prison staff.[354]

[350] Blackmon v. Garza, 484 F. App'x 866 (5th Cir. 2012).

[351] Webb v. Livingston, 618 F. App'x 201 (5th Cir. 2015).

[352] *Blackmon*, 484 F. App'x at 873.

[353] Kimball v. Benjamin, 632 F. App'x 231 *(5th C*ir. *2016*).

[354] *Id.*

Appellate Court	1st Prong: "Objective seriousness"	2nd Prong: Prison staff awareness	3rd Prong: Failure to ameliorate conditions
Seventh Circuit	In *Green*, the court did not find objective seriousness because the heat exposure did not last for an "extended period" and there was no clear injury.[355] However, under *Del Raine*, plaintiffs do not have to show that the temperatures imminently threatened their health.[356]	Under *Haywood*, plaintiffs do not have to show that their circumstances are *literally* ignored.[357] But they do have to show that the defendants were aware of sufficiently serious conditions yet intentionally or recklessly did nothing.[358]	There is a low bar for what is required to ameliorate extreme heat conditions, including access to an ice machine or the ability of incarcerated people to leave their room during the day (*Moore*);[359] accessing air conditioners during the day, ice, and medical care (*Rogers*);[360] or even merely placing a single fan in the hallway (*Green*).[361]
Ninth Circuit	This prong is not discussed in *Graves*.	This prong is not discussed in *Graves*.	Under *Graves*, failure to ameliorate temperatures that "greatly increase the risk of heat-related illnesses" is prohibited by the Eighth Amendment.[362]
Eleventh Circuit	The court defines objective seriousness to include "only those deprivations denying the minimal civilized measure of life's necessities" as "sufficiently grave to form the basis of an Eighth Amendment violation."[363]	A prison official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he also must draw the inference."[364]	Under *Green v. Secretary*, the court found ventilation and air circulation, extra fans during the heat of the summer, access to water, and medical intervention sufficient to ameliorate the conditions.[365]

[355] Green v. Walker, 398 F. App'x 166 (7th Cir. 2010).

[356] Del Raine v. Williford, 32 F.3d 1024 (7th Cir. 1994).

[357] Haywood v. Hathaway, 842 F.3d 1026 (7th Cir. 2016).

[358] *Id.*

[359] Moore v. Monahan, No. 06 C 6088, 2009 WL 310963 (N.D. Ill. Feb. 9, 2009).

[360] Rogers v. Scott, 695 F. App'x 155 (7th Cir. 2017).

[361] *Green*, 398 F. App'x. at 169.

[362] Graves v. Arpaio, 623 F.3d 1043, 1048 (9th Cir. 2010).

[363] Hudson v. McMillian, 503 U.S. 1, 9 (1992).

[364] Green v. Sec'y for Dep't of Corr., 212 F. App'x 869, 872 (11th Cir. 2006) (citing Farmer v. Brennan, 511 U.S. 825, 837 (1994)).

[365] *Id.*

TABLE 2: Relief Sought by Incarcerated Plaintiffs Versus Relief Granted

CASE	RELIEF SOUGHT	RELIEF GRANTED
FIFTH CIRCUIT		
Gates v. Cook, 374 F. 3d 323 (5th Cir. 2004)	Plaintiff sought injunctive relief, which would require "tak[ing] the necessary measurements . . . to determine the heat index on the individual tiers. . . . If the heat index reache[d] 90 degrees or above, the defendants w[ould] ensure that each cell is equipped with a fan, that ice water is available to each inmate, and that each inmate may take one shower during each day."[366]	The court ordered "fans, ice water, and daily showers when the heat index [surpassed] 90 degrees or above"[367]
Blackmon v. Garza, 484 F. App'x 866, 871 (5th Cir. 2012)	The complaint is unavailable and the court did not discuss the plaintiff's requests for relief.	The court reversed a grant of summary judgment for defendants, concluding that "provid[ing] cool water in the dorms with ice water . . . at least three times per day" along with "extra showers" was insufficient.[368]
Webb v. Livingston, 618 F. App'x 201 (5th Cir. 2015)	The plaintiff sought compensatory damages, nominal and presumed damages, and punitive damages.[369]	The court did not grant relief.

[366] Gates v. Cook, 376 F.3d 323, 336 (5th Cir. 2004).

[367] *Id.*

[368] Blackmon v. Garza, 484 F. App'x 866, 871 (5th Cir. 2012).

[369] Complaint at 24, Webb v. Livingston, No. 4:14-CV-3302, 2017 WL 2118969 (S.D. Tex. May 16, 2017).

CASE	RELIEF SOUGHT	RELIEF GRANTED
Ball v. LeBlanc, 792 F.3d 584 (5th Cir. 2015)	The plaintiff sought injunctive relief.	The district court issued a permanent injunction, requiring the state to install air conditioning throughout "death row." The Fifth Circuit overturned this decision, holding that permanent injunctive relief "violates the PLRA in two ways." First, "[u]nder the PLRA, plaintiffs are not entitled to the most effective available remedy; they are entitled to a remedy that eliminates the constitutional injury." Second, the "district court also erred because it awarded relief facility-wide, instead of limiting such relief" to plaintiffs.[370] The Fifth Circuit remanded the case for the district court to craft more limited relief. The court accepted, requiring officials to provide "ice chests" that blew cold air, noting that they are "compact and inexpensive."[371]
Yates v. Collier, 868 F. 3d 354 (5th Cir. 2017)	Plaintiff sought declaratory judgment and a permanent injunction requiring defendants to "maintain a safe indoor air apparent temperature . . . (88 degrees or lower) inside each . . . housing area[] . . . [or] other injunctive relief sufficient to protect the health and safety of the prisoners"[372] and attorneys' fees.	"In 2018, parties entered into a Court-approved settlement agreement providing for the installation of permanent air conditioning."[373]

[370] Ball v. LeBlanc, 792 F.3d 584, 599 (5th Cir. 2015).

[371] Ball v. LeBlanc, 881 F.3d 346, 353 (5th Cir. 2018).

[372] Yates v. Collier, 868 F.3d 354, 359 (5th Cir. 2017).

[373] Cole v. Collier, No. 4:14-CV-01698, 2023 WL 1967951, at *1 (S.D. Tex. Feb. 10, 2023).

Case	Relief Sought	Relief Granted
Meeks v. Davis, 786 F. App'x 16 (5th Cir. 2019)	Plaintiff sought injunctive relief "in the form of a transfer away from the Estelle Unit"[374] and compensatory damages.	The court reversed and remanded the district court's dismissal of Meeks' claims, agreeing with Mr. Meeks that he sufficiently alleged harm. The district court has not published a new opinion.[375]
Seventh Circuit		
Moore v. Monahan, No. 06 C 6088, 2009 WL 310963 (N.D. Ill. Feb. 9, 2009), *aff'd in part*, 428 F. App'x 626 (7th Cir. 2011)	The complaint is unavailable.	The court decided against plaintiffs, holding that carceral facility's employment of "exhaust fans," provision of "an ice machine[,]" allowing incarcerated plaintiffs to "take ice to their rooms," and an ability to leave their "room without restrictions during appropriate hours" were "reasonable measures to abate the cold and heat."[376]
Rogers v. Scott, 695 F. App'x 155 (7th Cir. 2017)	Petitioners sought declaratory and injunctive relief, compensatory and punitive damages, and costs and attorney's fees.[377]	The court held that access to air conditioners during the day, cold showers, ice, water, and medical care was sufficient to mitigate harm from eighty-five-degree weather.[378]

[374] Meeks v. Davis, No. CV H-18-3431, 2019 WL 1200617, at *1 (S.D. Tex. Mar. 14, 2019), *vacated and remanded*, 786 F. App'x 16 (5th Cir. 2019).

[375] *Meeks*, 786 F. App'x at 16-17.

[376] Moore v. Monahan, No. 06 C 6088, 2009 WL 310963, at *7 (N.D. Ill. Feb. 9, 2009), *aff'd in part*, 428 F. App'x 626 (7th Cir. 2011).

[377] Brief of Defendants-Appellees at 1, Rogers v. Scott, 695 F. App'x 155 (7th Cir. 2017) (Nos. 16-3716, 16-3717, 16-3731), 2017 WL 1907941, at *1

[378] Rogers v. Scott, 695 F. App'x 155, 160 (7th Cir. 2017).

CASE	RELIEF SOUGHT	RELIEF GRANTED
NINTH CIRCUIT		
Graves v. Arpaio, 633 F. Supp. 2d 834, 848 (D. Ariz. 2009), *aff'd*, 623 F.3d 1043 (9th Cir. 2010)	The court's decision is not clear as to what relief was sought.	Maximum temperature "in housing of pretrial detainees taking prescribed psychotropic medications"[379] and "permitting pretrial detainees to exercise outdoors without drinking water when the outside temperature exceeds 85 [degrees] . . . does not satisfy the constitutionally required opportunity for outdoor exercise."[380]
ELEVENTH CIRCUIT		
Green v. Sec'y for the Dep't of Corrections, 212 F. App'x 869 (11th Cir. 2006)	Plaintiffs sought damages, and injunctive and declaratory relief.[381]	The court held that access to (1) "ventilation and air circulation [that] exceed[s] standards set forth by the American Corrections Association," (2) "extra fans in the dormitories during the hottest parts of the summer[,]" and (3) "access to other forms of relief including medical intervention" was sufficient.[382]

[379] Graves v. Arpaio, 633 F. Supp. 2d 834, 848 (D. Ariz. 2009), *aff'd*, 623 F.3d 1043 (9th Cir. 2010).

[380] *Id.*

[381] Brief of Appellee, Green v. Sec.'y for Dept. of Corr., 212 F. App'x 869 (11th Cir. 2006) (No. 05-16807), 2006 WL 4392142.

[382] Green v. Sec'y for Dep't of Corr., 212 F. App'x 869, 872 (11th Cir. 2006) (citing Farmer v. Brennan, 511 U.S. 825, 837 (1994)).

TABLE 3: Fifth Circuit Interpretation of the Eighth Amendment in Natural Disaster Cases

APPELLATE COURT	1st PRONG: "OBJECTIVE SERIOUSNESS"	2nd PRONG: PRISON STAFF AWARENESS	3rd PRONG: FAILURE TO AMELIORATE CONDITIONS
Fifth Circuit	Under *Johnson v. Wilcher*, a district court in the Fifth Circuit declined to find deliberate indifference when incarcerated people were abandoned despite a mandatory evacuation for the county because the hurricane "skirted the coastline and failed to endanger" the plaintiff.[383]	Under *Pomier*, the court suggested that incarcerated people would have to show that prison officials "knew . . . [of a] substantial risk of serious harm because of the approaching hurricane."[384]	In *Kimball*, the court explained that Mr. Kimball's access to medical attention to treat his wounds and antibiotics amounted to sufficient "attentiveness" on the part of prison staff.[385]

[383] Johnson v. Wilcher, No. CV417-192, 2018 WL 1177937, at *2 (S.D. Ga. Jan. 2, 2018).
[384] Pomier v. Leonard, 532 F. App'x 553, 554 (5th Cir. 2013).
[385] *Id.*