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Disaster Risk in the Carceral State

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Disaster Risk in the Carceral State

Saptarishi Bandopadhyay and Joshua R.
Coene*

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The overlap between prisoner vulnerability and disasters in the United States is undeniable. During 2020 and 2021, the United States endured a series of natural hazards such as wildfires, floods, and hurricanes, many of which exposed the country's 2.1 million inmates to additional risks and compounded the danger posed by COVID-19. Yet policymakers and scholars are only beginning to appreciate the centrality and magnitude of disaster risk management for the millions of people currently held in penal institutions around the country. Unsurprisingly, the production of "lessons learned" documents that follow in the aftermath of disasters overlook how prisoner vulnerability is legally produced and inequitably distributed beyond individual disasters affecting individual prisons.

In this paper, we propose that these vulnerabilities and actual harm were neither accidental nor unforeseeable; rather, we argue that inmates are victims of interwoven "normal" rules, policies, and institutions, as well as long-standing, cultural narratives surrounding natural hazards and carceral processes. Our paper is unique in that we analyze problems of law, cultural narratives, policy, and practice as problems of "risk thinking" in the United States. Specifically, we focus on the development of, and relationship between, risk thinking in U.S. criminal justice and disaster management frameworks over the last 80 years.

Using this research, we argue that: (a) in the discourses and practices of criminal justice, prisoners fall in the cracks between scattered conceptions of risk and vulnerability on the one hand and the narrow and inelastic notions of risk and vulnerability on the other; (b) disaster-risk in prisons should not be studied in isolation from conceptions of disaster-risk applicable to "free" society; (c) prisoners have special vulnerabilities that require more and distinct protections than the rest of society; and (d) this goal is frustrated by the very structure of risk management described in (a).

We attempt this feat in two ways: first, we chart how officials, experts, legislation, and cultural narratives have shaped risk thinking in relation to crime and natural hazards. Second, we show how risk thinking in these areas, and the associated governance of prisons and disasters, ignores and thereby deepens vulnerabilities to hazards for prisoners, as well as correctional staff and communities. Given the nationwide mismanagement of the COVID-19 pandemic, our paper offers timely insights into the plight of incarcerated peoples caught between these regimes. It also suggests that, despite the unique dangers of carceral life and the popular belief that prisoners exist outside of society, social vulnerability beyond prison walls often hinges on our ability to transform vulnerability within them.

Turn here, there's Covid. Turn here, there's the fires.
You turn here, there's mass incarceration as a whole.

- Rasheed Stanley-Lockhart,
former California prisoner released in January 2020¹

I. INTRODUCTION

The overlap between prisoner vulnerability and disasters in the United States is undeniable. In March 2020, as the coronavirus outbreak took root across the United States, federal and state prisons and jails held approximately 2.1 million people, most of whom lacked the ability to follow basic precautions against infection.² Over the course of the year, the United States also endured a series of natural hazards such as wildfires, floods, and hurricanes, many of which exposed inmates to additional risks and compounded the danger posed by COVID-19.³

1. Tim Arango & Nicholas Bogel-Burroughs, *For Prisoners in the West, the Virus and the Wildfires Are Colliding Threats*, N.Y. TIMES (Sept. 14, 2020), <https://www.nytimes.com/2020/09/14/us/prisons-fires-coronavirus.html> [<https://perma.cc/2CHF-XEK8>].

2. U.S. DEP'T OF JUSTICE, NCJ 302776, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2020 - STATISTICAL TABLES 7 (2021); U.S. DEP'T OF JUSTICE, NCJ 304888, BUREAU OF JUSTICE STATISTICS, JAIL INMATES IN 2021 - STATISTICAL TABLES 7 (2022) [hereinafter BJS, JAIL INMATES IN 2021]. We arrive at this figure based on the 2019 year-end calculation for people held in state and federal prisons and 2019 mid-year calculation for jails. This better approximates the scale of carceral populations at the outset of March 2020 than the corresponding statistical data for 2020, which includes substantial declines because of pandemic response policies. Although beyond the scope of this paper, we note that this kind of carceral census figure is not adequate for determining the number of people potentially exposed to the pandemic in penal institutions. Aside from the fact that more people cycle in and out of such institutions throughout the year, this figure does not include all forms of adult correctional supervision or juvenile justice, immigration, and mental health institutions. For an analysis of the full spectrum of these other populations, see Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, Prison Policy Initiative (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> [<https://perma.cc/LY6M-BNYV>]. Nor does this include a much larger group of people who are ensnared in some form of criminal justice-related financial or debt obligation (e.g., fees, fines, bail bonds). Such "indentured citizens" often face the possibility of incarceration if they fail to meet these obligations. See Joshua Page & Joe Soss, *Criminal Justice Predation and Neoliberal Governance*, in *RETHINKING NEOLIBERALISM: RESISTING THE DISCIPLINARY REGIME* 139, 152 (Sanford F. Schram & Marianna Pavlovskaya ed., 2018) (arguing that "a predatory form of neoliberal governance in criminal justice has refashioned the state-citizen relation . . . around a market model of creditor-debtor relations").

3. Many of these hazards were arguably tied to global warming and their frequency and intensity is expected to increase in the years ahead. See *Wildfires and Climate Change*, CENTER FOR CLIMATE AND ENERGY SOLUTIONS, <https://www.c2es.org/content/wildfires->

These exposures were not accidental or unforeseeable. In Florida, for instance, many parole-eligible inmates died from COVID-19 while waiting for the state's three person Commission on Offender Review to consider (or reconsider) their petitions for early release.⁴ Despite criticism of its slow pace and broad discretionary power, the Commission approved only 2% of cases before it in 2019. In this paper, we seek to show that inmates are victims of interwoven "normal" rules, policies, and institutions as well as cultural narratives surrounding environmental toxicity, natural hazards, and carceral processes. In doing so, we also show how one of the foundational questions surrounding mass incarceration in the U.S.—*are prisoners risk multipliers or innocent victims deserving protection?*—is historically and culturally conditioned, and deployed through law and policy, to the disadvantage of inmates.

In their basic custodial functions, carceral institutions give rise to multiple forms of vulnerability among people who are often already burdened by a variety of social inequities.⁵ Long-term confinement and prison conditions often cause or aggravate pre-existing medical issues and cause additional health problems, ranging from mental illness⁶ and respiratory ailments to diabetes and sexually transmitted diseases.⁷ Institutions, especially those

and-climate-change [<https://perma.cc/AFK4-ZJQA>] (archived Apr. 5, 2023). While it is difficult to prove that a particular wildfire or hurricane was "caused" by climate change, there is broad scientific consensus that climate change is worsening natural hazards across the U.S. and around the world. See, e.g., Rong Fu, *Study Shows That Climate Change is the Main Driver of Increasing Fire Weather in the Western U.S.*, NOAA News (Nov. 9, 2021), <https://www.drought.gov/news/study-shows-climate-change-main-driver-increasing-fire-weather-western-us> [<https://perma.cc/J29N-AMHT>]; NOAA GEOPHYSICAL FLUID DYNAMICS LABORATORY, GLOBAL WARMING AND HURRICANES: AN OVERVIEW OF CURRENT RESEARCH RESULTS (2022), <https://www.gfdl.noaa.gov/global-warming-and-hurricanes> [<https://perma.cc/QLK2-M63F>].

4. Grace Toohey, *Many Who Have Died of COVID-19 in Florida's Prisons Were Eligible for Parole*, ORLANDO SENTINEL (Aug. 7, 2020), <https://www.orlandosentinel.com/coronavirus/os-ne-coronavirus-florida-prison-deaths-parole-eligible-20200807-zwga6b7rdzfc3otwh3vmgrjrxm-story.html> [<https://perma.cc/BDZ7-9HUA>].

5. See Sharona Hoffman, *Preparing for Disaster: Protecting the Most Vulnerable in Emergencies*, 42 CAL. DAVIS L. REV. 1491 (2009).

6. The Human Rights Watch has found that more than half of all state prisoners and almost half of federal prisoners have a history, or display symptoms, of mental illness. See Njideka Motanya & Pamela Valera, *Climate Change and Its Impact on the Incarcerated Population: A Descriptive Review*, 31 SOC. WORK PUB. HEALTH 348, 350 (2016).

7. See generally Dora M. Dumont et al., *Public Health and the Epidemic of Incarceration*, 33 ANN. REV. PUB. HEALTH 325 (2012); James Hamblin, *Mass Incarceration Is Making Infectious Diseases Worse*, ATLANTIC (July 18, 2016), <https://www.theatlantic.com/>

located in urban areas, carry the additional risk of incubating and spreading infectious diseases from the constant movement of staff, independent contractors, prisoners, and visitors in and out of their premises.⁸ Prisons are often built on low-value land susceptible to various natural hazards.⁹ Pervasive security concerns and the rigidly compartmentalized architecture of penal institutions also present numerous difficulties for responding to emergencies and evacuation.¹⁰ Prisoners live almost entirely under the control of custodial authorities; during emergencies they are particularly isolated and deprived of access to supportive relationships—a distinct characteristic of vulnerable communities.¹¹ Prison staff and their families, as well as other people and institutions that serve these carceral facilities, often share many of the same risks.¹²

The impact of COVID-19 on imprisoned populations points to a significant problem of governance in the U.S.: law, carceral studies, and disaster risk management¹³ can no longer be viewed in

health/archive/2016/07/incarceration-and-infection/491321/ ,
[https://perma.cc/8EYY-CZU5].

8. See generally Tana Ganeva, *America's Crowded Prisons Are About to Create a Coronavirus Crisis in Rural America*, INTERCEPT (May 7, 2020), <https://theintercept.com/2020/05/07/coronavirus-america-rural-prisons> [https://perma.cc/9U2L-8MBC]; Alison O. Jordan & Melvin H. Wilson, *Addressing COVID-19 and Correctional Facilities: A Social Work Imperative*, SOC. JUST. BRIEF (June 2020), <https://www.socialworkers.org/LinkClick.aspx?fileticket=o6zZ1n0yE0k%3d&portalid=0> [https://perma.cc/N33E-C8QN]; PENAL REFORM INT'L, NATURAL HAZARDS AND PRISONS: PROTECTING HUMAN RIGHTS OF PEOPLE IN PRISON IN DISASTER PREVENTION, RESPONSE AND RECOVERY (2021), at 2 [hereinafter PRI].

9. J. C. Gaillard & Fanny Navizet, *Prisons, Prisoners and Disaster*, 1 INT'L J. DISASTER RISK REDUCTION 33, 35-36 (2012) (discussing the siting of prisons on cheap, undesirable, and hazard-prone land).

10. For discussion of the difficulties involved in prison evacuations, see J. Carlee Purdum, *Hazardous or Vulnerable? Prisoners and Emergency Planning in the U.S.*, in EMERGING VOICES IN NATURAL HAZARDS RESEARCH 179, 186-188 (Fernando I. Rivera ed., 1st ed., 2019); PRI, *supra* note 8, at 12-14 (highlighting risk factors unique to prisons that may complicate evacuations).

11. See generally Gresham M. Sykes, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* (1958). For an overview of Sykes' conception of the "pains of imprisonment" and its subsequent use, see Kevin D. Haggerty & Sandra Bucerius, *The Proliferating Pains of Imprisonment*, 1 INCARCERATION: INT'L J. IMPRISONMENT, DETENTION & COERCIVE CONFINEMENT (2020), at 1; Ben Crewe et al., *The Gendered Pains of Life Imprisonment*, 57 BRIT. J. CRIMINOLOGY 1359 (2017); Ben Crewe, *Depth, Weight, Tightness: Revisiting the Pains of Imprisonment*, 13 PUNISHMENT & SOC'Y (2011).

12. See Ganeva, *supra* note 8.

13. The United Nations defines "disaster risk" as the "potential loss of life, injury, or destroyed or damaged assets which could occur to a system, society or a community in a specific period of time, determined probabilistically as a function of hazard, exposure, vulnerability and capacity." See *Terminology: Disaster Risk*, UNITED NATIONS OFFICE OF

isolation, if they ever could. Yet policymakers and scholars are only beginning to appreciate the centrality and magnitude of disaster risk management for the millions of people currently held in penal institutions around the country.¹⁴ This is not to say that policymakers and bureaucrats have ignored emergency management until now. To the contrary, following widespread prison unrest in the 1970s and 1980s, penal administrators and researchers sought to better understand the causes of collective prison violence and devise ways of avoiding or preparing for their occurrence.¹⁵

By the 1990s, emergency preparedness extended to other potential threats, from severe weather and flooding to industrial

DISASTER RISK REDUCTION, <https://www.undrr.org/terminology/disaster-risk> [<https://perma.cc/Q295-HEJL>] (archived Apr. 5, 2023). However, this event-specific and probabilistic definition of risk, relative to our conception of historical and ongoing cultures of “risk thinking,” sets the stage for the kind of impersonal, administrative, and technocratic approaches to defining prisoner vulnerability that we fundamentally disagree with in this paper. To speak to a multidisciplinary audience, we use the term “disaster risk management” in its common everyday sense as a catch-all for a cluster of interdisciplinary fields of academia (e.g., “disaster studies”) and applied research (e.g., “emergency management”). There is no expert consensus on how these fields can be distinguished or whether this is a necessary and worthwhile enterprise. Governmental preferences often influence popular usage, and states around the world use “disaster management” and “emergency management” interchangeably. See Janki Andharia, *Blurred Boundaries, Shared Practices: Disaster Studies as an Emerging Discipline and Disaster Management as a Field of Practice*, in *DISASTER STUDIES: EXPLORING INTERSECTIONALITIES IN DISASTER DISCOURSE* (Janki Andharia ed., 2020) (arguing that the concept of “disaster” is not objective but socially constructed). The development of “emergency management” practices in the United States, for instance, cannot be distinguished from our understanding of disaster management which includes the development of preparedness, risk mitigation, relief, reconstruction, and resilience-building practices. See, e.g., JANE BULLOCK ET AL., *INTRODUCTION TO EMERGENCY MANAGEMENT* 1-30 (7th ed. 2020).

14. Even some of the most well-informed roundups of vulnerability studies, for a legal audience, concern only the “free” civilian populations. See, e.g., Robert M. Verchick, *Disaster Justice: The Geography of Human Capability*, 23 *DUKE ENV'T. L. & POL'Y F.* 23 (2012); Lisa Grow Sun, *Disaster Mythology and The Law*, 96 *CORNELL L. REV.* 1131 (2011); Justin Pidot, *Deconstructing Disaster*, 2013 *BYU L. REV.* 213 (2013). But see Alicia J. Ferrara, Peter G. Stillman & Adelaide H. Villmoare, *The Prison City of New Orleans: Law's Responses to the Disaster of Hurricane Katrina*, in *DISASTERS, HAZARDS, AND LAW 203* (Mathieu Deflem ed., 2012); Rachel Shaw, *Up the Creek Without a Paddle: Consequences for Failing to Protect Prisoners During a Natural Disaster*, 9 *ENV'T & EARTH L. J.* 59 (2019); Purdum, *supra* note 10.

15. See generally BERT USEEM & PETER KIMBALL, *STATES OF SIEGE: U.S. PRISON RIOTS, 1971-1986* (1989); BERT USEEM ET AL., *RESOLUTION OF PRISON RIOTS: STRATEGIES AND POLICIES* (1996); REID H. MONTGOMERY, JR. & GORDON A. CREWS, *A HISTORY OF CORRECTIONAL VIOLENCE: AN EXAMINATION OF REPORTED CAUSES OF RIOTS AND DISTURBANCES* (1998).

and nuclear accidents.¹⁶ Since then, riot and emergency management plans proliferated throughout the country's penal bureaucracies,¹⁷ shaped by actors such as the American Correctional Association and the federal government through the National Institute of Corrections (NIC).¹⁸ However, these efforts have focused on easily identifiable and limited interventions from the perspective, and within the purview, of prison administrators. They have ignored wider questions about the role of the state in nurturing prisoner vulnerability to disaster risks as a "normal" part of its functioning.¹⁹ When political leaders and bureaucrats at the Department of Homeland Security (DHS) and the Federal Emergency Management Agency (FEMA) take a broader perspective on disasters, they regard them as threats to the "free" social order. Where governmental institutions prioritize relief, preparedness, and mitigation operations, they do so within the parameters of age-old cultural narratives that behold disasters as

16. See generally ROBERT M. FREEMAN, STRATEGIC PLANNING FOR CORRECTIONAL EMERGENCIES (1996); JEFFREY A. SCHWARTZ, CRITICAL ANALYSIS OF EMERGENCY PREPAREDNESS SELF-AUDIT MATERIALS (1996); JEFFREY A. SCHWARTZ & CYNTHIA BARRY, A GUIDE TO PREPARING FOR AND RESPONDING TO JAIL EMERGENCIES: SELF-AUDIT CHECKLISTS, RESOURCE MATERIALS, CASE STUDIES (2009); JEFFREY A. SCHWARTZ & CYNTHIA BARRY, A GUIDE TO PREPARING FOR AND RESPONDING TO PRISON EMERGENCIES: SELF-AUDIT CHECKLISTS, RESOURCE MATERIALS, CASE STUDIES (2005). Robert Freeman, who was superintendent of the State Correctional Institutional Camp Hill in Pennsylvania during a massive multi-day uprising in 1989, argues that "a correctional emergency is defined as any event that can (a) disrupt the orderly operation of the facility; (b) cause deaths, injuries, and property damage; and (c) jeopardize public safety." Robert M. Freeman, *The Real Event Model or the Organizational Convenience Model: A National Survey of Correctional Emergency Preparedness Evaluation Methodology*, 78 PRISON J. 152, 154 (1998) [hereinafter Freeman, *Real Event Model*]. For Freeman's account of the events at Camp Hill, see Freeman, *Pre-Emergency Planning for Post-Emergency Litigation*, 58 CORRECTIONS TODAY 98 (1996); Freeman, *Remembering the Camp Hill Riot*, 59 CORRECTIONS TODAY, Feb. 1997, at 56. For a more critical view, see USEEM ET AL., *supra* note 15, at 56-83.

17. Freeman, *Real Event Model*, *supra* note 16, at 158-61.

18. See Linda Greco, *NIC Update*, 58 CORRECTIONS TODAY 142 (1996) (describing the NIC's role in developing emergency response and preparation in state penal systems, particularly in the mid-1990s); see also AM. CORR. ASS'N, RIOTS AND DISTURBANCES IN CORRECTIONAL INSTITUTIONS: A DISCUSSION OF CAUSES, PREVENTIVE MEASURES AND METHODS OF CONTROL (1981); AM. CORR. ASS'N, CAUSES, PREVENTATIVE MEASURES, AND METHODS OF CONTROLLING RIOTS AND DISTURBANCES IN CORRECTIONAL INSTITUTIONS (1990); AM. CORR. ASS'N, PREVENTING AND MANAGING RIOTS AND DISTURBANCES (1996).

19. For an example of current managerial discourse on prison emergencies and preparedness, see the special issue of *Corrections Today*, VOL. 73 (Am. Corr. Ass'n, Alexandria, Va.), Oct. 2011.

“natural” and unforeseen and view victims as “innocent” until it is politically expedient to claim otherwise.²⁰

Such efforts are primarily concerned with fixing discernible causes of disaster (e.g., weak levees) and restoring the economic and social status quo; by contrast, preserving already-marginalized communities’ living spaces, social amenities, and livelihoods is usually a low priority.²¹ Official attempts to investigate the mundane, pre-existing socio-ecological realities that made people vulnerable to hazards are rarer still. Crucially, these efforts are overwhelmingly directed at “free” civilian communities.

There is also surprisingly little research that considers the nexus between mass incarceration and disasters. Carceral officials have traditionally neglected prisoners’ susceptibility to hazards and their attendant consequences for society at large—strikingly, training and preparedness were centered around disruptions caused by inmates.²² And emergency management practitioners are overwhelmingly concerned with the impact of disasters outside prison walls.²³ Supervisory state and federal officials and experts are frequently concerned with problems of policy, appropriations, logistics, and so on. Prisoners’ rights lawyers and scholars, in turn, usually target the constitutionality of legislations, and various inappropriate and discriminatory implementation practices.²⁴

20. Terry Cannon, *Vulnerability, “Innocent” Disasters and the Imperative of Cultural Understanding*, 17 DISASTER PREVENTION & MGMT. 350 (2008).

21. See, e.g., CRAIG E. COLTEN, AN UNNATURAL METROPOLIS: WRESTING NEW ORLEANS FROM NATURE 77-107 (2006) (providing a historical assessment of this phenomenon in New Orleans after Hurricane Katrina). On housing inequality and discrimination in rebuilding programs, see Rodney D. Green et al., *Housing, Race, and Recovery from Hurricane Katrina*, 40:2 REV. BLACK POL. ECON. 145, 146-53 (2013) (arguing leadership prioritized “big business restoration” over housing for the Black working class); Elizabeth Fussell et al., *Race, Socioeconomic Status, and Return Migration to New Orleans After Hurricane Katrina*, 31 POPULATION ENV’T 20, 30-33 (2010); Richard A. Webster & Jeff Adelson, *The Federal Program to Rebuild After Hurricane Katrina Shortchanged the Poor. New Data Proves It*, PRO PUBLICA (Dec. 11, 2022), <https://www.propublica.org/article/how-louisiana-road-home-program-shortchanged-poor-residents> [<https://perma.cc/Y63P-JWZG>].

22. See Michelle A. Sivilonis, *Prisons and Disasters* 11-17 (Dec. 2013) (PhD dissertation, Northeastern University) (<https://repository.library.northeastern.edu/files/neu:1039> [<https://perma.cc/K5TA-4DXP>]); Purdum, *supra* note 10, at 180-83.

23. Emergency management handbooks and manuals, for instance, rarely discuss carceral facilities and prisoners.

24. See Aaron Litman, *Free-World Law Behind Bars*, 131 YALE L. J. 1385 (2022) (arguing that the emphasis on constitutional rights litigation is misguided because it distracts from the failure of basic regulatory laws related to food, telecommunications, and healthcare to

Expert institutions routinely ignore wider and deeper problems of knowledge that define the problems of policy they are dedicated to resolving. In so proceeding, they ignore a universe of historical and social conditions, and cultural narratives that outline the character of disaster risk in prisons and underscore prisoners' susceptibility to hazards. As a result of this oversight, it is unsurprising that "lessons learned" documents that follow in the aftermath of disasters overlook how prisoner vulnerability is legally produced and inequitably distributed beyond individual events in specific carceral institutions.

Politicians and policymakers who operate within the rush of policy and media cycles, terms of office, and political agendas routinely overlook how vulnerability is produced and distributed across a region or nationwide over longer stretches of time.²⁵ Prisoner welfare is often not a priority. Within this narrow temporal frame, authorities and institutions only recognize spectacular "natural" events and the specter of "terrorism" as potential disaster-risks. This blinkered perspective on disaster-risk sponsors long-term, slow-moving disasters in the form of endemic poverty, hunger, discrimination, addiction, precarious employment, homelessness, and similar evils that structure everyday life inside and out of prisons.

Our paper contributes to this growing literature on the nexus of prison and disaster management. However, it is distinct from the already described approaches and existing literature in that we analyze problems of law, cultural narratives, policy, and practice as problems of "risk thinking"—problems of knowledge production and cultural meaning-making that have historically defined and limited the meanings of risk and vulnerability—in the United States.²⁶ Specifically, we focus on the development of, and relationship between, risk thinking in U.S. criminal justice and disaster management frameworks since the mid-twentieth century.

reach beyond prison gates, a problem that falls outside the scope of the 8th Amendment and Due Process frameworks).

25. SAPTARISHI BANDOPADHYAY, *ALL IS WELL: CATASTROPHE AND THE MAKING OF THE NORMAL STATE* 1-12, 15-19, 29-39 (2022); *see also* KENNETH HEWITT, *INTERPRETATIONS OF CALAMITY* 22-24 (1983) (arguing that the common framing of disasters as statistical inevitabilities makes them so mundane that they get folded into normal, everyday life); Ben Wisner, *Disaster Vulnerability: Scale, Power, and Daily Life*, 30 *GEOJOURNAL* 127 (1993) (discussing the difficulty of crafting a working definition of "vulnerability").

26. The literature on risk thinking is vast. *See, e.g.*, ÅSA BOHOLM, *ANTHROPOLOGY AND RISK* (2015); MARY DOUGLAS, *RISK AND BLAME: ESSAYS IN CULTURAL THEORY* (1992); *SOCIAL THEORIES OF RISK AND UNCERTAINTY: An INTRODUCTION* (Jens O. Zinn ed., 2008).

To streamline our analysis, we have organized these legal and institutional apparatuses into two imagined forms of authority: the American “carceral state” and “disaster-managerial” state, respectively.²⁷

In the late twentieth century, the American carceral state emerged from politicians and experts redefining crime and how it ought to be governed. As a result, crime and punishment became a major focal point of governance and political competition at the federal and state level. Jurisdictions across the country invested unprecedented resources to expand the number and scale of confinement institutions and simultaneously pursued preventative, situational crime control practices that pushed carceral framings well beyond prison walls, in effect outsourcing the responsibility to civilian “communities.” This decades-long binge of law-and-order politics, exclusionary policies, and resulting interests and political economies has produced a different order of risk and vulnerability for people ensnared in the carceral apparatus, which politicians, administrators, and the media routinely deny or normalize.²⁸

As the spread of COVID-19 within and beyond prison walls has shown, the carceral state itself produces social vulnerability that the disaster-managerial state must overcome. For over a century, the development of the American disaster-managerial state has been defined by top-down disaster relief operations framed by narratives of compassion (focused on “innocent” victims) and exceptionalism (driven by domestic and national security). These narratives color our cultural thinking about the causes of disasters (nature, technological failure, and terrorism) and their consequences (weakened national security, civil unrest, and generalized criminality).

Legislative and institutional apparatuses that produce, and are sustained by, such risk narratives routinely exclude prisoners and other detainees for a variety of reasons. For instance, inmates rarely

27. The question of what constitutes the “penal,” “prison,” or “carceral state” has received significant scholarly attention recently. Since this paper focuses on disaster-risk in confinement, we adopt the term “carceral” rather than “penal,” which emphasizes the broader scope of non-custodial punishments and punitive-like sanctions. See Ashley Rubin & Michelle S. Phelps, *Fracturing the Penal State: State Actors and the Role of Conflict in Penal Change*, 21 THEORETICAL CRIMINOLOGY 422 (2017).

28. See *infra* Part II.

fit the idealized but rebuttable “innocent victim” image²⁹ that the media adores³⁰—an illusion that generates public support for disaster management operations and allows political leaders to promise progress without accepting responsibility for fostering disaster-risks. Further, the federal government has identified correctional facilities as “critical infrastructure” that must be defended against terrorism and the weather;³¹ however, as disasters unfold, administrators and politicians regard inmates as threats to local law and order who must be disciplined and sequestered within these dangerous spaces or relocated to other overcrowded and underprepared institutions.

29. Within the discourse of crime and criminal justice, people convicted of crimes and confined in carceral institutions are usually depicted negatively, but such depictions vary considerably over time and place and in how they align with race, class, gender among many other axes of difference. Carceral practices, both formal and informal, always depend on cultural representations of the people subject to them, which have profound effects on they are treated by policymakers, carceral authorities, researchers, potential employers among many others. Carceral stigma haunts many people after imprisonment, frustrating their attempts to reintegrate into society, limiting their access to labor markets, housing opportunities, numerous social services, and many of routine legal protections. It also affects people associated with prisoners, such as family members, and can shape perceptions of certain places, even those not formally part of the criminal justice apparatus. For some relevant statements, see generally PIPPA HOLLOWAY, *LIVING IN INFAMY: FELON DISFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP* (2013); Stacey Hannem, *The Mark of Association: Transferred Stigma and the Families of Male Prisoners*, in *STIGMA REVISITED: IMPLICATIONS OF THE MARK* 95 (Stacey Hannem & Chris Bruckert eds., 2012); DEVAH PAGER, *MARKED: RACE, CRIME AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007); JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 225-300 (2010) [hereinafter JACOBS, *ETERNAL*]; *PRISONERS AS CITIZENS: HUMAN RIGHTS IN AUSTRALIAN PRISONS* (David Brown & Meredith Wilkie eds., 2002); Philippe Combessie, *Marking the Carceral Boundary Penal Stigma in the Long Shadow of the Prison*, 3 *ETHNOGRAPHY* 535 (2002); Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 *J. CRIM. L. CRIMINOLOGY & POLICE SCI.* 347 (1968); Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study (Part 2)*, 59 *J. CRIM. L. CRIMINOLOGY & POLICE SCI.* 542 (1968). For how such representations inform prison regimes, see JOHN M. SLOOP, *THE CULTURAL PRISON: DISCOURSE, PRISONERS AND PUNISHMENT* 11-14, 90-131 (1996); Dario Melossi, *Changing Representations of the Criminal*, 40 *BRIT. J. CRIMINOLOGY* 296 (2000).

30. As former correctional administrator John McCullough explains: “Unless they are negative, few prison events or happenings will draw press coverage or public reaction. An exception is the response of inmate work crews to disasters. Deep in the American psyche is the symbol of redemption, of the atonement of the sinner. When inmates are seen working to remedy damage in the community, it leaves a lasting impression.” JOHN M. MCCULLOUGH, *MANAGING CORRECTIONAL CRISES*, 106 (2006).

31. CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, *GOVERNMENT FACILITIES SECTOR-SPECIFIC PLAN 5* (2015), <https://www.cisa.gov/sites/default/files/publications/nipp-ssp-government-facilities-2015-508.pdf> [<https://perma.cc/MB8P-LS52>].

The American carceral and disaster-managerial states are defined by modes of risk thinking and resulting operational priorities that obfuscate harms and hinder reform possibilities. In so doing, they produce new and unforeseen orders of disaster risk and vulnerability. Scholars across disciplines have identified the carceral system and disaster management apparatus as integral to the character of modern American state.³² However, few have offered a cross-sectional account of the harmful notions of risk and vulnerability that sustain these conceptions of authority. Yet, this kind of analysis is critical for the continued development of environmental and disaster justice movements in America. In keeping with our commitment to aiding scholars, students and civil society invested in challenging socio-economic, political, and ecological vulnerability, our overarching goal is to show that poor disaster-risk management within the carceral system reflects the general “success,” and not isolated failures, of these forms of authority in the U.S.

Towards this larger claim, we will argue that: (a) in the discourses and practices of criminal justice, prisoners fall in the cracks between scattered conceptions of risk and vulnerability on the one hand and the narrow and inelastic notions of risk and vulnerability on the other; (b) disaster-risk in prisons should *not* be studied in isolation from conceptions of disaster-risk applicable to “free” society; (c) prisoners have special vulnerabilities that require more and distinct protections than the rest of society; and (d) this goal is frustrated by the very structure of risk management described in (a).

We attempt this feat in two ways: first, we chart how officials, experts, legislations, and cultural narratives have shaped risk thinking in relation to crime and natural hazards. Second, we show how risk thinking in these areas, and the associated governance of prisons and disasters, ignores and thereby deepens in-custody but also civilian vulnerabilities to hazards. Given the nationwide mismanagement of the COVID-19 pandemic, our paper offers timely insights into the plight of incarcerated peoples caught between these regimes. It also suggests that, despite the unique

32. See generally MICHELE LANDIS DAUBER, *THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE* (2013) (identifying disaster management as key to the modern American welfare state); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006) [hereinafter GOTTSCHALK, *PRISON AND THE GALLOWS*].

dangers of carceral life and the popular belief that prisoners exist outside of society, social vulnerability beyond prison walls often hinges on our ability to transform vulnerability within them. In this sense, our analysis is also relevant for readers invested in public health, environmental law, and income inequality concerns focused on non-carceral contexts.

We do not presume to offer a comprehensive history of American carceral and disaster-managerial authorities and their relationship. Rather, we analyze the development of risk thinking in each regime and examine the impact of their relationship on incarcerated people, and to a more modest extent, on society. By and large, we evaluate disaster-risk thinking at the federal level. States exercise a significant degree of law, policy, and administrative control over carceral institutions and populations,³³ but less so with respect to major disasters. A fuller taxonomy is not feasible here. Moreover, to pursue the trees in lieu of the forest would make it impossible to say anything meaningful about the general shape of risk thinking and corresponding legal architecture across these two expansive law and policy regimes. This approach is in keeping with our historical moment when social justice movements are forcing public conversations about “normal” or structural inequities across institutional regimes and public life in the U.S. We believe the paper will contribute to emerging fields such as disaster law and policy as well as to environmental justice, criminal justice, carceral studies, disaster studies, emergency management, and public administration. Significantly, our analysis also sets up another much-needed vein of study: that of disaster management in the context of illegal immigrant detention centers whose captives are often even more vulnerable than incarcerated Americans.

Our analysis is presented in four parts. Part II outlines the expansion of the American carceral system and risk thinking related to this regime. Part III performs a similar exercise, tracing mainstream conceptions of disaster-risk and vulnerability underpinning emergency management legislations, policies, and institutional apparatus. Part IV examines how these approaches to risk interact to realize an inequitable vision of how incarcerated

33. For a brief review of the relationship between emergency management and corrections infrastructure at the federal level and a deeper study of state level operational plans, see Purdum, *supra* note 10, at 181-83 and 196-204, respectively.

people and civilians should be governed. Finally, Part V briefly assesses the implications of our arguments for future research.

II. A SKETCH OF THE CARCERAL STATE

To understand the nature of prisoners' vulnerability to disaster in the current moment, it is necessary to canvass how penal practices and the prevailing discourses of crime, criminality, and risk transformed in recent decades. This sketch does not aim to capture the complexity and nuance of the research literature on these changes. Rather, it is intended to demonstrate how changes in criminal justice risk thinking in the last few decades simultaneously positioned offenders as *risks* and as people *at risk from* disasters, broadly conceived.

A. *Mass Incarceration, Excess, and Origins*

Risk thinking about crime has deep roots in American history, but it has recently become more central to American governance, political competition, and public discourse. Since the 1960s, numerous actors in government and civil society have fixated on rising crime, the fear and perception of crime, and waning public support for welfarist criminal justice policies. They've then drawn on these fixations to justify a new political order with deeply pessimistic and punitive views about crime, race, and poverty. This "crime complex," which became hegemonic by the early 1990s, provides a broad template for thinking about risk, interpreting social change, defining social problems, and authorizing state intervention.³⁴ It sponsors a form of government in which seemingly unrelated issues, policies, and political calculations can be legitimated through the grammar of risk and crime control; at the same time, the crime complex discourse valorizes harsh, moralistic, and exclusionary punishment as necessary and normal.³⁵ This can be seen most clearly in the enormous growth in prison populations at the state and federal levels, which by the mid-

34. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 164-65 (2001) [hereinafter GARLAND, *CULTURE OF CONTROL*].

35. *Id.* at xi, 163-65. For additional insight on this problem, see generally THE NEW PUNITIVENESS: TRENDS, THEORIES, PERSPECTIVES (John Pratt et al. eds., 2005); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007) [hereinafter SIMON, *GOVERNING THROUGH CRIME*].

2000s had grown nearly 700% from 1972 levels.³⁶ While this national trend has peaked and slowly declined since the 2008 recession, the country's combined prison and jail population still exceeded 2.1 million people as of 2018, with nearly 4.4 million additional people under other forms of correctional supervision.³⁷ State and federal authorities constructed 1,152 new prisons over a period of forty years while jail capacity increased from approximately 243,000 beds in 1970 to 915,100 beds in 2017.³⁸

Since the 1980s, scholars and activists have attempted to explain how this "punitive turn" took hold in the U.S. and how it affected core institutions like prisons and jails. Much of this literature attributed the emergence of occasionally conflicting punitive and risk-governance strategies to structural changes in U.S. racial formation, political economy, gender, and cultural norms in the latter part of the 20th century.³⁹ Some activists and scholars argue that race and racialized perceptions of crime, especially their influence on electoral politics, have been the

36. Nazgol Ghandnoosh, *U.S. Prison Population Trends: Massive Buildup and Modest Decline*, SENTENCING PROJECT (Sept. 17, 2019), <https://www.sentencingproject.org/publications/u-s-prison-population-trends-massive-buildup-and-modest-decline/> [<https://perma.cc/747V-CP6L>].

37. HADAR AVIRAM, *CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* 3-4, 53-55 (2015); Joan Petersilia & Francis T. Cullen, *Liberal but Not Stupid: Meeting the Promise of Downsizing Prisons*, 2 *STAN. J. CRIM. L. & POL'Y* 1, 3-7 (2015). The total correctional population crested in 2007; prison and jails populations reached their highest point in 2009 and 2008, respectively. Nevertheless, much of this decline has come just from one jurisdiction: California. While some jurisdictions have seen more modest declines, prison populations have increased in others. DANIELLE KAEBLE & MARY COWHIG, *CORRECTIONAL POPULATIONS IN THE UNITED STATES*, 2016, at 2 (2018).

38. JOHN M. EASON, *BIG HOUSE ON THE PRAIRIE: RISE OF THE RURAL GHETTO AND PRISON PROLIFERATION* 2 (2017); CHRIS MAI ET AL., *BROKEN GROUND: WHY AMERICA KEEPS BUILDING MORE JAILS AND WHAT IT CAN DO INSTEAD* 1 (2019).

39. See generally GARLAND, *CULTURE OF CONTROL*, *supra* note 34; SIMON, *GOVERNING THROUGH CRIME*, *supra* note 35; Pat O'Malley, *Volatile and Contradictory Punishment*, 3 *THEORETICAL CRIMINOLOGY* 175 (1999) [hereinafter O'Malley, *Volatile*]; MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* (2006); JOHN PRATT, *PUNISHMENT AND CIVILIZATION: PENAL TOLERANCE AND INTOLERANCE IN MODERN SOCIETY* (2002) [hereinafter PRATT, *PUNISHMENT AND CIVILIZATION*]; Page & Soss, *supra* note 3; Rueben Jonathan Miller, *Race, Hyper-Incarceration, and US Poverty Policy in Historic Perspective*, 7 *SOCIO. COMPASS* 573 (2013); LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009) [hereinafter WACQUANT, *PUNISHING THE POOR*].

primary drivers of the punitive turn.⁴⁰ In such accounts, punitive criminal justice policies were part of a popular backlash against the successes of civil rights movements during the 1950s and 1960s.⁴¹ In contrast, political scientist Vesla Weaver has emphasized that this process was driven more by elites than popular racial resentment.⁴² Political leaders who had lost battles to maintain racial segregation, Weaver argues, seized on the issue of crime as a way to resist and rollback civil rights reforms without appearing to violate the new political language of racial equality and integration.⁴³ In both accounts, increased attention to crime control through the militarization of police, sentencing reform, and mass incarceration were a means to reassert white supremacy in the aftermath of civil rights victories.

Other scholars have argued that the role of race in the punitive turn in U.S. public policy cannot simply be reduced to only discriminatory intent on the part of biased actors. Many liberal efforts to ameliorate racial inequality through criminal justice reform have often created a host of harmful consequences for African Americans.⁴⁴ For instance, during the 1940s and 1970s, many liberal reforms that were intended to lower criminal victimization and abusive law enforcement practices ended up

40. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 50-73 (2010); MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* 1-4, 106-14 (2011).

41. See generally KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (1997); MICHAEL W. FLAMM, *LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960s* (2005); Katherine Beckett & Megan Ming Francis, *The Origins of Mass Incarceration: The Racial Politics of Crime and Punishment in the Post-Civil Rights Era*, 16 *ANN. REV. LAW & SOC. SCI.* 433, 446 (2020) (“US mass incarceration cannot be explained without reference to the unique role of race in American politics and the ways in which racial dynamics have been shaped by the nature of the American political system.”).

42. Vesla Mae Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 *STUD. AM. POL. DEV.* 230, 237 (2007) (arguing that crime and urban riots were the two focusing events that provided segregationist elites with an ostensibly race-neutral way to resist liberal racial policies).

43. *Id.* at 236-37, 247-50.

44. NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 2-19 (2014); Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 *LAW & SOC'Y REV.* 695, 696 (2010) (arguing that viewing racism as only a matter of bias and intent “obscures the operation of racial power in penal practices and institutions”); HEATHER SCHOENFELD, *BUILDING THE PRISON STATE: RACE AND THE POLITICS OF MASS INCARCERATION* 13 (2018) [hereinafter SCHOENFELD, *PRISON STATE*]. These authors underscore the structural aspects of race in American society.

normalizing racist assumptions about crime and offenders and enhanced the overall capacities of police and carceral authorities.⁴⁵ As political scientist Naomi Murakawa has argued, “the United States did not face a crime problem that was racialized; it faced a race problem that was criminalized.”⁴⁶

Despite disagreements about the causality of race and racism in the production of mass incarceration, there can be little doubt about the massively disproportionate effect this carceral paroxysm has had on poor, Black, and Latinx communities.⁴⁷ The incarceration rate for African Americans during the late 20th century prison boom was often seven times that of whites.⁴⁸ Drawing on Bureau of Justice Statistics data for 2019, the Sentencing Project concluded that the national average incarceration rate for African Americans was a staggering 1240 per 100,000 compared to rates of 349 for Latinx and 261 for whites.⁴⁹ While there is some debate about whether the disproportionately high incarceration rate for African Americans is a relatively new phenomenon⁵⁰ or reflects the deep racial animus informing

45. MURAKAWA, *supra* note 44, at 2-19; ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 1-26 (2016). For works that highlight the role of crime and victimization in as well as support for law and order in Black communities, see generally JAMES FORMAN JR., LOCKING UP OUR OWN: THE STORY OF RACE, CRIME, AND JUSTICE IN THE NATION'S CAPITAL (2017); MICHAEL JAVEN FORTNER, BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT (2015). For a critique of Murakawa and Hinton, see Adaner Usmani, *Did Liberals Give Us Mass Incarceration?*, 1 CATALYST 168, 179-81 (2017) (arguing that liberals rightfully perceived crime to be a problem in Black communities, but failed to implement their own social democratic policy proposals to address it).

46. MURAKAWA, *supra* note 44, at 3.

47. See generally MARC MAUER, THE RACE TO INCARCERATE (2006); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006).

48. MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 121 (2015) [hereinafter GOTTSCHALK, CAUGHT]; WILLIAM J. SABOL ET AL., TRENDS IN CORRECTIONAL CONTROL BY RACE AND SEX 4 (2019), <https://counciloncj.org/wp-content/uploads/2021/09/Trends-in-Correctional-Control-FINAL.pdf> [<https://perma.cc/Y79G-F7EJ>].

49. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT'G PROJECT (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> [<https://perma.cc/4NVN-97L5>]. The racial disparity in imprisonment has declined in the early 2000s. E. ANN CARSON, PRISONERS IN 2018, at 1, 9-10 (2020); John Gramlich, *Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006*, PEW RSCH. CTR. (May 6, 2020), <https://www.pewresearch.org/fact-tank/2020/05/06/black-imprisonment-rate-in-the-u-s-has-fallen-by-a-third-since-2006/> [<https://perma.cc/9YED-LN53>].

50. MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 3-4 (David Garland ed., 2001); WACQUANT, PUNISHING THE POOR, *supra* note 39, at 195-208.

punishment in earlier periods of American history,⁵¹ the emphasis on incarceration and other forms of carceral supervision in the last several decades has deepened the association of Blackness with criminality in policy and popular culture.⁵²

Recently, scholars have begun to focus more attention on how large-scale social patterns have informed specific penal policies and conceptualizations of risk.⁵³ This has produced more localized case studies and cross-jurisdictional comparisons seeking to identify the key institutions, discourses, and actors forming the “penal,” “prison” or “carceral” state as well as explain wide geographic variations in use of imprisonment.⁵⁴ Sociologists

51. For historical incarceration rates by race and region, see William Sabol, *Racially Disproportionate Prison Populations in the United States: An Overview of Historical Patterns and Review of Contemporary Issues*, 13 CONTEMP. CRISES 405, 408 tbl.1 (1989); Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends*, in 26 PRISONS: CRIME AND JUST. - A REV. OF RSCH. 63, 77 (Michael Tonry & Joan Petersilia eds., 1999); Christopher Muller, *Northward Migration and the Rise of Racial Disparity in American Incarceration, 1880-1950*, 118 AM. J. SOCIO. 281, 282-83 (2012). For the history of criminal justice as a form of racial control, see Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 263 (2021) (arguing that mass incarceration needs to be understood as only the latest moment in “a longer and larger antiblack punitive tradition” formative of American institutions of policing and punishment have). For an alternative account that sees imprisonment as the latest in a succession of earlier forms of racial control (slavery, southern Jim Crow segregation, northern urban ghettos), see Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95, 98-99 (2001).

52. Criminologist Katheryn Russell-Brown has referred to the resulting stereotype as the “myth of the *criminalblackman*,” KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME* 14 (2008). For a history of the racialized nature of crime statistics and criminological knowledge, see generally KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME AND THE MAKING OF MODERN URBAN AMERICA* (2010). For the changing racialized representations of prisoners in the late 20th century, see SLOOP, *supra* note 29, at 62-131.

53. See David Garland, *Theoretical Advances and Problems in the Sociology of Punishment*, 20 PUNISHMENT & SOC’Y 8, 11-14 (2018) (arguing that punishment and society literature has become focused less on general theory and more on middle range theorizing with increased specificity in case studies and comparison); Pat O’Malley, *Neoliberalism, Crime and Criminal Justice* 8 (Sydney L. Sch., Legal Stud. Rsch. Paper, No. 16/10, 2016) (arguing that structural accounts of neoliberal penalty often fail to account for concrete penal policies and substantial differences between jurisdictions).

54. See generally VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* (2009); GOTTSCHALK, *PRISON AND THE GALLOWES*, *supra* note 32; GOTTSCHALK, *CAUGHT*, *supra* note 48; JOSHUA PAGE, *THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS’ UNION IN CALIFORNIA* (2011); Michael C. Campbell, *Varieties of Mass Incarceration: What We Learn from State Histories*, 1 ANN. REV. CRIMINOLOGY 219 (2018); Michael C. Campbell & Heather Schoenfeld, *The Transformation of America’s Penal Order: A Historicized Political Sociology of Punishment*, 118 AM. J. SOCIO. 1375 (2013); David Garland, *Penalty and the State*, 51 CRIMINOLOGY 475 (2013); David Jacobs & Aubrey L. Jackson, *On*

Michael Campbell and Heather Schoenfeld have also argued that the current penal order did not emerge fully formed, but rather developed in three distinct periods, characterized by different actors and institutions, conceptualizations of crime and risk, and criminal justice problems.⁵⁵ Their periodization is useful for tracing how risk thinking about crime and offenders emerged and how it has produced widespread vulnerabilities for offenders, their families, and prison staff.

In the first period, from the 1960s to the mid-1970s, crime and criminality became increasingly perceived as widespread and beyond the control of existing criminal justice institutions. Initially, political leaders increased spending on criminal justice reforms with unprecedented federal support from the Law Enforcement Assistance Administration.⁵⁶ These efforts included many progressive therapeutic programs and alternatives to incarceration, but as violent crime peaked in the late 1970s, commitment to these penal-welfarist responses waned.⁵⁷ This led to a new period of contestation over penal policy as political leaders and penal bureaucrats pursued multiple crime control strategies and policy options, some of which sought to reduce imprisonment through pragmatic, risk-based selective incapacitation policies.⁵⁸ Other reforms sought to constrain the discretion and perceived leniency of the judiciary and other criminal justice professionals.⁵⁹

the Politics of Imprisonments: A Review of Systematic Findings, 6 Ann. Rev. L. & Soc. Sci. 129 (2010); Rubin & Phelps, *supra* note 27.

55. Campbell & Schoenfeld, *supra* note 54, at 1387-1409.

56. MALCOLM M. FEELEY & AUSTIN D SARAT, POLICY DILEMMA FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, 1968-1978, at 40-54 (1980); FLAMM, *supra* note 41, at 52-54; HINTON, *supra* note 45, at 79-81; MURAKAWA, *supra* note 44, at 47, 79-81.

57. GARLAND, CULTURE OF CONTROL, *supra* note 34, at 53-73.

58. See generally Alfred Blumstein, *Selective Incapacitation as a Means of Crime Control*, 27 AM. BEHAV. SCI. 87 (1983); Jacqueline Cohen, *Incapacitation as a Strategy for Crime Control: Possibilities and Pitfalls*, in 5 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 1 (Michael Tonry & Norval Morris eds., 1983); Malcolm M. Feeley, *Actuarial Justice and the Modern State*, in PUNISHMENT, PLACES AND PERPETRATORS 62 (Gerben Bruinsma et al. eds., 2004); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992) [hereinafter Feeley & Simon, *New Penology*].

59. Jonathan Simon & Malcolm M. Feeley, *The Forms and Limits of the New Penology*, in PUNISHMENT AND SOCIAL CONTROL 75, 91 (Thomas G. Blomberg & Stanley Cohen eds., 2nd ed. 2003) [hereinafter Simon & Feeley, *Forms and Limits*]; Bernard Harcourt, *From the Ne'er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, 66 LAW & CONTEMP. PROBS., Summer 2003, at 99, 105 (describing the adoption of

By contrast, Sunbelt states prioritized zero tolerance policing and drug policies, lengthening prison sentences, and prison building.⁶⁰

By the 1990s, this period of contestation ended, and a consolidated form of penal populism began to emerge. Crime and punishment remained major political issues, but within a much narrower range of topics. A bipartisan consensus formed around the notion that crime posed a comprehensive societal risk. Total incapacitation and massive prison construction became the preeminent, and unquestioned, solutions for controlling both crime and offenders, who were now considered irredeemable and dangerous.⁶¹ However, at the same time, jurisdictions encouraged greater public awareness of potential criminal risks and shifted the burden of crime prevention to private security services and public/private partnerships.⁶² This “responsibilization” strategy tacitly acknowledged that the state could not effectively control some forms of crime and fostered risk thinking based on persistent threats, especially for white, middle-class citizens, who were often

sentencing guidelines and statutory determinate sentencing to reduce judicial discretion and enhance sentence uniformity in the early-to-mid 1980s).

60. MONA LYNCH, *SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* 119-38 (2010); ROBERT PERKINSON, *TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE* 286-324 (2010).

61. Campbell & Schoenfeld, *supra* note 54, at 1401-09; SIMON, *GOVERNING THROUGH CRIME*, *supra* note 35, at 141-43, 152-75. States still employed non-custodial sanctions, but few politicians took the political risk of advocating these approaches. By contrast, emotive and degrading punishments like prolonged isolation, austere prison regimes, chain-gangs, and other humiliating practices returned as did the increased use of the death penalty in many states. See David Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 *BRIT. J. CRIMINOLOGY* 445, 460 (1996) (arguing that the symbolic aspects of such penalties recall Foucault's analysis of ancient regime punishment, “designed to reaffirm the force of the law and reactivate the myth of sovereignty”) [hereinafter Garland, *Limits*]; DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* 256-307 (2010); O'Malley, *Volatile*, *supra* note 39, at 186, 189 (arguing that increasingly punitive sanctions stem from socially conservative, authoritarian elements of New Right political coalitions in contradiction of their more libertarian impulses in other criminal justice policies); John Pratt, *Emotive and Ostentatious Punishment: Its Decline and Resurgence in Modern Society*, 2 *PUNISHMENT & SOC'Y* 417, 419 (2000) (arguing that punitive sanctions and restorative justice share a common emphasis on greater visibility, emotion, and public participation in punishment contra rationality, expertise, and bureaucracy of penal modernism).

62. Garland, *Limits*, *supra* note 61, at 452-53 (arguing that this responsibilization strategy is a tacit acknowledgement “that the state alone is not, and cannot effectively be, responsible for preventing and controlling crime”).

the intended audiences for such efforts.⁶³ The ubiquity of cultural discourse around rampant criminality and the need for crime control propelled both pragmatic, community-based crime prevention efforts and the scale and punitiveness of carceral institutions.

The earlier hopes of reducing imprisonment through selective incapacitation were frustrated by the populist, bipartisan containment strategy of the 1990s.⁶⁴ While this approach retained the use of predictive methods and the goal of targeting high-risk offenders, it subsumed them within exclusionary and highly moralistic crime control policies, which rearticulated longstanding notions of Black criminality in the seemingly race-neutral language of the post-civil rights era.⁶⁵ This penal strategy sought to exclude, prevent, or eliminate risks rather than manage them through actuarial understandings of risk.⁶⁶

This moralistic approach has been particularly evident in other areas of social policy, especially in the process of welfare retrenchment of the 1980s and 1990s. While initially popular in the neo-conservative movement, attacking welfare programs and recipients became a bipartisan project by the late 1980s. Marshalling public resentment through racialized tropes of unrepentant criminals, drug addicts, and “welfare queens,” reformers instituted explicitly punitive policies designed to control risks and reduce overall expenditures, such as prohibiting

63. *Id.*; SIMON, GOVERNING THROUGH CRIME, *supra* note 35, at 154-59. *But see* Tim Goddard, *Post-Welfarist Risk Managers? Risk, Crime Prevention and the Responsibilization of Community-Based Organizations*, 16 THEORETICAL CRIMINOLOGY 347, 350 (2012) (finding that in juvenile justice settings, responsabilization strategies are used in conjunction with penal-welfarist methods rather than superseding them).

64. Simon & Feeley, *Forms and Limits*, *supra* note 59, at 94.

65. HINTON, *supra* note 45, at 309-10, 326-30, 337-39; Hinton & Cook, *supra* note 51, at 271-73 (finding that crime control efforts of Great Society era liberals viewed Black offenders as “social dynamite” and delinquent); MUHAMMAD, *supra* note 51, at 12-13, 270-75; PAT O’MALLEY, RISK, UNCERTAINTY AND GOVERNMENT 145-48 (2004) [hereinafter O’MALLEY, RISK, UNCERTAINTY AND GOVERNMENT]; Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 707 (2010) (arguing that the post-1970s image of the Black criminal has clear antecedents in the early- and mid-20th century).

66. GARLAND, CULTURE OF CONTROL, *supra* note 34, at 177-79; O’MALLEY, RISK, UNCERTAINTY AND GOVERNMENT, *supra* note 65, at 145-48; JOHN PRATT, LAW, INSECURITY AND RISK CONTROL: NEO-LIBERAL GOVERNANCE AND THE POPULIST REVOLT 2-4, 16, 179-222 (2020); Jonathan Simon, *Total Incapacitation: The Penal Imaginary and the Rise of an Extreme Penal Rationale in California in the 1970s*, in INCAPACITATION: TRENDS AND NEW PERSPECTIVES 15, 16-21 (Marijke Malsch & Marius Duker eds., Routledge 2016) [hereinafter Simon, *Total Incapacitation*].

convicted felons from receiving cash assistance or public housing.⁶⁷ Through such interwoven welfare and penal policies, this exclusionary form of penal risk thinking created a more tightly integrated continuum of techniques for governing racialized and poor populations.⁶⁸

B. Prison Regimes and Risk Management: Between Incapacitation and Correctionalism

The growing prominence of punitive and exclusionary penal policies paralleled that of conflicts between and among penal experts, senior administrators, correctional officers, and inmates within penal institutions over the nature of prison regimes and order. During the 1960s, many prisoners had become increasingly assertive, challenging penal authorities on the nature of prison regimes and the conditions of institutional life.⁶⁹ This often took the form of direct action against prison discipline and order through organized protests, unionization, and, at times, violence and uprisings.⁷⁰ Litigation brought by prisoners and organizations like the American Civil Liberties Union (“ACLU”) and National Association for the Advancement of Colored People (“NAACP”) during the 1960s and 1970s publicized the brutal and racist prison conditions throughout the country as well as the capricious and arbitrary nature of parole and the threat correctional programming posed to the autonomy and dignity of the people

67. See generally Julilly Kohler-Hausmann, *Guns and Butter: The Welfare State, the Carceral State, and the Politics of Exclusion in the Postwar United States*, 102 J. AM. HIST. 87 (2015) [hereinafter Kohler-Hausmann, *Guns and Butter*]; Julilly Kohler-Hausmann, *Welfare Crises, Penal Solutions, and the Origins of the “Welfare Queen,”* 41 J. URB. HIST. 756 (2015); JOE SOSS ET AL., *DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE* (2011).

68. See, e.g., Mimi Abramovitz, *From the Welfare State to the Carceral State: Whither Social Reproduction?*, 38 AFFILIA 20, 26-27 (2023); Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 3 PUNISHMENT & SOC’Y 43 (2001); Kohler-Hausmann, *Guns and Butter*, *supra* note 67; Christopher Mele & Teresa A. Miller, *Collateral Civil Penalties as Techniques of Social Policy*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES 9 (Christopher Mele & Teresa A. Miller eds., 2005); ANNE E. PARSONS, *FROM ASYLUM TO PRISON: DEINSTITUTIONALIZATION AND THE RISE OF MASS INCARCERATION AFTER 1945* (2018); WACQUANT, *PUNISHING THE POOR*, *supra* note 39.

69. PRATT, *PUNISHMENT AND CIVILIZATION*, *supra* note 39, at 153-56.

70. See generally ERIC CUMMINS, *THE RISE AND FALL OF CALIFORNIA’S RADICAL PRISON MOVEMENT* (1994); HEATHER ANN THOMPSON, *BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY* (2016); DONALD F. TIBBS, *FROM BLACK POWER TO PRISON POWER: THE MAKING OF JONES V. NORTH CAROLINA PRISONERS’ LABOR UNION* (2012).

subjected to it.⁷¹ The rehabilitative ethos of penal modernism had made few, if any, inroads in many of the states of the American South and West during the 20th century, but the penal bureaucracies in many of those states were also subjected to intense judicial intervention in several prominent cases.⁷²

Court-ordered reform would eventually force penal bureaucracies to modernize many aspects of their management practices, but it would arguably also set the stage for massive expansion as states chose to increase capacity through prison building, rather than pursue decarceration policies, as prison admissions grew.⁷³ The massive growth of penal populations from the mid-1970s onward and the waning commitment to welfarist principles underlying penal modernism transformed the management, operational routines, and daily life within prisons and jails in ways that dramatically contributed to the increased susceptibility of prisoners to disasters.

The large influx of new admissions to prisons and jails and lengthy sentences strained the capacity of many penal bureaucracies to maintain minimum standards for security, health, housing, employment, education, and therapeutic and recreational programming by the late 1980s.⁷⁴ In practice, this meant that prison administrators prioritized pragmatic managerial concerns, like security, budgeting, and resource allocation, over inmate education or therapeutic programming.⁷⁵ Many practices

71. GOTTSCHALK, PRISON AND THE GALLOWS, *supra* note 32, at 165-96; *see generally* James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts, 1960-80*, 2 CRIME & JUST. 429 (1980). For a contemporary summary, *see generally* AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971).

72. LYNCH, *supra* note 60, at 30, 45-52; PERKINSON, *supra* note 60, at 228-50; DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 238-52 (1997); Heather Schoenfeld, *The Delayed Emergence of Penal Modernism in Florida*, 16 PUNISHMENT & SOC'Y 258 (2014) [hereinafter Schoenfeld, *Delayed Emergence*]; Kirstine Taylor, *Sunbelt Capitalism, Civil Rights, and the Development of Carceral Policy in North Carolina, 1954-1970*, 32 STUD. AM. POL. DEV. 292 (2018); *see generally* LARRY W. YACKLE, REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM (1989).

73. SCHOENFELD, PRISON STATE, *supra* note 44, at 21-22, 27-28, 90-121.

74. WACQUANT, PUNISHING THE POOR, *supra* note 39, at 172-186; Susan P. Sturm, *Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 687-691 (1993).

75. *See generally* JOHN J. DiLULIO, JR., GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT (1987); JAMES B. JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY (1977); Jonathan Simon, *From the Big House to the Warehouse: Rethinking Prisons and State Government in the 20th Century*, 2 PUNISHMENT & SOC'Y 213 (2000); Jonathan Simon, *The 'Society of Captives' in the Era of Hyper-Incarceration*, 4 THEORETICAL CRIMINOLOGY 285 (2000); Simon, *Total Incapacitation*, *supra* note 66.

that correctional administrators avoided in the past, such as double and triple (or more) celling prisoners or using of open dormitory housing, became commonplace. In county and city jails, the increase of admissions created large fluctuations in prison populations and severe overcrowding.⁷⁶ Much of the existing infrastructure of penal modernism, like inmate custody classification and institutional security differentiation, was repurposed toward addressing these new realities with a greater focus on risk management.⁷⁷ By the 1990s, the austere, security-focused prison regimes in Sunbelt states, which had always eschewed the therapeutic model of prison reform, became de facto models for the rest of the country.⁷⁸ As prison populations grew, their overall racial composition also shifted with a majority of the country's prisoners being Black and Latinx.⁷⁹

Reflecting on these broad changes in the early 1990s, Malcolm M. Feeley and Jonathan Simon argued that a "new penology," or an actuarial form of justice, was emerging as the practices of penal modernism fragmented and declined.⁸⁰ Rather than attempting to identify and correct the causes of individual offending, actuarial justice focused more on managing offenders according to their dangerousness or risk of recidivism.⁸¹ Selective incapacitation proposals most clearly exemplified this shift in carceral risk

76. See generally JOHN P. WALSH, *THE CULTURE OF URBAN CONTROL: JAIL OVERCROWDING IN THE CRIME CONTROL ERA* (2013); WAYNE N. WELSH, *COUNTIES IN COURT: JAIL OVERCROWDING AND COURT-ORDERED REFORM* (1995).

77. See generally AM. CORR. ASS'N, *CLASSIFICATION AS A MANAGEMENT TOOL: THEORIES AND MODELS FOR DECISION-MAKERS* (1982); AM. CORR. ASS'N, *CLASSIFICATION: A TOOL FOR MANAGING TODAY'S OFFENDERS* (1993).

78. See generally LYNCH, *supra* note 60; PERKINSON, *supra* note 60; Schoenfeld, *Delayed Emergence*, *supra* note 72; Taylor, *supra* note 72.

79. See BARRY HOLMAN, NAT'L CTR. ON INSTS. & ALTS., *MASKING THE DIVIDE: HOW OFFICIALLY REPORTED PRISON STATISTICS DISTORT THE RACIAL AND ETHNIC REALITIES OF PRISON GROWTH* (2001), <https://www.prisonpolicy.org/scans/mask.pdf> [<https://perma.cc/4BPU-BMMA>]; NAT'L RSCH. COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 56-68 (Jeremy Travis et al. eds., 2014) [hereinafter NRC, *GROWTH OF INCARCERATION*]; *The Alarming Lack of Data on Latinos in the Criminal Justice System*, URBAN INST. (Dec. 2016), <http://apps.urban.org/features/latino-criminal-justice-data> [<https://perma.cc/9GPE-LZM6>].

80. Feeley & Simon, *New Penology*, *supra* note 58.

81. *Id.*; Malcolm Feeley & Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law*, in *THE FUTURES OF CRIMINOLOGY* 173 (David Nelken ed., 1994).

thinking, but it also appeared in many other areas of criminal justice like bail hearings and sentencing.⁸²

There has been considerable debate over the extent and effect of the new penology thesis in criminal justice, with many authors arguing that risk-based penal techniques have become braided with many other strategies and concerns.⁸³ The exclusionary excesses of penal populism and total incapacitation may have hindered the full development of risk-based methods like selective incapacitation, but these methods were easily incorporated into this broader penal strategy. They have become indispensable tools for managing the huge influx of prisoners and the overall growth of penal bureaucracies since the 1970s. However, some criminal justice professionals, especially parole officers and social workers, view these actuarial techniques as more of an adjunct to rehabilitation efforts rather than a replacement for them.⁸⁴

This hybridity of techniques and goals has become more prominent since the mid-1990s. While rehabilitative programming never entirely disappeared during the carceral boom, a new generation of “evidence-based” treatment approaches rekindled interest and investment in correctional treatment.⁸⁵ These new

82. This risk-based managerialism played a more prominent role in prison management, parole and other forms of discretionary release decision-making, and parole supervision during this period, than it initially did in other areas, especially in the juvenile justice system where rehabilitative methods remained strong. It also varied considerably between jurisdictions. For an overview of these issues, see generally Robert Werth, *Risk and Punishment: The Recent History and Uncertain Future of Actuarial, Algorithmic, and “Evidence-Based” Penal Techniques*, 13 SOCIO. COMPASS 1 (2019).

83. See, e.g., *id.*; David Garland, *Penal Modernism and Postmodernism*, in PUNISHMENT AND SOCIAL CONTROL 45 (Thomas G. Blomberg & Stanley Cohen eds., 2nd ed. 2003); Kelly Hannah-Moffat, *Criminogenic Needs and the Transformative Risk Subject: Hybridizations of Risk/Need in Penalty*, 7 PUNISHMENT & SOC’Y 29 (2005) [hereinafter Hannah-Moffat, *Criminogenic*]; Paul Maurutto & Kelly Hannah-Moffat, *Assembling Risk and the Restructuring of Penal Control*, 46 BRIT. J. CRIMINOLOGY 438 (2006); Vivian Leacock & Richard Sparks, *Riskiness and At-Risk-Ness: Some Ambiguous Features of the Current Penal Landscape*, in CRIMINAL JUSTICE, MENTAL HEALTH AND THE POLITICS OF RISK 199 (Nicola S. Gray, Judith M. Laing, & Lesley Noaks eds., 2002); Hazel Kemshall, *UNDERSTANDING RISK IN CRIMINAL JUSTICE* (2003); PAT O’MALLEY, *CRIME AND RISK* (2010).

84. See generally Kemshall, *supra* note 83; Werth, *supra* note 82, at 6.

85. The main “evidence-based” treatment paradigm is the Risk-Need-Responsivity model. For an overview, see James Bonta & J.S. Wormith, *Adult Offender Assessment and Classification in Custodial Settings*, in THE OXFORD HANDBOOK OF PRISONS AND IMPRISONMENT 397 (John Wooldredge & Paula Smith eds., 2016). For critical assessments, see generally Todd R. Clear, *Policy and Evidence: The Challenge to the American Society of Criminology: 2009 Presidential Address to the American Society of Criminology*, 48 CRIMINOLOGY 1 (2010); Tim Goddard & Randolph R. Myers, *Against Evidence-Based Oppression: Marginalized Youth and the Politics of Risk-Based Assessment and Intervention*, 21 THEORETICAL

forms of rehabilitation differ substantially from practices in the 1960s and 1970s, both in substance and the language used to frame treatment priorities and authorize interventions.⁸⁶ Most treatment programs now employ statistically-based, objective assessment tools designed around the “Risk-Need-Responsivity” model, which focuses on a person’s risk of reoffending; treating their specific “criminogenic needs” to reduce the likelihood of reoffending; and how well they respond to different styles of retreatment.⁸⁷ While this model still has detractors, it has become dominant partly because it aligns with the broader concepts of risk and public safety that are now hegemonic in criminal justice discourse.⁸⁸ Despite the gains made by this reformatory approach, the dominant articulation of contemporary carceral risk thinking still reflects the exclusionary impulses of penal expansion in the last few decades.

CRIMINOLOGY 151 (2017); Kelly Hannah-Moffat, *A Conceptual Kaleidoscope: Contemplating “Dynamic Structural Risk” and an Uncoupling of Risk from Need*, 22 PSYCH., CRIME & L., 33 (2016); Ronald Kramer, Valli Rajah & Hung-En Sung, *Neoliberal Prisons and Cognitive Treatment: Calibrating the Subjectivity of Incarcerated Young Men to Economic Inequalities*, 17 THEORETICAL CRIMINOLOGY 535 (2013); TONY WARD & SHADD MARUNA, REHABILITATION (2007). For a discussion of the persistence of treatment during the era of mass incarceration, see generally Michelle S. Phelps, *The Place of Punishment: Variation in the Provision of Inmate Services Staff Across the Punitive Turn*, 40 J. CRIM. JUST. 348 (2012); Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality*, 45 LAW & SOC’Y REV. 33 (2011).

86. For histories of the transformation of rehabilitation and penal classification techniques during this period, see generally JAMES BONTA & D.A. ANDREWS, RISK-NEED-RESPONSIVITY MODEL FOR OFFENDER ASSESSMENT AND REHABILITATION (2007), <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rsk-nd-rspnsvty/rsk-nd-rspnsvty-eng.pdf> [<https://perma.cc/P9PV-HTQG>]; Carl B. Clements, *Offender Classification: Two Decades of Progress*, 23 CRIM. JUST. & BEHAV. 121 (1996). For a nuanced critical assessment, see generally Hannah-Moffat, *Criminogenic*, *supra* note 83.

87. Bonta & Andrews, *supra* note 86, at 5-7. Criminogenic needs “are dynamic risk factors that are directly linked to criminal behaviour” (p. 5). Unlike static risk factors (like criminal history), they are potentially amenable to change and form the basis of correctional interventions. Andrews and Bonta argue that there are seven main areas of criminogenic need/dynamic risk: (1) antisocial personality pattern; (2) pro-criminal attitudes; (3) social supports for crime (i.e. criminal friends, networks); (4) substance abuse; (5) poor family or marital relationships; (6) poor school or work skills and performance; and (7) prosocial recreational activities. While targeting other needs for intervention, such as major mental disorders, low self-esteem, vague feelings of personal distress, and poor physical health, may improve the quality of life for offenders, these needs are not thought to be causally related to criminal offending/recidivism.

88. PHIL GOODMAN, JOSHUA PAGE & MICHELLE PHELPS, BREAKING THE PENDULUM: THE LONG STRUGGLE OVER CRIMINAL JUSTICE 97, 107-108, 114-115, 121 (2017). For a sympathetic critique and reframing of the Risk-Need-Responsivity model, see Tony Ward, Joseph Melser & Pamela M. Yates, *Reconstructing the Risk-Need-Responsivity Model: A Theoretical Elaboration and Evaluation*, 12 AGGRESSION & VIOLENT BEHAV. 208 (2007).

C. *The Production of Carceral Vulnerability*

Jonathan Simon's description of the contemporary prison as a human "warehouse" or "waste management facility" might discount the persistence of some reformatory practices, but it underscores how the construction of an enormous penal state rested on dehumanizing assumptions about crime and criminality.⁸⁹ This in turn has reshaped perceptions of state power, citizenship, and the character of public life in the U.S. and diminished opportunities for a better life for millions of people.⁹⁰ This fixation on imprisonment has produced modest reductions in crime but has come at an enormous social and financial cost.⁹¹

A large multidisciplinary literature has now clearly established mass incarceration's numerous "collateral consequences," which affect not only prisoners but also their families and communities.⁹² A felony conviction compounds the broader incidence of racial discrimination in access to social services, education, healthcare, and housing, and disqualifies people from full citizenship.⁹³ Large sections of Black, Latinx, and poor communities now have limited access to the labor market because of felony convictions, imprisonment, and the difficulties of re-entry.⁹⁴

Incarceration has also been linked to divorce and family disintegration as well as a range of emotional, developmental, and learning difficulties for the children of incarcerated parents.⁹⁵ While penal institutions provide healthcare for some people who would otherwise not have it,⁹⁶ incarceration exacerbates existing

89. SIMON, GOVERNING THROUGH CRIME, *supra* note 34, at 142.

90. *Id.*; GOTTSCHALK, CAUGHT, *supra* note 48.

91. NRC, GROWTH OF INCARCERATION, *supra* note 79, at 4-7, 130-156, 202-319.

92. David S. Kirk & Sara Wakefield, *Collateral Consequences of Punishment: A Critical Review and Path Forward*, 1 ANN. REV. CRIMINOLOGY 171, 172-73 (2018) (arguing that the term "collateral" suggests that the "consequences" are secondary and unintended - an unwarranted assumption in many circumstances).

93. JACOBS, *supra* note 29, at 225-300. See generally HOLLOWAY, *supra* note 29.

94. Bruce Western & Catherine Sirois, *Racialized Re-Entry: Labor Market Inequality After Incarceration*, 97 SOC. FORCES 1517, 1517 (2019).

95. See generally JOYCE A. ARDITI, PARENTAL INCARCERATION AND THE FAMILY: PSYCHOLOGICAL AND SOCIAL EFFECTS OF IMPRISONMENT ON CHILDREN, PARENTS, AND CAREGIVERS (2014); Kristin Turney, *Liminal Men: Incarceration and Relationship Dissolution*, 62 SOC. PROBS. 499, 521 (2015); SARA WAKEFIELD & CHRISTOPHER WILDEMAN, CHILDREN OF THE PRISON BOOM: MASS INCARCERATION AND THE FUTURE OF AMERICAN INEQUALITY (2014).

96. See Dumont et al., *supra* note 7, at 330 (noting that "correctional facilities can provide the only sustained contact with a health care system" for many people who lack or

health problems and creates new ones, which can be especially acute for Black prisoners who often suffer from poorer health than white inmates.⁹⁷ Mass incarceration, and especially the use of long prison sentences, has also created the emerging problem of providing special facilities and extensive forms of healthcare and geriatric services for aging prisoners.⁹⁸

Given the overall vulnerability that imprisonment creates, certain forms of disasters pose particular threats for prisoners. The recent COVID-19 outbreak has been exceptionally hard to control within many residential institutions.⁹⁹ Containing the spread of infectious disease is, of course, not a novel problem in prisons and has been the subject of criticism and reform since at least the 18th century.¹⁰⁰ However, the current crisis reveals how the risk

have inadequate health care and/or health insurance in their communities). This phenomenon, obtaining better or simply existent medical treatment in custody, is perhaps as old as the use of confinement as the predominant criminal penalty. Historian Jacqueline Cahif argues that sex workers in colonial Philadelphia frequently used stays in the city's almshouse as a way to receive treatment for syphilis that they could not easily access in the community. See Jacqueline Cahif, "Those Insolent Hardened Husseys Go On Dispensing All Rule & Order Here": Women with Venereal Disease in the Philadelphia Almshouse, in *BURIED LIVES: INCARCERATED IN EARLY AMERICA* 85, 85-86 (Michele Lise Tarter & Richard Bell eds., 2012).

97. Kim M. Blankenship, Ana Maria del Rio Gonzalez, Danya E. Keene, Allison K. Groves & Alana P. Rosenberg, *Mass Incarceration, Race Inequality, and Health: Expanding Concepts and Assessing Impacts on Well-Being*, 215 *SOC. SCI. & MED.*, 45, 45 (2018); Kathryn M. Nowotny & Anastasiia Kuptsevych-Timmer, *Health and Justice: Framing Incarceration as a Social Determinant of Health for Black Men in the United States*, *SOCIO. COMPASS*, Jan. 3, 2018, at 1.

98. See generally RONALD H. ADAY, *AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS* 3, 7 (2003); HUMAN RIGHTS WATCH, *OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES* 4, 6 (2012).

99. For an overview of the some of the problems encountered, see Catherine Heard, *Commentary: Assessing the Global Impact of the Covid-19 Pandemic on Prison Populations*, *VICTIMS & OFFENDERS*, Oct. 20, 2020, at 2; Don Hummer, *United States Bureau of Prisons' Response to the COVID-19 Pandemic*, *VICTIMS & OFFENDERS*, Oct. 22, 2020, at 1; Meghan A. Novisky, Chelsey S. Narvey & Daniel C. Semenza, *Institutional Responses to the COVID-19 Pandemic in American Prisons*, *VICTIMS & OFFENDERS*, Oct. 22, 2020, at 1; Kathryn M. Nowotny, Kapriske Seide & Lauren Brinkley-Rubinstein, *Risk of COVID-19 Infection Among Prison Staff in the United States*, *BMC PUB. HEALTH*, June 2, 2021, at 1.

100. For an 18th century account of the spread of "gaol fever" and small pox in prisons, see generally JOHN HOWARD, *THE STATE OF THE PRISONS IN ENGLAND AND WALES WITH PRELIMINARY OBSERVATIONS, AND AN ACCOUNT OF SOME FOREIGN PRISONS (1777)*; O'BRIEN, *THE PROMISE OF PUNISHMENT: PRISONS IN NINETEENTH-CENTURY FRANCE* 42-46 (1982); see also PIETER SPIERENBURG, *PRISON EXPERIENCE: DISCIPLINARY INSTITUTIONS AND THEIR INMATES IN EARLY MODERN EUROPE 188-191* (1991). Spierenburg notes that in the early institutions of confinement in the Netherlands, prisoners displaying illness were often released or had their sentences modified to prevent the transmission of infectious diseases. This was especially the case with prisoners serving relatively short terms. However,

thinking of the mass incarceration era produces systemic and individual vulnerabilities for a large population of incarcerated people.

Despite recent declines in the national incarceration rate, prison overcrowding is still a serious problem in several states with many more operating near capacity.¹⁰¹ Basic techniques of containing the spread of the coronavirus, like social distancing and quarantining, are especially difficult to achieve in prisons because space limitations and the different custody classifications of prisoners reduce the flexibility of housing assignments. Multiple-occupancy cells and dormitory-style housing have become commonplace since the 1980s. However, they present obvious challenges for social distancing, as does prisoners' limited access to cleaning supplies and masks.

The large population turnover in city and county jails and movement of staff between different units also increases the likelihood of virus transmission. Inadequate and underfunded prison healthcare makes implementing consistent coronavirus testing difficult. Facilitating social distancing through any decarceration policy, even if temporary, is potentially controversial and politically costly. Despite warnings by public health experts that the uncontrolled spread of the coronavirus within penal institutions poses a threat to the broader community, the fear of newly released prisoners committing crime has limited the effect of some emergency reductions over the last couple years.¹⁰² Many of the same practices and risk narratives that hinder responses to COVID-19 leave prisoners and prison staff endangered by other kinds of disaster. In the mass-incarceration era, such narratives are

as the use of penal confinement and longer sentences increased, public officials accepted that illness was a common aspect of incarceration and institutional management.

101. For state and federal prison capacity utilization statistics prior to the pandemic, see U.S. DEP'T OF JUST., NCJ 255115, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2019, 24-25 (2020). Prison capacity utilization rates fell for many jurisdictions in 2020 with the overall decline in carceral populations because of the pandemic. Nevertheless, prison populations in several states still exceeded their capacity. While not reaching its pre-pandemic levels, prison overcrowding increased during 2021. U.S. DEP'T OF JUST., NCJ 305125, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2021, 37-38 (2022). Similar trends have occurred in the country's jails. BJS, JAIL INMATES IN 2021, *supra* note 2, at 13.

102. Camila Strassle & Benjamin E. Berkman, *Prisons and Pandemics*, 57 SAN DIEGO L. REV. 1083, 1086 (2020) (arguing that fear of crime and political risks to governors has shaped resistance to COVID-19 releases and framed the policy as "public health versus public safety").

more likely to position offenders as threats to be contained than victims of an inequitable social structure and natural hazards alike.

As prefaced, our goal is to show how trajectories of risk thinking and authority formation amplify disaster risk and vulnerability for inmates, carceral employees, and society more generally. In contrast to the fragmented forms of risk thinking and lawmaking surveyed so far, the history of American disaster management rules and policies, expert practices, and rhetoric reveals a relatively coherent, if inequalitarian, trajectory of risk thinking and normative regulation. Starkly, risk thinking in the disaster-managerial state evolved to protect an “innocent” public and legitimize authority to the virtual exclusion of prisoner interests.

III. BETWEEN COMPASSION AND SECURITY: DISASTER RISK IN THE MANAGERIAL STATE

For over a century, the American welfare state has developed a top-down disaster management approach that is defined by compassion-driven disaster relief operations and exceptionalist, security-driven narratives about disaster risks “caused” by nature, technological failure, terrorism, and generalized lawlessness. The consequences of these risks are routinely framed in terms of weakened national security, civil unrest, and a breakdown of political institutions and the economy. Over the last fifty years, policymakers have invested in disaster preparedness and mitigation measures in addition to post-disaster relief and rescue efforts. But the resulting institutions, the Federal Emergency Management Agency (FEMA) and the Department of Homeland Security (DHS), have only reified these longstanding assumptions, justifications, and approaches.

This approach to disaster management ignores and deepens political, socio-economic, and ecological disparities that have long characterized “normal” life in the United States. In conjunction with pollution, hazards, and technological complexities, these disparities translate into seemingly unforeseeable risks and disasters. Instead of exploring the production of these social vulnerabilities, the United States has focused on producing “resilient” societies, leaving the political and socio-economic status quo undisturbed. This approach conceptualizes risks at the largest “systemic” level and assumes that societies can be equipped to survive any exceptional external threats. It prioritizes infrastructure improvements, evacuation protocols, warning

systems, military security, criminal legislations, and building law-enforcement capacity. However, as before, this conception of “resilience” elides more fundamental—and threatening—questions about the production of disaster vulnerability, about which communities receive infrastructure development and which are subjected to police surveillance, and why.

In the public eye, the millions of people incarcerated around the country are the definition of “undeserving” communities. Inmates can be forced to perform disaster relief and rescue operations in civilian spaces, but they rarely receive similar protection by the state.¹⁰³ Inmate communities are also themselves risky and generally prohibited from organizing self- or community-help measures.¹⁰⁴ Carceral institutions, therefore, remain focused on protecting society from inmates instead of serving inmates themselves.¹⁰⁵ The result is a welfare-managerial state that fears exceptional and often external risks—for instance, storms, tornadoes, terrorists, and criminals—but overlooks the mundane, official measures that render prisoners powerless and deeply vulnerable to disaster risk.¹⁰⁶

A. *Disaster Risk Narratives in the Big State*

In *fin de siècle* United States, two cultural intuitions regarding the causes of risk and the consequences of catastrophe motivated federal disaster relief operations; together, they anticipated the American welfare state. The first intuition was that victims of disasters were innocents who deserved large-scale relief and rescue. The second intuition was that disasters threatened national security and local law and order and demanded urgent and robust responses.¹⁰⁷ In the aftermath of the historic 1906 California earthquake, which set San Francisco ablaze for three days, these conceptions were merged into a singular narrative that continues to dominate official and popular conceptions of disaster

103. Purdum, *supra* note 10, at 181, 183, 195, 199.

104. *Id.* at 183-85, 204 (noting that traditionally emergency management within the corrections system was designed to manage “inmate-precipitated” events such as riots, escapes, hunger strikes, and work stoppage).

105. See Brenna Helppie-Schmieder, *Toxic Confinement: Can the Eighth Amendment Protect Prisoners from Human-Made Environmental Health Hazards?*, 110 NW. U. L. REV. 647 (2016); Purdum, *supra* note 10, at 192-195.

106. Purdum, *supra* note 10, at 198-199.

107. John F. Hutchinson, *Disasters and the International Order: Earthquakes, Humanitarians, and the Ciraolo Project*, 22 INT’L HIST. REV., March 2000, at 1, 9-11.

management in the United States. Soon after the quake, the American Red Cross sent Ernest P. Bicknell, then director of the Chicago Bureau of Charities, to San Francisco to survey relief and reconstruction efforts. Bicknell was a proponent of scientific philanthropy and was recommended by President Theodore Roosevelt, who was interested in consolidating governmental disaster relief efforts and military security. Three years later, while addressing members of the National Conference of Charities and Correction on “disaster relief and its problem,” Bicknell developed a narrative of disaster management centered around building the state’s capacity to defend the social order against chaos and criminality.¹⁰⁸

Disasters threatened to dismantle the social order, Bicknell argued, by inspiring “the swift relapse of human beings into conditions of savagery.”¹⁰⁹ He feared that official aid and charity, the centerpieces of American disaster relief in late nineteenth century,¹¹⁰ would not prevent social collapse; worse, these contributions were likely to be misappropriated by the irrational, morally weak, and greedy.¹¹¹ Instead, Bicknell argued, the state needed to form “a strong central directive agency” that would prevent “the vicious triumph of the bold and unscrupulous.”¹¹² He recommended the militarization of on-the-ground relief operations because “the presence of soldiers,” tended to allay “excitement . . . giving a sense of confidence and security to the weak and of suppressing the lawless and selfish.”¹¹³

As the same time, Bicknell cautioned that disaster management would fail if the state limited itself to merely preventing law and order breakdown in the aftermath of disasters. During the Progressive Era, both capitalists and champions of state intervention regarded charity as an instrument of rationalized social reform, rather than a passive means of ensuring short-term security.¹¹⁴ In Bicknell’s view, the state needed to take more comprehensive control over social life in post-disaster spaces. Accordingly, he favored public investment in works projects to

108. *Id.* at 10.

109. *Id.*

110. Gareth Davies, *The Emergence of a National Politics of Disaster, 1865-1900*, 26 J. POL’Y HIST. 305, 326 (2014).

111. Hutchinson, *supra* note 107, at 11.

112. *Id.*

113. *Id.*

114. *Id.* at 10.

prevent “idleness,” which inevitably bred “discontent, disorder, and pauperism.”¹¹⁵

On the ground in San Francisco, this understanding of risk and corresponding inventions paved the way for the city’s reconstruction. “Federal rehabilitation grants” revived the housing market, legislation required earthquake-resistant construction, and engineers redeveloped the harbor and added a network of reservoirs, subterranean cisterns, and sea-water pumps for fire prevention.¹¹⁶ Bicknell, among others, rejoiced that the earthquake had rejuvenated the city’s infrastructure and governance.¹¹⁷ However, the redevelopment was lopsided and marked by racial and class discrimination. The planners also ignored how unrestrained land speculation and construction on landfills and swamplands had made the residents vulnerable to earthquakes.¹¹⁸

Federal relief operations took center stage again in 1927 after the Mississippi River flooded its banks, then ramped up more decisively during the Great Depression as the Roosevelt administration expanded the state’s capacity to manage disasters. The federal government repurposed the Reconstruction Finance Corporation and the Bureau of Public Roads to fund immediate relief measures, finance medium-term public works projects, and invest in longer-term disaster management institutions.¹¹⁹ However, critics claimed that these measures violated the Constitution’s Taxation and Spending Clause.¹²⁰ In response, the administration amassed a century’s worth of historical precedents to argue that since 1794 the federal government had conducted relief operations without distinguishing between poverty alleviation, food security, and other general welfare initiatives, on

115. *Id.* at 11.

116. *Id.* at 12.

117. *Id.*

118. See TED STEINBERG, *ACTS OF GOD: THE UNNATURAL HISTORY OF NATURAL DISASTER IN AMERICA* 49-53 (2006).

119. See Price Fishback, *How Successful Was the New Deal? The Microeconomic Impact of New Deal Spending and Lending Policies in the 1930s*, 55 J. ECON. LITERATURE 1435 (2017).

120. U.S. CONST. art. I, § 8, cl. 1 requires that taxpayer dollars only be used to settle governmental debts and to finance national defense and general welfare initiatives. See Michele L. Landis, “*Let Me Next Time Be Tried by Fire*”: *Disaster Relief and Origins of the American Welfare State 1789-1874*, 92 NW. U. L. REV. 967, 975-1009 (1998) (showing how 18th and 19th century narratives around “fate and blame” conditioned disaster relief and inaugurated the American welfare state).

the one hand, and event-specific, disaster relief interventions on the other.¹²¹

Proponents of this flexible and pragmatic understanding of “disaster” insisted that their approach was grounded in America’s deep commitment to protect innocents from misfortunes beyond their control. President Roosevelt’s (“FDR”) vision of the state and his interpretation of the causes underlying the Great Depression reflected this well-established relationship between the state, moral and law-abiding citizens, and their socio-economic and ecological circumstances. Welfarists established compassionate and generous disaster relief as *the* defining feature of the American state and legitimized a blameless, expansive view of disaster-risk that included vulnerabilities like poverty, unemployment, and endemic hunger alongside hazards such as floods and wildfires. The American state, they concluded, was *obliged* to invest in social safety nets, drought relief and prevention; far from being legal and political overreach, Americans were owed the “New Deal.”¹²²

This moment was also distinguished by the state’s desire to scientifically control nature to promote economic development (e.g., hydroelectricity) and ecological management (e.g., flood management).¹²³ Social security and relief operations were matched by military-engineering marvels like the Hoover and the Tennessee Valley dams (which immediately became high-security spaces) and sweeping legislation like the Tennessee Valley Authority Act and the 1936 Flood Control Act.¹²⁴ These innovations embodied the American welfare state’s commitment to defending its people against economic and environmental risks alike.

During World War II, the focus of American social science research shifted from natural hazard management to national security—specifically, the psychological toll of strategic bombing

121. DAUBER, *supra* note 32, at 3-8, 17-52.

122. *Id.*

123. For a review, see GILBERT FOWLER WHITE, *NATURAL HAZARDS: LOCAL, NATIONAL, AND GLOBAL* 4-10 (1974); see also GILBERT FOWLER WHITE, *HUMAN ADJUSTMENT TO FLOODS: A GEOGRAPHICAL APPROACH TO THE FLOOD PROBLEM IN THE UNITED STATES* (1942).

124. See, e.g., Tennessee Valley Authority Act of 1933, Pub. L. No. 73-17, 48 Stat. 58; Flood Control Act of 1936, Pub. L. No. 74-738, 49 Stat. 1570. These legislations increased the authority of the U.S. Corps of Engineers over flood management. BULLOCK ET AL., *supra* note 13, at 3; see generally Ralph T. Templin, *A Century of Unreliability in Engineering: Arthur Morgan on the Army Corps of Engineers in Civil Works*, 20 J. HUM. REL. 30, 30-31 (1972).

and the development of nuclear weapons.¹²⁵ In the post-war period, American experts and policymakers elaborated an objectivist approach to disaster management grounded in empirical social sciences and pragmatism.¹²⁶ Like early-twentieth-century experts, they viewed disasters as temporary, episodic disruptions of the social order caused by physical phenomena such as hurricanes or industrial accidents.¹²⁷ But their risk calculus integrated people's behavioral responses to disasters and relief and preparedness operations as well.¹²⁸

Post-war experts increasingly regarded disasters as a unique social problem at the juncture of nature, technology, and human psychology and behavior.¹²⁹ Federal disaster response continued to be justified on compassionate grounds. For instance, in 1950, Congress passed the Disaster Relief Act, the first "permanent and general disaster legislation"¹³⁰ on the subject, designed to supplement state and local government spending to alleviate "suffering and damage resulting from a major peacetime disaster."¹³¹ Yet, politicians still deemphasized the historical, moral, and political underpinnings of disasters, viewing such factors as epiphenomena.¹³² This depoliticized view of disasters

125. James K. Mitchell, *Human Dimensions of Environmental Hazards: Complexity, Disparity, and the Search for Guidance*, in NOTHING TO FEAR: RISKS AND HAZARDS IN AMERICAN SOCIETY 131, 136 (Andrew Kirby ed., 1990).

126. Harry B. Williams, *Fewer Disasters, Better Studied*, 10 J. SOC. ISSUES, Summer 1954, at 5.

127. For classic debates on whether the category of "disaster" should include slower, ongoing "complex emergencies," see Enrico L. Quarantelli, *Epilogue*, in WHAT IS A DISASTER? PERSPECTIVES ON THE QUESTION 260 (Enrico L. Quarantelli ed., 1998); Russell R. Dynes, *Expanding the Horizons of Disaster Research*, 28 NAT. HAZARDS OBSERVER, Mar. 2004, at 1-2; Lei Sun & A.J. Faas, *Social Production of Disasters and Disaster Social Constructs: An Exercise in Disambiguation and Reframing*, 27 DISASTER PREVENTION & MGMT. 623, 624 (2018).

128. Charles E. Fritz & Eli S. Marks, *The NORC Studies of Human Behavior in Disasters*, 10 J. SOC. ISSUES, Summer 1954, at 26-27. The studies were funded by the U.S. Army Chemical Center drawing on interviews with nearly 1,000 people who had survived events ranging from tornados to train wrecks.

129. Charles E. Fritz, *Disasters*, in CONTEMPORARY SOCIAL PROBLEMS 651, 652, 654-55 (Robert K. Merton & Robert A. Nisbet eds., 1961).

130. FRANK P. BOURGIN, A HISTORY OF FEDERAL DISASTER RELIEF LEGISLATION, 1950-1974, at 3 (1983).

131. Disaster Relief Act of 1950, Pub. L. No. 81-875, 64 Stat. 1109, 1109 (1950); Use of the Disaster Relief Act of 1974 in an "Immigration Emergency," 6 Op. O.L.C. 708, 709 (1982).

132. JOHN HANNIGAN, DISASTERS WITHOUT BORDERS: THE INTERNATIONAL POLITICS OF NATURAL DISASTERS 11-13 (2012).

complemented Truman-era nuclear security concerns and produced the Federal Civil Defense Act (1951).¹³³ As historian Ted Steinberg summarized, technical experts during the 1950s were committed to “the illusion that nature remained largely to blame for the natural disaster problem,” and “American political leaders were obsessed with eradicating evil forces, be they communist spies or disorderly weather patterns.”¹³⁴ These commitments paved the way for an “all hazards” approach to disaster management which continues to dominate the federal government’s understanding of disaster management today.¹³⁵

The need for disaster relief and preparedness in a non-war context surged in the 1960s in response to the Great Alaska earthquake and tsunami of 1964, which caused extensive death and devastation.¹³⁶ In the east, Hurricanes Betsy (1965) and Camille (1969) ravaged the Gulf Coast where homeowners did not hold flood insurance, leaving the federal government to pay for large-scale relief and reconstruction.¹³⁷ In response, Congress passed the National Flood Insurance Act (1968) and created the National Flood Insurance Program, which offered people federally subsidized insurance if communities passed ordinances prohibiting construction on flood plains.¹³⁸ Prisons, however, continued to be constructed in hazard-prone spaces.¹³⁹

133. Scott G. Knowles & Howard C. Kunreuther, *Troubled Waters: The National Flood Insurance Program in Historical Perspective*, 26 J. POL’Y HIST. 327, 330 (2014).

134. STEINBERG, *supra* note 118, at 127.

135. Knowles & Kunreuther, *supra* note 133, at 331; *see also* Enrico L. Quarantelli, Arjen Boin & Patrick Lagadec, *Studying Future Disasters and Crises: A Heuristic Approach*, in HANDBOOK OF DISASTER RESEARCH 61, 64 (H. Rodríguez et al. eds., 2018).

136. *On This Day: Great Alaska Earthquake and Tsunami*, NAT’L CTRS FOR ENV’T INFO. (March 28, 2017), <https://www.ncei.noaa.gov/news/great-alaska-earthquake> [<https://perma.cc/6QHXLKU8>].

137. Knowles & Kunreuther, *supra* note 133, at 327-29, 332, 336-37.

138. *See* Erwann O. Michel-Kerjan, *Catastrophe Economics: The National Flood Insurance Program*, 24 J. ECON. PERSP. 165, 167 (2010).

139. *See, e.g.*, Harrison Ashby, Jasmine Vazin & David Pellow, *Superfund Sites and Juvenile Detention: Proximity Analysis in the Western United States*, 13 ENV’T JUST. 65, 65-67 (2019); Elizabeth A. Bradshaw, *Tombstone Towns and Toxic Prisons: Prison Ecology and the Necessity of an Anti-Prison Environmental Movement*, 26 CRITICAL CRIMINOLOGY 407, 407 (2018); Maggie Leon-Corwin et al., *Polluting our Prisons? An Examination of Oklahoma Prison Locations and Toxic Releases, 2011-2017*, 22 PUNISHMENT & SOC’Y 413, 427 (2020); David N. Pellow, *Struggles for Environmental Justice in US Prisons and Jails*, 53 ANTIPODE 56 (2021); Robert Todd Perdue, *Linking Environmental and Criminal Injustice: The Mining to Prison Pipeline in Central Appalachia*, 11 ENV’T JUST. 177 (2017); Robert Todd Perdue, *Trashing Appalachia: Coal, Prisons and Whiteness in a Region of Refuse*, PUNISHMENT & SOC’Y, Apr. 2021, at 1; JUDAH SCHEPT, *Sunk Capital, Sinking Prisons, Stinking Landfills: Landscape, Ideology and*

Starting in the 1970s, sociologists and geographers turned away from the hazards approach but retained its empirical and behavioral methodologies.¹⁴⁰ These scholars dismissed the notion of “natural” disasters,¹⁴¹ contending that such occurrences revealed pre-existing “vulnerabilities” within a society.¹⁴² This included physical or infrastructural and socio-economic vulnerabilities like uneven economic development, social and ecological marginalization, poor urban planning, discrimination, and inadequate access to food, healthcare, and housing.¹⁴³ Such

the Carceral State in Central Appalachia, in ROUTLEDGE INTERNATIONAL HANDBOOK OF VISUAL CRIMINOLOGY 497 (Michelle Brown & Eamonn Carrabine eds., 2017); *Investigation Reveals Environmental Dangers in America's Toxic Prisons*, EQUAL JUST. INITIATIVE (June 16, 2017), <https://eji.org/news/investigation-reveals-environmental-dangers-in-toxic-prisons/> [<https://perma.cc/8TWX-STHT>]; Cara Bayles, *Behind Bars on Polluted Land: Do American Prisoners Suffer from Environmental Discrimination?*, ATLANTIC (May 24, 2016), <https://www.theatlantic.com/health/archive/2016/05/behind-bars-on-polluted-land/484202/> [<https://perma.cc/BA72-URXN>]; Christopher Mele, *Casinos, Prisons, Incinerators, and Other Fragments of Neoliberal Urban Development*, 35 SOC. SCI. HIST. 423 (2011); Candice Bernd, Maureen N. Mitra & Zoe Loftus-Farren, *America's Toxic Prisons: The Environmental Injustices of Mass Incarceration*, TRUTHOUT (June 1, 2017), <https://truthout.org/articles/america-s-toxic-prisons-the-environmental-injustices-of-mass-incarceration/> [<https://perma.cc/BNF4-PY2N>]; Knowles & Kunreuther, *supra* note 133; Tara Opsal & Stephanie A. Malin, *Prisons as LULUs: Understanding the Parallels between Prison Proliferation and Environmental Injustices*, 90 SOC. INQUIRY 579 (2019); *No Escape: Exposure to Toxic Coal Waste at State Correctional Institution Fayette*, ABOLITIONIST L. CTR. (2014), <https://abolitionistlawcenter.org/wp-content/uploads/2014/09/no-escape-3-3mb.pdf> [<https://perma.cc/7MJF-MKAB>].

140. Russell R. Dynes, *Conceptualizing Disaster in Ways Productive for Social Science Research* 3-6 (Univ. of Del. Disaster Rsch. Ctr., Working Paper No. 80, 1989); Russell R. Dynes, ORGANIZED BEHAVIOR IN DISASTER (1970).

141. Phil O'Keefe, Ken Westgate & Ben Wisner, *Taking the Naturalness Out of Natural Disasters*, 260 NATURE 566, 566-67 (1976); Greg Bankoff, *No Such Thing as Natural Disasters: Why They Are Human Inventions*, HARV. INT'L REV. (Aug. 23, 2010), <http://perma.cc/AE5M-C8AW>; ILAN KELMAN, DISASTER BY CHOICE: HOW OUR ACTIONS TURN NATURAL HAZARDS INTO CATASTROPHES vii-viii (2020) [hereinafter KELMAN, DISASTER BY CHOICE].

142. Peter Timmerman, *Vulnerability, Resilience and the Collapse of Society: A Review of Models and Possible Climatic Applications* 1-3 (Inst. for Env't. Stud., Environment Monograph No. 1, 1981). Around the same time, vulnerability emerged as a definitive category in Development Studies. See generally Robert Chambers, RURAL DEVELOPMENT: PUTTING THE LAST FIRST (1983). Vulnerability is now part of the United Nations approach to disaster risk. See U.N. OFF. FOR DISASTER RISK REDUCTION, GLOBAL ASSESSMENT REP. ON DISASTER RISK REDUCTION: REVEALING RISK, REDEFINING DEVELOPMENT 9 (2011). For an elaboration of biophysical and social vulnerabilities, see Nick Brooks, *Vulnerability, Risk and Adaptation: A Conceptual Framework* (Univ. of E. Anglia, Tyndall Ctr. for Climate Change Rsch., Working Paper No. 38, 2003).

143. See, e.g., Wisner, *supra* note 25; Susan L. Cutter et al., *A Place-Based Model for Understanding Community Resilience to Natural Disasters*, 18 GLOB. ENV'T CHANGE 598 (2008).

factors heightened people's vulnerability to hazards and often produced slow-moving crises like extreme poverty, pollution, and endemic hunger across society.¹⁴⁴ As discussed in Section B below, these insights produced the "vulnerability" approach to disaster management, which dominates contemporary expert discourse but is routinely neglected and even subverted by official disaster management policies and practices.

B. *Reifying Risks, Overlooking Vulnerabilities*

Vulnerability experts viewed disasters as processual occurrences, produced by a confluence of social conditions, political choices, technological complexities, and natural phenomena, rather than discrete events.¹⁴⁵ The vulnerability approach offered the hope that societies could avoid or weather disasters by preparing for natural hazards through scientific urban planning and by enhancing people's access to life's basic necessities.¹⁴⁶ This approach departed from official and popular notions that disasters were unforeseeable and caused by external, "natural" forces. In theory, this meant that leaders and experts would have to reckon with the long-term effects of their choices.¹⁴⁷

However, official and media narratives of disaster have continued to neglect these insights. During the 1970s, for example, federal disaster management continued to focus on "compassionate" post-disaster relief.¹⁴⁸ In the aftermath of the 1971

Given our interest in prisoners, incarceration systems, and the social conditions that support their creation, we consider physical and social vulnerabilities together.

144. See, e.g., HEWITT, *supra* note 25; Ilan Kelman, *Understanding Vulnerability to Understand Disasters*, in CANADIAN DISASTER MANAGEMENT TEXTBOOK 1-7 (Brenda L. Murphy & David Etkin eds., 2011); Ben Wisner et al., AT RISK: NATURAL HAZARDS, PEOPLE'S VULNERABILITY AND DISASTERS (2nd ed. 2003).

145. See Gustavo Naumann et al., *Exploring Drought Vulnerability in Africa: An Indicator Based Analysis to be Used in Early Warning Systems*, 18 HYDROL. & EARTH SYS. SCIS. 1591 (2014); Ronald W. Perry, *What is a Disaster?*, in HANDBOOK OF DISASTER RESEARCH 3 (Havidán Rodríguez, Enrico L. Quarantelli & Russell R. Dynes eds., 2nd ed. 2018); Rob Nixon, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 6 (2011).

146. See generally Anthony Oliver-Smith, "What is a Disaster?": *Anthropological Perspectives on a Persistent Question*, in THE ANGRY EARTH: DISASTER IN ANTHROPOLOGICAL PERSPECTIVE 18 (Anthony Oliver-Smith & Susanna M. Hoffman eds., 1999); Amartya Sen, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION (1981); Amartya Sen, DEVELOPMENT AS FREEDOM (2000).

147. KELMAN, DISASTER BY CHOICE, *supra* note 141 at 79-154.

148. See Richard Nixon, *Statement on Signing the Disaster Relief Act of 1970*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/statement-signing-the-disaster-relief-act-1970> [<https://perma.cc/2544-3GEY>] ("The bill demonstrates that

San Fernando earthquake, Congress expanded the scope of relief operations through the Disaster Relief Act Amendments (1974) and authorized the use of federal funds to develop disaster mitigation measures.¹⁴⁹ However, federal disaster management operations remained spread across some 100 agencies until President Jimmy Carter authorized the creation of a centralized disaster response coordination authority: FEMA.¹⁵⁰

From the beginning, FEMA was subject to instructions from the White House Military Office and the President's national security advisors.¹⁵¹ It adopted a comprehensive "all hazards" approach to disasters ranging from tornadoes to nuclear war.¹⁵² As a result, FEMA standards and practices continued to be subject to an overarching logic of civil defense and military security.

In March 1979, disaster and national security concerns were, once again, pushed together in the public imagination when the Three Mile Island nuclear power plant near Harrisburg, Pennsylvania experienced a partial reactor core meltdown. The incident and ensuing radiation leakage stoked public fears surrounding nuclear power and amplified official concerns that terrorists would target such sites.¹⁵³ The Reagan administration strengthened the national security and counterterrorism approach by reorganizing and aligning FEMA with Department of Defense priorities: the threats of war and nuclear attack.¹⁵⁴ General Julius Becton, FEMA Director during Reagan's second term, ranked hurricane, flood, and earthquake management among the least

the Federal Government in cooperation with State and local authorities is capable of providing compassionate assistance to the innocent victims of natural disasters.").

149. Disaster Relief Act Amendments of 1974, Pub. L. No. 93-288, 88 Stat. 143. In 1988, the statute was renamed the Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, 102 Stat. 4689. The statute has been amended many times since, most recently via the 2018 Disaster Recovery Reform Act, but with mixed results. See Shannon Collins Schroeder, *Does America's New Disaster Relief Law Provide the Relief America Needs?*, 56 HOUS. L. REV. 1177 (2019).

150. Gary A. Kreps, *The Federal Emergency Management System in the United States: Past and Present*, 8 INT'L J. MASS EMERGENCIES & DISASTERS 275, 275-77 (1990) [hereinafter Kreps, *Emergency*]; BULLOCK ET AL., *supra* note 13, at 7.

151. Garrett M. Graff, *The Secret History of FEMA*, WIRED (Sept. 3, 2017), <https://www.wired.com/story/the-secret-history-of-fema/> [<https://perma.cc/46SP-GMFJ>].

152. David McLoughlin, *A Framework for Integrated Emergency Management*, 45 PUB. ADMIN. REV. 165, 165-171 (1985).

153. J. SAMUEL WALKER, *THREE MILE ISLAND: A NUCLEAR CRISIS IN HISTORICAL PERSPECTIVE* 16-17, 25, 37 (2004).

154. Kreps, *Emergency*, *supra* note 150, at 287-290.

important of FEMA's 20 then-active programs.¹⁵⁵ The World Trade Center and Oklahoma City bombings, among other events, ensured that 1990s federal disaster management remained dominated by terror and security concerns.¹⁵⁶

Under George W. Bush's administration, FEMA returned to its Cold War era roots, meaning disaster management was synonymous with militarized nuclear holocaust preparedness.¹⁵⁷ Following 9/11, FEMA was absorbed into the DHS, and disaster management was again driven by national security concerns.¹⁵⁸ This expansive department, comprising 179,000 employees across 22 agencies, was charged with orchestrating disaster preparedness with a singular focus on "catastrophic" threats such as bioterrorism and nuclear war.¹⁵⁹ As a sub-agency, FEMA covered response and recovery, but preparedness and mitigation were dispersed across other agencies.¹⁶⁰ FEMA's disastrous handling of Hurricane Katrina reflected the impact of continually shifting priorities, untrained leadership, and resource drain.¹⁶¹ In the hurricane's aftermath, political and media narratives championed innocent victims but quickly descended into calls for strong law enforcement and military responses. "Innocent" hurricane survivors were now looters, rapists, and murderers—enemies of recovery and social order.¹⁶²

155. BULLOCK ET AL., *supra* note 13, at 9.

156. Around this time, North American risk and environmental politics experts Thomas Homer-Dixon and Janet Welsh-Brown released the results of their government-funded "Environmental Change and Acute Conflict Project," which riveted "natural disaster" management and national security concerns in the minds of policymakers and the President himself. See Bill Clinton's 1994 remarks quoted in Betsy Hartman, *Will the Circle Be Broken? A Critique of the Project on Environment, Population, and Security*, in *VIOLENT ENVIRONMENTS* 39 (Nancy Lee Peluso & Michael Watts eds., 2001).

157. See BULLOCK ET AL., *supra* note 13, at 13.

158. U.S. GOV'T ACCOUNTABILITY OFF., GAO-03-113, MAJOR MANAGEMENT CHALLENGES AND PROGRAM RISKS: FEDERAL EMERGENCY MANAGEMENT AGENCY 4-6 (2003), <https://www.gao.gov/assets/gao-03-113.pdf> [<https://perma.cc/F552-5DN4>]. The report elaborates on a number of concerns stemming from FEMA's absorption into the DHS.

159. See BULLOCK ET AL., *supra* note 13, at 14; Lisa Grow Sun & RonNell Andersen Jones, *Disaggregating Disasters*, 60 UCLA L. REV. 884 (2013).

160. BULLOCK ET AL., *supra* note 13, at 16.

161. U.S. Senate, Comm. on Homeland Sec. & Governmental Affs., HURRICANE KATRINA: A NATION STILL UNPREPARED, S. REP. NO. 109-322, at 2-19, 585-605 (2006) [hereinafter 2006 HURRICANE KATRINA SENATE REPORT]; Jonathan P. Hooks & Trisha B. Miller, *The Continuing Storm: How Disaster Recovery Excludes Those Most in Need*, 43 CAL. W. L. REV. 21 (2006).

162. Sun, *supra* note 14, at 1137-1152.

The 2006 Post-Katrina Emergency Management Reform Act elevated the status of FEMA within the DHS. But this hierarchical management model has been criticized as ineffective.¹⁶³ The new regime remains focused on preparedness in a limited sense, usually referring to building structural safeguards, such as higher dams, stronger levees, and evacuation and response protocols. The rhetoric and imperatives of disaster management are still centered around fears of a sudden apocalypse and compassion for innocent victims instead of the need for long-term risk mitigation,¹⁶⁴ which must begin with vulnerability identification and minimization. Yet successive governments have ignored why certain communities are always the first and the hardest hit victims. As a result, lobbying, legislation, expert discourses, and administrative regulations have generalized vulnerability and precipitated disasters from coast to coast.¹⁶⁵

Politicians construe disasters, from floods to bombings, as dramatic and time-limited “attacks” on the state’s integrity and legitimacy, which allow leaders to pursue relief and reconstruction on a war footing.¹⁶⁶ In these moments, they can gush over human ingenuity in the face of uncertainty and promise “victory” over “enemies” that range from nature and technological failure to lawless citizens.¹⁶⁷ Proponents of these narratives routinely trace

163. See generally Patrick S. Roberts, *The Lessons of Civil Defense Federalism for the Homeland Security Era*, 26 J. POL’Y HIST. 354 (2014).

164. U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-99R, NATIONAL PREPAREDNESS: ACTIONS TAKEN BY FEMA TO IMPLEMENT SELECT PROVISIONS OF THE POST-KATRINA EMERGENCY MANAGEMENT REFORM ACT OF 2006 10, 14 (2013), <https://www.gao.gov/assets/gao-14-99r.pdf> [<https://perma.cc/NGC6-G49U>]. The report claims that one of the main shortfalls of the post Katrina Emergency Management Reform Act of 2006 is the lack of clarity on the results of risk assessments. The GAO recommends “implementing the National Planning System informed by threat and hazard identification and risk assessment processes.”

165. See, e.g., Bob Bolin & Lisa C. Curtz, *Race, Class, Ethnicity, and Disaster Vulnerability*, in HANDBOOK OF DISASTER RESEARCH 181 (Havidán Rodríguez, Enrico L. Quarantelli & Russell R. Dynes eds., 2nd ed. 2018); Soc. Sci. Rsch. Council, *Understanding Katrina*, ITEMS: INSIGHTS FROM THE SOC. SCIS. (June 11, 2006), <http://understandingkatrina.ssrc.org/> [<https://perma.cc/T2UK-STBH>]; Daniel A. Farber, *Response and Recovery after Maria: Lessons for Disaster Law and Policy*, 87 REV. JUR. U.P.R. 743 (2018); Min Hee Go, *The Federal Disaster: The Failed Logic of Disaster Prevention in New Orleans*, in DISASTERS, HAZARDS, AND LAW 155 (Mathieu Deflem ed., 2012); Charles W. Gould, *The Right to Housing Recovery After Natural Disasters*, 22 HARV. HUM. RTS. J. 169 (2009); Sun, *supra* note 14, at 1132-1137, 1152-1190; Verchick, *supra* note 14

166. Sun & Jones, *supra* note 159, at 914-931.

167. Pidot, *supra* note 14, at 224-235; see also Jessica Chasmar, *Jerry Brown: Climate Change ‘Devastating in a Similar Way’ to the Nazis*, WASH. TIMES (Dec. 31, 2018),

disasters back to narrow and exceptional causes, whether operator error or an earthquake. In turn, officials and political partisans use traditional and social media to spin the old narrative that disaster-affected communities devolve into anarchic spaces,¹⁶⁸ which scholars have long disproved.¹⁶⁹ But it remains a centerpiece of political and media rhetoric and has ensured that law and order concerns dominate post-disaster policy discourse and governance initiatives.¹⁷⁰ The public, in turn, is primed to ignore or soon forget the relationship between such events and normalized vulnerabilities. Generalized social vulnerability is often the result of successful policies, cherished cultural beliefs, and mainstream labor relations, economic rationales, and lifestyle choices.

The 2006 Senate Committee report on FEMA's handling of Hurricane Katrina sparked a national furor because its authors refused to accept that the flooding was unforeseeable¹⁷¹ and dismissed the myth that survivors turned to looting, rape, and violence.¹⁷² Instead, they blamed the disaster on FEMA mismanagement and technical negligence by the U.S. Army Corps of Engineers.¹⁷³ This mismanagement and negligence rendered Hurricane Katrina's impact inevitable given the web of pre-existing vulnerabilities that characterized normal life for the poor and politically marginalized people living in New Orleans.¹⁷⁴

<https://infoweb.newsbank.com/apps/news/document-view?p=AMNP&docref=news/170ACAC1E2B5CDA0&f=basic> [<https://perma.cc/5RL9-XLLA>]; Rosemary Williamson, *Authenticity in Newspaper Coverage of Political Leaders' Responses to Disaster: A Historical Study*, 20 JOURNALISM STUD. 1511 (2018).

168. See McCullough, *supra* note 30, at 105.

169. For a classic sociological analysis of this myth whose findings remain valid today, see Henry W. Fischer III, RESPONSE TO DISASTER: FACTS VERSUS FICTION AND ITS PERPETUATION: THE SOCIOLOGY OF DISASTER 49-56 (3rd ed. 2008); Sun, *supra* note 14, at 1137-1152; Rebecca Solnit, A PARADISE BUILT IN HELL: THE EXTRAORDINARY COMMUNITIES THAT ARISE IN DISASTER 139 (2009). For a positive analysis of how post-disaster criminality may threaten the legitimacy of the state, see Susan S. Kuo, "Not Only Injurious to Individuals, But Dangerous to the State": A Theory of Disaster Crime, in DISASTERS, HAZARDS AND LAW 19 (Mathieu Deflem ed. 2012). On the difficulties of policing in the aftermath of Hurricane Katrina, see Benjamin Sims, *The Day After the Hurricane: Infrastructure, Order, and the New Orleans Police Department's Response to Hurricane Katrina*, 37 SOC. STUD. SCI. 111 (2007).

170. Sun, *supra* note 14, at 1137-1152.

171. 2006 HURRICANE KATRINA SENATE REPORT, *supra* note 161, at 11-14.

172. *Id.* at 325, 439, 443, 445.

173. *Id.* at 3-12, 87-92, 129-141, 212-225, 590-591.

174. Neil Smith, *There's No Such Thing as a Natural Disaster*, SOCIAL SCIENCE RESEARCH COUNCIL, ITEMS: INSIGHTS FROM THE SOCIAL SCIENCES (June 11, 2006), <https://items.ssrc.org/understanding-katrina/theres-no-such-thing-as-a-natural-disaster/>

Unfortunately, official indictments are rare and have marginal influence on the state's conception of risk. In recent years, official emergency management discourses and practices have bypassed the economic and social core of vulnerability analysis. They remain wedded to securitization and now embrace the can-do rhetoric of "resilience."

C. *Resilience-Building: Towards a Bigger, Less Responsible State*

Resilience emerged from 1970s systems ecology discourse.¹⁷⁵ Its proponents suggested that any system subject to uncertainty could be designed to prevent the occurrence of a loss or withstand the impact of a loss and recover to some state of normalcy.¹⁷⁶ For a flexible approach that assumed insufficient knowledge and uncertainty, Cold War era experts integrated resilience into their nuclear preparedness plans. Through the 1990s and 2000s, resilience developed into a catch-all for contingency planning against disaster-risks writ large.¹⁷⁷

During this period, resilience became a centerpiece of the DHS's security-driven "all-hazards" approach obsessed with protecting critical infrastructure.¹⁷⁸ Following 9/11 and Hurricane Katrina, resilience rhetoric spread rapidly, reflecting the state's sudden anxiety about unseen external hazards and human threats alike. The federal government formally adopted resilience as part of its National Security Strategy in 2017. Some advocates have hailed resilience as a liberal paradigm that could generate a grassroots form of state-making.¹⁷⁹ Others, however,

[<https://perma.cc/WB5Q-6HGM>]. For a longer historical analysis of this problem, see ANDY HOROWITZ, *KATRINA: A HISTORY, 1915-2015* (2020).

175. Jeremy Walker & Melinda Cooper, *Genealogies of Resilience: From Systems Ecology to the Political Economy of Crisis Adaptation*, 42 *SEC. DIALOGUE* 143, 144-146 (2011).

176. *Id.* at 146; Philip Buckle, *Assessing Social Resilience*, in *DISASTER RESILIENCE: AN INTEGRATED APPROACH* 88 (Douglas Paton & David Johnston eds., 2006); NAT'L RSCH. COUNCIL, *DISASTER RESILIENCE: A NATIONAL IMPERATIVE* 16-18 (2012).

177. Angela Oels, *Rendering Climate Change Governable by Risk: From Probability to Contingency*, 45 *GÉOFORUM* 17 (2013); see also Claude Gilbert, *Studying Disaster: A Review of the Main Conceptual Tools*, 13 *INT'L J. MASS EMERGENCIES & DISASTERS* 231 (1995).

178. Stephen J. Collier & Andrew Lakoff, *The Vulnerability of Vital Systems: How 'Critical Infrastructure' Became a Security Problem*, in *SECURING 'THE HOMELAND': CRITICAL INFRASTRUCTURE, RISK AND (IN)SECURITY* 17 (Myriam Dunn Cavelty & Kristian Soby Kristensen eds., 2008).

179. See U.N. System Task Team on the Post-2015 UN Development Agenda, *Disaster Risk and Resilience: Thematic Think Piece* (May 2012), https://library.wmo.int/doc_num.php?explnum_id=7636 [<https://perma.cc/X8EJ-PC3B>].

have speculated that the term might displace “vulnerability” and its “tendency to bring up social inequalities...[and] redistributive solutions” that are unlikely to find political consensus in the United States.¹⁸⁰ Resilience, by contrast, “implies a system where community members come together as equals to solve important problems and resolve deep anxieties in a cooperative, ‘pro-active’ spirit, which is much more likely to be perceived as politically neutral.”¹⁸¹

Since 2011, DHS-FEMA has adopted a “whole community approach” in the hopes of producing a resilient society.¹⁸² Critics have noted that official community empowerment initiatives like this frequently result in “socialization of responsibility.”¹⁸³ Community responsabilization minimizes state responsibility and affirms the market-logic that private actors should freely mold their values, lifestyles, economies, and ecologies into a system that self-consciously adapts to all manner of internal threats and external hazards.

Resilience has quickly become the dominant lens through which U.S. officials and politicians conceptualize disaster risks. A resilient society blends the natural hazards and human action frames together; disaster-risks are still discrete events caused by distinct and identifiable forces. Resilience, like the charity towards innocents and securitization frames, overlooks widespread economic and social vulnerabilities and minimizes state responsibility. As federal disaster management institutions commit to the rhetoric of resilience-building, they grow incapable of seeing generalized disaster-risks ranging from poverty to hunger, precarious employment, and global warming.

Even if responsabilization were synonymous with decentralized power, it seems unlikely that inmates in the United States would be

180. Benjamin Sims, *Resilience and Homeland Security: Patriotism, Anxiety, and Complex System Dynamics*, 1 LIMN (2011), <https://escholarship.org/uc/item/2fn1723n> [<https://perma.cc/UYS2-WTZV>].

181. *Id.*

182. Dept. of Homeland Sec., FEMA, A WHOLE COMMUNITY APPROACH TO EMERGENCY MANAGEMENT: PRINCIPLES, THEMES, AND PATHWAYS FOR ACTION FDOC 104-008-1 (Dec. 2011), https://www.fema.gov/sites/default/files/2020-07/whole_community_dec2011__2.pdf [<https://perma.cc/XF9J-G5C8>].

183. Anne Tiernan et al., *A Review of Themes in Disaster Resilience Literature and International Practice Since 2012*, 2 POL’Y DESIGN & PRAC. 53 (2019).

entrusted with their own communal welfare.¹⁸⁴ Like the American carceral state, the disaster-managerial state is characterized by the progressive expansion and centralization of scientific, economic, criminal, and military power, and a neglect of wider and deeper social vulnerabilities. Unlike the carceral state, however, the evolution of the American disaster-managerial state has been sustained by more coherent, if inegalitarian, conceptions and distributions of risk and responsibility.

In the next section, we discuss a few examples of how these normalized visions of risk governance heighten disaster vulnerability for inmates, carceral employees, and, sometimes, for society as a whole.

IV. PRISONERS OF THE STATE

For almost a century, the promise and practice of disaster management, as a central function of the American welfare state, has been defined by an exceptionalist, relief/charity-focused, and security-obsessed conception of disasters. Politicians and the media routinely regard yet-un-incarcerated people as innocent victims deserving compassion. But they also regard these would-be victims, distinguished by race, class, and gender, among other marginal identities, as potential threats to the social order and state power. When experts buttress compassion with an empowerment narrative, as when FEMA commits to building community networks, they remain focused on anticipating catastrophic events and preparing local communities to manage evacuations and facilitate uninterrupted information-sharing. These are crucial, practical measures, but they cannot begin to address the continuous and long-term production of social vulnerability in hundreds of thousands of such communities around the U.S.

By contrast, political authorities, administrative institutions (including state Departments of Public Welfare), and the media are practiced at blaming poverty and vulnerability on the poor and the vulnerable. In the absence of exceptional events, policymakers, administrators, and the media mark incarcerated people as direct threats to public authority and normalcy, like terrorists. Prison and jail inmates, and to varying degrees those remanded to juvenile

184. Corrections officers are routinely trained to look out for inmates who may use an ongoing disaster to escape or perpetrate violence. See, e.g., Purdum, *supra* note 10, at 180.

justice and immigrant detention centers, are *a priori* disqualified from charity, disaster preparedness, and long-term vulnerability mitigation efforts. These attitudes cover millions of people ensnared by criminal justice institutions whose vulnerability is not an oversight, but rather a defining characteristic of how the American carceral state distributes risk and regulates the social order.

Disasters have long exposed society's pre-existing circumstances and myth of "normalcy."¹⁸⁵ Hurricane Katrina showed the American public how a historical network of policies, legislations, and political and corporate arrangements stitched infrastructural, economic, and socio-ecological inequalities into the fabric of New Orleans.¹⁸⁶ Because of these pre-existing conditions, the hurricane's arrival brought death and devastation on particular spaces and populations.¹⁸⁷ This is particularly evident in the suffering endured by nearly 8,000 prisoners from the Orleans Parish Prison.¹⁸⁸

On August 28, 2005, when it became clear that the storm would cause widespread flooding, Mayor Ray Nagin issued an evacuation order for the city. But, this order exempted essential personnel in criminal justice agencies, including the staff and prisoners at the Orleans Parish Prison, the seventh-largest prison in the United States. Sheriff Marlin N. Gusman, in turn, refused to evacuate inmates to other prisons despite offers of help from the Louisiana Department of Corrections and other parish prisons.¹⁸⁹ He

185. See generally HEWITT, *supra* note 25; Gary A. Kreps, *Sociological Inquiry and Disaster Research*, 10 ANN. REV. SOCIO. 309 (1984); Verchick, *supra* note 14; Wisner et al., *supra* note 144.

186. See generally HOROWITZ, *supra* note 174.

187. See, e.g., AMERICAN CIVIL LIBERTIES UNION, ABANDONED AND ABUSED: ORLEANS PARISH PRISONERS IN THE WAKE OF HURRICANE KATRINA (2006) [hereinafter ACLU]; Hoffman, *supra* note 5; *New Orleans: Prisoners Abandoned to Floodwaters*, HUMAN RIGHTS WATCH (Sept. 21, 2005), <http://www.hrw.org/news/2005/09/21/new-orleans-prisoners-abandoned-floodwaters> [<https://perma.cc/Y6DJ-HJU6>] [hereinafter HRW]; DEMAREE INGLESE & DIANA G. GALLAGHER, NO ORDINARY HEROES: 8 DOCTORS, 30 NURSES, 7,000 PRISONERS AND A CATEGORY 5 HURRICANE (2007); Ira P. Robbins, *Lessons from Hurricane Katrina: Prison Emergency Preparedness as a Constitutional Imperative*, 42 U. MICH. J. L. REFORM 1 (2008).

188. See generally Phyllis Kotey, *Judging Under Disaster: The Effect of Hurricane Katrina on the Criminal Justice System*, in HURRICANE KATRINA: AMERICA'S UNNATURAL DISASTER 105 (Jeremy I. Levitt & Matthew C. Whitaker eds., 2009).

189. Ferrara et al., *supra* note 14, at 214.

justified keeping the “prisoners where they belong” because the prison was equipped with backup generators.¹⁹⁰

When the storm arrived the following day, prison officials and the Sheriff’s office were caught unprepared. The electricity grid went down, and prison generators and ventilation systems failed. Without electricity to power the kitchen or any reserve provisions, food service ceased entirely.¹⁹¹ The first floor of Orleans Parish Prison was still occupied when the flooding began; when the electricity failed, many inmates were trapped in their cells. Some 600 prisoners escaped the compound, while many others remained stranded in chest- and neck-deep toxic water indoors.¹⁹²

By the following morning, the Louisiana Department of Corrections began sending boats to the prison to rescue inmates. Most prisoners were taken to a staging area on an outdoor football field. But others could not be removed from the city. Instead, deputies brought prisoners to several temporary holding areas on higher ground. About 3,500 of them spent several days on an overpass. Inmates received no food and were forced to remain seated to the point where they urinated and defecated on themselves. The Sheriff’s office and Department of Corrections eventually evacuated the prisoners to other temporary holding facilities and prisons around Louisiana. One prisoner later recounted being detained on a football field for five days where guards threw sandwiches over the gates, and “if you didn’t get one, you just didn’t.”¹⁹³

In the aftermath of the storm, the ACLU interviewed 1,300 prisoners about their experiences and found no evidence to support prison officials’ claims that the prisoners had rioted, seized control of the prison armory, and taken a deputy and his family hostage.¹⁹⁴ However, in the moment, the media reported these claims without corroboration, bolstering officials’ justifications for leaving prisoners locked inside flooding cells. By

190. Robbins, *supra* note 187, at 7. Gusman later claimed that it would have been impossible to convince other sheriffs to house his inmates. Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 DUKE L. J. 127, 136 (2006).

191. See Kotey, *supra* note 188, at 110.

192. Savilonis, *supra* note 22, at 16-17.

193. Michael Patrick Welch, *Hurricane Katrina Was a Nightmare for Inmates in New Orleans*, VICE (Aug. 28, 2015), https://www.vice.com/en_us/article/5gjdxn/hurricane-katrina-was-a-nightmare-for-inmates-in-new-orleans-829 [<https://perma.cc/J6H8-7LYG>].

194. See ACLU, *supra* note 187, at 9.

contrast, numerous prisoners spoke of witnessing inmate deaths owing to a combination of starvation, dehydration, and open violence at the hands of guards and other prisoners. Guards thwarted escape attempts by shooting inmates with rubber bullets.¹⁹⁵

The Sheriff disputed these accounts, claiming that no prisoners died at the Orleans Parish Prison during the storm.¹⁹⁶ The real figures will likely remain unknown. However, disaster relief officials shared the same attitude towards prisoners as Sheriff Guzman, local police, and prison guards. For instance, one federal official involved in relief and rescue operations is quoted saying: "Move all of the prisoners to the roof, and if they start to act out, shoot one and throw his body off the roof, the rest will then behave."¹⁹⁷ Another federal official supported legislation that would legalize the decision to leave prisoners to die locked in their cells.¹⁹⁸ As we have suggested, criminal justice officials emphasize inmates' innate riskiness, while disaster management officials ignore prisoner's preexisting vulnerabilities and "at-risk-ness" in favor of law and order solutions.¹⁹⁹

The aftermath of Hurricane Katrina has been rigorously studied to show inmate suffering, as well as the transformation of New Orleans into an extended prison-city.²⁰⁰ However, the interaction between hazards and prisons across the U.S. is far from novel. Disasters have precipitated violent prison riots in which prisoners have been deprived of basic healthcare needs, faced physical or sexual assault, and been subjected to psychological trauma. In some instances, the loss of prisoner records resulted in inmates being imprisoned long past their sentences. And in New

195. *Id.* at 24.

196. *Id.* at 62.

197. Savilonis, *supra* note 22, at 11.

198. *Id.* at 13.

199. Our use of "at-risk-ness" here emphasizes the specific vulnerabilities prisoners face from disasters and therefore differs from Leacock and Sparks's concept of "at-risk-ness" in their analysis of New Labour's juvenile justice policy in the UK during the 1990s. Leacock and Sparks argued that New Labour increasingly focused on preemptive interventions with youth who displayed characteristics or behaviors that placed them "at-risk" of becoming nascent career criminals and future threats to public safety. This form of "at-risk-ness" is thus more penal in the types of interventions it authorizes. *See* Leacock and Sparks, *supra* note 83, at 201-14.

200. *See generally* Ferrara et al., *supra* note 14; Sun, *supra* note 14.

Orleans, many prisoners were unable to consult with their lawyers for several months after the floods.²⁰¹

But not all prisoner vulnerability is owed to custodial unpreparedness or other systemic deficiencies. While some prisons have been built in or near cities, urban dwellers and city officials have often refused such proposals. In contrast, since the 1980s, politicians, labor unions, businesses, and churches in rural communities have frequently campaigned to have prisons sited locally, even in hazardous spaces. Based on research in Eastern Kentucky, for example, geographer Brett Story has noted: “Prison development has been used . . . to respond to various crises at once, particularly those crises of material well-being.”²⁰² Over the last fifty years, as coal production dwindled, some rural communities hoped to revitalize local economies through prison construction and employment provided by state and federal penal bureaucracies. As numerous scholars have demonstrated, the dreams of economic recovery pitched by prison boosters never materializes.²⁰³ Nevertheless, prison construction has become a limited public works program for some distressed rural communities and has prevented further economic deterioration.²⁰⁴

The debate over the economic wisdom of prison expansion often fails to consider prisoners and the economic plight of their communities of origin.²⁰⁵ As one researcher has found, in Kentucky, the “fate of those to be held within [incarceration facilities] did not enter the public discourse at all.”²⁰⁶ This disregard for the well-being of prisoners is also apparent in the

201. Garrett & Tetlow, *supra* note 190, at 157-58; Savilonis, *supra* note 22, at 16-17.

202. BRETT STORY, PRISON LAND: MAPPING CARCERAL POWER IN NEOLIBERAL AMERICA 81 (2019).

203. See Gregory Hooks et al., *Revisiting the Impact of Prison Building on Job Growth: Education, Incarceration, and County-Level Employment, 1976-2004*, 91 SOC. SCI. Q. 228, 240-41 (2010); Ryan Scott King, Marc Mauer & Tracy Huling, *An Analysis of the Economics of Prison Siting in Rural Communities*, 3 CRIMINOLOGY & PUB. POL'Y 453, 453 (2004); Robert Todd Perdue & Kenneth Sanchagrin, *Imprisoning Appalachia: The Socio-Economic Impacts of Prison Development*, 22 J. APPALACHIAN STUD. 210, 210 (2016); STORY, *supra* note 202, at 79-104.

204. John M. Eason, *Prisons as Panacea or Pariah? The Countervailing Consequences of the Prison Boom on the Political Economy of Rural Towns*, 6 SOC. SCI. 1, 1 (Jan. 2017), <https://doi.org/10.3390/socsci6010007>.

205. *But see* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 181-240 (2007).

206. Sylvia Rose Ryerson, *Prison Progress. . . Neocolonialism as a Relocation Project in “Post-Racial” America: an Appalachian Case or Listening to the Canaries in the Coal Mine* (April 2010) (Honors thesis, Wesleyan University) (on file with Wesleyan University).

locations chosen for the construction of rural prisons. In 2003, the USP Big Sandy, the most expensive federal prison to date in the U.S., was built on a mountaintop coal removal site near Inez in Eastern Kentucky. The hefty price tag was owed to \$40 million worth of site remediation costs incurred when the still incomplete facility began to sink into the deep, abandoned mine below—an ever-present risk easily captured by the prison's nickname: "Sink-Sink."²⁰⁷

The Sink-Sink debacle did not stop the U.S. Bureau of Prisons (BOP) and Rep. Hal Rogers (R-KY) from pushing to build another prison in Letcher County, also on the site of a former coal mine.²⁰⁸ The BOP shelved plans for the new prison in 2019 after activists sued the federal government over environmental safety concerns²⁰⁹ and the Trump administration raised concerns over its cost and the need for a new facility.²¹⁰ Undaunted, Rep. Rogers, Sen. Mitch McConnell, and the Letcher County Planning Commission successfully pushed for a return to the project, which recommenced in September 2022.²¹¹ In both cases, un-

207. STORY, *supra* note 202, at 81-82.

208. Jon Schuppe, *Does America Need Another Prison? It May Be This Rural County's Only Chance at Survival*, NBC NEWS (Mar 22, 2018), <https://www.nbcnews.com/specials/kentucky-prison-coal-country/> [<https://perma.cc/BE2K-UK5B>].

209. Panagioti Tsolkas, *Plans for a New Federal Prison on Coal Mine Site in Kentucky Withdrawn*, PRISON LEGAL NEWS (Sept. 8, 2019), <https://www.prisonlegalnews.org/news/2019/sep/8/plans-new-federal-prison-coal-mine-site-kentucky-withdrawn/> [<https://perma.cc/X4RJ-N9UT>]; *Fighting Against a New Prison—and Winning—in Letcher County, Kentucky*, THE APPEAL (July 1, 2019), <https://theappeal.org/fighting-against-a-new-prison-and-winning-in-letcher-county-kentucky/> [<https://perma.cc/P4XV-4E3L>].

210. Philip Wegmann, *The Federal Prison Trump Doesn't Want—and Ky. Does*, REAL CLEAR POL. (Mar. 9, 2019), https://www.realclearpolitics.com/articles/2019/03/09/the_federal_prison_trump_doesnt_want_-_and_ky_does_139698.html [<https://perma.cc/34LE-HNKE>].

211. The new project is for a medium-security facility and work camp rather than the original proposal for a maximum-security prison. See Katie Myers, *There's a New Plan for a Prison in Letcher County, and Public Comment Opens Soon*, LOUISVILLE PUB. MEDIA (Oct. 5, 2022), <https://www.lpm.org/news/2022-10-05/theres-a-new-plan-for-a-prison-in-letcher-county-and-public-comment-opens-soon> [<https://perma.cc/DE5L-BASJ>]; Bill Estep, *Agency Renews Proposal for Large Eastern Kentucky Prison after Earlier Withdrawal*, LEXINGTON HERALD-LEADER (Oct. 28, 2022), <https://www.kentucky.com/news/state/kentucky/article267989162.html> [<https://perma.cc/7JKT-TEAH>]; Notice of Intent to Prepare a Draft Environmental Impact Statement for the Proposed Federal Correctional Institution and Federal Prison Camp in Letcher County, Kentucky, 87 Fed. Reg. 58822 (Sep. 28, 2022).

incarcerated local communities advocated prison expansion to counter the effects of deindustrialization.²¹²

Disaster management authorities are rarely concerned with prisoner welfare in such instances. As a general characteristic of how the American state and the public conceive of prisoners' vulnerability and disaster risk, this conclusion is utterly mundane. For instance, when Hurricane Florence struck the Gulf Coast in September 2008, then South Carolina Governor, Henry McMaster, called for his constituents to evacuate early, proclaiming that his government would not "gamble with the lives of the [state's inhabitants]."²¹³ Yet, at the same time, unlike officials in North Carolina and Virginia, McMaster opted not to vacate the state's prisons located within the mandatory evacuation zone. Instead, he insisted that the MacDougall Correctional Institution, one of the institutions in the hurricane's path, was "the safest place for those people to be at this time."²¹⁴

Pre-existing rules, policies, narratives, and institutional practices, described in Parts 2 and 3, shape the ways in which penal authorities conceptualize and respond to imminent risks. These responses, in turn, limit administrators' capacity to manage future risks while generating newer vulnerabilities for prisoners. In 2016, for instance, the Louisiana Correctional Institute for Women was flooded. Inmates were evacuated and "temporarily" dispersed between the Elayn Hunt Correctional Center for adult men and a former juvenile detention center.²¹⁵ In May 2020, transferees continued to live in overcrowded dormitories at these facilities as

212. The timing of the Letcher prison project announcement, following the devastating Central Appalachian floods, underscores the interwoven character of disaster and incarceration in the region's economic redevelopment strategies. For a public discussion of these issues, see the recording of the public scoping forum on the BOP's new plans, *Scoping a Letcher County KY Prison*, MAKING CONNECTIONS NEWS (Dec. 21, 2022), <https://www.makingconnectionsnews.org/2022/12/scoping-a-letcher-county-ky-prison/> [<https://perma.cc/R3GH-D3VZ>].

213. Madison Pauly, *Thousands of Prisoners Are Being Forced to Stay During Hurricane Florence*, MOTHER JONES (Sept. 11, 2018), <https://www.motherjones.com/crime-justice/2018/09/thousands-of-prisoners-are-being-forced-to-stay-during-hurricane-florence/> [<https://perma.cc/3LVQ-49GQ>].

214. Emily Bohatch, *SC Officials Won't Evacuate Medium-Security Prison Despite Mandatory Order*, STATE (Sept. 14, 2018), <https://www.thestate.com/news/state/south-carolina/article218179005.html> [<https://perma.cc/N7LY-ZGLR>].

215. Grace Toohey, *"Temporary has Become Permanent" for Displaced Inmates of Flooded Louisiana Women's Prison*, THE ADVOCATE (Apr. 20, 2019), https://www.theadvocate.com/baton_rouge/news/crime_police/article_0fcebfb8-5d6b-11e9-bac5-f7b4ee1d77f0.html [<https://perma.cc/RQ3B-LHYS>].

the funding to rebuild their original home, roughly \$100 million, remained stuck in budgetary delays.²¹⁶ That same month, 85% of the 200 inmates living in the men's correction facility tested positive for COVID-19 and three-quarters of infected inmates were asymptomatic carriers; at the time, this was more than 3.5 times the average COVID-19 rates in Louisiana.²¹⁷

Marc Stern, a former medical director of the Washington State Department of Corrections who has studied COVID-19 infection rates in prisons across the country, was not surprised: "These are places where people live, sleep, eat and recreate in close proximity, and infections are going to spread quickly through places like that. This is not a new realization."²¹⁸ Aaron Littman, a prisoners' rights expert, described the situation more starkly: "It's important to remember that when we say overcrowded, we mean dozens of people sleeping inches within each other's faces. They're using the same toilets. Most don't have access to liquid hand soap. In short, [prisons] are ideal sites for incubating respiratory viruses."²¹⁹

Similarly, the overlapping risks posed by COVID-19 and wildfires that affected large parts of the western United States in 2020 underscore how the disaster-managerial state and carceral state define prisoners as threats while simultaneously disregarding actual threats to the prisoners' safety and wellbeing. In early 2020, for instance, senior administrators at the Oregon Department of Corrections (ODOC) knew that the coronavirus posed a significant threat to people living and working in the state's prisons. Yet, their response failed to stop its rapid spread: to implement social distancing procedures, the ODOC would have had to release roughly 5,800 prisoners (around 40% of the state's prison population), which the state was not prepared to do.²²⁰

By July 1, 2020, one prisoner had died from COVID-19 and 178 others had tested positive for the virus.²²¹ During litigation brought

216. Lea Skene, *85% of Inmates in St. Gabriel Women's Prison Got Coronavirus – But Most Showed No Symptoms*, THE ADVOCATE (May 6, 2020), https://www.theadvocate.com/baton_rouge/news/coronavirus/article_2c551b72-8fbb-11ea-849a-e390bbc57059.html [<https://perma.cc/4D5Z-AYT6>].

217. *Id.*

218. *Id.*

219. Ganeva, *supra* note 8.

220. *See* Maney v. Brown, No. 6:20-cv-00570-SB, 2020 WL 7364977, at *2 (D. Or. Dec. 15, 2020).

221. *COVID-19 Newsletter - Notice #38*, OR. DEP'T OF CORR., (Or. Dep't of Corr., Salem, Or.), July 1, 2020, <https://digital.osl.state.or.us/islandora/object/osl%3A949228>

by prisoners over the Department's handling of the pandemic response, Department officials acknowledged that the virus was being spread mainly by prison staff and independent service contractors.²²² Nevertheless, the Department and senior prison management failed to enforce the state's mask-wearing mandate among staff.²²³ These lapses were particularly egregious because prison staff and contractors moved freely between the quarantine areas, where infected prisoners were housed, and the non-quarantine areas of the prisons. Despite COVID-19's continuing threat, prisoners accused prison staff and administrators of relaxing social distancing and prevention measures during late summer 2020.²²⁴

In early September 2020, approaching wildfires forced the evacuation of nearly 2,750 prisoners from the Coffee Creek Correctional Facility for women and three male prisons: the Oregon State Correctional Institution, the Mill Creek Correctional Facility, and the Santiam Correctional Institution.²²⁵ The usual immobility imposed on prisoners and constant concerns about escape and security made quickly transferring this many prisoners challenging, especially when other institutions lacked the capacity to receive them. Women transferred from Coffee Creek to Deer Ridge Correctional Institution reported being zip-tied to another inmate and crammed onto school buses at 11:00 pm.²²⁶ They were permitted to bring only one change of clothes. After arriving at 4:00 am, they remained on the bus for hours without bathroom access. Women threw cups full of urine, feces, and used tampons out the windows. Without menstrual products, some women bled through their clothes as they waited.²²⁷

The Department transferred 1,450 men to the maximum-security Oregon State Penitentiary, already at capacity with 2,000

/datastream/OBJ/view [https://perma.cc/43YU-5HKG]. Note that the acronym "AIC" refers to "Adult In Custody."

222. *Maney v. Brown*, 516 F. Supp. 3d 1161, 1169 (D. Or. 2021).

223. *Maney*, 2020 WL 7364977, at *8.

224. Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at 9, *Maney v. Brown*, No. 6:20-cv-00570-SB (D. Or. Oct. 3, 2020).

225. Arango & Bogel-Burroughs, *supra* note 1; Jayati Ramakrishnan, *Oregon Prisoners Report "Inhumane" Conditions Following Fire Evacuations, Transfers*, OREGONIAN (Sept. 14, 2020), <https://www.oregonlive.com/crime/2020/09/oregon-prisoners-report-inhumane-conditions-following-fire-evacuations-transfers.html> [https://perma.cc/DZ65-HH26].

226. Ramakrishnan, *supra* note 225.

227. *Id.*

inmates.²²⁸ The men had to wait in a football field-sized yard for hours in smoke soot from the wildfires.²²⁹ Fighting broke out between some prisoners, which was quelled by pepper spray. The men were placed in housing units or impromptu dormitories with little regard for a person's quarantine status, often bunking within inches of other prisoners' faces. Guards moved freely between different areas of the prison, often not wearing masks.²³⁰ Risks to prisoners' safety from both wildfires and the coronavirus converged in the haphazard evacuation process, which was made more difficult because of how prison staff managed security this situation. With fires still visible in the distance, many prisoners now worried about their mass exposure to the coronavirus. By mid-December, 1,641 prisoners had tested positive for COVID-19 and 19 had been killed by it.²³¹

The carceral state's deliberate devaluing of prisoners' health and safety during the coronavirus pandemic is further evident in how Oregon managed the early distribution of the vaccine once it became available. The state created a phased vaccine distribution plan in which tier one prioritized people working and living in congregate residential facilities.²³² Prison staff and contractors fell into this category. The ODOC expected 55% of its staff to get the vaccine, but only 34% availed themselves of the opportunity.²³³ Prisoners who worked in medical roles in the institution were also included in this first tier. The remainder of the prison population was not eligible despite clearly residing in a congregate setting like people in elder care homes.

Soon after, a miscommunication by the ODOC staff enabled 1,343 prisoners who were 60 years or older with medical vulnerabilities to receive the vaccine—even though Oregon's vaccination policy did not, in fact, authorize treatment for these obviously vulnerable prisoners.²³⁴ The U.S. District Court for Oregon decided that the state's policy constituted deliberate indifference to the safety of prisoners and ordered the ODOC to

228. *Id.*

229. Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, *Maney*, 2020 WL 7364977 (No. 6:20-cv-00570-SB), at 14.

230. *Id.*

231. *Maney v. Brown*, 516 F. Supp. 3d 1161, 1169 (D. Or. 2021).

232. *Id.* at 1170.

233. *Id.* at 1171.

234. *See id.*

offer the vaccine to all prisoners in its care as if they had been part of the first tier.²³⁵

It is common knowledge that COVID-19 vaccines do not offer complete or perennial protection against infection. The likelihood of transmission is still greater in residential facilities, and the risk of serious illness or death is still higher for people with pre-existing health conditions or poor access to healthcare. Prisoners and detainees, who generally have greater health problems and difficulty with nonpharmacological prevention practices, have had infection rates four to five percent higher than the general population throughout the pandemic.²³⁶ Part of the continued risk for people living in prison stems from the low level of vaccination among correctional staff. In multiple states, vaccination rates among prisoners exceeded those for correctional staff even though these workers have been prioritized for early access to the vaccines.²³⁷

In some states, this immunity-differential has led to disputes over vaccines between correctional officers, senior corrections officials, and state administrations. In Pennsylvania, for example, vaccine hesitancy and refusal among correctional staff has been widespread throughout the pandemic.²³⁸ Even though the state prioritized both guards and prisoners early in the vaccine rollout, only 22% of the state's prison workers were fully vaccinated by June 2021.²³⁹ By contrast, 75% of inmates were fully vaccinated as of

235. *Id.* at 1181-82, 1184-85.

236. Lea Prince et al., *Uptake of COVID-19 Vaccination Among Frontline Workers in California State Prisons*, 3 JAMA HEALTH F. e220099 (2022), <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2789952> [<https://perma.cc/Z9ZF-HEFW>].

237. See Wanda Bertram & Wendy Sawyer, *With the Majority of Corrections Officers Declining the COVID-19 Vaccine, Incarcerated People Are Still at Serious Risk*, PRISON POL'Y INITIATIVE (Apr. 22, 2021), <https://www.prisonpolicy.org/blog/2021/04/22/vaccinerefusal/> [<https://perma.cc/QR8M-NPN2>]; Eva Herscovitz, *Is Anti-Vax Movement Gaining Traction Among Corrections Staff?*, THE CRIME REPORT (July 12, 2021), <https://thecrimereport.org/2021/07/12/is-anti-vax-movement-gaining-traction-among-correction-staff/> [<https://perma.cc/E9AM-65TC>].

238. Joseph Darius Jaafari, *Workers in Pa. Prisons, COVID-19 Hotspots, Aren't Getting Vaccinated. Here's Why That's Dangerous*, SPOTLIGHT PA (Apr. 22, 2021), <https://www.spotlightpa.org/news/2021/04/pa-coronavirus-covid-19-vaccine-prisons-officers-johnson-johnson/> [<https://perma.cc/Z9D5-QXXD>].

239. Joseph Darius Jaafari, "A Turning Point": *Thousands in Pa. Prisons Will Be Offered COVID-19 Vaccine*, SPOTLIGHT PA (Apr. 8, 2021), <https://www.spotlightpa.org/news/2021/04/pa-coronavirus-covid-vaccine-prisons-johnson-and-johnson-inmates-corrections/> [<https://perma.cc/MZ84-NAQ2>]; Amy Worden, *Most Inmates Have Had Their Covid Shots - But Their Guards Likely Haven't*, KAISER HEALTH NEWS (July 8, 2021),

June 2021, according to the Pennsylvania Department of Corrections.²⁴⁰ Discrepancies in vaccination rates like this present an ongoing institutional risk for future COVID-19 outbreaks, especially those involving different variants of the virus. This potential threat is magnified by the routine movement of many correctional employees between different units and facilities and working shifts where they would be near other prisoners, employees, and members of local communities.²⁴¹

But the leadership of the Pennsylvania Department of Corrections and the state's Democratic Governor Tom Wolf have struggled to convince prison employees to receive the vaccinations.²⁴² The Pennsylvania State Corrections Officers Association (PSCOA) pushed for guards to be included in the state's early vaccine distribution plans,²⁴³ and the union's president, John Eckenrode, prioritized vaccination of the union's members.²⁴⁴ Nevertheless, Eckenrode defended officers who refused to do so, claiming that getting vaccinated "should be an individual choice."²⁴⁵ Whereas first responders around the country were required to be vaccinated, prison staff were exempted.

Faced with significant vaccine refusal and the prospect of future outbreaks in state institutions, Governor Wolf announced

<https://khn.org/news/article/prison-inmates-corrections-officials-vaccine-hesitancy/>
[<https://perma.cc/89PH-BGYM>].

240. Worden, *supra* note 239.

241. See Bertram & Sawyer, *supra* note 237.

242. The vaccination rate for correctional staff, as monitored by the Pennsylvania Department of Corrections, lagged far behind that for prisoners throughout the pandemic. By early August 2021, this gap had widened with 85% of prisoners having been inoculated compared to only 22% of correctional officers. Kelly Powers & Sammy Gibbons, *Low Reports of Prison Staff COVID-19 Shots Leave Vulnerability on Both Sides of the Wire*, YORK DAILY RECORD (Sept. 21, 2021), <https://www.ydr.com/story/news/2021/08/12/low-prison-staff-covid-shots-leave-vulnerability-both-sides-wire/5487543001/>
[<https://perma.cc/483L-HSY6>].

243. The union's official Twitter account was devoted to press releases, commentary and reposts calling for prioritizing correctional officers for vaccine eligibility throughout early 2021. See, e.g., PA State Corr. Officers Ass'n (@PA_SCOA), TWITTER (Jan. 22, 2021), https://twitter.com/PA_SCOA/status/1352723888959070211
[<https://perma.cc/5C2V-FTBU>]; PA State Corrections Officers Association (@PA_SCOA), TWITTER (Jan. 27, 2021), https://twitter.com/PA_SCOA/status/1354447058124623878 [<https://perma.cc/S9AC-RTEW>]; PA State Corr. Officers Ass'n (@PA_SCOA), TWITTER (Feb. 26, 2021), https://twitter.com/PA_SCOA/status/1365335121155473413 [<https://perma.cc/C8UT-IJWQ>]; PA State Corr. Officers Ass'n (@PA_SCOA), TWITTER (Mar. 3, 2021), https://twitter.com/PA_SCOA/status/1367171704573804546 [<https://perma.cc/WP34-5NH2>].

244. Worden, *supra* note 239.

245. *Id.*

in August 2021 that vaccines would be mandatory for all public employees working in residential facilities who were hired after September 7, 2021.²⁴⁶ Existing employees who refused to get vaccinated were required to submit to routine COVID-19 testing.²⁴⁷

Alone among the unions representing public employees, the PSCOA petitioned the Commonwealth Court for an injunction and review of the governor's order within days of its effective date.²⁴⁸ They eventually lost.²⁴⁹ Subsequently, many guards agreed to get vaccinated, but a large number still refused, opting instead for routine COVID-19 testing. While the disparity in vaccination rates between prisoners and correctional officers has narrowed since the autumn 2021, it remains large.²⁵⁰ According to the

246. Megan Guza, *Gov. Wolf Mandates Vaccination for New Hires at State-Run Health Care Facilities, Prisons*, PITT. TRIBUNE REV. TRIBLIVE (Aug. 10, 2021), <https://triblive.com/news/pennsylvania/gov-wolf-mandates-vaccination-for-new-hires-at-state-run-health-care-facilities-prisons/> [<https://perma.cc/KK8G-2ARC>]; Erin McCarthy & Justine McDaniel, *Pa. to Require Health, Congregate Workers to Get the Coronavirus Vaccine or be Tested Weekly*, PHILA. INQUIRER (Aug. 8, 2021), EBSCO AN: 2W62110850004, <https://www.inquirer.com/health/coronavirus/pa-covid19-vaccine-mandate-health-workers-20210810.html> [<https://perma.cc/B3F3-9QXC>].

247. This concession was no doubt weighed against the continual opposition in the General Assembly to the administration's pandemic policies. *See generally* Ethan Edward Coston, *Pa. GOP Answered Wolf's Pandemic Vetoes with Constitution Changes. The Strategy is Here to Stay*, THE SPOTLIGHT FOR PATRIOT-NEWS PENNLIVE (Jan. 17, 2022), <https://www.pennlive.com/news/2022/01/pa-gop-answered-wolf-pandemic-vetoes-with-constitution-changes-the-strategy-is-here-to-stay.html> [<https://perma.cc/32VR-5BTW>]; Charles Thompson, *Pa. House Passes Bill Prohibiting COVID-19 Vaccine Requirements at Colleges, Public Facilities*, PATRIOT-NEWS PENNLIVE (June 23, 2021), <https://www.pennlive.com/news/2021/06/pennsylvania-house-passes-bill-prohibiting-vaccine-requirements-at-colleges-public-facilities-on-party-line-vote.html> [<https://perma.cc/3QCD-9K98>]; Ford Turner, *Legislature Terminates Gov. Tom Wolf's COVID-19 Disaster Declaration: "This Vote Restores Liberty"*, THE MORNING CALL (June 10, 2021), <https://www.mcall.com/news/pennsylvania/capitol-ideas/mc-nws-pa-disaster-end-vote-20210610-4qsityryre3zdpqjh6hacmmim-story.html> [<https://perma.cc/C773-EFLP>].

248. Matthew Santoni, *Pa. Prison Guards' Union Challenges Vaccine Mandate*, LAW360 (Sep. 13, 2021), <https://www.law360.com/employment-authority/articles/1421203/pa-prison-guards-union-challenges-vaccine-mandate> [<https://perma.cc/X7BJ-H2ZM>].

249. *Pennsylvania State Correctional Officers Association v. Commonwealth*, No. 300 MD 2021, 9 (Pa. Commw. dismissed Sept. 28, 2021), <https://ujportal.pacourts.us/Report/PacDocketSheet?docketNumber=300%20MD%202021&dnh=j8hscG1sja8Q1iTSfx9FJg%3D%3D> [<https://perma.cc/8AZG-Y84E>].

250. Mark Scolforo, *Prison Guard Vaccinations Increase After Governor's Mandate*, ASSOCIATED PRESS (Oct. 8, 2021), <https://apnews.com/article/coronavirus-pandemic-tom-wolf-pennsylvania-health-a0f6d35a4a91b1dfb61e576311647133> [<https://perma.cc/L9S8-ANLN>] (noting that the vaccination rate for correctional officers doubled a month after the governor's vaccinate-or-test mandate went into effect).

Department of Corrections, 87.9% of state prisoners were fully vaccinated, and an additional 1.8% had received at least one dose of the Pfizer-BioNTech or Moderna vaccine by March 2022.²⁵¹ By comparison, only 51% of the guard force had been fully vaccinated.²⁵² This disparity, of course, meant that correctional officers remained one of the primary vectors of COVID-19 transmission where routine testing proved inadequate.

Vaccination refusal has precipitated other dangerous contingencies. The large percentage of unvaccinated guards has contributed to already existing staffing shortages in numerous institutions in Pennsylvania. In addition to officers missing work due to illness, officers and staff who tested positive for COVID-19 but were asymptomatic or who came into direct contact with infected people were also required to quarantine.²⁵³ This problem, along with high labor turnover during the pandemic and the Department's struggle to hire new employees, created acute labor shortages at a time when responding to the pandemic also required additional tasks and labor time.²⁵⁴ Voluntary and mandatory overtime shifts have been commonplace for officers since the pandemic began, with the added labor costs being paid for from

251. PA DEP'T OF CORR., COVID-19 DASHBOARD 8, <https://www.cor.pa.gov/Pages/COVID-19.aspx> [<https://perma.cc/28CG-CLAX>].

252. *Id.* The actual rate of vaccination may be higher than the Department's figures indicate as staff can obtain the vaccine from numerous sources and are not required to report their vaccination status to the Department. However, it seems unlikely many officers would be willing to undergo unnecessary testing if they were already vaccinated. *See* Corr. Ass'n of New York, John Howard Ass'n of Illinois & PA Prison Soc'y, *THREE STATE PRISON OVERSIGHT DURING THE COVID-19 PANDEMIC* 41 (2021).

253. Like other states, Pennsylvania's contact tracing policies and quarantine requirements during the pandemic were highly contentious and evolved over time. *See* COMMONWEALTH OF PA, *Responding to COVID-19 in Pennsylvania* (Apr. 11, 2022), <https://www.pa.gov/guides/responding-to-covid-19/#COVIDMitigationinPennsylvania> [<https://perma.cc/858Q-AXRU>]. For an epidemiological overview of the pandemic in Pennsylvania between March 2020 and March 2021, *see* Ayse Yilmaz & Allison Hermanc, *Impact of the COVID-19 Pandemic on Pennsylvania and Its Healthcare System*, 5 HEALTH SCI. REP. e615 (May 2022), <https://doi.org/10.1002/hsr2.615>.

254. For a discussion of how the pandemic created national correctional labor shortages, *see* Keri Blakinger, Jamiles Lartey, Beth Schwartzapfel, Mike Sisak & Christie Thompson, *As Corrections Officers Quit in Doves, Prisons Get Even More Dangerous*, THE MARSHAL PROJECT (Nov. 1, 2021), <https://www.themarshallproject.org/2021/11/01/as-corrections-officers-quit-in-doves-prisons-get-even-more-dangerous> [<https://perma.cc/7ZP9-FW6D>].

emergency funding sources such as the Coronavirus Relief Fund (CARES Act), FEMA, and the U.S. Department of Justice.²⁵⁵

Staffing shortfalls, in turn, can dramatically affect the nature of inmate confinement, reduce their access to medical and treatment services, job training, work, education, and pre-release programs, as well as recreational activities and family visitation. Since security is the primary consideration in prisons, such activities are often the first to be curtailed in the event of chronic staff shortage.²⁵⁶ The resulting vulnerabilities and burdens for prisoners, for their families, and for officers are rarely part of the risk-thinking calculus in the carceral state.

A. Decarceration as Disaster Risk Management

In part because of the prisoner mistreatment detailed above, the pandemic has rejuvenated widespread calls for decarceration.²⁵⁷ We welcome the possibility of substantial

255. *Budget Hearing for the Department of Corrections/Probation & Parole Before the Pennsylvania Senate Republicans, Senate Appropriations Committee* (PA Feb. 24, 2022), <https://www.pasenategop.com/blog/corrections-probation-parole-2/> [https://perma.cc/YAN8-DL8V]; PA DEP'T OF CORR., Acting Secretary George Little, FY22-23 BUDGET TESTIMONY 5-6, 18 (2022), <https://www.cor.pa.gov/About%20Us/Statistics/Documents/Budget%20Documents/Budget%20Testimony%202022-23.pdf> [https://perma.cc/9GYA-4U5V]; PA DEP'T OF CORR., BUDGET REQUEST FOR FISCAL YEAR 2021-2022 PRESENTED TO THE APPROPRIATIONS COMMITTEE 20 (2021), <https://www.cor.pa.gov/About%20Us/Statistics/Documents/Budget%20Documents/2020-2021-Budget-Request-for-Appropriations-Committee.pdf> [https://perma.cc/YH4D-TMNZ]; PA DEP'T OF CORR., Commissioner of Corrections John Wetzel, FY21-22 BUDGET TESTIMONY 3 (2021), <https://www.cor.pa.gov/About%20Us/Statistics/Documents/Budget%20Documents/Budget%20Testimony%202021-22.pdf> [https://perma.cc/PZ2K-UQK6].

256. For instance, the surge in COVID-19 infections from the Omicron variant prompted Pennsylvania's Department of Corrections to reinstitute a visitation ban for inmates at all state prisons in late January 2022 because staffing had fallen to critical levels for certain positions. *See* Patrick Varine, *Pa. State Prison Visits Suspended Amid Covid-19 Surge, Staffing Shortages*, PITT. TRIBUNE REV. TRIBLIVE (Jan. 24, 2022), <https://triblive.com/news/pennsylvania/pa-state-prison-visits-suspended-amid-covid-19-surge-staffing-shortages/> [https://perma.cc/PRP4-58UW].

257. *See, e.g.*, Press Release, Am. Med. Ass'n, *AMA Policy Calls for More COVID-19 Prevention for Congregate Settings*, (Nov. 17, 2020), <https://www.ama-assn.org/press-center/press-releases/ama-policy-calls-more-covid-19-prevention-congregate-settings> [https://perma.cc/98PR-GCVR]; Policy Statement, Am. Pub. Health Ass'n, *Advancing Public Health Interventions to Address the Harms of the Carceral System*, (Oct. 26, 2021), <https://www.apha.org/Policies-and-Advocacy/Public-Health-Policy-Statements/Policy-Database/2022/01/07/Advancing-Public-Health-Interventions-to-Address-the-Harms-of-the-Carceral-System> [https://perma.cc/N9BU-MC8M]; Benjamin A. Barsky, Eric Reinhart, Paul Farmer & Salmaan Keshavjee, *Vaccination Plus Decarceration – Stopping Covid-19 in Jails and Prisons*, 384 NEW ENG. J. MED. 1583, 1584 (2021); Carlos Franco-Paredes,

reductions in carceral populations nationwide as a prudent response to the pandemic. However, the actual number of prisoners released during the pandemic has been far too low to alleviate the practical obstacles that prisoners and staff face in protecting themselves against infection. Examined structurally, however, the causes and patterns of pandemic-time decarceration underscore the resilience of the carceral state and the attendant risk thinking that we have described.

It is well-documented that “front-end” changes by police, courts, and probation/parole officers reduce the level of new admissions to penal institutions; these adaptations to the pandemic account for a much greater percentage of the decline in the number of people in jail and prison than “back-end” forms of release.²⁵⁸ Front-end adaptations include fewer arrests, increased issuance of citations or appearance notices by police instead of detention, and deliberate decisions to *not* revoke parole or jail

Nazgol Ghandnoosh, Hassan Latif, Martin Krsak, Andres F. Henao-Martinez, Megan Robins, Lilian Vargas Barahona & Eric M. Poeschla, *Decarceration and Community Re-Entry in the COVID-19 Era*, 21 LANCET INFECTIOUS DISEASES e11 (2021); Amanda Klonsky & Eric Reinhart, *As Covid Surges Again, Decarceration Is More Necessary Than Ever*, NATION (Dec. 22, 2021), <https://www.thenation.com/article/society/covid-prisons-decarceration/> [<https://perma.cc/3VPQ-QHHA>]; Eric Reinhart & Daniel Chen, Letter to the Editor, *Releasing Nonviolent Accused Makes Us Safer in Covid Era*, WALL ST. J. (June 26, 2020), <https://www.wsj.com/articles/releasing-nonviolent-accused-makes-us-safer-in-covid-era-11593194683> [<https://perma.cc/8BGR-UPNC>]; Karthik Sivashanker, Jessie Rossman, Andrew Resnick & Donald M. Berwick, *Covid-19 and Decarceration: Healthcare Needs to Lead the Charge*, BMJ (May 12, 2020), <https://www.bmj.com/content/bmj/369/bmj.m1865.full.pdf> [<https://perma.cc/XYL8-8F7E>]; *UN Rights Chief Urges Quick Action by Governments to Prevent Devastating Impact of COVID-19 in Places of Detention*, UN NEWS (Mar. 20, 2020), <https://news.un.org/en/story/2020/03/1060252> [<https://perma.cc/Q7JY-WBF7>]; Ghada Fathi Waly, Tedros Adhanom Ghebreyesus, Winnie Byanyima & Michelle Bachelet, *UNODC, WHO, UNAIDS and OHCHR Joint Statement on COVID-19 in Prisons and Other Closed Settings*, WORLD HEALTH ORG. (May 13, 2020), <https://www.who.int/news/item/13-05-2020-unodc-who-unaid-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings> [<https://perma.cc/HP4C-5GFH>].

258. NAT’L ACADS. OF SCIS., ENG’G, & MED., *DECARCERATING CORRECTIONAL FACILITIES DURING COVID-19: ADVANCING HEALTH, EQUITY, AND SAFETY* 59 (Emily A. Wang et al. eds., 2020) [hereinafter NASEM]; Emily Widra, *Data Update: As the Delta Variant Ravages the Country, Correctional Systems are Dropping the Ball (Again)*, PRISON POL’Y INITIATIVE (Oct. 21, 2021), https://www.prisonpolicy.org/blog/2021/10/21/october2021_population/ [<https://perma.cc/3BMW-3J39>] [hereinafter Widra, *Data Update*]; Emily Widra, *State Prisons and Local Jails Appear Indifferent to COVID Outbreaks, Refuse to Depopulate Dangerous Facilities*, PRISON POL’Y INITIATIVE (Feb. 10, 2022), https://www.prisonpolicy.org/blog/2022/02/10/february2022_population/ [<https://perma.cc/5BC4-LSUE>] [hereinafter Widra, *State Prisons*].

probation for smaller violations.²⁵⁹ Some courts have made greater use of alternatives to detention, revised bail policies, and opted for more non-custodial sentences.²⁶⁰ Pandemic-related court closures, coupled with the effect of stay-at-home public health advisories, led to an overall decline in some forms of crime and in the number of people entering the criminal justice system, and fewer still being imprisoned.²⁶¹

Relative to these approaches, there have been only modest decarceration efforts that involve back-end prisoner release. This is due, in part, to criminal justice officials' limited power to release prisoners, even during a national emergency.²⁶² Most existing discretionary release mechanisms employ screening criteria that are categorically different from the vulnerabilities revealed and precipitated by the pandemic. While parole decision-making practices vary across jurisdictions, most releasing authorities rely on actuarial risk assessment tools and parole guidelines that emphasize, among other things: the severity and nature of the offense committed, criminal history, institutional conduct, correctional program completion, response to education and work training as well as statements from victims, prosecutors and the offenders' family members; they also often consider whether the potential parolee has found stable housing in the community or has displayed remorse for their conduct.²⁶³ Legal mechanisms for

259. See NASEM, *supra* note 258, at 51; Widra, *Data Update*, *supra* note 258.

260. Widra, *Data Update*, *supra* note 258. The Prison Policy Initiative maintains a dynamic list of many of the pandemic responses by jurisdictions across the country. *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POLY INITIATIVE, <https://www.prisonpolicy.org/virus/virusresponse.html> [<https://perma.cc/HKL7-PV7T>] (archived Apr. 5, 2023).

261. NASEM, *supra* note 258, at 52-53. However, despite the overall decline, pandemic-related court delays have also lengthened the stay of some prisoners who did not meet release criteria, particularly those awaiting trial in jails and deemed to be high risk. *Id.* at 53. It is also noteworthy that pandemic-related decarceration policies appear to have disproportionately benefitted white detainees and prisoners. Racial disparities in prison and jail populations had been declining for over a decade but have increased in numerous jurisdictions since 2020. For the recent decline in incarceration racial disparity, see Carson, *supra* note 49, at 1, 9-10; Gramlich *supra* note 49. For more on the practices that may have contributed to the reversal of this trend during the pandemic, see Brennan Klein et al., *The COVID-19 Pandemic Amplified Long-Standing Racial Disparities in the United States Criminal Justice System 6* (Jan. 11, 2022) (preprint), <https://www.medrxiv.org/content/10.1101/2021.12.14.21267199v2> [<https://perma.cc/9T6K-E248>].

262. NASEM, *supra* note 258, at 57.

263. For an overview of parole decision-making practices and release criteria, see generally Nicole Bronnimann, *Remorse in Parole Hearings: An Elusive Concept with Concrete Consequences*, 85 MO. L. REV. 321 (2020); Kevin R. Reitz and Edward E. Rhine, *Parole Release*

compassionate release (e.g., due to illness) are byzantine, time-consuming, and underutilized in the United States.²⁶⁴ Likewise, executive clemency has been drastically curtailed since the 1970s in many states and is rarely used beyond exceptional cases of injustice.²⁶⁵ Other forms of sentence reduction, like the accrual of good-time credits, are designed to encourage good institutional conduct and cannot be used as an emergency release tool.²⁶⁶

As these decarceration patterns suggest, it is very difficult legally, practically, and politically to release people once they are detained—and even harder after they have been sentenced.²⁶⁷ It is, therefore, unsurprising that most of the recent decarceration has occurred in jails rather than prisons.²⁶⁸ Jails typically hold people for short periods of time (e.g., those awaiting charges, trial, and

and Supervision: Critical Drivers of American Prison Policy, 3 ANN. REV. CRIMINOLOGY (2020); Edward E. Rhine, Kelly Lyn Mitchell, and Kevin R. Reitz, Robina Inst. of Crim. Law & Crim. Just., LEVERS OF CHANGE IN PAROLE RELEASE AND REVOCATION (2018); Ebony L. Ruhland, Edward E. Rhine, Jason P. Robey, and Kelly Lyn Mitchell, Robina Inst. of Crim. Law & Crim. Just., THE CONTINUING LEVERAGE OF RELEASING AUTHORITIES: FINDINGS FROM A NATIONAL SURVEY (2016); Susan C. Kinnevy and Joel M. Caplan, Center for Research on Youth & Social Policy, FINDINGS FROM THE APAI INTERNATIONAL SURVEY OF RELEASING AUTHORITIES (2008). For a due process critique of the use of guidelines in parole decision-making, see Kimberly Thomas & Paul Reingold, *From Grace to Grids: Rethinking Due Process Protection for Parole*, 107 J. CRIM. L. & CRIMINOLOGY 213, 241 (2017).

264. MARY PRICE, FAMILIES AGAINST MANDATORY MINIMUMS, EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE STATES 13-16 (2018).

265. Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J. L. & PUB. POL'Y 1, 35 (2013) (arguing that executive clemency has become too politically risky for frequent use).

266. Rewards for good behavior in custody, including sentence reduction, have long been a part of prison management. For an overview, see *id.* at 11, 40, arguing that good-time credit systems survived the criticism directed at parole in the late 20th century partly because it was earned by prisoners and based on immediate past conduct rather than expert predictions of future recidivism.

267. NASEM, *supra* note 258, at 55. Larkin notes that one of the by-products of the creation of parole boards and indeterminate sentencing in the early 20th century was that it shifted release decisions and responsibility away from elected governors to political appointees. Larkin, Jr., *supra* note 265, at 35. Executive pardons and commutations declined as a result. As faith in rehabilitation and criminal justice officials waned in the 1970s and 1980s, the decision-making of parole boards became increasing controversial and subject to restriction or outright elimination in some jurisdictions. *Id.* at 7-10. Nevertheless, even during the height of its use, parole was never well-received by the public, who viewed parole boards as too lenient and prisoners as too adept at feigning reform and manipulating the process. In her extensive study of parole systems, Joan Petersilia notes that "82 percent of U.S. adults believed that parole was not strict enough and should not be granted as frequently" in a 1934 Gallup poll. WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 61 (2002), <https://doi.org/10.1093/acprof:oso/9780195160864.001.0001>.

268. NASEM, *supra* note 258, at 50.

sentencing, or those serving short sentences); as such, jails have been more sensitive to the recent pandemic-induced changes in police and judicial behavior. By contrast, prisons, which hold sentenced offenders, are more difficult to de-densify during disasters. Carceral officials fear decarceration as a threat to public safety and political careers alike.²⁶⁹

Predictably, public officials and advocates of decarceration have turned to the armature of risk-assessment technologies developed since the 1980s to determine who should be released. There are some benefits to such technologies. The widely used Risk-Need-Responsivity (RNR) model, for instance, identifies specific “criminogenic needs” of prisoners which can then be used to tailor release plans and match services for individuals.²⁷⁰ However, as much as the RNR model and others like it can assist in decarceration, they also reinforce the historical grammar of risk, described earlier, as the dominant framework for implementing disaster-era decarceration in the U.S.²⁷¹ The prospect of release based on these technologies, and therefore protection from disaster, is reserved for what Marie Gottschalk has called the “non, non, nons”: nonviolent, nonserious, and nonsexual offenders.²⁷²

Decarceration during the pandemic also underscored the pre-existing problems of inadequate funding and resources for re-entry programs as well as a lack of affordable housing and employment opportunities for recently released prisoners.²⁷³

269. *Id.* at 48, 57.

270. Alisha Desai et al., *Releasing Individuals from Incarceration During COVID-19: Pandemic-Related Challenges and Recommendations for Promoting Successful Reentry*, 27 PSYCH. PUB. POL’Y & L. 242, 244, 248-251 (2021) (arguing that many of the difficulties prisoners face upon re-entry have worsened with the decline in social service availability, adequate housing, and employment opportunities during the pandemic). For a description of “criminogenic needs,” see *supra* note 87.

271. In this respect, the decarceration policies pursued during the pandemic are subject to some of the same critiques that have been made of other recent penal reform efforts based on technocratic, evidence-based, “what works” interventions, which do not offer a way to drastically reduce the size and scope of the carceral state, improve prison conditions, or address the long-term effects of incarceration for individuals and communities. *E.g.* GOTTSCHALK, CAUGHT, *supra* note 48, at 260-262. By contrast, see historian Pieter Spierenburg’s description of the health-based criteria that penal authorities used in release decisions in early-modern Europe. SPIERENBURG, *supra* note 100, at 188-191.

272. GOTTSCHALK, CAUGHT, *supra* note 48, at 165.

273. CSG Justice Center Staff, *Survey Shows Reentry Services Halting Across U. S.*, COUNCIL OF STATE GOV’TS JUST. CTR. (Apr. 22, 2020), https://csgjusticecenter.org/2020/04/22/survey-shows-reentry-services-halting-across-u-s/?mc_cid_13c23b1fd9&mc_eid_934a806857 [https://perma.cc/5USJ-FBCL].

Decarceration also raised the troubling prospect that released prisoners would spread COVID-19 to their families and communities.²⁷⁴ At the same time, decarceration may not be in the best interests of all prisoners: while imprisonment should be seen as a “fundamental social cause of health inequalities” and vulnerability to COVID-19, penal institutions often provide the only, or the most readily available, access many people have to vaccines and other healthcare during the pandemic.²⁷⁵ Simply releasing people without adequate continuity of care and support in the name of protecting them from COVID-19 may in some cases increase their vulnerability to serious illness or death.²⁷⁶

Our study of risk thinking, the institutional fortitude of the American carceral state, and the near absence of disaster-management institutions leaves us skeptical about the staying power of current decarceration trends and their ability to protect prisoners from future disasters. The Prison Policy Project has already demonstrated that over the past year, the downward population trends for prisons and jails early in the pandemic have either stabilized or reversed in most jurisdictions around the country.²⁷⁷ How the millions who remain incarcerated, and others about to be incarcerated, will be protected against future disasters remains a painfully open question.

This review is not an argument against decarceration as a legitimate prospect for alleviating prisoner vulnerability; it is a caution against viewing it as a salve discovered amid a crisis. As we have tried to show, risk thinking within and between the American

274. Gregory Hooks & Wendy Sawyer, *Mass Incarceration, COVID-19, and Community Spread*, PRISON POLICY INITIATIVE (Dec. 2020), <https://www.prisonpolicy.org/reports/covidspread.html> [<https://perma.cc/T7Y8-P99B>]. For an overview of the epidemiological relationship between carceral institutions and surrounding communities, see Martial L. Ndeffo-Mbah, Vivian S. Vigliotti, Laura A. Skrip, Kate Dolan & Alison P. Galvani, *Dynamic Models of Infectious Disease Transmission in Prisons and the General Population*, 40 EPIDEMIOL. REV. 40 (2018).

275. Meghan A. Novisky, Kathryn M. Nowotny, Dylan B. Jackson, Alexander Testa, & Michael G. Vaughn, *Incarceration as a Fundamental Social Cause of Health Inequalities: Jails, Prisons and Vulnerability to COVID-19*, 61 BRIT. J. CRIMINOLOGY 1630, 1631 (2021) (arguing that incarceration should be considered “a structural driver of health inequalities” akin to resource inequalities).

276. Luisa T. Schneider, *Let me take a vacation in prison before the streets kill me!: Rough sleepers’ longing for prison and the reversal of less eligibility in neoliberal carceral continuums*, 25 PUNISHMENT & SOC’Y 60, 61 (2023) (arguing that prison provided a respite for some homeless people (“rough sleepers”) and “change of subject position” from a person who is “politically unwanted to an inmate whose rehabilitation becomes a political project”).

277. Widra, *State Prisons*, *supra* note 258.

carceral and disaster-managerial state—including narratives of state formation through national security, crime and criminality, innocence, race, poverty, vulnerability, resilience, and responsabilization—exists as a “normal” (*stable*) prism of interlocking exclusions, dependencies, and vulnerabilities affecting prisoners, custodial staff, and “free” Americans. Decarceration, however approached, will be refracted through this inequitable prism.

V. IMPLICATIONS AND DIRECTIONS

Thus far, we have argued: (a) that prisoners fall in the cracks between scattered conceptions of risk and vulnerability in the discourses and practices of criminal justice, and the narrow and historically inelastic notions of risk and vulnerability in the discourses and practices of disaster management; (b) that disaster-risk in prisons should *not* be studied in isolation from conceptions of disaster-risk applicable to “free” society; (c) that prisoners have special vulnerabilities that require more and distinct protections than the rest of society; and, finally, (d) that this goal is frustrated by the very structure of risk management described in (a).

The federal government’s mishandling of the COVID-19 pandemic has been justly chastised. But Americans’ vulnerability to the coronavirus emerged within the structure and character of U.S. politics and policymaking long before COVID-19 appeared.²⁷⁸ This vulnerability is amplified for those living in residential institutions, from hospitals and elder care homes to prisons and detention centers. Yet, people living in these institutions are not considered equally deserving of legal protection. “Free” elderly people and hospital patients make for sympathetic victims; prisoners and detainees do not. In American popular discourse, they are considered threats to the social order underserving of public sympathy, especially if they are Black, Latinx, Indigenous, or immigrants.

For decades, law and social science scholars have shown how legal and administrative mechanisms exclude the concerns of marginalized people most likely to be affected by chemical toxicity

278. Saptarishi Bandopadhyay, *Before the Plague*, CORONAJOURNAL (Apr. 25-26, 2020), <https://crisis-diary.net/2020/04/26/before-the-plague/> [<https://perma.cc/9JGM-HMUL>].

and disaster-risk alike.²⁷⁹ It is not surprising that the U.S. EPA's Office of Environmental Justice still has no official policies directed at prisoner protection.²⁸⁰ Courts have never articulated substantive rights protecting prisoners from disaster. Even general principles emerging from disaster scholars have yet to be widely incorporated into carceral practices. This is particularly tragic because the deleterious effects and vulnerabilities associated with incarceration demand that inmates receive distinct and potentially higher levels of protection from disaster risk than the general public. At the same, as we have noted, these risks cannot be sealed away from the interests of the public whose expectations of prosperity and protection have historically shaped official tolerance of prisoner vulnerability. The public interest demands that we act on the knowledge that COVID-19, tuberculosis, and other infectious diseases amount to disaster-risks that are cultivated inside carceral facilities but often escape prison walls.²⁸¹

As it stands, the goal of protecting prisoners is frustrated by popular and expert conceptions of risk and security and accompanying institutions, laws, and practices that constitute the American carceral and disaster-managerial state. Identifying and analyzing the impact of risk rationalities underlying the carceral and disaster-managerial states is a neglected and crucial first step towards substantive change. Disaster-risk for civilians, and especially for prisoners, cannot be addressed without challenging

279. Bolin & Curtz, *supra* note 165; Richard J. Lazarus, *Pursuing Environmental Justice: The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 793-796, 799-806 (1993); Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Law and "Justice"*, 47 AM. U. L. REV. 221, 228-242 (1997).

280. See *To EPA: Prisoner Populations Key to Environmental Justice Action Plan*, GLOB. JUST. ECOLOGY PROJECT (July 28, 2016), <https://globaljusticeecology.org/to-epa-prisoner-populations-key-to-environmental-justice-action-plan/> [<https://perma.cc/5NMA-9Z3G>]. The finalized Environmental Justice 2020 Action Agenda offers no agenda items or guidelines on the subject. See ENV'T PROT. AGENCY, ENVIRONMENTAL JUSTICE 2020 ACTION AGENDA: THE U.S. EPA'S ENVIRONMENTAL JUSTICE STRATEGIC PLAN FOR 2016-2020 (2016), https://www.epa.gov/sites/production/files/201605/documents/052216_ej_2020_strategic_plan_final_0.pdf [<https://perma.cc/SLH6-W9RF>].

281. Gabrielle Beaudry, Shaoling Zhong, Daniel Whiting, Babak Javid, John Frater & Seena Fazel, *Managing Outbreaks of Highly Contagious Diseases in Prisons: A Systematic Review*, 5 BMJ GLOB. HEALTH 1, 9 (2020), <https://gh.bmj.com/content/5/11/e003201> [<https://perma.cc/3DPV-YGNJ>] (identifying numerous cases of actual or potential community transmission of infectious disease from penal institutions); Georgina Kenyon, *Russia's prisons fuel drug-resistant tuberculosis*, 9 LANCET INFECTIOUS DISEASES, 594, 594 (2009) (arguing that bottlenecks in the supply of antituberculosis drugs and crowding in Russian prisons are fueling the epidemic of multidrug resistant tuberculosis).

the assumptions and practices that structure how normal risk is distributed in the U.S.; the assumptions and practices studied in this paper construct prisoners as risky populations undeserving of real protection in the face of calamity. Put bluntly: poor disaster-risk management within the carceral system reflects *successful* governance under status quo procedures rather than a series of isolated failures or unintended consequences.

Our analysis of prisoner vulnerability to disaster risk has been necessarily broad, drawing on examples from across the country to underscore the nature, pervasiveness, and depth of the problem. We expect that the specific contours of prisoner vulnerability will vary considerably over time and space and hope that future empirical analysis and policy research will build upon our conceptual framework. For instance, at a policy and planning level, our paper offers a new lens for critically assessing the continuing trend of carceral facility expansion around the United States; research using our conceptualization may be directed not only towards the question of whether and where new facilities should be built, but also whether jail remediation initiatives are worthy of public investment and how carceral officials might address questions of prisoner vulnerability to disaster, if at all. Our approach can also be a basis for designing and reviewing decarceration proposals and evaluating alternative sentencing interventions. Carceral and disaster justice scholars and activists, in turn, should find that their respective concerns and ambitions are closely reflected in our description of the dynamics of risk thinking. Importantly, our analysis offers legal scholars a robust interdisciplinary method of thinking about the problem of mass incarceration beyond the traditional avenues of constitutional, criminal, and administrative law.

In addition, our analysis also provides a useful way to understand the production of vulnerability in other areas of social control, particularly in relation to immigration detention. As many scholars have recently pointed out, immigration and refugee law in numerous countries has increasingly come to resemble and rely on criminal law and crime control strategies (“cimmigration”) in the way it manages immigrants and asylum seekers.²⁸² By contrast,

282. The literature on “cimmigration” is quite extensive now. For some representative works, see Katja Franko Aas, *Bordered Penalty: Precarious Membership and Abnormal Justice*, 16 PUNISHMENT & SOC’Y 520 (2014); THE BORDERS OF PUNISHMENT: MIGRATION, CITIZENSHIP, AND SOCIAL EXCLUSION (Katja Franko Aas & Mary Bosworth

disaster management practices remain limited to ad hoc relocations of detainees amid disasters. This approach is unsurprising given that political leaders and the media routinely employ xenophobic language to mark detainees (and those who remain undocumented but “at large”) as people who have violated the country’s laws and endangered its resources and cultural identity. Far from being presumed innocent, these people, individually and as a group, are viewed as perennial threats to the American state’s political legitimacy and national security. Most significant, for our purposes, is how crimmigration and the parallel absence of disaster preparedness reflects many aspects of the risk thinking we have explored. If, as Teresa Miller has argued, immigration detention has created “a new system of social control that draws from both immigration and criminal justice,” but “is purely neither,”²⁸³ then the character and scale of the resulting risks and vulnerabilities is an urgent question that must be confronted.

eds., 2013); ANA ALIVERTI, *CRIMES OF MOBILITY: CRIMINAL LAW AND THE REGULATION OF IMMIGRATION* (2013); MARY BOSWORTH, *INSIDE IMMIGRATION DETENTION* (2014); IMMIGRATION POLICY IN THE AGE OF PUNISHMENT: DETENTION, DEPORTATION, AND BORDER CONTROL (David C. Brotherton & Philip Kretsedemas eds., 2018); César Cuauhtémoc García Hernández, *The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness*, 1 COLUM. J. RACE & L. 353 (2012); SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR (Maria João Guia, Maartje van der Woude & Joanne van der Leun eds., 2013); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L. J. 611 (2003); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

283. Miller, *supra* note 282, at 618.